

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Output 2.1

Question No. 211

Senator Ludwig asked the following question at the hearing on 14 February 2005:

It is understood that some in industry are describing the anticipated requirements and costs in the same terms as the Financial Services reform measures. What transitional period is proposed?

The answer to the honourable senator's question is as follows:

Consultations are continuing with industry sectors on the need for and possible length of any transitional periods.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Output 2.1

Question No. 212

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Please provide the full range of cash dealers and areas to which the Financial Action Task Force is proposing to extend.

- (i) Does this include real estate agents, lawyers, doctors and jewellery dealers?

Has AUSTRAC undertaken any analysis of costs to consumers of extending the scheme to these dealers?

The answer to the honourable senator's question is as follows:

- 1) The revised Forty Recommendations of the Financial Action Task Force on Money Laundering extend to the following financial and non-financial sector businesses and professions:
- (a) Casinos.
 - (b) Real estate agents when they are involved in transactions for their client concerning the buying and selling of real estate.
 - (c) Dealers in precious metals.
 - (d) Dealers in precious stones.
 - (e) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:
 - Buying and selling of real estate;
 - Managing of client money, securities or other assets;
 - Management of bank, savings or securities accounts;
 - Organisation of contributions for the creation, operation or management of companies;
 - Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.
 - (f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties:
 - acting as a formation agent of legal persons;

- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
- acting as (or arranging for another person to act as) a trustee of an express trust;
- acting as (or arranging for another person to act as) a nominee shareholder for another person.

(g) Financial service providers performing the following activities:

- Acceptance of deposits and other repayable funds from the public
- Lending
- Financial leasing
- The transfer of money or value
- Issuing and managing means of payment (eg credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money).
- Financial guarantees and commitments.
- Trading in:
 - (i) money market instruments (cheques, bills, CDs, derivatives etc).
 - (ii) foreign exchange;
 - (iii) exchange, interest rate and index instruments;
 - (iv) transferable securities;
 - (v) commodity futures trading.
- Participation in securities issues and the provision of financial services related to such issues.
- Individual and collective portfolio management.
- Safekeeping and administration of cash or liquid securities on behalf of other persons.
- Otherwise investing, administering or managing funds or money on behalf of other persons.
- Underwriting and placement of life insurance and other investment related insurance.
- Money and currency changing.

The Forty Recommendations do not extend to doctors.

- 2) The Government has put in place an extensive public consultation process to ensure that effective regulation is balanced by a sensible approach to the impact on industry and on members of the public. The Government is committed to working cooperatively with all stakeholders to ensure that Australia's anti-money laundering system works for the interests of business and customers and against criminals.

The Government has been working with industry representatives through a Systems Working Group to examine key implementation issues arising from proposed anti-money laundering reforms. Its terms of reference include the consideration of cost implications for each industry sector of any necessary upgrades or re-engineering options and any training and customer education implications. AUSTRAC participates in the SWG.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN TRANSACTION REPORTS AND ANALYSIS CENTRE

Question No. 213

Senator Ludwig asked the following question at the hearing on 14 February 2005:

How much surplus IT equipment was provided to Fiji, Palau, Vanuatu, Samoa and Tonga?

(a) Please provide a breakdown of the equipment provided and its monetary value.

The answer to the honourable senator's question is as follows:

Two computers have been provided to the FIU in Palau, one to the FIU in Fiji and one to the FIU in Tonga. The remaining computer is currently with the Pacific Islands Forum Secretariat and will be sent to either the FIU of Vanuatu or the FIU of Samoa.

a) Each of the 5 computers when provided had a book (written down) value of \$0. Their original purchase price was \$1,810 each.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN TRANSACTION REPORTS AND ANALYSIS CENTRE

Question No. 214

Senator Ludwig asked the following question at the hearing on 14 February 2005:

1. Has any work (eg. Feasibility studies, reports.) been done on the possibility of incorporating TRAQ with other similar government databases (eg. CrimTrac, Smartgate, etc.)?
 - a. If so...
 - i. What is the nature of the work that has been done?
 - ii. Please provide any studies or reports that you are able to.
 - b. Is there a timeframe for implementing this incorporation?

The answer to the honourable senator's question is as follows:

No work (eg. feasibility studies, reports) has been done on the possibility of incorporating TRAQ with other similar government databases.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 215

Senator Ludwig asked the following question at the hearing on 14 February 2005:

On what date did the DPP provide advice to the AGD about literary proceeds? (In relation to Mr Habib)

The answer to the honourable senator's question is as follows:

(It was agreed that this question was answered at the hearing.)

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 216

Senator Ludwig asked the following question at the hearing on 14 February 2005:

In how many cases over the last year, how many requests were there for video-links to provide evidence?

- a) How many requests from foreign jurisdictions were received?
 - i) How many were able to be complied with?
- b) How many requests were issued to foreign jurisdictions?
 - i) How many were able to be complied with?

The answer to the honourable senator's question is as follows:

Formal mutual assistance requests under the Mutual Assistance in Criminal Matters Act 1987 are only required in cases where witnesses will not voluntarily attend a video link site to give evidence or the foreign jurisdiction will not allow its citizens to give evidence voluntarily without a formal request. In other situations video link evidence is arranged between the prosecution and the witness without the necessity for government to government requests.

- a) In 2003/2004, 7 formal requests were received to compel witnesses in Australia to give evidence via video link. In 6 cases the requests were successfully complied with, in 1 case the accused pleaded guilty and the evidence was not required.

In the period 1/7/04-1/3/05 – 2 formal requests were received. In both cases the requests were successfully complied with.

- b) In 2003/2004, 3 formal requests were made to compel witnesses in other countries to give evidence via video link. In 2 of those cases the trials have been delayed and the evidence has not been given. In the third case the witness voluntarily attended a commercial video link site and there was no need for the witness to be compelled to attend a court.

In the period 1/7/04-1/3/05, 3 formal requests were made. In 1 of those cases the request was successfully complied with. In the second case the evidence has been commenced and adjourned. In the third case the request was denied.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 217

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Did the DPP have any problems with technological infrastructure in attempting to provide these services?

If so, what was the nature of the problem?

The answer to the honourable senator's question is as follows:

In some cases there have been problems with poor communication links. The DPP has been advised that the problems experienced have not been caused by any deficiencies in the infrastructure provided by the courts.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 218

Senator Ludwig asked the following question at the hearing on 14 February 2005:

What measures are being undertaken to overcome the practical difficulties in video-links?

- a) Is the DPP liaising with other jurisdictions?
 - i) If so, which ones?

If not, why not?

The answer to the honourable senator's question is as follows:

Practical difficulties are currently being dealt with on a case by case basis as they arise. One difficulty is the time difference between some jurisdictions. The Australian and foreign courts have been very accommodating, sitting from 6am until late in the evenings in some cases. The DPP liaises closely with the state courts to arrange appropriate times and procedures for video link evidence to be taken.

Where necessary, the DPP liaises with its foreign counterparts in relation to witnesses giving evidence.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 219

Senator Ludwig asked the following question at the hearing on 14 February 2005:

How many cases regarding sexual servitude are currently being prosecuted?

a) In the last two years, how many cases regarding sexual servitude have been completed?

The answer to the honourable senator's question is as follows:

The CDPP is currently prosecuting 10 cases involving sexual servitude. None have been completed.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Question No. 220

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Have the prosecutions regarding the following persons been finalised?

- a) Daniel Sweeseang Kwok
- b) Jenny Chai Lin Ong
- c) Aik Tong Tan
- i) If so, what was the outcome of the prosecutions?

Have there been any appeals?

The answer to the honourable senator's question is as follows:

No.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
CRIMTRAC

Question No. 221

Senator Ludwig asked the following question at the hearing on 14 February 2005:

What agency is currently dealing with a missing persons database?

The answer to the honourable senator's question is as follows:

CrimTrac is responsible for the development of the CrimTrac Police Reference System (CPRS). The CPRS will include a central database containing information on a range of critical policing areas, including information on missing persons nationally.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
CRIMTRAC

Question No. 222

Senator Ludwig asked the following question at the hearing on 14 February 2005:

National missing persons database: set up under Keating government – was it abandoned as a priority by the government?

The answer to the honourable senator's question is as follows:

The Keating government promised \$1.2 million over four years to establish a national missing persons bureau. CrimTrac has no knowledge of any national missing persons database accompanying this promise.

While retaining the capability within the Australian Federal Police in 1999, the Howard government committed \$50 million to establish CrimTrac, a major national policing initiative.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
CRIMTRAC

Question No. 223

Senator Ludwig asked the following question at the hearing on 14 February 2005:

- a) What is the timeframe for CrimTrac to build ANCOR?
- b) Are any systems in place in the interim before ANCOR is operational?
- c) Have there been any systems in place to facilitate the cross-jurisdictional sharing of child offender data?
- d) What information will be accessible to ANCOR, and why was this information chosen?
- e) Will any information be accessible to the public?
 - i) Has this been considered and, if so, what was the decision?
- f) Will ANCOR immediately alert local police if a child offender moves into the local area?

The answers to the honourable senator's questions are as follows:

a) The November 2003 Australasian Police Ministers Council meeting authorised the ANCOR system's development. The project commenced at the CrimTrac Agency in November 2003 with an initial delivery date of 1 July 2004. Legislation was still being drafted and enacted in jurisdictions in the run up to the delivery date so the date was extended to 1 September 2004 when a production system was released that allowed for the registration of offenders, that being the initial requirement. Victoria police commenced using the system on the 1 October 2004.

There was a second release that allowed for a national view of registered persons in November 2004. At this time Victoria was still the system's only user. Queensland, Northern Territory and Western Australia enacted legislation early in 2005 and began using the system. A third release of the system was made on 3 March 2005 that allows for the national transfer and sharing of cases across jurisdictions. The final release - due mid March 2005 - will provide additional analytical tools. This system specifically covers offenders that have committed offences against children, in accordance with the APMC directive of November 2003 and the Crimtrac Intergovernmental Agreement that identified the need for a national child sex offender system.

b) Registering child offenders on a register is a new function to policing jurisdictions with the exception of NSW, where the Child Protection (Offenders Registration) Act 2000 (NSW) commenced on 15 October 2001. Although the NSW registry could alert other jurisdictions on the interstate movements of registered offenders (via ALEIN), this was of limited effectiveness when the legislative and information management support did not exist to monitor these offenders elsewhere.

The ALEIN system is managed through the ACC – previously ABCI. There has previously been limited exchange of information through the NCA when high profile offenders had been identified.

There were no formal exchange process or protocols established between jurisdictions and as a result these offenders were dealt with on an ad-hoc basis.

Jurisdictional stand-alone systems may have been used for this purpose, but no national system was in place prior to ANCOR

d) A common model legislation format was used to dictate the information that would be gathered in regards to persons subject to registration on ANCOR. The data set includes such information as employment details, residential address, description, motor vehicle and access to children details. This information is mandated by legislation to be supplied by offenders as part of their reporting obligations and must be updated in a timely manner.

e) ANCOR is for police use only and its access within policing is also restricted to members of the jurisdictions who have a role in managing this type of offender.

i) Consideration was made at a national level to the appropriate access of information on the ANCOR system. It was nationally agreed by policing jurisdictions that the information contained on the system would *not* be released to outside bodies. Any information that may be released about specific offenders would be from jurisdictional systems and not from ANCOR. Lessons learnt from similar international initiatives formed part of this decision making process.

f) The system will not carry out this function automatically, but it will allow for the managing registry to alert local police of the presence of such an offender in an area. This is assuming the offender has conformed to reporting obligations and declared either intended travel movements or changes to residential address.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Question No. 224

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Complaints received by the HREOC:

Please provide details of complaints in relation to age discrimination (to a similar level as described for complaints made under other legislation within the HREOC Annual report)

The answer to the honourable senator's question is as follows:

i.) Total Number of age discrimination related complaints:

49 complaints were received between 23 June 2004 and 8 February 2005

ii.) Age discrimination complaints received by area:

34 : Employment
14 : Various goods and services
1 : Education

iii.) Type of respondent organisation:

Commonwealth (department/ authority/business) = 3
State (department/authority/business) = 11
Private (includes a mix of retail/banking/travel/hospitality/employment services) = 35

iv.) Total Number of finalised age discrimination complaints:

16 complaints were finalised between 23 June 2004 – 8 February 2005

v.) Outcome of complaints finalised:

8 - Conciliated
4 - Closed as concurrent complaints had been lodged with State EO Commissions
2 - Terminated as lacking in substance
2 - Withdrawals

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Question No. 225

Senator Ludwig asked the following question at the hearing on 14 February 2005:

What is the status of the investigation into the One Nation newsletter that allegedly defamed Jews?

The answer to the honourable senator's question is as follows:

The Commission's practice is not to discuss or disclose any details or specifics of any investigation it is undertaking in order to ensure the integrity of the complaint process. However, as the complaint has been previously raised in evidence before the Committee on 14 February 2005, the Commission confirms in this instance that a complaint has been received and the investigation is at a preliminary stage.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION

Question No. 226

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Make available the reasons for the Review Board's decision to overturn the X classification of *9 Songs*.

The answer to the honourable senator's question is as follows:

The Office of Film and Literature Classification provided a response to the Committee about this question on 15 March 2005. The response stated:

The Classification Review Board's reasons for its decision in relation to the film *9 Songs* are not yet finalised. As soon as the reasons are finalised the Office of Film and Literature Classification will provide the reasons to the Senator. The reasons will also be made available on the OFLC website (www.oflc.gov.au/content.html?n=173&p=66) once completed.

The reasons were finalised on 4 April 2005 and are attached.



Australian Government

Classification Review Board

17 January 2005

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

MEMBERS: **Ms Maureen Shelley (Convenor)**

The Hon Trevor Griffin (Deputy Convenor)

Ms Dawn Grassick

Mr Robert Shilkin

Ms Kathryn Smith

APPLICANT: Accent Film Entertainment Pty Ltd (Accent), original applicant for classification, represented by Mr Dean O’Flaherty (Marketing and Acquisitions Manager, Accent); Ms Raena Lea-Shannon (Solicitor, Michael Frankel & Co Solicitors), Ms Margaret Pomeranz (Expert Witness); Mr David Haines (Expert Witness).

**INTERESTED
PARTIES:**

Australian Family Association (AFA) represented by Mr Damien Tudehope (Solicitor, O’Hara & Company).

Communications Law Centre (CLC) represented by Ms Elizabeth Beal (Director, Victoria University).

BUSINESS: To review the Classification Board’s decision to classify the film *9 Songs* (the film) ‘X’ with the consumer advice ‘Contains sexually explicit material’.

DECISION AND REASONS FOR DECISION

1. DECISION

The Classification Review Board (the Review Board) in the majority classified the film ‘R’ with the consumer advice ‘Actual sex, high-level sex scenes’.

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. 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.

Relevantly, the Code in paragraph 3 of the Table under the heading ‘Films’ provides that films (except RC films and X films) that are unsuitable for a minor to see are to be classified ‘R’. The Code also states various principles for classifications, and that effect should be given, as far as possible, to these principles including, that “adults should be able to read, hear and see what they want”.

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 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 film; and
- (c) the general character of the 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 *2003 Guidelines for the Classification of Films and Computer Games* (the Guidelines), determined under Section 12 of the Act:

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

3. PROCEDURE

Having earlier received a valid written application for review, five members of the Review Board viewed the film *9 Songs* at its meeting on January 17, 2005.

The Review Board made the formal determination that the application was valid.

The Review Board accepted written submissions from the Australian Family Association and the Communication Law Centre but declined to hear oral submissions from these organisations’ representatives.

The Review Board then received oral submissions from Ms Raena Lee-Shannon representing the Applicant, which was confirmed in a written submission and from Ms Margaret Pomeranz and Mr David Haines. Mr Dean O’Flaherty also attended on behalf of the Applicant during the oral submissions.

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

4. EVIDENCE AND OTHER MATERIAL TAKEN INTO ACCOUNT

In reaching its decision the Review Board had regard to the following:

- (i) Accent's application for review;
- (ii) Accent's written and oral submissions;
- (iii) The AFA's written submission;
- (iv) The CLC's written submission;
- (v) The film;
- (vi) The relevant provisions in the Act;
- (vii) The relevant provisions in the Code, as amended in accordance with Section 6 of the Act;
- (viii) The Classification Board's report; and
- (ix) The *Guidelines for the Classification of Films and Computer Games 2003*.

5 SYNOPSIS

Lisa, a young American student in London for a year, meets a somewhat older Matt at a concert in suburban London. They commence a romantic and sexual relationship. The explicit and at times intimate film follows the course of their physical and emotional relationship using the device of depicting their sexual acts and rock concert attendance. They then part at Lisa's instigation. The narrative is given from Matt's perspective as he reflects on what he remembers of the relationship.

6 FINDINGS ON MATERIAL QUESTIONS OF FACT

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

(a) **Themes** – Despite his relationship with Lisa, Matt expresses feelings of loneliness at 44 minutes (“5,000 people at a concert and you can still feel alone”). At approximately 46 minutes, the film depicts Lisa playing with a bottle of tablets. She seems depressed. She appears to smoke a marijuana cigarette. Matt expresses concern. She says, “I haven't taken any fucking pills at this time of the day. You're not paying any fucking attention to me.” These themes of loneliness, depression and potential suicide are moderate in impact and justified by context.

(b) **Sex** – The film is mainly concerned with the couple's sexual relationship and their attendance at rock concerts. At 34 seconds the scene depicts the couple in what could be a simulated sex scene. The lighting is subdued, the audience hears heavy breathing. Matt speaks: “I remember her smell, her taste”. At approximately 2 minutes 18 seconds the film depicts a scene of apparent cunnilingus. At 2 minutes 43 seconds Matt squeezes Lisa's breast and nipple. At 2 minutes 57 seconds and 3 minutes 10 seconds scenes of what appears to be simulated sex are shown. At 3 minutes 36 seconds Lisa is astride Matt and they appear to be having sex. At 9 minutes 28 seconds is a scene of apparent cunnilingus. At 9 minutes 44 seconds Matt's head is shown between Lisa's legs. At 9 minutes 58 seconds Matt's tongue is shown in Lisa's pubic area. This appears to be a scene of actual sex. At 10 minutes 16 seconds is a scene of implicit sexual intercourse. At 13 minutes 49

seconds an implicit sex scene is shown. There is some moaning and little other detail. At 14 minutes an implicit sex scene is shown and the couple do not use a condom. At approximately 21 minutes the film depicts Matt's erect penis in the bath water. Lisa begins to manipulate his penis with her feet which she does for approximately one minute. Matt's penis lengthens and becomes more erect during this activity. This is a scene of actual sex. At 26 minutes 44 seconds Matt kisses Lisa's breasts. His hands clasp her head more tightly than necessary. There is some discomfort in watching this action, which is not quite menace. At 27 minutes 30 seconds Lisa reads a sexually-charged passage from a book. At approximately 28 minutes 23 seconds Matt blindfolds Lisa. He ties her hands to the bed posts. At 29 minutes 12 seconds is a visual of Lisa's pubic area shown at a low angle and between her legs as she lies on the bed. There is some genital detail. At 29 minutes 46 seconds Matt's head is shown between Lisa's legs in the area of her genitals. There are further visuals of Lisa's blindfolded face with her mouth open and of her breasts. At 30 minutes 28 seconds Matt's tongue is shown and he apparently licks Lisa's pubic area. At 31 minutes Matt's head is off to one side but still depicted between Lisa's legs. Lisa says, as if still reading, "she grabs his balls and puts his cock in her mouth. Fuck me man. Fuck me, come up here." At 32 minutes 37 seconds Matt has his erect penis in his hand. At 33 minutes Matt is astride Lisa, she is still bound, she tries to alter the position of her hands but is unable to free them. She says "Fuck me". This continuous scene is shown for approximately 5 minutes. In the background during the scene is piano music that is soft and slow. The other sounds heard are the couple's breathing. The scene ends at 34 minutes 30 seconds. At 37 minutes 53 seconds Lisa is shown blind folded (but not bound). Matt holds her head. Lisa says "do it harder". Matt holds her neck and massages it firmly. There is a low-level sense of menace. At 38 minutes 29 seconds Lisa takes Matt's hand and puts it in her vaginal area. At 40 minutes 15 seconds Lisa is shown apparently using a dildo to stimulate herself. At 41 minutes Lisa is shown breathing rapidly, she makes some moaning sounds. At 42 minutes 39 seconds Lisa is shown in bed with a top on and without knickers. She is implicitly using a vibrator. Matt is watching her from a distance. Lisa is shown prone on the bed, moving very little. She apparently reaches climax. Matt walks away. At 47 minutes 58 seconds Lisa ties Matt to the bed, she slaps his face with her open hand and puts her stiletto heel into his chest and puts her weight on her foot. She then puts her booted foot onto Matt's legs. She undresses. At 49 minutes 45 seconds Lisa asks Matt "do my nipples feel sore to you? They are." At 50 minutes a two-minute scene of actual sex commences. Lisa kisses Matt's penis and pulls at his testicles. She holds his penis in her mouth (actual sex), she manipulates his penis with her hand (actual sex), her hand is shown repeatedly manipulating Matt's penis (actual sex). Matt explicitly ejaculates (actual sex). His semen is explicitly shown spurting out of the end of his penis onto his chest and stomach (actual sex). Lisa continues to fondle Matt after he climaxes. The scene is prolonged and contains significant detail. At approximately 60 minutes an actual sex scene of two minutes duration is shown. At 60 minutes Lisa removes her knickers and the couple start to fondle each other. At 60 minutes 28 seconds, explicit vaginal penetration is shown. The camera angle is at the end of the bed as the shaft of Matt's penis explicitly enters Lisa's vagina. Her vagina is visible and some detail is shown including pubic hair, open labia and moist clitoral region. Matt's penis is erect and wet. The camera angle is from the end of the bed toward the couple. Matt is on his knees facing away from the camera and is seen in mid shot. His buttocks and testicles are shown. The shaft of his penis is shown explicitly entering Lisa's vagina and partly withdrawing and moving up and down, re-entering her vagina in a rhythmic manner. The scene is prolonged and detailed and ends at approximately 62 minutes and 21 seconds. The film ends at 69 minutes 23 seconds.

The majority view was that the sex scenes (including those of actual sex), while high in impact, were justified by context and could be accommodated at an 'R' classification. It was the view of the minority that the impact of two prolonged scenes of actual sex was very high and the cumulative

impact of all the actual sex scenes was very high. The minority view was that the amount of actual sex scenes was gratuitous.

(c) **Drug use** – At approximately 12 minutes a character apparently snorts what appears to be cocaine up their nose. At approximately 36 minutes the protagonists apparently smoke a marijuana cigarette at a concert. At 46 minutes the scene described under themes takes place. At approximately 57 minutes the characters both appear to snort cocaine. The drug use is moderate in impact and justified by context.

(d) **Language** – The characters use strong coarse language during the film. At approximately five minutes Lisa says to Matt “Fuck me”. At 15 minutes someone says colloquially: “Fucking weird man”. At 31 minutes Lisa says to Matt, “Fuck me man, fuck me”. At approximately 38 minutes Lisa tells Matt that at times she would like to bite him in “not a nice way”, “I want to bite you, fucking hard”. All of these references would be in keeping with an ‘MA15+’ classification. At 46 minutes the scene described under themes takes place. The coarse language is strong in impact and justified by context.

(e) **Nudity** – At 2 minutes 43 seconds Lisa’s breast and nipple are shown. At 4 minutes and 27 seconds Lisa gets out of bed naked, her breasts and buttocks are shown. At 11 minutes Lisa walks naked and her breast and buttocks are seen. At 11 minutes 30 seconds Matt is seen naked, his penis is visible. At 11 minutes 54 seconds Lisa lays on the table naked. At 12 minutes 5 seconds Lisa watches her naked self in the mirror. At 12 minutes 57 seconds Lisa is seen dancing without knickers on. Her buttocks are seen. At 20 minutes 57 seconds the couple are seen in the bath naked. Her breasts and his penis are depicted. At 22 minutes 37 seconds Matt removes his clothes and goes swimming. His buttocks are shown. At 26 minutes Matt and Lisa are naked in bed. At 39 minutes 48 seconds partially naked women are shown dancing. At 41 minutes 37 seconds the couple is shown naked in bed. Lisa is crying. At 56 minutes Lisa and Matt are shown naked kissing in bed. Lisa sits on Matt. Her breasts are seen. The nudity is strong in impact and justified by context.

The Review Board in the majority found that while the overall impact of the material was ‘high’, there was not sufficient strength in the film to cause a higher level of impact for any individual scene or cumulatively. Scenes were dealt with in a realistic yet restrained manner that was not gratuitous or exploitative. Each scene was justified by the context in which it was presented and the overall theme of the film, the couple’s sexual and emotional relationship.

The Review Board in the majority found that the film had a serious intent and some artistic merit and that the sex scenes were justified and in context.

It was the view of the minority that at least two of the individual scenes were prolonged, detailed and gratuitous and as such went beyond what the Review Board had been previously prepared to accept within an ‘R’ rated film. Further, the cumulative impact of the lengthy and numerous actual sex scenes ensured that the impact of the film was very high and as such should be Refused Classification.

7 REASONS FOR THE DECISION

The ‘X’ classification, the unanimous view

The Review Board considered the Classification Board’s report and the classification given by the Board of ‘X’. The Review Board made a careful examination of the Guidelines in this regard. The Guidelines state that, amongst other fetishes, bondage is “not permitted”. There is no discretion available to the Review Board in this instance. If a film contains bondage then it cannot be classified ‘X’ as fetishes “are not permitted”.

The film contains two scenes that the Review Board unanimously determined to be “bondage” scenes. The first is where Lisa is tied by her wrists to the bed and blindfolded. Matt then explicitly performs actual sexual acts with her. The second is where Matt is tied by the wrists to the bed and blindfolded. Lisa slaps him across the face, steps on him with a stilettoed foot and performs explicit actual sexual acts with him.

The Review Board determined that these were scenes of bondage and the latter scene was one of sexualised violence. As such, the Review Board accepted the Applicant’s submission on this issue – as represented by Mr Haines – and determined that the Guidelines do not permit the film *9 Songs* to be classified ‘X’.

If not ‘X’, then what? The majority view

The Guidelines for R18+ films state that “sexual activity may be realistically simulated; the general rule is ‘simulation, yes - the real thing, no’ ”.

The rule is expressed to be a general rule, implying the possibility of exceptions in a limited number of instances. While the general rule must be given weight by the Review Board, its application to any given film must be consistent with the scope and objects of the Act and the Code. The general rule cannot be applied so inflexibly such that the various matters in the Act and the Code (all of which the Review Board is required to consider in reaching a decision) are effectively ignored or rendered immaterial.

In *Reid v Director-General of Social Services* (1981) 4 ALN No. 1, the Administrative Appeals Tribunal stated:

in exercising the discretion under [the relevant section] of the Act 'the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the ...Act .. Thus while keeping the general rule laid down by [the relevant section] in mind, the decision-maker must nevertheless be prepared to respond to the circumstances of a particular case if for any special reason the application of the general rule would be unjust, unreasonable or otherwise inappropriate having regard to the scope and object of the Act.

In a limited number of previous decisions, the Review Board has permitted exceptions to the general rule by allowing depictions of “the real thing” in the R18+ category (for example *Romance*, *Irreversible* and *Anatomy of Hell*). These films variously contained scenes of actual intercourse, fellatio and masturbation.

The Review Board in the majority found that there were special aspects of *9 Songs* which differentiated it from other films which feature “the real thing” and have been Refused Classification by the Classification Review Board:

- *9 Songs* is a film in which Matt and Lisa’s relationship is explored, from Matt’s perspective, through music and sexual activity. In this context, the scenes of actual sex are integral to the plot and theme of the movie.
- *9 Songs*, made by the highly-regarded British director Michael Winterbottom, is a film of serious intent and considered by many to have artistic merit. The underlying themes of the movie, the honest, realistic and, at times, emotional and poignant depiction of the couple’s relationship, which were integrated with the scenes at rock concerts, were likely to resonate with a number of the film’s likely audience and had artistic value.
- The scenes of actual sex are not considered by the majority to be exploitative, immoral, indecent, demeaning, improper or gratuitous. In particular, regarding the scene in which Lisa slaps Matt and steps on him with a stiletto boot, the majority was of the view that the impact of this scene was mild and was not demeaning to Matt or Lisa.
- The tone of the scenes of actual sex, in terms of theme and style, were contextually relevant, filmed in a restrained manner and different from standard pornographic films that are routinely classified ‘X’.

Accordingly, viewed in context and in light of the above points, the scenes of actual sex were, in the view of the majority, of no more than high impact.

While some adults would be offended by the film, most reasonable adults (even if some would choose not to see the film) would not be offended. In reaching this conclusion, the majority was influenced by its belief that the Australian community is more accepting of a film containing contentious elements that are sexual in nature, are neither violent nor exploitive and are between consenting adults.

After careful consideration, the majority of the Review Board determined that the limited discretion implicit in the application of the general rule should be exercised because, in this instance, ‘R’ was

the most appropriate classification for the film, having regard to the special aspects of the film mentioned above, and the objects and operation of the classification scheme (in particular Section 11 of the Act, the four guiding principles in the Code and the Guidelines).

The minority view

It was the minority view that the film should be classified 'RC' as the contentious material exceeds that permissible in the 'R' classification. The minority noted previous decisions of the Review Board permitting fleeting, non-detailed scenes of actual sex and case law regarding the application of a "general rule". In the film, the actual sex scenes were prolonged and detailed, took more than five minutes of the 69 minute film and were shown with full lighting. The amount of actual sex scenes and cumulative impact of those scenes was gratuitous. It was also noted that the protagonists were not the subject of sexualised violence in the actual sex scenes of the three previous films depicting actual sex that have been classified 'R' by the Review Board.

The minority of the Review Board noted that the AAT stated in *Reid v Director-General of Social Services* that:

there must be some factor or factors in the circumstances of the particular case which take it outside the common run of cases

The minority view was that there were no circumstances in the particular film to "take it outside the common run of cases". The argument put by the majority is that given the theme of a sexual relationship, artistic merit of the film and likely audience that the actual sex is justified by context and cites these as special factors to take *9 Songs* outside the "common run of cases". However, artistic merit and likely audience are but two of the four matters to be taken into consideration in making classification decisions. The first of the four listed "matters to be considered in classification" is the "standards of morality, decency and propriety generally accepted by reasonable adults". It was the minority view that the gratuitous actual sex, in particular the explicit actual ejaculation scene and sexualised violence present in the film exceeds this standard.

Further, proper consideration of the impact of the explicit ejaculation scene in regard to Section 11 (d) of the Act and under the Guidelines in the circumstances of a public cinema need to be given as does the "class of persons" who attend such cinemas. These cinemas use larger screens and more powerful sound systems than that used by the Review Board and films have greater impact in these circumstances. No previous film in Australia has been classified 'R' by the Review Board where it contains a prolonged, detailed scene of explicit, actual ejaculation.

Also sufficient weight and proper consideration of the principles to be given effect in classification decisions under the Code, particularly (d) needs to be given, especially for the scene where Lisa slaps Matt across the face and stands upon him whilst she is wearing stiletto boots and where he is blindfolded and tied to the bed. One principle that the Code requires the Review Board to give effect to "as far as possible" is "the need to take account of community concerns about" "the portrayal or persons in a demeaning manner". The scene depicts actual sexualised violence (although at a lower level of violent scenes) in an actual sex scene and where it is the minority that Matt is portrayed in a demeaning manner. No sexual partner, regardless of gender, should be portrayed in a demeaning manner or subject to sexualised violence in actual sex scenes in a classified film, in the view of the minority.

The film has a serious intent and the minority accepted the submission of the applicant that the film has some artistic merit. However, the mere absence of more extreme sexual behaviour does not constitute a factor to set aside the general rule of “simulation, yes – the real thing, no”.

8 SUMMARY

While the classifiable elements and the impact in the overall context of the film *9 Songs*, in the majority view, did not justify a Refused Classification, the impact and contentious material warrant the legally-restrictive ‘R’ classification.

It was the majority view of the Review Board that the contentious material and impact of the film did make it unsuitable for minors and warranted specific consumer advice relating to actual sex and high-level sex scenes.

It was the minority view that the film should be Refused Classification.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION

Question No. 227

Senator Ludwig asked the following question at the hearing on 14 February 2005:

Is the OFLC currently in discussions with the AFP regarding ways to speed up the classification of pornographic images?

If so, how far have these discussion progressed?

Please give an overview of the discussions that have been held to date.

The answer to the honourable senator's question is as follows:

There are no current discussions on this issue. However, considerable liaison was undertaken between the AFP and OFLC during and following Operation Auxin – investigations into online child sex offences. The test for the classification of pornographic images under Division 474 *Criminal Code Act 1995* is that a reasonable person would in all the circumstances regard the material offensive. Matters progressing under this legislation do not require OFLC classification.

Discussions with OFLC to date have been to clarify requirements for classification applications and to discuss options for effectively managing those applications. The AFP took a lead role in coordinating applications from State and Territory enforcement authorities regarding Operation Auxin.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 228

Senator Ludwig asked the following question at the hearing on 15 February 2005.

Regarding Mr Habib:

Were any authorities present other than the AFP and ASIO on 26 and 29 October 2001 and 15 May 2002 in Guantanamo Bay? As far as you are aware were the US authorities or Pakistani authorities present at the time of interview?

The answer to the honourable senator's question is as follows:

26 and 29 October 2001 – Apart from AFP and ASIO officers, US and Pakistani officers were present at the interview.

15 May 2002 – Only ASIO, DFAT and AFP officers were present.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 229

Senator Ludwig asked the following question at the hearing on 15 February 2005.

Was the relationship between the Pakistani authorities and the United States attaché understood at the time, in terms of who had captured Mr Habib and was holding him in custody?

The answer to the honourable senator's question is as follows:

The AFP is unaware.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 230

Senator Ludwig asked the following question at the hearing on 15 February 2005.

Does the Australian Government in any form, whether AFP or ASIO, have any involvement in the United States inquiry in to prisoner abuse?

The answer to the honourable senator's question is as follows:

No.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 231

Senator Ludwig asked the following question at the hearing on 15 February 2005.

Regarding Mr Habib:

Was a medical examination provided at the time of the AFP/ASIO interview, or subsequently?

The answer to the honourable senator's question is as follows:

No examination was undertaken at the time of the AFP/ASIO interview. We are unaware if a subsequent examination was undertaken.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 232

Senator Ludwig asked the following question at the hearing on 15 February 2005:

Mr Habib: Could you advise whether the AFP had any advice with regard to the date on which the Australian authorities might have been aware that Mr Habib was in Egypt – whether that was relayed to the AFP?

The answer to the honourable senator's question is as follows:

The AFP became aware on 19 November 2001 that Mr Habib was no longer in Pakistan and was most likely to be in Egypt.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 233

Senator Ludwig asked the following question at the hearing on 15 February 2005:

Is there any truth to the media report that at the time of Mr Habib's arrest he was on a bus, two Germans were being interviewed, Mr Habib intervened and was arrested?

The answer to the honourable senator's question is as follows:

The AFP was made aware of the circumstances of Mr Habib's arrest however the AFP is not in a position to confirm those circumstances.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 234

Senator Ludwig asked the following question at the hearing on 15 February 2005:

- a) Did the Minister write to Senator Abetz (as Special Minister of State) informing him of the outcome of the AFP investigation?
- b) What is the protocol in this instance?
- c) Should the AFP inform SMOS directly?
- d) Or through the AEC?
- e) Or does the AFP Minister advise the AEC Minister?

The answer to the honourable senator's questions is as follows:

- a) No.
- (b), (c), (d) & (e) The AFP regularly informs the referring department or agency of the progress of an investigation, including the outcome of an investigation. It is then a matter for that department or agency to brief its Minister.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 235

Senator Ludwig asked the following question at the hearing on 15 February 2005:

Clarify if there is no point in pursuing further evidence from other witnesses because with respect to Mr Windsor's allegations alone it does not amount to an offence under the AEC Act?

The answer to the honourable senator's question is as follows:

The AFP conducted interviews and obtained statements from three witnesses to the conversation which is the subject of the allegation. The Commonwealth Director of Public Prosecutions (CDPP) advised that none of the versions of the conversation related by any of the witnesses amounted to an "offer to give or confer" a benefit to sustain a charge under the *Commonwealth Electoral Act 1918* or the *Criminal Code Act 1995*.

On this basis there was no criminal offence disclosed. As a result the AFP did not conduct any further interviews and the matter was finalised.

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
AUSTRALIAN FEDERAL POLICE

Question No. 236

Senator Ludwig asked the following question at the hearing on 15 February 2005:

How many joint AFP-PNG patrols were done in 2004? How many are scheduled for 2005? Are they routine or not? Are the patrols continuing on the same basis or are they increasing?

The answer to the honourable senator's question is as follows:

The Assisting Australian Police (AAP) commenced joint patrols with the RPNGC in Port Moresby at Gordons Police Station on 2 December 2004.

The patrols are routine and consist of two Royal Papua New Guinea Constabulary (RPNGC) and two AAP officers on regular day shift patrols. On 30 December 2004, multiple shifts commenced and as of 1 January 2005, Gordons Station was manned 24/7 with AAP members operating a three shift rotating roster in conjunction with the RPNGC. The AAP presence on RPNGC patrols will expand to include 24/7 patrols at the Badili and Waigani sector stations, once the AAP has its full complement of general duties officers (88 members in total).

Effectively, there are three patrols per shift, therefore, 78 patrols were undertaken in 2004. Presently, the AAP assists at six shifts per day – three at Gordons, as well as a split day/afternoon shift at Badili and two shifts at Waigani Station, which equates to 18 patrols per day. The number of patrols will increase as the AAP continues to expand its general duties presence, until it is also servicing Badili and Waigani Stations on a 24/7 basis. It is estimated that the AAP will conduct a total of 5346 patrols in Port Moresby during 2005.

AAP members deployed to Bougainville at the townships of Buka and Arawa on 7 September 2004 and commenced joint patrols with the RPNGC in mid-September after in-country familiarisation. Both locations operate a day and an evening shift, foot and/or vehicle patrolling on average three times each shift.