



**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:** BeDaring the Adult Shop 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 *Ben Dover's Bummed Out in Britain*.

**DECISION AND REASONS FOR DECISION**

**1. Decision**

The Classification Review Board (the Review Board) exercised its discretion and determined not to accept the out of time application. The Classification Board's original classification of *Ben Dover's Bummed Out in Britain* therefore stands: X 18+ with the consumer advice, 'Contains sexually explicit material'.

**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 applicant notified the original applicant of its application to the Review Board.

### **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) principles to be considered in proceedings in regard to matters relating to those 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 Review 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.

### **Synopsis**

The Classification Board in its consumer advice states that the film "Contains Sexually Explicit Material". The Review Board accepted this view of the product.

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

Below is a timeline of events relating to this application:

<b>15-August-1999</b>	Application for classification. Applicant: The Axis Group
<b>20-August-1999</b>	Item received
<b>08-September-1999</b>	Classification decision: X18+
<b>23-June-2005</b>	Company sold objectionable film, according to Mr Cannavan (QLD Censorship Official) complaint.
<b>07-July-2005</b>	Application for s 87 Certificate from Office of Fair Trading, Qld
<b>20-July-2005</b>	s 87 Certificate issued
<b>13-December-2005</b>	Mr Cannavan makes complaint

BeDaring becomes aware of Mr Cannavan complaint. "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 BeDaring to Review Board, 28  
"mid April 2006" Sept 2006

---

**28-September-2006** Application to Review Board (date on letter)

---

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+ in 1999. The Review Board viewed the cover of the copy of the video that was the subject of the complaint by the Queensland Censorship Official, sent via facsimile transmission. The Review Board noted it was marked with a sticker from BeDaring The Adult Shop and clearly showed the X18+ classification.

Further advice was partially covered by the sticker from The Adult Shop, but the following could be read easily: "Restricted to Adults 18y (contains sexually expli. . .). The cover includes the phrase "Bum's the word in this anal &" and includes depictions of nude and partially nude females with some breast and buttock detail.

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

*Ben Dover's Bummed Out in Britain* was classified X18+ in 1999. The original applicant was the Axis Group (Aust) Pty Ltd.

The applicant for review, BeDaring, The Adult Shop Pty Ltd (<http://www.bedaring.com/online/home.asp>) is a retailer of adult DVDs, adult toys, lingerie, etc according to the company's letterhead and website.

The Review Board found

1. the applicant to be a regular retailer of X-rated products and it to be the responsibility of the business to have knowledge of the law and regulations in matters concerning that business;
2. the timeline shows that the lodging of the application for review was well beyond the 30 days required;
3. the explanation by the applicant for the delay to be inadequate;
4. the action taken by the applicant apart from lodging the application, to have been insufficient;
5. that on preliminary assessment of the merits of the application, based on the cover of the videotape, the status of the applicant as being involved in the classification matters on a regular basis 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 *Ben Dover's Bummed Out in Britain* to have been lodged out of time.