



Australian Government
Classification Review Board

5 December 2003

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

MEMBERS: Ms Maureen Shelley (Convenor)
Mr Jonathan O’Dea (Deputy Convenor)
Mr Robin Harvey
Ms Kathryn Smith

APPLICANT: Nine Network Australia

BUSINESS: To review the Classification Board’s decision to classify the VHS format film *McLeod’s Daughters (A Dry Spell/ Three’s A Crowd/ The Bridle Waltz/ To Have And To Hold/ Home Is Where The Heart Is {said to be Series 2, episodes 28-32})* M (Mature) under the *Classification (Publications, Films and Computer Games) Act 1995*

DECISION AND REASONS FOR DECISION

1. Decision

The Review Board exercised its discretion not to hear the application as it was made out of time.

2. Legislative provisions

The *Classification (Publications, Film and Computer Games) Act 1995* (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.

3. Procedure

The Review Board members individually watched the episodes of *McLeod's Daughters* on VHS format prior to the meeting date. The Review Board convened and heard submissions on behalf of Channel 9 from Mr Richard Lyle and Mr John Dickie.

The Review Board then met in camera. After its deliberations, the Convenor advised Mr Lyle and Mr Dickie that the Review Board was following the principles for considering out of time applications as established by Wilcox J in *Hunter Valley Developments Pty Ltd & Ors v Cohen FCR 344* on advice from the Australian Government Solicitor. The Convenor read these principles to Mr Lyle and Mr Dickie and invited further submission, but no further material information was provided.

The Review Board then advised Mr Lyle and Mr Dickie that the Review Board had exercised its discretion not to hear the application as it was made out of time.

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 (including written and oral submissions); and
- (ii) the relevant provisions in the Classification 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*.

The following excerpt is taken from the Human Rights and Equal Opportunity Commission's website – legal bulletins (http://www.hreoc.gov.au/legal/bulletins/volume_3.html). It sets out these principles, which were substantially followed by the Review Board in determining this matter.

Principles for commencement out of time

In the light of the decision in Ahearn's case it is useful to set out in modified form the relevant principles in relation to the exercise of the Court's discretion when considering an extension of time in a human rights application based upon those principles distilled by Wilcox J in *Hunter Valley* as follows:

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 court's discretion (*Wedesweiller v Cole* (1983) 47 ALR 528).

This passage was repeated by McInnis in *Beling v Stapels* [2001] FMCA 135.

5. Synopsis

The applicant stated in its written submission

“McLeod’s Daughters is a television drama produced and filmed in Australia about two step sisters who run a cattle station. For general distribution other than television it is packaged in episodes which run for approximately an hour on television but the actual length of the episode is closer to 41 or 42 minutes.”

The Review Board accepted this view of the product.

6. Findings on material questions of fact

The Review Board found the application for review of *McLeod’s Daughters* (*A Dry Spell/ Three’s A Crowd/ The Bridle Waltz/ To Have And To Hold/ Home Is Where The Heart Is*) to have been lodged out of time.

7. Reasons for the decision

Channel 9 is the owner of the television series known as *McLeod's Daughters*. Columbia Tristar Home Entertainment is the distributor of the series in VHS and DVD format. Channel 9 and Columbia Tristar Home Entertainment have a contractual relationship.

Columbia Tristar Home Entertainment (CSHE – the original applicant) received classification for *McLeod's Daughters (A Dry Spell/ Three's A Crowd/ The Bridle Waltz/ To Have And To Hold/ Home Is Where The Heart Is {said to be Series 2, episodes 28-32})* on 27 June 2003. The classification given was M (mature). The classification was entered on the Office of Film and Literature Classification public classification database in the afternoon of that day.

Through a series of administrative events, Channel 9 did not communicate with the Office of Film and Literature Classification until an undated letter, postmarked 7 November 2003, was received by the Secretary to the Review Board. After a series of telephone and e-mail correspondence from the Secretary to Channel 9, the final necessary elements for an application for review were received on 3 December 2003.

The application for review was therefore lodged more than five months after the product was classified.

The applicant stated in its oral and written submission that the matter was an unusual one due to the amount of material Channel 9 had to consider – some 44 episodes altogether in two series – the considerable work involved in assessing that material, that CSHE was the original applicant and CSHE was unconcerned by the rating given, and that Mr Lyle had been overseas for three weeks during the period from when the classification was given until he wrote to the Review Board.

The applicant also stated that it had wanted CSHE to apply for the review and then sought their co-operation in lodging the review. It had apparently been operating under the mistaken view that it needed the permission of CSHE to lodge the review application.

In oral submission, Mr Lyle for the applicant stated that he did not clarify the position with the Office of Film and Literature Classification – either by speaking to staff or visiting the website, nor did he – nor anyone else at Channel 9 – seek advice from the Channel 9 in-house counsel. It was unclear as to when Channel 9 sought Mr Dickie's advice on the matter.

The Review Board found

- the explanation by Channel 9 for the delay to be inadequate
- the action taken by Channel 9, apart from lodging the application, to be insufficient
- on preliminary assessment, the merits of the application for review to be possible rather than likely to succeed
- that the Review Board had been strict in the application of the 30-day rule in the past and to applicants with considerably less resources than those available to Channel 9; and

- that while there might be some public interest in a reconciling of classification between that administered by television stations and that administered by the Office of Film and Literature Classification, as was the submission of the applicant, that such interest was not sufficiently significant to grant an out of time application.

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. As the Review Board had met to determine the validity of the application, the application fee was not refundable.

Channel 9 was advised of its appeal rights to the Federal Court of Australia.