



Australian Government
Classification Review Board

24 October 2005

23-33 MARY STREET
SURRY HILLS, NSW

MEMBERS: Ms Maureen Shelley (Convenor)
Mr Rob Shilkin
Mrs Kathryn Smith

APPLICANT: BG¹, represented by: Mr Bruce Quinn (Barrister at Law).

INTERESTED PARTIES: NSW Police Service, (Child Protection Squad) and the Australian Federal Police.

BUSINESS: To review the Classification Board's decision to classify the film CD-ROM (known as *04/0226 PC01*) (the film) RC (Refused Classification) and subject of application number T04/4445.

DECISION AND REASONS FOR DECISION

1. Decision

The Classification Review Board (the Review Board) in a unanimous decision classified the film RC (Refused Classification).

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, as in force on 9 March 2005.

¹ Applications for review received by the Review Board where the original application is lodged by an enforcement agency are allocated a two-letter code. The code bears no relation to the applicant's name.

Relevantly, the Code in paragraph 1(b) of the Table under the heading 'Films' provides that:

1. Films that:

(b) depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not);

are to be classified 'RC'.

The Code also sets out various principles to which classification decisions should give effect, as far as possible. Section 11 of the Act requires that the matters to be taken into account in making a decision on the classification of a film or publication include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or educational merit (if any) of the publication or film; and

(c) the general character of the publication or film, including whether it is of a medical, legal or scientific character; and

(d) the 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 *2003 Guidelines for the Classification of Films and Computer Games* (the Guidelines), determined under s.12 of the Act:

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

3. Procedure

The Review Board met on 9 March 2005 in response to the receipt of an application for review from BG (the Applicant), dated 17 February 2005 and numbered T04/4445.

As preliminary matters, the Review Board considered the Applicant's submission to consider his standing as "a person aggrieved" and whether the Review Board should exercise its discretion to consider the matter "out of time". Another matter for consideration by the Review Board was the validity of the application, given the absence of payment of the fee or the granting of a fee waiver. The Director of the Classification Board had declined to grant a fee waiver on 9 March 2005.

The original application for classification of the film CD-ROM (known as *04/0226 PC01*) was lodged by the Australian Federal Police on 28 October 2004 (application reference T04/4445). The Classification Board classified the film (T04/4445) as RC on 22 November 2004 (Classification Certificate No 53517009).

The Applicant, on his standing as a person aggrieved, submitted :

- He had been personally affected by the decision of the Classification Board and that his interests were adversely affected by the decision and the determination;
- that the decision directly and indirectly affects his existing and future legal rights;
- that his employment rights and future employment rights together with his business rights have been seriously aggrieved; and
- that he is a person who has a genuine grievance because a decision had been made that prejudicially affected his interests.

The Review Board unanimously determined the Applicant was a person aggrieved by the decision of the Classification Board.

The Applicant, on why the Review Board should exercise its discretion to consider the matter “out of time”, submitted:

- On 28 September 2004 NSW detectives executed a search warrant on his premises and took possession of 36 images on photo paper, 58 short (mpeg) movie files and 400-600 (mpeg) movie files.
- The next day he was charged with Possess Child Pornography under S579B (2) of the *NSW Crimes Act 1900*.
- On or around 28 October 2004 that application was made on behalf of the NSW Police Service for the movie files material to be classified under the *Classification (Publications, Films and Computer Games) Act 1995*.
- The material was refused classification on 22 November, 30 November 2004 and 12 November 2004.²
- A Copy of the classification was given to him as part of the Police brief of evidence delivered to him on 9 December 2004.
- On 23 December 2004 he appeared before the Local Court of NSW in relation to the criminal charges. He submitted that it was only after closely reading Classification 53517009 (in relation to application number T04/4445), that it became apparent to him that he may have a right of appeal against the decision.
- That he had difficulty obtaining legal advice during the Christmas/New Year period.

² These dates were submitted by the applicant (BG). The correct dates are 29 November 2004 (Classification No. 4250600B), 22 November 2004 (Classification No. 53517009) and 12 November 2004 (Classification No. 77493311).

- That on 20 January 2005, he lodged an application for review of the decision with the Administrative Appeals Tribunal (AAT), where he was advised that he needed to apply to the Office of Film and Literature Classification (OFLC) for review.
- On 31 January 2005 he wrote seeking a review of the classification decision and was subsequently informed that he had to submit the application on the appropriate form. On visiting the OFLC, he was given a copy of the appropriate form.
- His application for review was dated 17 February 2005 and received at the OFLC on 21 February 2005.

The Review Board accepted the Applicant's submission that he had made all endeavours in pursuit of his review rights. The Review Board accepted that the Applicant had a genuine, if mistaken, belief that appeal under the *Administrative Decisions Judicial Review Act 1977* was the appropriate course of action. Further the Review Board accepted that, after being given correct advice the Applicant submitted his application for review expeditiously.

Given the circumstances of the application, the Review Board determined to exercise its discretion and consider the application out of time.

In regard to the absence of a fee or the granting of a fee waiver, the Applicant was advised that the Review Board would hear submissions on the matter but not reach a determination until either the fee had been paid or a fee waiver granted after appeal to the AAT. The Convenor advised that the Review Board would consider this matter because of the unusual circumstances arising from an enforcement matter that could have very serious consequences on the Applicant's life and liberty. Further, the Convenor advised the Applicant that if a fee waiver was not granted on appeal then he would be liable for the cost of the review and would owe a debt to the Commonwealth. The Applicant agreed to proceed on this basis.

Three members of the Review Board viewed the film at the Review Board's meeting on 9 March 2005. The Review Board heard an oral submission from Mr Bruce Quinn (Barrister at Law) representing the Applicant. A representative from the Child Protection Squad of the New South Wales Police Service attended on behalf of the original applicant for classification and a representative from the Australian Federal Police (AFP) provided AFP presence at the meeting but made no submissions.

The Applicant had applied to the Director of the Classification Board for a fee waiver, which was refused on 9 March 2005. The Applicant appealed the fee waiver refusal to the AAT where a settlement was reached on 4 August 2005. As part of the settlement the Applicant agreed to pay the prescribed fee for application T04/4445 which was paid on 9 August 2005.

On 10 August 2005 the Review Board was informed by an officer from the OFLC of the settlement reached before the AAT in regard to payment of the fees. The validity of the application was then considered and the Review Board determined that the application before it was valid.

The Review Board convened by teleconference to consider the matter 'in camera' on 17 August 2005, 24 August 2005 and 24 October 2005.

At a later teleconference the Review Board considered the matter of which Act, Code and Guidelines should be used in regard to the application. During the time between when the Review Board first met to consider the matter and when the Applicant had paid the fees, the Act, Code and Guidelines had changed. After due and careful consideration of all the relevant matters, the Review Board wrote to Mr Quinn as representative for the Applicant, advising that it proposed to use the Act, Code and Guidelines that were in force at the time of the original meeting of the Review Board. Mr Quinn confirmed in writing, on behalf of the Applicant that he was satisfied with this course of action.

4. Evidence and other material taken into account

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

- (i) The Applicant's application for review;
- (ii) The Applicant's written and oral submissions;
- (iii) The film T04/4445 (CD-ROM known as 04/0226 PC01);
- (iv) The relevant provisions in the Act;
- (v) The relevant provisions in the Code, as amended in accordance with s.6 of the Act
- (vi) The Classification Board's report; and
- (vii) The *Guidelines for the Classification of Films and Computer Games*.

5 Synopsis

The Film T04/4445 (CD-ROM known as 04/0226 PC01) contained 9 movie files depicting girls.

6 Applicant's Submissions

Mr Quinn submitted, on behalf of the Applicant, that all scenes in the film were those of nudity only. He stated that the product did not contain any sex, violence or other themes but were examples of nudity only. The Review Board considered Mr Quinn's submission; however, it did not accept the submission. If the Review Board had accepted Mr Quinn's submission that the product only represented nudity, the product would still have depicted offensive images of persons who are or who look like they are under 16 years of age.

7 Findings on material questions of fact

The Film T04/4445 (CD-ROM known as 04/0226 PC01):

The Review Board found that the film contains aspects or scenes of importance, under various classifiable elements:

- (a) **Themes** – The overall theme of the film was that of sexualised imagery of girls who appear to be between the ages of approximately six years to 14 years of age.
- (b) **Violence** - No violence was depicted or described.
- (c) **Sex** –A number of the films depicted the girls in sexualised poses, with some nipple and breast and genital detail including pubic hair (or mostly the absence of it in the young children). A number of the films depicted the girls making sexualised movements and gestures.
- (d) **Drug use** – No drug use was depicted or described.
- (e) **Language** – No coarse language was depicted.
- (f) **Nudity** – The majority of the mpegs were of nude or partially nude girl children – approximately six years to approximately 14 years in sexualised poses or dance routines.

8 Reasons for the decision

As described above, most of the mpegs were sexualised images of girls between the ages of approximately six years and approximately 14 years. The nudity, partial nudity and sexualised poses of the girls ensured that the impact of the films was very high, and that the images were offensive, exploitative and demeaning. Some of the films depicted the girls in fantasy-style settings and these were offensive and abhorrent.

Most mpegs included the girls dancing in sexualised movements. Most girls were depicted wearing red lipstick, which was at odds with their very young faces. Some images were of the girls dancing, some were of them in the bath, some had them removing their clothing, some showed the girls without underwear, while partially clothed.

One mpeg included the song *In Your Eyes*, sung by Kylie Minogue, with the little girl mouthing the words as she dances without her underwear. As the child dances her pubic area and buttocks are shown. The mpeg ends as she mouths to the camera “In your eyes”. In another mpeg a naked girl in the bath is shown, her hand moves towards her pubic area.

All the mpegs show young girls in sexualised poses or depicted nude or partially nude. The individual impact of these young children in this sexualised imagery is very high and the intensity is increased by the cumulative impact.

9 Summary

The classifiable elements and the impact in the overall context of the film CD-ROM (known as *04/0226 PC01* with application reference T04/4445) warrant a refused classification (RC). The film depicts in a way that is likely to cause offence to a reasonable adult, persons who are, or appear to be children under 16.

The decision of the Review Board was unanimous.