



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

30 March 2004

23-33 MARY STREET  
SURRY HILLS, NSW

**MEMBERS:** Ms Maureen Shelley (Convenor)  
Mr Robert Shilkin  
Ms Kathryn Smith

**APPLICANT:** Australian Family Association (AFA) represented by Mr Damien Tudehope (Solicitor)

**INTERESTED PARTIES:** Accent Film Entertainment Pty Ltd (Original Applicant) represented by Mr Dean O'Flaherty (Marketing and Acquisitions Manager); Ms Raena Lea-Shannon (Solicitor), Mr Douglas Stewart (Classifier);

**BUSINESS:**

- To consider whether the Review Board should exercise its discretion to accept the application for review of a decision outside the prescribed period
- To consider whether the AFA has standing to apply for review
- To review the Classification Board's (the Board) decision to classify the 35mm format film *Irreversible* R18+ with the consumer advice "Strong sexual violence, Graphic violence, Sexual activity"

**DECISION AND REASONS FOR DECISION**

**1. Decision**

The Classification Review Board (the Review Board) determined that

- (a) an application for review of the decision of the Classification Board made by the AFA was made outside the time stipulated in section 43(3)(a) of the *Classification (Publications, Film and Computer Games) Act 1995* (the Classification Act); and
- (b) it should not exercise its power under section 43(3)(b) to allow the making of the application for review outside 30 days stipulated in section 43(3)(a) of the Classification Act.

## **2. Legislative provisions**

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

Section 42(1)(d) of the Classification Act provides that a person aggrieved by the decision may apply to the Review Board for a review of a decision.

Section 42 (3) and (4) deem particular persons, organisations or associations, who fit within the requirements of the section, to be “persons aggrieved” in relation to a “restricted decision”. A restricted decision includes a decision to classify a film R.

Section 43(3) of the Classification Act provides that an application for review must be made (a) within 30 days after the applicant received notice of a decision; or (b) within such longer period as the Review Board allows.

## **3. Background and Procedure**

Between 6 March 2003 and 6 April 2003 screenings of *Irreversible* took place in Canberra, Sydney, Melbourne, Brisbane, Adelaide and Perth during the French Film Festival. At that time the film had been granted a Film Festival exemption by the Director of the Classification Board. There was media coverage regarding the Festival and the nature of the film *Irreversible*.

On 30.10.03 an application by Accent Film Entertainment dated 28.10.03 for classification of the film *Irreversible* was received by the Applications Section of the Office of Film and Literature Classification (OFLC).

On 19.11.03 the Classification Board determined a classification for *Irreversible* of “R18+ (Restricted)” with the consumer advice “Strong Sexual Violence, Graphic Violence and Sexual Activity.”

On 26.11.03 a Classification Certificate for the *Irreversible* was issued and sent to Accent Film Entertainment Pty Ltd. By 27.11.03 the determination was published on the public database on the OFLC website.

The AFA submitted that it first became aware of the decision of the Classification Board to give *Irreversible* an R18+ classification through various media reports published during February 2004. A notice of the decision of the Classification Board on *Irreversible* was provided by the OFLC to the Perth office of the AFA on 3 February 2004.

Screenings of *Irreversible* were held on the weekend of 7 and 8 February and received some publicity in the national media. Subsequently *Irreversible* was screened at the Chauvel and Valhalla cinemas in Sydney, and at the Lumiere cinema in Melbourne. At these screenings the classification determination and consumer advice were publicised.

Mr Egan of the AFA wrote a letter dated 9.03.04 to the Convenor of the Classification Review Board seeking a review of the Classification Board's decision to classify the film *Irreversible* "R18+" and seeking advice of fees and any additional steps in pursuing the review. This was received by fax on 10.03.04.

By fax dated 10.03.04, the Secretary of the Review Board wrote to the AFA enclosing an application form for completion and advising of the fee for review, noting that until a signed application form and prescribed fee were received, the matter would not be considered for review.

On 10.03.04 the Secretary of the Review Board spoke to Mr Richard Egan of the AFA by telephone. Mr Egan raised preliminary issues and suggested that fees should not be payable unless a substantive review of the film was held. The Secretary agreed to seek further guidance from the Principal Policy Officer at OFLC and to keep him informed about the Review Board's progress in dealing with the issue.

Mr Egan wrote a letter to the Review Board dated 10.03.04 confirming his conversation with the Secretary. The letter asserted that the prescribed fee of \$2820 was only payable if there was a substantial review, and there was no fee for deciding preliminary questions of standing and whether to accept the application out of time. The letter proposed options for proceeding without paying fees.

On 12.03.04 the Secretary of the Review Board spoke again with Mr Egan of the AFA. She confirmed that she was working on the issues he had raised and would get back to him as soon as she had obtained further directions from the Convenor.

In a letter of 15 March 2004, faxed to the AFA the Secretary advised that:

- an application for review must be accompanied by the prescribed fee
- the AFA could apply to the Director (of the Classification Board) to have the prescribed fee waived
- the Convenor had advised that as preliminary issues would involve a consideration of the merits of the substantive application for review the preliminary issues and substantive issues would be dealt with in one hearing
- until an application accompanied by fees, or a fee waiver, was received the Review Board would not treat the application as having been lodged.

In a letter of 15 March 2004 to the Director seeking a waiver of fees, the AFA stated that:

- the OFLC provided the Board's reasons for its decision by fax on 03.02.04
- it also wrote to the Attorney-General, Philip Ruddock, asking him to apply for review of the decision on 03.02.04
- the Attorney-General, Philip Ruddock replied to the AFA's letter declining to apply for review of the decision on a letter dated 03.03.04, but the letter was actually received on 09.03.04
- the Review Board replied (to the AFA's fax of 10.03.04) on 15.03.04 ignoring its arguments and asserting that the prescribed fee was payable whether a substantive hearing proceeded or not; and proposing it apply for a fee waiver.

In a letter of 17 March 2004 faxed to the AFA on that date, the Director confirmed that a payment of fees or fee waiver was necessary before the Classification Review Board could consider an application for review and that the Review Board has no power to waive fees or to refund fees in the event that preliminary issues were not determined in an applicant's favour. An additional application form was faxed. Confirmation was also sought as to the grounds on which the AFA sought a fee waiver.

On 17 March 2004, the AFA lodged via fax the completed application form and confirmation that it sought a waiver of fees.

On 23 March 2004, the Director advised the AFA in writing that the fee waiver had been granted.

On 30 March the Review Board viewed a screening of *Irreversible*. The parties were invited to the screening. The applicant was represented by Mr Damien Tudehope. The original applicant did not attend the screening.

Following the screening the Review Board convened a meeting to determine the application by the AFA.

The Convenor advised the parties that the Review Board proposed to deal first with the out of time issue, followed by the matter of whether the Australian Family Association had standing as a person aggrieved and then the substantive application of review of the decision of the Classification Board. The parties did not object to this process.

The Convenor provided a copy document, prepared by the Review Board secretariat, of significant dates regarding the film *Irreversible* to the applicant and original applicant. This document was accepted by the parties as being an accurate statement of the order of events. The chronology established by that document is reflected above.

The Review Board heard oral submissions on the "out-of-time issue" on behalf of the AFA from Damien Tudehope and on behalf of the original applicant – Accent Film Entertainment – from Raena Lea-Shannon of Michael Frankel & Co. Solicitors and Douglas Stewart, classifier. Written submissions were also

received from each of these representatives. The Review Board also received a written submission from the Communications Law Centre.

After an adjournment to consider the matter the Review Board made its determination and advised the parties. The Review Board did not determine whether the AFA was an 'aggrieved person' within the scope of section 43(1)(d) of the Classification Act' or the substantive review of the decision.

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

In making its determination the Review Board had regard to the following:

- (i) the Australian Family Association's application for review (including written and oral submissions);
- (ii) the written and oral submissions on behalf of Accent Film Entertainment
- (iii) the relevant provisions in the Classification Act; and
- (iv) principles described by Wilcox J in *Hunter Valley Developments Pty Ltd & Ors v Cohen* 3 FCR 344 ('**Hunter Valley**') and subsequent Federal Court and Federal Magistrates Court cases as being relevant to determining whether to grant an application for an extension of time in which to lodge an application.

#### **5. Synopsis**

The Classification Board stated in its report regarding *Irreversible*:

*"In a Paris sex club, Marcus and Pierre are on a frenzied night time search for a man. Overcome by rage and despair, they are involved in a brutal act of violence. The reason is revealed as the story plays out in reverse. Marcus's girlfriend Alex is brutally raped and bashed after a party. The complex relationship between Marcus, Pierre and Alex also unfolds and the film ends with Marcus and Alex as yet untouched by the horror that awaits them."*

The Review Board accepted this view of the product.

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

The Review Board found that

- (a) the decision of the Classification Board was published to Accent Film Entertainment Pty Ltd and on the OFLC website by no later than 27 November 2003;
- (b) the AFA was sent a copy of the classification decision on 3 February 2004;
- (c) by the time the AFA made an application for review which complied with section 43(1) of the Classification Act (17 March 2004) more than 30 days had passed since the AFA and Accent Film Entertainment Pty Ltd had received notice of the decision of the Classification Board.

In these circumstances the Review Board found the application for review of *Irreversible* to have been lodged outside the 30 day period for application for review of a decision specified by section 43(3)(a) of the Classification Act.

## 7. Reasons for the decision

### **Was the application made within the period prescribed by section 43(3)(a) of the Classification Act?**

The classification certificate for the film *Irreversible* was issued on 26 November 2003 and notice to that effect was posted on the OFLC public website by no later than 27 November 2003.

The AFA states in its written submission:

*"The Australian Family Association first became aware of the decision of the Classification Board to give Irreversible an R18+ classification through various media reports published during February 2004. A notice of the decision of the Classification Board on Irreversible was received, as requested, by facsimile from the Office of Film and Literature Classification at the Perth office of the Association on 3 February 2004.*

*"We wrote on that day to the Attorney-General, Phillip Ruddock [copy already supplied], asking him to exercise his prerogative under Section 42 of the Act to apply for a review of the decision. We received a reply from Mr Ruddock, dated 3 March 2004 on 9 March 2004, declining to request a review of the decision. [Copy supplied].*

*"It is the submission of the Association that although the statutory 30 day period may have expired on 4 March 2004 the Classification Review Board should exercise its discretion under Section 43 (3) (b) to allow extra time for the appeal. It would have been unreasonable for the Association to independently initiate a review, which may have exposed us to a cost of \$2,820 in the event we could not obtain a waiver of fees, while waiting to hear from the Attorney-General as to whether he would himself apply for a review."*

There had been correspondence between the OFLC and the AFA commencing 3 February 2004. Correspondence between the Review Board Secretariat and the AFA commenced on 9 March 2004.

The AFA lodged an application in the approved form for review of the classification of the film on 17 March 2004 and at the same time lodged an application for waiver of fees under Section 91 of the Classification Act with the Director of the OFLC. The fee waiver was granted on 23 March 2004.

Sub-section 1 of Section 43 of the Classification Act states

- (1) An application for review of a decision must be:
  - (a) in writing; and
  - (b) made in a form approved by the Convenor in writing;  
and
  - (c) signed by or on behalf of the applicant; and

- (d) except for an application by the Minister – accompanied by the prescribed fee.

These basic requirements for an application were, therefore, satisfied on 23 March 2004.

Sub-section 3 of Section 43 of the Classification Act 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.

It is noted that the AFA had conceded that it was lodging an out of time application. However, it was the AFA's submission that it "received notice of the decision" on 3 February 2004 when it received a fax from the OFLC regarding the film's classification. The applicant argued that the 30-day notice period commenced from this date. Even on this view its application fell outside the time prescribed by section 43(3)(a) of the Classification Act.

It has been the consistent practice, during a number of years, for the Review Board to consider that the 30 day notice period commences for the purposes of section 43(3) of the Classification Act on the date that the classification determination is published on the OFLC public website. In the case of *Irreversible*, this was by 27 November 2003.

In considering applications for review of decisions by the Classification Board, the Review Board must give due consideration to the interests of all parties including those of the original applicant, the public and others who have been in similar circumstances to the applicant.

The Review Board considers that it would be unreasonable for the notice period to commence at some later undetermined time, when applicants – particularly those other-than-original applicants – receive written confirmation from the OFLC regarding classification decisions. On this basis, the notice period could commence at any time and original applicants for film classification would have no certainty regarding classification decisions.

In its written submission the AFA noted that as part of its activities, it "*has monitored and analysed developments in the media and entertainment industry, including developments in the classification of films.*" (para 1.2). The Review Board considers that those interested in film classification – such as the AFA – should take reasonable steps to keep themselves informed regarding decisions of interest to them.

Information regarding the nature of the film *Irreversible* was available in the media approximately a year prior to the applicant contacting the OFLC and was available on the OFLC public website from 27 November 2004, some 2 ½ months earlier than the AFA's contact with the OFLC.

Members of the AFA could have seen the film in March/April 2003 in several states. In its submission of 9 March 2004, the AFA states that it had been unable to view the film, although it was screening in Sydney and Melbourne, albeit in limited numbers of cinemas, from 7 February 2004 in Sydney and 12 February 2004 in Melbourne.

Even if it is accepted that the 30 day notice period commenced on 3 February 2004, the decision of the Review Board on the out-of-time issue would not change. The AFA could have lodged an application for review at the same time that it was writing to the Attorney General in February 2004. Although not taken into consideration, the Review Board was aware that this was the action followed by the AFA in regard to the film *Baise Moi* in 2002 – it pursued both actions simultaneously. When the then Attorney General applied to the Review Board for a review of the decision regarding *Baise Moi*, the AFA withdrew its application.

### **Should the Review Board allow a longer period for the AFA 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 though 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 pre-condition (*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. In considering these principles the Review Board found :

- the explanation by the AFA for the delay to be inadequate,
- the action taken by the AFA apart from lodging the application, to have been reasonably sufficient but needed to have commenced earlier than February 2004
- that on preliminary assessment of the merits of the application, based on a viewing of the film and the written submissions provided by the applicant and the original applicant, the application for review was unlikely to succeed and there was virtually no prospect of the classification changing;
- 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 AFA), including those with less experience in classification matters than the AFA. 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
- 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;
- that while there might arguably be some public interest in ensuring a strict application of the Guidelines, as submitted by the applicant, this was not sufficiently significant to grant an out of time application, particularly when coupled with the Review Board's assessment of the merits of the application.

Having regard to these matters the Review Board decided 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.

### **Other matters**

As noted above, the Review Board did not proceed to review the classification decision in *Irreversible* or deal with the remaining preliminary issue of the AFA's standing as either a 'person aggrieved' or as a person or organisation 'deemed to be a person aggrieved' under section 42 of the Classification Act.

A submission was received from the Dr Derek Wilding of the Communication Law Centre and circulated to the applicant, the original applicant and members of the Review Board. However, as it related to the substantive application it was not referred to, nor taken into account, during the Review Board's deliberations.

The AFA was advised that it could make an application under the ADJR Act in relation to the determination of the Review Board.

### **8. Summary**

Due to the delay, without adequate reason, in the lodgement of the application for review, the Review Board determined not to exercise its discretion to allow an extension of the period for lodgement of the application.