



Australian Government

**Australian Communications
and Media Authority**

Investigation Report No. 2040

File no.	ACMA2008/1263
Licensee	Channel Nine South Australia Pty Ltd
Station	NWS
Type of service	Commercial Broadcasting Service (Television)
Name of program	<i>Underbelly – Episode 8 (Earning A Crust)</i>
Date/s of broadcast	2 April 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)• Clause 4.5 (M Classification – Suicide) of Appendix 4 (Television Classification Guidelines)

Investigation conclusion

The Australian Communications and Media Authority (ACMA) finds that the program *Underbelly – Episode 8 (Earning a Crust)* broadcast by Channel Nine South Australia Pty Ltd on 2 April 2008 contained a depiction of intimate sexual behaviour at 30 minutes which was not implied or simulated in a restrained way. ACMA therefore finds the licensee did not correctly classify the program in accordance with clause 4.2 (M Classification – Sex and Nudity) 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 19 May 2008 the Australian Communications and Media Authority (ACMA) received a written complaint about an episode of *Underbelly* broadcast on 2 April 2008. The complainant alleged that the M-classified program contained offensive sexual material, high impact violence, coarse language and a realistic portrayal of suicide. In correspondence to ACMA the complainant also objected to the depiction of 'explicit frontal female nudity'. 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 dramatising 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 growing public unrest within Victoria and the establishment of the Police Task Force Purana to combat the gangland war. The personal rivalry between Jason Moran and Carl Williams further escalates when both parties take out contract to kill each other. This episode also depicts loan-shark Mario Condello's attempts to resolve his personal financial crisis.

The 45 minute program broadcast over a 60 minute period was classified M and was preceded by a consumer advice warning of: 'Strong Violence, Frequent Coarse Language, Strong 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.

4.5 *Suicide:* Suicide must not be promoted or encouraged by the program and methods of suicide must not be shown in realistic detail.

Complainant's submissions

In relation to the program's classification, the complainant expressed concern about depictions of violence, alleged to be of high impact and therefore excluded from the M and MA categories. Further, the complainant believes the portrayal of suicide contained 'confronting realistic shots of [the victim] hanging from the tree' that are excluded from the M, MA and AV categories. The complainant also objected to the use of frequent coarse language, which 'contributes to the normalisation of this type of aggressive language in the community' and offensive sexual material.

Licensee's submissions

Channel Nine South Australia Pty Ltd (a division of WIN Corporation), the licensee of NWS, submitted that it 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 10 June 2008 stated that:

- The program complied with the Television Industry Code of Practice.
- 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 12 June 2008 stated that:

The Nine Classifier ... undertook an extensive review of the Program and made a large number of modifications to the unedited series to bring it into line with the Code classification requirements.

In keeping with this acknowledgement, Nine notes that the Office of Film and Literature Classification ('OFLC') recently applied an 'MA' classification to the DVD release of the series. It is important to note that this version of 'Underbelly' differs significantly from that broadcast on Nine and Episode 8 of the DVD series includes a number of scenes that have been removed from the Program.

Nine also submitted 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 is 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 quick editing.
- The use of coarse language by criminals and their associates is justified as it is a defining element of their behaviour.
- The program's storyline details how various criminals came to grief over drugs and did not promote or encourage drug use.
- The depiction of suicide was not detailed. The scene as shown was stylised and did not contain realistic detail.

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

We have further been assured by the Nine Network that they will take appropriate steps to ensure that the classification in particular and the compliance of the above episode and any future episodes of this Series will be amended to ensure compliance with the Television Industry Code of Practice should this episode/series be scheduled for repeat broadcast or a new series produced for broadcast, subject to the outcome of 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 Program prior to any future broadcast during the M Classification period to take into account the Report's findings.

While Nine accepts the finding, Nine again notes that the "M" guidelines at 4.2 of Appendix 4 of the Code do not contain limits upon a length of a scene. While ACMA may determine that individual shots exceed the classification guidelines, Nine maintains that the length of the scene is not relevant to a determination of the term "restrained" under the classification guidelines of Appendix 4 or Appendix 5. We further note that there is no reference to a length of a scene in the essential principles at the beginning of Appendix 4.

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 two scenes depicting intimate sexual behaviour. ACMA considers that the strongest depiction of intimate sexual behaviour occurs in a scene at approximately 30 minutes, in which the characters Lewis Caine and Andrew 'Benji' Veniamin engage in implied sexual activity with two women. The scene, which immediately follows a scene in which Caine and Veniamin implicitly take drugs at a strip club (discussed below), consists of a series of brief, fast-cut shots depicting vigorous implied intercourse in various positions and combinations including implied rear-entry intercourse, implied astride-standing intercourse and implied female astride male intercourse. The scene contains sexualised depictions of breast nudity, buttock nudity, manipulation of breasts and nipple licking. The scene concludes with shots of the men watching the women engaged in sexual activity. The conceptual strength of the four-way sexual encounter is considered to add to the intensity of the material. The depiction of intimate sexual behaviour is 30 seconds in duration.

ACMA notes that on 14 February 2008, the Classification Board, following the *Guidelines for Classification of Films and Computer Games*, classified the *unedited* version of the *Underbelly* series MA15+ with the consumer advice 'Strong violence, Strong sex scenes, Strong drug use.' ACMA understands that the Classification Board, when preparing a report on the classification of a film, identifies examples of content which contributed to the film's classification. The Classification Board Report is a statement of findings intended to provide an overall understanding of the nature of the film and its impact, using some examples, but does not provide edit points or an exhaustive list of elements which contributed to that classification. In relation to this episode, the Classification Board's report notes that:

During the episode ... Benji and Lewis engage in implied group sex with two women. The scene is a series of brief, fast-cut visuals and includes images of implied rear-entry sex, implied cunnilingus and other positions of implied sexual activity. In the Board's view this scene is at the upper limit of what can be accommodated at the MA15+ classification.

ACMA considers that while the program was modified for broadcast, and the editing, fast camera work and dim lighting obscure some detail in the scene described above, detailed depictions of breast nudity, buttock nudity and nipple licking remain.

In relation to the 30-second duration of the scene, ACMA considers that 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 duration as a factor likely to determine the impact of classifiable elements, the Classification Board's Guidelines for Classification of Films and Computer Games provide a comparable framework for the classification of material, and guidance on the relationship between the duration of a depiction and its impact. They state that, '*[i]mpact may be higher where a scene contains greater detail ... [or] is prolonged*' (emphasis in original). Consistent with the Classification Board's guidelines, 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.

For the reasons outlined above, ACMA considers that the length and detail of the scene were such that the depiction of implied intimate sexual behaviour was not restrained.

Having determined that the depiction was not ‘restrained’, ACMA has not considered whether the depiction was justified by the storyline or program context.

The other scene of intimate sexual behaviour occurs at approximately 19 minutes and depicts Lewis Caine and Zarah Garde-Wilson engaged in implied intercourse. The scene contains two brief shots of Garde-Wilson thrusting against Caine as she sits astride him, but the activity is implied mainly by shots of the characters’ heads and shoulders. The shots do not include breast or genital nudity. It is considered that the behaviour depicted in this scene is not implied in an unrestrained way and the depiction was justified by the storyline concerning the romantic relationship between the two characters. It is therefore considered that the depiction does not exceed the M classification requirements for sex.

The program contains two further scenes depicting nudity. At 29 minutes Lewis Caine and Andrew ‘Benji’ Veniamin are shown at a strip club. At 37 minutes, Nik Radev, Carl Williams and Tony Mokbel meet at a strip club. Throughout these two scenes there are various shots of the female dancers performing on the stage and also amongst the crowd with some breast nudity. The depictions of nudity are brief and justified by the context of the storyline concerning the activities of criminals and their associates. It is considered that these depictions of nudity can be accommodated within the M classification.

Violence

The program contains two scenes of violence:

- At approximately 28 minutes, Victor Pierce is depicted sitting in his car. A close-up shot of a pistol is shown, followed by the sound of gun shots. There are further visuals shown of Victor slumped in the driver’s seat as his wife rushes over to him. Blood can be seen seeping from his mouth.
- At approximately 40 minutes, Nik Radev is implicitly shot repeatedly by Andrew ‘Benji’ Veniamin and another man. Already implicitly shot and wounded, Radev grapples with Veniamin until Veniamin pushes him away. Veniamin and his accomplice implicitly shoot Radev several more times. He slumps to the ground and is shown lying on the ground, with blood seeping from his mouth. There is also a brief depiction of a bullet wound to his forehead. This scene occurs at night time and is very dimly lit. The frantic editing emphasises the chaos of the shooting and obscures detail of wounding. The focus of the scene quickly turns to the shooters, and their argument over who was responsible for Radev’s death, (and consequently, who will claim the reward money) mitigating the impact of the action which has just occurred.

It is considered that the depictions of violence are not frequent in the context of a one-hour program. While the depiction at 28 minutes is realistic, it is relatively brief, visually discreet and lacks detail. The depiction at 40 minutes is stylised. Depictions of realistic violence are infrequent in the context of a one hour program. ACMA

therefore considers that the impact of the violence is not high. 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. Criminal behaviour is depicted with negative repercussions including police investigations and/or personal turmoil.

It is therefore considered that the depictions of violence do not exceed the M classification guidelines.

Language

The Code establishes a scale for the use 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 permits 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 Coarse Language’, contains 33 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.

Thirty-three 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, and this mitigates the overall impact.

It is therefore considered that the coarse language can be accommodated within the M classification.

Drug use

The program contains a scene of implied drug use at approximately 30 minutes when Lewis Caine is depicted cutting powder into lines on a table, before he and Andrew 'Benji' Veniamin implicitly inhale the powder through a rolled up banknote.

The program also contains verbal and visual references to paraphernalia associated with drug manufacturing. The program depicts the use of illegal drugs but does not depict intravenous drug use.

The drug use 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.

Suicide

A late-teenage boy, Damien receives a loan from Mario Condello to start his own business. When he is unable to re-pay his loan it is inferred that the subsequent pressure causes him to commit suicide. A very brief scene at approximately 51 minutes shows Damien hanging from a tree in a cemetery at night. The scene contains three shots, the last of which is a close up of his face. There are no visuals of the method of suicide. The scene contains no instruction or promotion of suicide. The event is portrayed as a tragedy triggered by the loan shark's ruthless behaviour. It is considered that this depiction of suicide does not exceed the M classification requirements regarding suicide.

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 in the scene at 30 minutes exceeds the M classification requirement that the depiction be restrained 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 8 (Earning A Crust)* on 2 April 2008:

- breached clause 4.2 (M Classification – Sex and Nudity) 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