



Australian Government

**Australian Communications
and Media Authority**

Investigation Report No. 2023

File no.	ACMA2008/1262
Licensee	Channel Nine South Australia Pty Ltd
Station	NWS
Type of service	Commercial Broadcasting Service (Television)
Name of program	<i>Underbelly – Episode 7 (Wise Monkeys)</i>
Date/s of broadcast	26 March 2008
Relevant legislation/code	<i>Broadcasting Services Act 1992</i> , section 148 Commercial Television Industry Code of Practice 2004: <ul style="list-style-type: none">• Clause 2.4 (Classification of Other Material)• Clause 4.1 (M Classification – Violence) of Appendix 4 (Television Classification Guidelines)• Clause 4.2 (M Classification – Sex and Nudity) of Appendix 4 (Television Classification Guidelines)• Clause 4.3 (M Classification – Language) of Appendix 4 (Television Classification Guidelines)• Clause 4.4 (M Classification – Drugs) of Appendix 4 (Television Classification Guidelines)

Investigation conclusion

The Australian Communications and Media Authority (ACMA) finds that the program *Underbelly – Episode 7 (Wise Monkeys)* broadcast by Channel Nine South Australia Pty Ltd on 26 March 2008 contains:

- a depiction of intimate sexual behaviour at 51 minutes that was not implied or simulated in a restrained way, and
- use of very aggressive coarse language at 34 minutes.

ACMA therefore finds that the licensee did not correctly classify the program in accordance with clause 4.2 (M Classification – Sex and Nudity) and clause 4.3 (M Classification – Language) of the Television Classification Guidelines (the Guidelines) at Appendix 4 to the Commercial Television Industry Code of Practice (the Code), and breached clause 2.4 of the Code in relation to this broadcast.

The Complaint

On 7 April 2008 the Australian Communications and Media Authority (ACMA) received a written complaint about an episode of *Underbelly* broadcast on 26 March 2008.

The complainant alleged that the M-classified program contained very frequent coarse language, gratuitous nudity and violent sex scenes. In correspondence to ACMA the complainant also objected to the depiction of drug use which was considered to be 'effectively intravenous use' and therefore in breach of the M and MA guidelines.

Not satisfied with the written response provided by the licensee, the complainant forwarded the matter to ACMA for investigation.

The Program

Underbelly is an Australian series which dramatises the 10 year gangland war in Melbourne. The series focuses on the bloody rivalry between Carl Williams and the 'Carlton Crew' and the related investigations by the Victorian police.

This episode follows the women involved with gangsters. Carl Williams is incarcerated and a rival crime boss attempts to undermine his empire.

The program 45 minute program broadcast over a 60 minute period was classified M and the licensee advises that it was preceded by a consumer advice warning: 'Strong Violence, Frequent Very Coarse Language, Sex Scenes, Drug Use and Nudity'. This consumer advice warning was repeated on return from each commercial break.

Assessment

The assessment is based on a copy of the relevant broadcast, provided to ACMA by the licensee and submissions from the complainant and licensee.

The *Broadcasting Services Act 1992* (the BSA) requires the commercial television industry to develop codes of practice relating to programming matters, including classification of material and specification of time zones in which material classified other than G can be broadcast. In relation to these matters, the Code:

- Reproduces guidelines made under the Classification Act for the classification of films, and also contains the Television Classification Guidelines which apply to material other than films and news and current affairs programs.
- Requires broadcasters to supply consumer advice on certain material. Consumer advice gives viewers information about particular classifiable elements that have contributed to a program's classification and is intended to assist viewers in making informed choices about the type of programming that is suitable for them and their families to watch.
- Proscribes the broadcast of certain types of material under any circumstances.

The BSA also requires ACMA to investigate unresolved complaints about matters covered by the Code.

The objectives of the classification scheme set out in the Code include that:

- Each broadcast day is divided into classification zones which are based on the majority audience normally viewing at that time, with particular regard to the child component of the audience
- Only material which is suitable for a particular classification zone is broadcast in that zone

As the program was classified M and broadcast during an M time zone, the Code requires that it be classified in accordance with clause 4 of the Television Classification Guidelines set out in Appendix 4 of the Code.

Relevant provisions

The Code contains the following provisions that are relevant in the matters raised by the complainants:

SECTION 2: CLASSIFICATION

...

Classification of Other Material

2.4 **All other material for broadcast:** Subject to Clauses 2.3 and 2.4.1, all other material for broadcast must be classified according to the Television Classification Guidelines (set out in Appendix 4) or, where applicable, the stricter requirements of Section 3: Program Promotions and Section 6: Classification and Placement of Commercials.

...

Appendix 4: Television Classification Guidelines

The Mature (M) Classification

4. Material classified M is recommended for viewing only by persons aged 15 years or over because of the matter it contains, or of the way this matter is treated.

4.1 Violence: May be realistically shown only if it is not frequent or of high impact and is justified by the story line or program context. Violence should not be presented as desirable in its own right. Any visual depiction of or verbal reference to violence occurring in a sexual context must be infrequent and restrained, and strictly justified by the story line or program context.

4.2 Sex and nudity: Visual depiction of intimate sexual behaviour may only be implied or simulated in a restrained way. It must be justified by the story line or program context. Verbal references to sexual activity should not be detailed. Visual depiction of nudity must be justified by

the story line or program context, and must not be detailed if in a sexual context.

4.3 Language: The use of coarse language must be appropriate to the story line or program context, infrequent and must not be very aggressive. It may be used more than infrequently only in certain justifiable circumstances when it is particularly important to the story line or program context.

4.4 Drugs: Intravenous use of illegal drugs may not be shown in detail. The program must not promote or encourage the use of illegal drugs.

Complainant's submissions

In relation to the program's classification, the complainant expressed concern about depictions of violence in a sexual context, specifically a scene depicting a 'discipline fetish' and a rape scene. Further, the complainant considers that nudity in the episode was 'gratuitous' and 'unnecessary'. The complainant also objected to the use of frequent coarse language and 'detailed' drug use.

Licensee's submissions

Channel Nine South Australia Pty Ltd (a division of WIN Corporation), the licensee of NWS, broadcasts Nine Network Australia programs in accordance with a program supply agreement with the Nine Network, and as a consequence relies on the Nine Network for classification advice. The licensee and the Nine Network have both made submissions in relation to the broadcast of this program.

The licensee's submission of 6 May 2008 stated that:

- The program complied with the Television Industry Code of Practice.
- The series is based on real events and it is essential for the storyline to portray as honestly as possible the ongoing anti-social behaviour practised by the crime figures.
- Appropriate steps were taken to ensure that viewers were well informed of the program's content with detailed consumer advice warnings.

The Nine Network's submission of 6 May 2008 stated that:

- Acts of violence depicted fall within the M classification guidelines.
- The visual depiction of violent activities is restricted to key events important to the program context.
- The violence was often presented in a stylised manner which lowers its impact.
- Depictions of sexual activity are only implied in a restrained way. When intimate sexual activity is depicted, much of the action is obscured by the camera angles used.

- A scene between Mark Moran and Danielle McGuire depicting the characters engaging in foreplay, was restrained and was important to the depiction of the character of Moran.
- A scene of sexual intercourse was not an ‘anal rape scene’ as alleged by the complainant. ‘The scene does not proceed to actual intercourse being either rear entry or anal’.
- Nudity is limited in frequency and occurs when only important to the story line or program context. It is usually limited to brief imagery of breasts in strip clubs or other similar premises frequented by the criminal figures, the subject of the story line.
- The use of coarse language by criminals and their associates is justified as it is a defining element of their behaviour.
- Coarse language encompasses a variety of language including threats of violence, intimidation, racial slurs and misogynistic comments. The consumer advice ranging from ‘Some Coarse Language’ through ‘Frequent Coarse Language’ up to ‘Strong, Frequent Coarse Language’ is a description of all the language used, not just the number and variations of the word fuck.
- The program does not feature intravenous drug use. The program’s storyline details how various criminals came to grief over drugs and does not promote or encourage drug use.

The licensee’s response to ACMA’s preliminary report stated that:

The Nine Network will take appropriate steps to ensure that the episodes will be amended to ensure compliance with the Commercial Television Industry Code of Practice should the episodes/series be repeated or new series scheduled in the future, subject to ACMA’s final Investigation Report.

The Nine Network’s response to ACMA’s preliminary report stated that:

Nine undertakes to make further edits to the Programs prior to any future broadcast during the M Classification period to take into account the Report’s findings. While Nine accepts the findings, Nine does wish to raise some objections to the reasoning adopted and believes some aspects of the Reports raise erroneous matters not relevant to a determination of compliance with the Code.

Nine maintains that the length of the scene is not relevant to a determination of the term ‘restrained’ as it applies to the classification of programs under Appendix 4

...

Nine notes the scene contains no below-the-waist shots of genital nudity, or groin or buttock nudity. Nine maintains the couple are framed in such a way as to leave this to the viewer’s imagination... Nine also notes that the “verbal detail” referred to in the Report is references to slang or euphemisms for sexual activity rather than language that would too clearly describe the acts themselves... the slang terms are used to obscure rather than give detail of ‘sexual activity’.

The Report also refers to a scene involving ‘fuck’ language at 34 minutes... While he [Nik Radev] is rude, aggressive and insulting, Nine notes he does not use ‘fuck’ language in relation to any threats of violence or harm towards her, nor can the use of the language be reasonably found to be “very aggressive” within its correct application. Nine notes that, while clearly not happy in the way Nik reacts, Danielle is not seen as frightened, fearful or distraught.

Reasons for decision

Clause 4 of the Television Classification Guidelines (Appendix 4 to the Code) states that material classified M is recommended for viewing only by persons aged 15 years or over because of the matter it contains, or the way this matter is treated.

Assessment of a program’s classification requires consideration of the intensity and frequency of the classifiable elements, and it is necessary to consider the impact of individual elements in each scene, as well as the cumulative impact of the elements in the context of the entire program.

Sex and nudity

The program contains three scenes depicting intimate sexual behaviour. ACMA considers that the strongest depiction of intimate sexual behaviour occurs in a scene at approximately 51 minutes, in which characters Tiffany and Paul 'PK' Kallipolitis are shown engaged in implied sexual intercourse. Tiffany sits astride Kallipolitis on a bed thrusting vigorously against him. The scene includes medium shots of waist-up female nudity as Kallipolitis attempts to climax. This depiction of intimate sexual behaviour is accompanied by detailed verbal references. During the scene Kallipolitis exclaims, “Oh, you like it like that... your tits are beautiful...” while groping Tiffany’s breasts. Tiffany pushes his hands away saying, “If a girl wants a root she’s gotta do it herself.” Kallipolitis responds, “Shut up let me come in peace.” The scene ends with Tiffany placing her hand over Kallipolitis’ mouth and saying, “Give me some of that pot you promised, and I’ll blow you next.” He replies, “What about blowing me now?” As Tiffany walks away Kallipolitis says, “You’re leaving me with blue balls mate...you’re a prick tease. I’m hung and hard like a donkey mate.” The depiction is 38 seconds in duration.

ACMA does not accept the Nine Network’s argument that the duration of a depiction is irrelevant to a judgement about whether or not that depiction is restrained. A judgement about whether or not a depiction is restrained requires a consideration of its impact. While the Television Classification Guidelines do not explicitly identify factors that are likely to determine the impact of classifiable elements, it is noted for example, that the Classification Board’s Guidelines for Classification of Films and Computer Games, which provide a comparable framework for the classification of material, offer guidance regarding the relationship between duration and impact, stating that, ‘*[i]mpact may be higher where a scene contains greater detail ... [or] is prolonged*’ (emphasis in original). ACMA also considers that the longer certain

material is depicted, the greater its likely impact on the viewer, and the less likely it is restrained.

The visuals are supported by dialogue, the tone of which, adds to the scene's impact. These verbal sexual references contain some detail and contribute to the strength and intensity of the scene.

While the scene at 51 minutes contains no below-the-waist shots of genital nudity, or groin or buttock nudity, it features medium and close-up shots from various angles, some of which include breast nudity, clearly depicting vigorously simulated sexual intercourse. While viewers would have accepted that the intimate sexual behaviour being depicted was implied or simulated, ACMA considers that the combination of visual depictions and accompanying verbal references was unambiguous. ACMA does not accept that it was left to 'the viewer's imagination' to conclude what was occurring in the scene, as the Nine Network has argued.

ACMA therefore considers that the length of the scene and the level of visual and verbal detail are such that the intimate sexual behaviour is not implied or simulated in a restrained way, and therefore cannot be accommodated within the M classification. Having determined that the depiction was not restrained, ACMA has not considered whether the depiction was justified by the storyline or program context.

Other depictions of intimate sexual behaviour include:

- The opening recap includes shots of a lingerie-clad woman leaning over a man's lap. He slaps her buttock and she jumps up saying, "That hurt!" The shots, which occur as part of a brief, heavily edited montage depicting other scenes from previous episodes, contain a single glimpse of the woman's buttocks from the side. It is considered that the shots are appropriately characterised as foreplay and do not amount to a depiction of a discipline fetish. The brevity of the depiction meant that it did not exceed the M classification requirement that depictions be 'restrained'. The depiction was justified by the storyline concerning the romantic relationship between the two characters.
- A scene at approximately 2 minutes depicts Carl Williams implicitly receiving fellatio from his wife Roberta in a car parked outside court. The scene includes shots of William's face and his hand on the back of her bobbing head in his lap. The scene is not prolonged or detailed and did not exceed the M classification requirement that depictions be 'restrained'. The depiction was justified by the storyline concerning their relationship and William's imminent incarceration.
- A scene at approximately 30 minutes, depicting implied non-consensual sexual activity (discussed below).
- A scene at approximately 43 minutes depicts Zarah Garde-Wilson photographing Lewis Caine in her apartment. Throughout this sequence there are brief inter-cut black and white shots of Garde-Wilson and Caine kissing. The couple slowly remove each others clothes as the camera revolves around them including a brief depiction of Caine squeezing Garde-Wilson's bare

buttock with his hand. This depiction of intimate sexual behaviour is brief and highly stylised, meaning that it does not exceed the M classification requirement that depictions be ‘restrained’. The depiction was justified by the storyline concerning the romantic relationship between the two characters.

The program also contains three other scenes depicting nudity:

- A scene in a prison shower at approximately 19 minutes depicts brief male rear nudity.
- At 28 minutes Carl Williams is visited in prison by a prostitute who opens her shirt to expose her breasts.
- A scene at approximately 39 minutes depicts Andrew 'Benji' Veniamin, Kallipolitis and Tiffany at a strip club. At approximately 51 minutes Veniamin returns to the same club. Throughout these two scenes there are various shots of the female dancers performing on the stage and also amongst the crowd. These shots include female waist up and rear nudity.

These depictions of nudity are justified by the context of the storyline. It is considered that these depictions of nudity can be accommodated within the M classification.

Language

The Code establishes a scale of coarse language that is permissible at each classification, ranging from very mild coarse language, which is permissible in G-classified programs in certain circumstances, to very coarse language, which is permissible in MA-classified programs when appropriate to the story line or program context and not overly frequent or impactful. As noted above, the guidelines for M-classified programs permit use of coarse language that is:

- appropriate to the storyline or program context,
- infrequent, and
- not very aggressive.

Such language ‘may be used more than infrequently only in certain justifiable circumstances, when it is *particularly important* to the storyline or program context’ (emphasis added).

The program, which was preceded by the consumer advice of ‘Frequent Very Coarse Language’, contains 54 instances of the word ‘fuck’ and its derivatives, such as ‘fucking’. These occur throughout the 45 minute program broadcast over a 60 minute period.

Such language is considered to be coarse language for the purpose of classifying television programs, and is permissible in M-classified programs but only within the constraints outlined above. While the use of coarse language in an M-classified program can be justified by context, the frequent use of coarse language is subject to the additional requirement that it may only be used in certain justifiable circumstances when it is *particularly important* to the story line or program context.

Fifty-four instances of the use of the word 'fuck' and its derivatives within a 60 minute period is considered to be frequent use of coarse language. In considering whether this frequent use was *particularly* important to the story line or program context, it is noted that the program tells the true story of the gangland war in Melbourne. It is considered that the coarse language is particularly important to the realistic portrayal of the criminal characters and their associates as it is a defining element of their anti-social behaviour. The language is largely confined to scenes depicting the criminal characters, these are intercut with scenes of the police investigation which generally do not include coarse language.

While coarse language may be used more than infrequently in certain justifiable circumstances, it must not be very aggressive under any circumstances.

A scene at approximately 34 minutes depicts Danielle McGuire telling Nik Radev, that their relationship is over. Radev replies by smashing a bottle of liquor on the ground, and he starts yelling at her, "You don't give me fucking present! ...Who the fuck you think you are? Who the fuck you think you are?" The scene then intercuts a flashback to the implied non-consensual sexual activity in the apartment (described below) and Radev yelling at McGuire, "You are fucking nothing....You are fucking hairdresser... You're fucking nothing! Fucking whore!" The outburst contains an inherent threat of violence which is made explicit in the flashbacks to the scene of non-consensual sexual activity. It is considered that shots of McGuire's face also emphasises McGuire's distressed reaction to the tirade.

ACMA does not accept the Nine Network's assertion that the language in this scene is not very aggressive and the implication that the coarse language was unconnected to threats of violence and harm. The language is delivered in a very aggressive and intimidating manner and is intercut with images of implied non-consensual sexual activity. ACMA therefore considers that this use of coarse language amounts to very aggressive use, and that it therefore cannot be accommodated in an M-classified program.

Violence

The program contains six scenes of violence:

A scene which commences approximately at 30 minutes depicts Nik Radev with his girlfriend, Danielle McGuire. Radev forcibly kisses her breast. Trying to push him away she says, "Niki! Not yet." He grabs her face saying, "No fucking 'Not yet.'" She takes his thumb in her mouth, telling him to relax. He grabs her by the shoulders and positions her so that she is bent forward over a kitchen bench. He hitches her skirt up and implicitly begins to thrust from behind. The shot quickly cuts from her face to her hand on the bench with movement reflected in the benchtop.

Flashbacks to this scene are shown at 34 minutes as Radev verbally abuses McGuire. These include a shot of Radev thrusting behind McGuire, and close ups of both character's faces. The shots are bleached of colour and shown in slow motion.

These two brief depictions of violence in a sexual context are considered to be infrequent in the context of the overall program. The depictions are visually discreet as the focus is on the character's faces and the woman's hand. The flashback

depictions are stylised which mitigates their impact. The treatment of the violence is considered, in the context of the M classification category, to be restrained. The scene is justified in the context of the episode's storyline depicting, in part, the inequitable power relationship between the male criminals and the women with whom they associate.

Other depictions of violence include:

- At 11 minutes Roberta Williams is attacked by a rival dealer in a carpark. The man tries to drag William's daughter out of her car and she implicitly claws and punches his face before driving off.
- At 19 minutes a man implicitly punches another man in the face leaving him with a bloody nose.
- At 21 minutes Zarah Garde-Wilson imagines the assault that led to the conviction of Lewis Caine for murder. He is shown to knock a man to the ground then implicitly punch and kick him repeatedly. The scene is highly stylised using both slow and fast motion shots. It is intercut with pages of text of Caine's police file.
- At 34 minutes Andrew 'Benji' Veniaman implicitly shoots Paul Kallipolitis. None of the gunshots are shown to impact. The victim is seen to slump down a door leaving a trail of blood.

These depictions are considered not to have a high impact. The violence is depicted in the context of the storyline relating to rivalry between criminal gangs and it is not presented as desirable in its own right. Any criminal behaviour is depicted with negative repercussions, including Police investigations and/or personal turmoil.

It is therefore considered that these depictions do not exceed the M classification requirements for violence.

Drugs

The program does not depict intravenous drug use. It contains one depiction of illegal drug use. A scene at 50 minutes depicts Veniamin briefly cutting white powder on a mirror with a credit card. He then inhales a line of the powder through a rolled up banknote. While the drug use is depicted in some detail, it is not promoted or encouraged. Drug use within the program is justified by the storyline, which examines a war between gangs involved in the manufacture and distribution of illegal drugs. It is therefore considered that these depictions do not exceed the M classification requirements for drug use.

Cumulative impact

As noted above, the classification guidelines specify particular elements of material that are to be considered when assessing the material's appropriate classification.

In this case, the frequency and intensity of the classifiable elements throughout the program mean that, in accordance with classification principles, consideration should also be given to the cumulative intensity of the program as a whole.

Cumulative intensity may be reduced by juxtaposing scenes of high impact with others with lower impact, including, for example, those that do not contain any classifiable elements, or contain elements that would be suitable at lower classification levels.

The program under assessment is part of a scripted drama series and the classifiable elements described above occur within the context of a storyline concerning the gangland war in Melbourne. In this episode, scenes in which classifiable elements are prominent are interspersed with other scenes of a lesser intensity mitigating their cumulative impact.

However, as stated above, the depiction of intimate sexual behaviour which was not restrained in the scene at 51 minutes and the use of very aggressive coarse language in the scene at 34 minutes exceed the M classification requirements and therefore ACMA considers that the program was incorrectly classified.

Decision

The Australian Communications and Media Authority determines for the above reasons that Channel Nine South Australia Pty Ltd, licensee of NWS, in relation to the broadcast of *Underbelly – Episode 7 (Wise Monkeys)* on 26 March 2008:

- breached clause 4.2 (M Classification – Sex and Nudity) of Appendix 4 of the Commercial Television Industry Code of Practice (July 2004);
- breached clause 4.3 (M Classification – Language) of Appendix 4 of the Commercial Television Industry Code of Practice (July 2004); and
- breached clause 2.4 (Classification of Other Material) of the Commercial Television Industry Code of Practice (July 2004).

The Common Seal of the
Australian Communications and Media Authority
was affixed to this document in
the presence of:

Signature of Member

Signature of

Name

Name

Dated 2 October 2008