



## **Australian Government**

### **Classification Review Board**

**22 November, 6 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  
Ms Ann Stark  
Mrs Gillian Groom  
Mr Anthony Hetrih

**APPLICANT:** AdultShop.com Ltd, represented by:

- Mr Brian Walters SC,
- Mr Paul Bevilacqua counsel,
- Mr Nicholas Brown, Director, Salter Power Lawyers,  
and
- Mr Malcolm Day, Director, AdultShop.com

**BUSINESS:** To review the Classification Board's decision to classify the film *Viva Erotica* X18+ with the consumer advice 'Explicit sex'.

**Interested parties:**

- New South Wales Council for Civil Liberties (the Council), represented by Mr Stephen Blanks, Secretary.
- Australian Family Association (the AFA), represented by Ms Angela Conway, State Vice President Victoria and Media Spokesperson, and Mr Damien Tudehope, Solicitor

**Also present:**

- Ms Sonja Marsic, Counsel assisting Review Board, Australian Government Solicitors,
- Secretariat support, Office of Film and Literature Classification

## **DECISION AND REASONS FOR DECISION**

### ***1. Decision***

1.1 The Classification Review Board (the Review Board) classified the film X18+ with the consumer advice 'Explicit sex'.

### ***2. Legislative provisions***

2.1 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.

2.2 Three essential principles underlie the use of the *Guidelines for the Classification of Films and Computer Games 2005* (the Guidelines), determined under s 12 of the Act:

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

### ***3. Procedure***

3.1 Having determined that it had received a valid written application for review, seven members of the Review Board viewed the film *Viva Erotica* at the Review Board's meeting on 22 November 2006.

3.2 The Review Board received an oral submission from Mr Brian Walters SC representing the Applicant, as well as a written submission. Mr Paul Bevilacqua and Mr Nicholas Brown and Mr Malcolm Day also attended on behalf of the Applicant during Mr Walter's oral submission.

3.3 Oral and written submissions were also made by the New South Wales Council for Civil Liberties represented by Mr Stephen Blanks and by the Australian Family Association represented by Mr Damien Tudehope. Ms Angela Conway from the Australian Family Association was present during Mr Tudehope's submission.

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

3.5 Further information was requested from the Applicant. This material was circulated to the interested parties. The matter was further considered by the Review Board on 6 December 2006 during a meeting held by teleconference.

### ***4. Material taken into account***

- 4.1 In reaching its decision the Review Board had regard to the following:
- (i) AdultShop.com Ltd's application for review;

- (ii) AdultShop.com Ltd's written and oral submissions including survey and expert evidence and all supporting material;
- (iii) The film, *Viva Erotica*;
- (iv) relevant provisions in the Act;
- (v) relevant provisions in the Code, as amended in accordance with s.6 of the Act;
- (vi) the *Guidelines for the Classification of Films and Computer Games 2005*;
- (vii) New South Wales Council for Civil Liberties' written and oral submissions;
- (viii) Australian Family Association's written and oral submissions.

### ***5 Synopsis***

5.1 The film *Viva Erotica* is of 98 minutes duration and depicts men and women having explicit sex. There is no plot and the persons depicted are not given names. There are six separate, unrelated "vignettes" containing explicit sex scenes, five involving a man and a woman and one involving two women.

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

6.1 The Review Board determined that there were no depictions of any violence. There was some coarse language used in the film, however, its frequency was insufficient to warrant separate consumer advice. There was no drug use depicted. The nudity was in the context of a sexually explicit film. The movie had no plot or characterisation and therefore no discernible themes of any note.

#### **6.2 Sex –**

6.2.1 The Review Board concluded that the film was made in such a way as to be solely for the sexual stimulation and arousal of its audience. This was accepted by the Applicant.

6.2.2 Various forms of sexual activity are explicitly depicted including cunnilingus, fellatio, rear-entry sex, the use of prostheses such as dildos, self, partner and mutual masturbation, ejaculation, as well as digital and penal vaginal penetration and tongue stimulation of the anus. The camera angles are designed to accentuate and focus on the explicit sexual activity. Throughout all six vignettes, there is significant, repeated and frequent usage of filmic techniques to accentuate the sexual activity including close ups, zooms, lighting details, background music and noises by the actors.

*Are any "fetishes" depicted?*

6.2.3 Whilst Vignette 1 included detailed and somewhat prolonged scenes of toe sucking and licking, these depictions were not considered by the Review Board to constitute a "fetish". The Code and the Guidelines identify fetishes

such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting. The Review Board considered that the licking of the toes and shoe in this film do not fall into this category.

6.2.4 Further, in Vignette 4, four-finger vaginal penetration is explicitly depicted. However, this activity was not considered to be captured by the term "fisting". The *Macquarie Dictionary* does not include a definition of "fisting". The online encyclopaedia *Wikipedia* defines fisting as "sexual activity that involves inserting the hand and forearm into the vagina or anus".

6.2.5 In Vignette 6, the man is shown using his open hand to stimulate his erect penis by infrequent moderate slapping. This was not considered to be "spanking" as it was playful rather than violent, was carried out by the man on himself and not a partner and was not a fetishistic act.

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

### **7.1 The Applicant**

The paragraphs below paraphrase the arguments for the Applicant, which were clearly put by Mr Walters for the Applicant:

7.1.1 The Applicant submitted that the film should be classified R18+ as although the film contains real depictions of actual sex between consenting adults, it is not offensive to a reasonable adult (by reference current community standards) and therefore does not fall with Item 3(2)(a) of the Code. The Applicant led survey and expert evidence in support of this proposition (see below). The Applicant therefore submitted that the film could not properly be classified X18+. The Applicant further submitted that the Act required the Review Board to apply the standards of morality, decency and propriety generally accepted by reasonable adults and that these standards were necessarily subject to change over time.

7.1.2 It was the Applicant's submission that the Review Board needs to inform itself of community standards to make an informed judgment of what constitutes a depiction of explicit sexual activity that would be offensive to a reasonable adult. The Applicant submitted that Guidelines do not exist to embody community standards but were merely a mechanism to assist in the interpretation of the Code. The Review Board should have regard, the Applicant submitted, to relevant and credible evidence of such standards, where available. The Applicant's written submission included the statement of three academics who gave as their opinion that Australian adults are not offended by explicit sexual material in films. The submission also included the details of an online survey that, the Applicants submitted, concluded that adults are not offended by explicit sexual material in films.

7.1.3 The Applicant stated that if there was a conflict between the Code and the Guidelines then the Guidelines - being a tool to the interpretation of the Code - must be "read down". It was the Applicant's submission that there was such a conflict between the Code and the Guidelines in relation to the "general rule" in the R18+ Guidelines which state, in relation to sex that in

R18+ films, "simulation, yes – the real thing, no". The Applicant stated that such a prescriptive rule is in conflict with the parameters of the X classification in the Code

7.1.4 Further, the Applicant submitted, this "general rule" was in conflict with the requirement in the Act that classification decisions have regard to the standards of morality, decency and propriety generally accepted by reasonable adults and the principle in the Code that "adults should be able to read, hear and see what they want". The Applicant submitted that because State Governments (as opposed to Territory Governments) did not allow the sale or hire of X-rated films, the ability of adults to see X-rated films was being restricted in contravention of the relevant principle in the Code.

7.1.5 The Applicant made no submission in regard to the artistic or any other merit of the film. The Applicant accepted that if the Review Board did not accept the Applicant's submission that the film was not offensive to a reasonable adult then its application for classification of the film at R18+ would fail.

## **7.2 NSW Council for Civil Liberties**

7.2.1 The Council submitted that the Act encompasses "majoritarian" values and that freedom of expression has flexibility and that the decisions of the Review Board need to reflect the standards of the day.

7.2.2 Mr Blanks stated that due to the technology available today that there had been a shift in community values and that these should be reflected in the interpretation of community standards. He asserted that the "majoritarian" values are not offended by the film *Viva Erotica*.

## **7.3 The Australian Family Association**

7.3.1 The AFA submitted that it was Parliament's intention to cover the type of material shown in the film in the X classification.

7.3.2 The AFA further submitted that the X classification was to cover non-violent erotica of the type depicted in *Viva Erotica* and that the Guidelines were based on up-to-date standards and were prepared after extensive community consultation and that there had been no change in standards that warranted a change in the way the R and X classifications were applied. It was the AFA's submission that the Review Board was obliged to apply the "general rule" in the Guidelines unless the specific context, artistic merit or other feature of a film justified a departure from the general rule and that the Review Board had taken this approach in its consideration of films such as *Irreversible*, *9 Songs* and *Anatomy of Hell*.

7.3.2 The AFA submitted that the majority of the expert material available to the Applicant's experts had been available during a review of the Guidelines in 1999 and that the Parliament did not consider it necessary to change the X classification.

## 7.4 Review Board findings

7.4.1 "Community standards" can and do change over time. They are an amorphous concept and difficult to identify with real precision. The legislative scheme (section 11(a) of the Act) requires the Review Board to take them into account (standards of morality, decency and propriety generally accepted by reasonable adults) in its decision making. The Review Board accepts that community standards evolve over time and due to other circumstances (for example as demonstrated by changes in legislation).

7.4.2 As a matter of principle, while survey and expert evidence can be informative and persuasive, the Review Board cannot simply delegate its responsibility to make a decision on community standards to others – no matter how learned those others may be or how many people may be involved in a survey. It is the role of the Review Board to independently apply its understanding and perception of community standards. In this context, the Review Board notes that its membership is selected under section 74(2) of the Act to be broadly representative of the Australian community, presumably to enable it to bring to its decision making the perspective of a wide cross section of the Australian community. In reviewing this application, the review panel was comprised of all members of the Review Board.

7.4.3 The Review Board does not believe that community standards are uniform among Australian adults in the context of sexually explicit films. There is a wide spectrum of views such that notions of "majoritarianism" are difficult to apply. Many adults would not be offended by the material in *Viva Erotica* or by "stronger" sexually explicit material. Conversely, many would be offended by even the most fleeting of sexually explicit scenes in an artistic film. From this broad spectrum including older and younger, liberal and conservative, passionate and ambivalent views, the Review Board must use its own perception, its experience and available evidence to form the best view in the circumstances of the current standards of the Australian community and reasonable adults.

7.4.4 In reaching its view, the Review Board had regard to its perception of community standards as demonstrated by the process of updating the Guidelines in May 2005 and the debate over the amendments to the X classification at the turn of the decade, both of which involved extensive community consultation and a conclusion, by State, Territory and Australian Governments that the classification regime in relation to R and X rated films did not require an overhaul in light of changing community standards and that the current classifications were, broadly, working well and were in line with community expectations.

7.4.5 It also regarded the general rule in the Guidelines of "simulation yes – the real thing, no", promulgated by elected Government representatives after community consultation as being broadly representative of the current community standards. The Review Board considers that most reasonable adults would accept that an exception to this rule - permitting explicit sexual

activity in a film - may apply when there are other pertinent features, such as artistic or other merit to be considered, and the actual sex is not prolonged or detailed in the context of the film. However, it is the view of the Review Board that in regard to a wholly explicit film, such as *Viva Erotica*, where the entire film is focused solely on sexually explicit activity and titillation that the community would not accept this under the "exception" rule and that the general rule should therefore apply. The Review Board noted that the Applicant made no submission as to artistic or any other merit of *Viva Erotica*.

7.4.6 The Review Board considered that if *Viva Erotica* and films that contain similar sexually explicit material were to be classified R, then the X classification would have very little work to do. It was the Review Board's view that as an administrative - not policy making - body required to give effect as best as possible to the intent and letter of the classification regime in the Act, Code and Guidelines, that it should not lightly make a decision that so radically alters a regime which is endorsed by elected representatives of State and Territory Governments and the Australian Government without persuasive evidence that community standards justify such a decision.

7.4.7 The Review Board did not consider that the expert and survey evidence provided by the Applicant lent significant support to the Applicant's arguments that reasonable adults were not offended by films containing explicit sex between consenting adults - and that the film was therefore not offensive to a reasonable adult - for the following reasons:

#### *7.4.8 Survey*

1. Survey participants were not shown *Viva Erotica* or a similar film before completing the survey. This would have focused their answers and made them more meaningful;
2. There is no evidence that survey participants had ever watched an explicit sexual film or were aware of what was in such a film;
3. There is no evidence that it was explained clearly, or at all, to survey participants what was meant by "actual" sexual activity for the purposes of the survey;
4. There is no evidence in the survey that participants had been informed of the distinction between the R and X classifications or the availability of films to adults under an R and X classification. For example, it was not explained to survey participants that X18+ films may be legally available on a restricted basis by mail order in some States or in the ACT or NT;
5. As an online survey it may not have been as representative of the broader community as an offline survey, although evidence was given that some adjustment was made to ensure the survey results were broadly representative;
6. Without such context, the survey participant's answers were at best high level, first instinct statements of principle, rather than useful guidance as to what specific sexually explicit matters and depictions cause offence to adult Australians.

#### 7.4.9 Expert evidence

1. The Review Board considered the evidence of Associate Professor Catharine Lumby in detail. Her evidence provides support for the broad notions that an increasing number of adult Australians consume sexually explicit materials, that many, if not most, Australians believe that sexually explicit material should be available on a restricted basis to adults and that most Australians are more concerned about depictions in films of violence than by depictions of sex. However, the Review Board concluded that, despite Professor Lumby's qualifications, these matters - if it is accepted that they are accurate - do not, of themselves, answer the specific question of whether a reasonable adult would be offended by the specific depictions in *Viva Erotica*. The conclusions in her report were very broad. Other than the 2006 survey referred to above, the survey methodologies on which Professor Lumby relies were not spelt out.
2. The Review Board considered the evidence of Associate Professor Alan McKee in detail. His evidence supports the conclusion that one in four Australians have consumed a sexually explicit film in the last 12 months and that consumers of sexually explicit material are broadly representative of the wider community. He concludes that such consumers are "reasonable". However, his research focuses on the attitudes of consumers of sexually explicit materials and the Review Board does not regard his evidence as persuasive in relation to the question of whether non-consumers of sexually explicit materials would find the material in *Viva Erotica* offensive.
3. The Review Board considered the evidence of Ms Katherine Albury in detail. In relation to the issue of whether the Australian community believes that sexually explicit material should be available to adults, her evidence notes that there is "very little research in this area". She notes the diversity of values and attitudes within the Australian community, which the Review Board also acknowledges. She notes the rise of "raunch" culture among young women and refers to *Sex and the City* and "DIY" erotic and/or explicit media. Her conclusion that "most Australians have a "liberal" attitude towards sexually explicit material" does not, however, assist the Review Board materially in its consideration of whether a reasonable Australian adult would be offended by such a film.
4. Overall, the Review Board noted and took into account all the expert evidence in its consideration of current community standards and of whether *Viva Erotica* contained depictions that would offend a reasonable adult. The Review Board did not regard the evidence as definitive on either issue. The evidence was quite general in nature.

7.4.10 The Review Board also considered the general character of the film as being a depiction of consenting adults, designed solely to titillate its audience. Without making a moral judgment, it was a film of the "pornography" genre with all the attendant directorial and filmic devices. The Review Board considered that this mitigated against a departure from the general rule in the Guidelines.



7.4.11 The Review Board considered the likely audience of the film, being persons in search of titillation or arousal. This would remain the case regardless of whether the film was classified X18+ or R18+. The Review Board noted that due to restrictions in State legislation, the audience would be more limited in number if the film were classified X18+. However, it is not the Review Board's task to second guess decisions of elected Governments or to ensure that a film has the widest possible audience when determining its classification.

7.4.12 The Review Board also took into account the 4 relevant matters under the Code to which it is required to give effect, *as far as possible*, noting that they are not absolute binding rules but merely statements of principle:

1. Adults should be free to see what they want. Unlike RC films, X18+ films are not prohibited outright. However, the Review Board acknowledges restrictions on the availability of X18+ films and the Review Board is conscious that it should not arrive at X18+ classifications lightly unless it is satisfied that the film is of a nature that is offensive to a reasonable adult.
2. Minors should be protected from material likely to harm or disturb them. This would remain the case regardless of whether the film is classified R18+ or X18+.
3. Everyone should be protected from exposure to unsolicited material that they find offensive. Both R18+ and X18+ classifications are restricted.
4. The Review Board did not believe that the film contained any depictions that condone or incite violence or that portrayed persons in a demeaning manner.

7.4.13 Taking into account the above matters, the Review Board concluded that the depictions of explicit sexual activity in the film *Viva Erotica* would cause offence to a reasonable adult (either as that term is defined in the Guidelines or as defined in the Macquarie Dictionary), were unsuitable for a minor to see, that there were no circumstances justifying a departure from the general rule in the Guidelines and that that the most appropriate classification for the film was X18+.

## **8 Summary**

8.1 It was the Review Board's unanimous determination that the film was offensive to a reasonable adult and was unsuitable for a minor to see and therefore that the film *Viva Erotica* should be classified X18+ with the consumer advice of "Explicit sex".