



Australian Government

Classification Review Board

13, 18 December 2006

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

MEMBERS:

Ms Maureen Shelley (Convenor)
The Hon Trevor Griffin (Deputy Convenor)
Mr Rob Shilkin
Ms Kathryn Smith

APPLICANT Penday Pty Ltd represented by Nyst Lawyers

BUSINESS: To exercise the Classification Review Board's discretion under the *Classification (Publications, Films and Computer Games) Act 1995* s 43(3) to hear an out of time application for review of the Classification Board's classification of *Busty Beauties #14*.

DECISION AND REASONS FOR DECISION

1. Decision

The Classification Review Board (the Review Board) exercised its discretion and decided not to accept the out of time application. The Classification Board's original decision therefore stands: *Busty Beauties #14* was classified X18+ with the consumer advice 'Explicit sex'.

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.

Relevantly, for applications for review lodged by applicants other than the Minister, Section 43(3) states “Any other application for review of a decision must be made:

- (a) within 30 days after the applicant received notice of the decision; or
- (b) within such longer period as the Review Board allows.”

3. Procedure

The Classification Review Board accepted written submissions from the applicant. It convened on 13 December 2006 and 18 December 2006 and considered the out of time matter on the papers. The original applicant was notified.

4. Evidence and other material taken into account

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

- (i) the applicant’s submissions;
- (ii) relevant provisions in the Act;
- (iii) the principles to be considered in proceedings beyond the prescribed time limit as set out by Wilcox J in *Hunter Valley Developments Pty Ltd & Ors v Cohen FCR 344* as modified by McInnes FM in *Phillips v Australian Girls Choir & Anor* (2001) FMCA 109 and *Beling v Stapels* (2001) FMCA 135.

Should the Review Board allow a longer period for the applicant to make its application using its power under section 43(3)(b)?

In *Hunter Valley* it was held that a number of factors were relevant in determining whether to grant an extension of time for making an application to apply for judicial review under section 11 of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act). Section 11 confers a discretion on the Federal Court to extend time for the making of an application in a similar manner to the discretion conferred under section 43 of the Classification Act on the Board.

The principles distilled by Wilcox J and modified by the Full Court of the Federal Court in the matter of *Comcare v A’Hearn* (1993) 45 FCR 441 have been applied by many Courts and Tribunals. They were summarised in the matter of *Phillips v Aust. Girls Choir & anor.* [2001] FMCA 109 (28 November 2001):

1. There is no onus of proof upon an applicant for extension of time although an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The 'prescribed period' of 28 days is not to be ignored (*Ralkon v Aboriginal Development Commission* (1982) 43 ALR 535 at 550).
2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is not a

pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. It is to be expected that such an explanation will normally be given as a relevant matter to be considered, even though there is no rule that such an explanation is an essential precondition (*Comcare v A'Hearn* (1993) 45 FCR 441 and *Dix v Client Compensation Tribunal* (1991) 1 VR 297 at 302).

3. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised. (See *Doyle v Chief of Staff* (1982) 42 ALR 283 at 287)

4. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension. (See *Doyle* at p 287)

5. The mere absence of prejudice is not enough to justify the grant of an extension. (*Lucic* at p 416)

6. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted. (See *Lucic* at p 417)

7. Considerations of fairness as between the applicant and other persons otherwise in a like position are relevant to the manner of exercise of the [decision making body's] discretion (*Wedesweiller v Cole* (1983) 47 ALR 528).

The Review Board was assisted by consideration of these principles in determining this matter.

5 Synopsis

The Classification Board report states that the film is "A series of vignettes depicting consenting adults engaging in actual sexual activity. Extra features include a behind the scenes featurette, interviews, dancing, director's profile, slide show, trailers and sex talk." The Review Board accepted this view of the product.

6 Findings on material questions of fact

The following is a timeline in regard to this application:

23-June-2005	Date of Seizure (according to letter from Mr Cannavan, Qld Censorship Official to OFLC)
09-September-2005	Application for evidentiary certificate and/or classification certificate

	Receipt for goods lodged - submitted by Office of Fair Trading, Qld;
13-September-2005	Enforcement application received by OFLC
20-September-2005	Viewed by Board; Board Report signed; X18+ Explicit sex
23-September-2005	s 87 Certificate – signed by Director, OFLC; Classification Certificate signed by Director, OFLC
26 September-2005	Certificates sent to applicant-by fax
27 September-2005	Certificates sent to applicant- by registered post
22-June-2006	Mr Cannavan made complaint (according to letter accompanying application to Review Board)
02-October-2006	Company receives copy of classification certificate
09-November-2006	"Upon receipt of Mr Cannavan's complaint the company was first made aware of any issue in respect of the classification of that film" - letter from Penda to Review Board, 9 Nov 2006
09-November-2006	Application to Review Board received - sent by fax

The Review Board accepted the above timeline as being representative of the order of events in regard to this application for review.

The Review Board noted that the film had been classified X18+ Explicit sex in 2005. The Review Board viewed the cover of the copy of the DVD that was seized by the Queensland Censorship Official, sent via facsimile transmission.

The Review Board viewed the cover of the DVD, *Busty Beauties #14*, which showed sexually explicit material, including a female engaged in fellatio, an erect penis, and a woman with legs spread apart showing genital detail.

The Review Board found the application for review of *Busty Beauties #14* to have been lodged out of time.

7 Reasons for the decision

Busty Beauties # 14 was classified X18+ Explicit sex on 20 September 2005 on application of the Queensland Censorship Official.

The applicant for review is Penda Pty Ltd.

In considering the application, the Review Board found:

1. the explanation by the applicant for the delay to be inadequate;

2. the action taken by the applicant, apart from lodging the application, to have been insufficient;
3. that the director of the applicant company has had many sexually explicit Category 1 and Category 2 magazines classified by the Office of Film and Literature Classification in recent years;
4. the timeline above shows that the lodging of the application for review was well over the 30 days required;
5. that on preliminary assessment of the merits of the application, based on the depictions on the DVD cover and the written submissions provided by the applicant, the application for review was unlikely to succeed and there was little prospect of the classification changing;
6. that the Review Board had been very consistent in applying the 30-day rule in the past to a range of applicants (with either more or less resources than the applicant), including those with less experience in classification matters than the applicant. It was not in the interests of fairness between applicants in like positions to hear this out-of-time application while not hearing others; and
7. there was a need for time limits to apply to the making of applications to review classification decisions to enable greater certainty and finality of classification decisions.

Having regard to these matters the Review Board determined that it should not exercise its power under section 43(3)(b) to allow the making of the application for review outside the 30 days stipulated in section 43(3)(a) of the Classification Act.

8 Summary

Due to the extended delay, without adequate reason, in the lodgement of the application for review, the Review Board determined not to exercise its discretion to grant an out of time application.

The Review Board found the application for review of *Busty Beauties #14* to have been lodged out of time.