



**Australian Government**  
**Classification Review Board**

17 January 2005

23-33 MARY STREET  
SURRY HILLS, NSW

- MEMBERS:** Ms Maureen Shelley (Convenor)  
The Hon Trevor Griffin (Deputy Convenor)  
Ms Dawn Grassick  
Mr Robert Shilkin  
Ms Kathryn Smith
- APPLICANT:** Accent Film Entertainment Pty Ltd (Accent), original applicant for classification, represented by Mr Dean O’Flaherty (Marketing and Acquisitions Manager, Accent); Ms Raena Lea-Shannon (Solicitor, Michael Frankel & Co Solicitors), Ms Margaret Pomeranz (Expert Witness); Mr David Haines (Expert Witness).
- INTERESTED PARTIES:** Australian Family Association (AFA) represented by Mr Damien Tudehope (Solicitor, O’Hara & Company).  
  
Communications Law Centre (CLC) represented by Ms Elizabeth Beal (Director, Victoria University).
- BUSINESS:** To review the Classification Board’s decision to classify the film *9 Songs* (the film) ‘X’ with the consumer advice ‘Contains sexually explicit material’.

**DECISION AND REASONS FOR DECISION**

**1. Decision**

The Classification Review Board (the Review Board) in the majority classified the film ‘R’ with the consumer advice ‘Actual sex, high-level sex scenes’.

## **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.

Relevantly, the Code in paragraph 3 of the Table under the heading 'Films' provides that films (except RC films and X films) that are unsuitable for a minor to see are to be classified 'R'. The Code also states various principles for classifications, and that effect should be given, as far as possible, to these principles including, that "adults should be able to read, hear and see what they want".

Section 11 of the Classification Act requires that the matters to be taken into account in making a decision on the classification of a film 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 film; and
- (c) the general character of the 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 Section 12 of the Act:

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

## **3. Procedure**

Having earlier received a valid written application for review, five members of the Review Board viewed the film *9 Songs* at its meeting on January 17, 2005.

The Review Board made the formal determination that the application was valid.

The Review Board accepted written submissions from the Australian Family Association and the Communication Law Centre but declined to hear oral submissions from these organisations' representatives.

The Review Board then received oral submissions from Ms Raena Lee-Shannon representing the Applicant, which was confirmed in a written submission and from Ms Margaret Pomeranz and Mr David Haines. Mr Dean O'Flaherty also attended on behalf of the Applicant during the oral submissions.

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

#### **4. Evidence and other material taken into account**

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

- (i) Accent's application for review;
- (ii) Accent's written and oral submissions;
- (iii) The AFA's written submission;
- (iv) The CLC's written submission;
- (v) The film;
- (vi) The relevant provisions in the Act;
- (vii) The relevant provisions in the Code, as amended in accordance with Section 6 of the Act;
- (viii) The Classification Board's report; and
- (ix) The *Guidelines for the Classification of Films and Computer Games 2003*.

#### **5 Synopsis**

Lisa, a young American student in London for a year, meets a somewhat older Matt at a concert in suburban London. They commence a romantic and sexual relationship. The explicit and at times intimate film follows the course of their physical and emotional relationship using the device of depicting their sexual acts and rock concert attendance. They then part at Lisa's instigation. The narrative is given from Matt's perspective as he reflects on what he remembers of the relationship.

#### **6 Findings on material questions of fact**

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

(a) **Themes** – Despite his relationship with Lisa, Matt expresses feelings of loneliness at 44 minutes (“5,000 people at a concert and you can still feel alone”). At approximately 46 minutes, the film depicts Lisa playing with a bottle of tablets. She seems depressed. She appears to smoke a marijuana cigarette. Matt expresses concern. She says, “I haven't taken any fucking pills at this time of the day. You're not paying any fucking attention to me.” These themes of loneliness, depression and potential suicide are moderate in impact and justified by context.

(b) **Sex** – The film is mainly concerned with the couple's sexual relationship and their attendance at rock concerts. At 34 seconds the scene depicts the couple in what could be a simulated sex scene. The lighting is subdued, the audience hears heavy breathing. Matt speaks: “I remember her smell, her taste”. At approximately 2 minutes 18 seconds the film depicts a scene of apparent cunnilingus. At 2 minutes 43 seconds Matt squeezes Lisa's breast and nipple. At 2 minutes 57 seconds and 3 minutes 10 seconds scenes of what appears to be simulated sex are shown. At 3 minutes 36

seconds Lisa is astride Matt and they appear to be having sex. At 9 minutes 28 seconds is a scene of apparent cunnilingus. At 9 minutes 44 seconds Matt's head is shown between Lisa's legs. At 9 minutes 58 seconds Matt's tongue is shown in Lisa's pubic area. This appears to be a scene of actual sex. At 10 minutes 16 seconds is a scene of implicit sexual intercourse. At 13 minutes 49 seconds an implicit sex scene is shown. There is some moaning and little other detail. At 14 minutes an implicit sex scene is shown and the couple do not use a condom. At approximately 21 minutes the film depicts Matt's erect penis in the bath water. Lisa begins to manipulate his penis with her feet which she does for approximately one minute. Matt's penis lengthens and becomes more erect during this activity. This is a scene of actual sex. At 26 minutes 44 seconds Matt kisses Lisa's breasts. His hands clasp her head more tightly than necessary. There is some discomfort in watching this action, which is not quite menace. At 27 minutes 30 seconds Lisa reads a sexually-charged passage from a book. At approximately 28 minutes 23 seconds Matt blindfolds Lisa. He ties her hands to the bed posts. At 29 minutes 12 seconds is a visual of Lisa's pubic area shown at a low angle and between her legs as she lies on the bed. There is some genital detail. At 29 minutes 46 seconds Matt's head is shown between Lisa's legs in the area of her genitals. There are further visuals of Lisa's blindfolded face with her mouth open and of her breasts. At 30 minutes 28 seconds Matt's tongue is shown and he apparently licks Lisa's pubic area. At 31 minutes Matt's head is off to one side but still depicted between Lisa's legs. Lisa says, as if still reading, "she grabs his balls and puts his cock in her mouth. Fuck me man. Fuck me, come up here." At 32 minutes 37 seconds Matt has his erect penis in his hand. At 33 minutes Matt is astride Lisa, she is still bound, she tries to alter the position of her hands but is unable to free them. She says "Fuck me". This continuous scene is shown for approximately 5 minutes. In the background during the scene is piano music that is soft and slow. The other sounds heard are the couple's breathing. The scene ends at 34 minutes 30 seconds. At 37 minutes 53 seconds Lisa is shown blind folded (but not bound). Matt holds her head. Lisa says "do it harder". Matt holds her neck and massages it firmly. There is a low-level sense of menace. At 38 minutes 29 seconds Lisa takes Matt's hand and puts it in her vaginal area. At 40 minutes 15 seconds Lisa is shown apparently using a dildo to stimulate herself. At 41 minutes Lisa is shown breathing rapidly, she makes some moaning sounds. At 42 minutes 39 seconds Lisa is shown in bed with a top on and without knickers. She is implicitly using a vibrator. Matt is watching her from a distance. Lisa is shown prone on the bed, moving very little. She apparently reaches climax. Matt walks away. At 47 minutes 58 seconds Lisa ties Matt to the bed, she slaps his face with her open hand and puts her stiletto heel into his chest and puts her weight on her foot. She then puts her booted foot onto Matt's legs. She undresses. At 49 minutes 45 seconds Lisa asks Matt "do my nipples feel sore to you? They are." At 50 minutes a two-minute scene of actual sex commences. Lisa kisses Matt's penis and pulls at his testicles. She holds his penis in her mouth (actual sex), she manipulates his penis with her hand (actual sex), her hand is shown repeatedly manipulating Matt's penis (actual sex). Matt explicitly ejaculates (actual sex). His semen is explicitly shown spurting out of the end of his penis onto his chest and stomach (actual sex). Lisa continues to fondle Matt after he climaxes. The scene is prolonged and contains significant detail. At approximately 60 minutes an actual sex scene of two minutes duration is shown. At 60 minutes Lisa removes her knickers and the couple start to fondle each other. At 60 minutes 28 seconds, explicit vaginal penetration is shown. The camera angle is at the end of the bed as the shaft of Matt's

penis explicitly enters Lisa's vagina. Her vagina is visible and some detail is shown including pubic hair, open labia and moist clitoral region. Matt's penis is erect and wet. The camera angle is from the end of the bed toward the couple. Matt is on his knees facing away from the camera and is seen in mid shot. His buttocks and testicles are shown. The shaft of his penis is shown explicitly entering Lisa's vagina and partly withdrawing and moving up and down, re-entering her vagina in a rhythmic manner. The scene is prolonged and detailed and ends at approximately 62 minutes and 21 seconds. The film ends at 69 minutes 23 seconds.

The majority view was that the sex scenes (including those of actual sex), while high in impact, were justified by context and could be accommodated at an 'R' classification. It was the view of the minority that the impact of two prolonged scenes of actual sex was very high and the cumulative impact of all the actual sex scenes was very high. The minority view was that the amount of actual sex scenes was gratuitous.

(c) **Drug use** – At approximately 12 minutes a character apparently snorts what appears to be cocaine up their nose. At approximately 36 minutes the protagonists apparently smoke a marijuana cigarette at a concert. At 46 minutes the scene described under themes takes place. At approximately 57 minutes the characters both appear to snort cocaine. The drug use is moderate in impact and justified by context.

(d) **Language** – The characters use strong coarse language during the film. At approximately five minutes Lisa says to Matt "Fuck me". At 15 minutes someone says colloquially: "Fucking weird man". At 31 minutes Lisa says to Matt, "Fuck me man, fuck me". At approximately 38 minutes Lisa tells Matt that at times she would like to bite him in "not a nice way", "I want to bite you, fucking hard". All of these references would be in keeping with an 'MA15+' classification. At 46 minutes the scene described under themes takes place. The coarse language is strong in impact and justified by context.

(e) **Nudity** – At 2 minutes 43 seconds Lisa's breast and nipple are shown. At 4 minutes and 27 seconds Lisa gets out of bed naked, her breasts and buttocks are shown. At 11 minutes Lisa walks naked and her breast and buttocks are seen. At 11 minutes 30 seconds Matt is seen naked, his penis is visible. At 11 minutes 54 seconds Lisa lays on the table naked. At 12 minutes 5 seconds Lisa watches her naked self in the mirror. At 12 minutes 57 seconds Lisa is seen dancing without knickers on. Her buttocks are seen. At 20 minutes 57 seconds the couple are seen in the bath naked. Her breasts and his penis are depicted. At 22 minutes 37 seconds Matt removes his clothes and goes swimming. His buttocks are shown. At 26 minutes Matt and Lisa are naked in bed. At 39 minutes 48 seconds partially naked women are shown dancing. At 41 minutes 37 seconds the couple is shown naked in bed. Lisa is crying. At 56 minutes Lisa and Matt are shown naked kissing in bed. Lisa sits on Matt. Her breasts are seen. The nudity is strong in impact and justified by context.

The Review Board in the majority found that while the overall impact of the material was 'high', there was not sufficient strength in the film to cause a higher level of impact for any individual scene or cumulatively. Scenes were dealt with in a realistic yet restrained manner that was not gratuitous or exploitative. Each scene was justified by the context in which it was presented and the overall theme of the film, the couple's sexual and emotional relationship.

The Review Board in the majority found that the film had a serious intent and some artistic merit and that the sex scenes were justified and in context.

It was the view of the minority that at least two of the individual scenes were prolonged, detailed and gratuitous and as such went beyond what the Review Board had been previously prepared to accept within an 'R' rated film. Further, the cumulative impact of the lengthy and numerous actual sex scenes ensured that the impact of the film was very high and as such should be Refused Classification.

### ***7 Reasons for the decision***

#### **The 'X' classification, the unanimous view**

The Review Board considered the Classification Board's report and the classification given by the Board of 'X'. The Review Board made a careful examination of the Guidelines in this regard. The Guidelines state that, amongst other fetishes, bondage is "not permitted". There is no discretion available to the Review Board in this instance. If a film contains bondage then it cannot be classified 'X' as fetishes "are not permitted".

The film contains two scenes that the Review Board unanimously determined to be "bondage" scenes. The first is where Lisa is tied by her wrists to the bed and blindfolded. Matt then explicitly performs actual sexual acts with her. The second is where Matt is tied by the wrists to the bed and blindfolded. Lisa slaps him across the face, steps on him with a stilettoed foot and performs explicit actual sexual acts with him.

The Review Board determined that these were scenes of bondage and the latter scene was one of sexualised violence. As such, the Review Board accepted the Applicant's submission on this issue – as represented by Mr Haines – and determined that the Guidelines do not permit the film *9 Songs* to be classified 'X'.

#### **If not 'X', then what? The majority view**

The Guidelines for R18+ films state that "sexual activity may be realistically simulated; the general rule is 'simulation, yes - the real thing, no'".

The rule is expressed to be a general rule, implying the possibility of exceptions in a limited number of instances. While the general rule must be given weight by the Review Board, its application to any given film must be consistent with the scope and objects of the Act and the Code. The general rule cannot be applied so inflexibly such that the various matters in the Act and the Code (all of which the Review Board is required to consider in reaching a decision) are effectively ignored or rendered immaterial.

In *Reid v Director-General of Social Services* (1981) 4 ALN No. 1, the Administrative Appeals Tribunal stated:

in exercising the discretion under [the relevant section] of the Act 'the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the ...Act .. Thus while keeping the general rule laid down by [the relevant section] in mind, the decision-maker must nevertheless be prepared to respond to the circumstances of a particular case if for any special reason the application of the general rule would be unjust, unreasonable or otherwise inappropriate having regard to the scope and object of the Act.

In a limited number of previous decisions, the Review Board has permitted exceptions to the general rule by allowing depictions of “the real thing” in the R18+ category (for example *Romance*, *Irreversible* and *Anatomy of Hell*). These films variously contained scenes of actual intercourse, fellatio and masturbation.

The Review Board in the majority found that there were special aspects of *9 Songs* which differentiated it from other films which feature “the real thing” and have been Refused Classification by the Classification Review Board:

- *9 Songs* is a film in which Matt and Lisa’s relationship is explored, from Matt’s perspective, through music and sexual activity. In this context, the scenes of actual sex are integral to the plot and theme of the movie.
- *9 Songs*, made by the highly-regarded British director Michael Winterbottom, is a film of serious intent and considered by many to have artistic merit. The underlying themes of the movie, the honest, realistic and, at times, emotional and poignant depiction of the couple’s relationship, which were integrated with the scenes at rock concerts, were likely to resonate with a number of the film’s likely audience and had artistic value.
- The scenes of actual sex are not considered by the majority to be exploitative, immoral, indecent, demeaning, improper or gratuitous. In particular, regarding the scene in which Lisa slaps Matt and steps on him with a stiletto boot, the majority was of the view that the impact of this scene was mild and was not demeaning to Matt or Lisa.
- The tone of the scenes of actual sex, in terms of theme and style, were contextually relevant, filmed in a restrained manner and different from standard pornographic films that are routinely classified ‘X’.

Accordingly, viewed in context and in light of the above points, the scenes of actual sex were, in the view of the majority, of no more than high impact.

While some adults would be offended by the film, most reasonable adults (even if some would choose not to see the film) would not be offended. In reaching this conclusion, the majority was influenced by its belief that the Australian community is more accepting of a film containing contentious elements that are sexual in nature, are neither violent nor exploitive and are between consenting adults.

After careful consideration, the majority of the Review Board determined that the limited discretion implicit in the application of the general rule should be exercised because, in this instance, 'R' was the most appropriate classification for the film, having regard to the special aspects of the film mentioned above, and the objects and operation of the classification scheme (in particular Section 11 of the Act, the four guiding principles in the Code and the Guidelines).

### **The minority view**

It was the minority view that the film should be classified 'RC' as the contentious material exceeds that permissible in the 'R' classification. The minority noted previous decisions of the Review Board permitting fleeting, non-detailed scenes of actual sex and case law regarding the application of a "general rule". In the film, the actual sex scenes were prolonged and detailed, took more than five minutes of the 69 minute film and were shown with full lighting. The amount of actual sex scenes and cumulative impact of those scenes was gratuitous. It was also noted that the protagonists were not the subject of sexualised violence in the actual sex scenes of the three previous films depicting actual sex that have been classified 'R' by the Review Board.

The minority of the Review Board noted that the AAT stated in *Reid v Director-General of Social Services* that:

there must be some factor or factors in the circumstances of the particular case which take it outside the common run of cases

The minority view was that there were no circumstances in the particular film to "take it outside the common run of cases". The argument put by the majority is that given the theme of a sexual relationship, artistic merit of the film and likely audience that the actual sex is justified by context and cites these as special factors to take *9 Songs* outside the "common run of cases". However, artistic merit and likely audience are but two of the four matters to be taken into consideration in making classification decisions. The first of the four listed "matters to be considered in classification" is the "standards of morality, decency and propriety generally accepted by reasonable adults". It was the minority view that the gratuitous actual sex, in particular the explicit actual ejaculation scene and sexualised violence present in the film exceeds this standard.

Further, proper consideration of the impact of the explicit ejaculation scene in regard to Section 11 (d) of the Act and under the Guidelines in the circumstances of a public cinema need to be given as does the "class of persons" who attend such cinemas. These cinemas use larger screens and more powerful sound systems than that used by the Review Board and films have greater impact in these circumstances. No previous film in Australia has been classified 'R' by the Review Board where it contains a prolonged, detailed scene of explicit, actual ejaculation.

Also sufficient weight and proper consideration of the principles to be given effect in classification decisions under the Code, particularly (d) needs to be given, especially for the scene where Lisa slaps Matt across the face and stands upon him whilst she is wearing stiletto boots and where he is blindfolded and tied to the bed. One principle

that the Code requires the Review Board to give effect to “as far as possible” is “the need to take account of community concerns about” “the portrayal or persons in a demeaning manner”. The scene depicts actual sexualised violence (although at a lower level of violent scenes) in an actual sex scene and where it is the minority that Matt is portrayed in a demeaning manner. No sexual partner, regardless of gender, should be portrayed in a demeaning manner or subject to sexualised violence in actual sex scenes in a classified film, in the view of the minority.

The film has a serious intent and the minority accepted the submission of the applicant that the film has some artistic merit. However, the mere absence of more extreme sexual behaviour does not constitute a factor to set aside the general rule of “simulation, yes – the real thing, no”.

### **8 Summary**

While the classifiable elements and the impact in the overall context of the film *9 Songs*, in the majority view, did not justify a Refused Classification, the impact and contentious material warrant the legally-restrictive ‘R’ classification.

It was the majority view of the Review Board that the contentious material and impact of the film did make it unsuitable for minors and warranted specific consumer advice relating to actual sex and high-level sex scenes.

It was the minority view that the film should be Refused Classification.