



Australian Government
Classification Review Board

24 October 2005

23-33 MARY STREET
SURRY HILLS, NSW

MEMBERS: Ms Maureen Shelley (Convenor)
Mr Rob Shilkin
Mrs Kathryn Smith

APPLICANT: BG¹, represented by: Mr Bruce Quinn (Barrister at Law).

INTERESTED PARTIES: NSW Police Service, (Child Protection Squad) and the Australian Federal Police.

BUSINESS: To review the Classification Board's decision to classify the publication *36 Photographs printed on paper* (the publication) RC (Refused Classification) the subject of application number L04/1407.

DECISION AND REASONS FOR DECISION

1. Decision

The Classification Review Board (the Review Board) in a unanimous decision classified the publication RC (Refused Classification).

2. Legislative provisions

The *Classification (Publications, Film and Computer Games) Act 1995* (the Act) governs the classification of publications and the review of classification decisions. Section 9 of the Act provides that publications are to be classified in accordance with the National Classification Code (the Code) and the classification guidelines, as in force on 9 March 2005.

Relevantly, the Code in paragraph 1(a) and 1(b) of the Table under the heading 'Publications' provides that:

¹ Applications for review received by the Review Board where the original application is lodged by an enforcement agency are allocated a two-letter code. The code bears no relation to the applicant's name.

1. Publications that:

(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or

(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not);

are to be classified 'RC'.

The Code also sets out various principles to which classification decisions should give effect, as far as possible. Section 11 of the Classification Act requires that the matters to be taken into account in making a decision on the classification of a film or publication include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

(b) the literary, artistic or educational merit (if any) of the publication or film; and

(c) the general character of the publication or film, including whether it is of a medical, legal or scientific character; and

(d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

Three essential principles underlie the use of the *1999 Guidelines for the Classification of Publications* (the Publication Guidelines), determined under s.12 of the Act:

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

3. Procedure

The Review Board met on 9 March 2005 in response to the receipt of an application from BG (the Applicant), dated 17 February 2005 and numbered L04/1407.

As preliminary matters, the Review Board considered the Applicant's submission to consider his standing as "a person aggrieved" and whether the Review Board should exercise its discretion to consider the matter "out of time". Another matter for consideration by the Review Board was the validity of the application, given the absence of payment of the fee or the granting of a fee waiver. The Director of the Classification Board had declined to grant a fee waiver on 9 March 2005.

The original application for classification of the publication (known as *36 Photographs Printed on Paper*) was lodged by the Australian Federal Police on 28 October 2004 (application reference L04/1407). The Classification Board classified the publication (L04/1407) as RC on 29 November 2004 (Classification Certificate No. 4250600B).

The Applicant, on his standing as a person aggrieved, submitted:

- He had been personally affected by the decision of the Classification Board and that his interests were adversely affected by the decisions and the determination;
- that the decision directly and indirectly affects his existing and future legal rights;
- that his employment rights and future employment rights together with his business rights have been seriously aggrieved; and
- that he is a person who has a genuine grievance because a decision had been made that prejudicially affected his interests.

The Review Board unanimously determined that the Applicant was a person aggrieved by the decision of the Classification Board.

The Applicant made submission as to why the Review Board should exercise its discretion to consider the matter “out of time”. The Applicant submitted that:

- On 28 September 2004 NSW detectives executed a search warrant on his premises and took possession of 36 images on photo paper, 58 short (mpeg) movie files and 400-600 (mpeg) movie files.
- The next day he was charged with Possess Child Pornography under S579B (2) of the *NSW Crimes Act 1900*.
- On or around 28 October 2004 that applications were made on behalf of the NSW Police Service for the 36 images on photo paper to be classified under the *Classification (Publications, Films and Computer Games) Act 1995*. This material was refused classification on 22 November.²
- Copies of the classifications were given to him as part of the Police brief of evidence delivered to him on 9 December 2004.
- On 23 December 2004 he appeared before the Local Court of NSW in relation to the criminal charges. He submitted that it was only after closely reading the Classification Certificate numbered 53517009 (in relation to a separate application for classification, application reference number T04/4445), that it became apparent to him that he may have a right of appeal against the decision. He submitted that the classification for L04/1407 (*36 Photographs printed on paper*) did not provide such a notification regarding rights of appeal.
- That he had difficulty obtaining legal advice during the Christmas/New Year period.

² These dates were submitted by the applicant (BG). The correct date for classification is 29 November 2004 (Classification No. 4250600B).

- That on 20 January 2005, he lodged an application for review of decision with the Administrative Appeals Tribunal (AAT), where he was advised that he needed to apply to the Office of Film and Literature Classification (OFLC) for review.
- On 31 January 2005 he wrote seeking a review of the classification decision and was subsequently informed that he had to submit the application on the appropriate form. On visiting the OFLC, he was given a copy of the appropriate form.
- His application for review was dated 17 February 2005 and received at the OFLC on 21 February 2005.

The Review Board accepted the Applicant's submission that he had made all endeavours in pursuit of his review rights. The Review Board accepted that the Applicant had a genuine, if mistaken, belief that appeal under the *Administrative Decisions Judicial Review Act 1977* was the appropriate course of action. Further the Review Board accepted that, after being given correct advice the Applicant submitted his application for review expeditiously.

Given the circumstances of the application, the Review Board determined to exercise its discretion and consider the application out of time.

In regard to the absence of a fee or the granting of a fee waiver, the Applicant was advised that the Review Board would hear submissions on the matter but not reach a determination until either the fee had been paid or a fee waiver granted on appeal to the AAT. The Convenor advised that the Review Board would consider this matter because of the unusual circumstances arising from an enforcement matter that could have very serious consequences on the Applicant's life and liberty. Further, the Convenor advised the Applicant that if the fee waiver refusal was not overturned at the AAT he would be liable for the cost of the review and would therefore owe a debt to the Commonwealth. The Applicant agreed to proceed on this basis.

Three members of the Review Board viewed the publication at the Review Board's meeting on 9 March 2005. The Review Board received an oral submission from Mr Bruce Quinn (Barrister at Law) representing the Applicant for review. A representative from the Child Protection Squad of the New South Wales Police Service attended on behalf of the original applicant for classification and a representative from the Australian Federal Police (AFP) provided AFP presence at the meeting but made no submissions.

The Applicant had applied to the Director of the Classification Board for a fee waiver, which was refused on 9 March 2005. The Applicant appealed the fee waiver refusal to the AAT and settlement was reached on 4 August 2005. As part of the settlement the Applicant agreed to pay the prescribed fee for application L04/1407 which was paid on 9 August 2005. On 10 August 2005 the Review Board was advised by an officer from the OFLC of the settlement reached before the AAT in regard to payment.

The Review Board then reconvened by teleconference to consider the matter 'in camera' on 17 August 2005, 24 August 2005 and 24 October 2005.

The validity of the application was considered and the Review Board determined that the application before it was valid.

At a later teleconference the Review Board considered the matter of the applicable Act, Code and Guidelines that should be used in regard to the application L04/1407. During the time between when the Review Board first met to consider the matter and when the Applicant had paid the fees, the Act, Code and Guidelines had been amended. After due and careful consideration of all the relevant matters, the Review Board wrote to Mr Quinn as representative for the Applicant advising that it proposed to use the Act, Code and Guidelines that were in force at the time of the original meeting of the Review Board. Mr Quinn confirmed in writing, on behalf of the Applicant, that he was satisfied with this course of action.

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;
- (ii) The Applicant's written and oral submissions;
- (iii) The Publication L04/1407 (known as 36 Photographs printed on paper);
- (iv) The relevant provisions in the Act;
- (v) The relevant provisions in the Code, as amended in accordance with s.6 of the Act;
- (vi) The Classification Board's report; and
- (vii) The *Guidelines for the Classification of Publications*.

5 Synopsis

The Publication L04/1407 (known as 36 Photographs printed on paper):

The application referred to 36 Photographs, however, the Review Board noted the presence of a further image overprinted on the reverse of one photograph so that there were 37 images overall. All the images were of girls aged from approximately six years to 16 years of age. Whilst some girls were clothed or partially clothed and two images were of nude girls by a swimming pool in a naturalist setting, the majority depicted sexualised poses.

6 Applicant's Submissions

Mr Quinn submitted, on behalf of the Applicant, that all instances of publication (photographs) related to the classifiable element of nudity only. He stated that the product did not contain any sex, violence or other themes but were examples of nudity only. The Review Board considered Mr Quinn's submission; however, it did not accept the submission. If the Review Board had accepted Mr Quinn's submission that the product only represented nudity, the product would still have depicted and

described offensive images of persons who are or who look like they are under 16 years of age.

7 Findings on material questions of fact

The Publication L04/1407 (known as 36 Photographs printed on paper):

The Review Board found that the publication contains aspects or scenes of importance, under various classifiable elements:

(a) **Themes** – The overall theme of the publication was that of sexualised imagery of girls who appear to be between the ages of approximately six years to approximately 16 years of age. Whilst two images were of nude girls in a naturalist setting, the majority were of partial or full nudity in sexualised poses.

(b) **Violence** – Although the Review Board noted that there was some appearance of minor scratches and some bruising on the arms of some girls and there was redness on the genitalia of some of the girls depicted, no actual violence was depicted or described.

(c) **Sex** – A number of the photographs depicted the girls in sexualised poses, with some nipple and breast and genital detail including pubic hair (or the absence of it in the young children). Several images showed girls who appeared to be under 10 years of age in sexualised poses.

(d) **Drug use** – Although the Review Board noted that a number of the children were depicted with glazed expressions or with very “sleepy” looking faces, no actual drug use was depicted or described.

(e) **Language** – No coarse language was described or depicted.

(f) **Nudity** – The majority of the images were of nude or partially nude girl children – who appeared to be ranging in age from approximately six years to approximately 16 years, with most appearing to be eight to 12 years – in sexualised poses.

The photographs of the fully-clothed girls mainly focused on the genital region, some depicted the girls with their legs splayed with detail of the panty area the central focus. Of the images of the partially-clothed girls, most showed nipple or breast detail or buttock or pubic area detail. Some images included significant genital detail including pubic hair and clitoral detail.

8 Reasons for the decision

As described above, most of the photographs were sexualised images of girls who appeared to be between the ages of approximately six years to approximately 16 years. The nudity, partial nudity and sexualised poses of the girls made the impact of the images very high. The images were offensive, exploitative and demeaning. The demeaning nature of the images was compounded in some cases by the titles given to the images such as “hairless” or “nymph”. Some of the images depicted the girls in fantasy-style settings and these images were offensive and abhorrent.

9 Summary

The classifiable elements and the impact in the overall context of the Publication L04/1407 (known as 36 Photographs printed on paper) warrant a refused classification (RC). The publication describes or depicts in a way that is likely to cause offence to a reasonable adult, persons who are, or appear to be children under 16.

The decision of the Review Board was unanimous.