



Australian Government
**Australian Communications
and Media Authority**

Investigation Report No. 1947, 1981

File no.	PF2008/70
Licensees	Network Ten (Perth) Pty Ltd (1947) Network Ten (Sydney) Pty Ltd (1981)
Station	NEW TEN
Type of service	Commercial Broadcasting Service (Television)
Name of program	<i>Californication - Episode 10</i>
Date of broadcast	29 October 2007
Relevant legislation/code	Commercial Television Industry Code of Practice 2004: <ul style="list-style-type: none">• Clause 2.4 (Classification of Other Material)• Clause 5.2 (MA Classification – Sex and Nudity) of Appendix 4 (Television Classification Guidelines)

Investigation conclusion

In relation to the broadcast of *Californication* on 29 October 2007, ACMA is of the view that the duration, conceptual strength and detail of the visual depiction of ‘threesome’ occurring in the scene at approximately 21:18 minutes, were such that the intimate sexual behaviour depicted in the program was not discreetly implied or discreetly simulated.

ACMA therefore finds that Network Ten (Perth) Pty Ltd and Network Ten (Sydney) Pty Ltd breached clauses 2.4 (Classification of Other Material) and 5.2 (MA Classification – Sex and Nudity) of Appendix 4 (Television Classification Guidelines) of the Code.

The complaints

The Australian Communications and Media Authority (ACMA) received two written complaints about an episode of *Californication* broadcast on 29 October 2007 by Network Ten (Perth) Pty Ltd and Network (Sydney) Pty Ltd, the licensees of NEW and TEN, respectively.

The complaints allege that the program contained depictions of sexual activity and nudity that exceeded the MA classification category. Not satisfied with the written response provided by the licensee, the complainants forwarded the matter to ACMA for investigation.

The program

Californication is a US television series characterised as a comedy/drama which satirises the mores of Californian society. The program focuses on a struggling novelist Hank Moody suffering from writer's block after his novel becomes a best-seller and is made into a Hollywood film. Hank struggles to combine his duties as a father to twelve-year-old Becca while still carrying a torch for his ex-partner Karen, Becca's mother, who is engaged to another man.

This 30-minute episode is the tenth of the series and establishes that Charlie, Hank's agent and friend, has separated from his wife, Marcy, and is now living with Hank. Charlie and Hank meet Laura at the gym. Subsequently, Hank agrees to engage in a 'threesome' with Charlie and Laura. Concurrently, the two men's ex-partners, Karen and Marcy, decide to resolve their differences with the two men and set out to surprise them at Hank's home, where they discover the three engaged in sexual activity.

The program was classified MA and was preceded by consumer advice which stated that the program contained: 'A sex scene, Frequent coarse language'.

Assessment

The assessment is based on a copy of the relevant broadcast, provided to ACMA by Network Ten, and submissions from the complainants and licensee. Network Ten initially provided ACMA with an unedited version of the program, rather than an edited version that was broadcast. This oversight was corrected by Network Ten, and the correct version of the program was supplied to ACMA for assessment in this investigation.

The *Broadcasting Services Act 1992* ('the BSA') requires the commercial television industry to develop codes of practice relating to programming matters. The Commercial Television Industry Code of Practice 2004 ('the Code') deals with classification and content issues. The Code reproduces guidelines made under the Classification Act for the classification of films, and also contains the Television Classification Guidelines which apply to other material broadcast on commercial television. The Code also 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 intends to assist viewers in making informed choices about the type of programming that is suitable for them and their families to watch.

The complainants' concerns raise questions as to whether the program contains elements unsuitable for the MA classification category. The program was classified MA by the licensee and broadcast at 9.30pm in the MA time zone. The MA classification comprises the strongest material that is permitted for broadcast on commercial free-to-air television (apart from that with violent content).

Relevant code provisions

The Code contains the following provisions that are relevant to the matters raised by the complainants regarding classification:

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 Audience (MA) Classification

5. Material classified MA is suitable for viewing only by persons aged 15 years or over because of the intensity and/or frequency of sexual depictions, or coarse language, adult themes or drug use.

...

5.2 ***Sex and nudity:*** Visual depiction of intimate sexual behaviour (which may only be discreetly implied or discreetly simulated) or of nudity only where relevant to the story line or program context. However, a program or program segment will not be acceptable where the subject matter serves largely or wholly as a vehicle for gratuitous, exploitative or demeaning portrayal of sexual behaviour or nudity. Exploitative or non-consenting sexual relations must not be depicted as desirable.

Complainants' submissions

The complainants submitted that a scene in this episode exceeded the provisions at the MA classification level in relation to the depiction of sexual behaviour, verbal references to sexual behaviour and depiction of nudity in a sexual context. In particular, the complainants submitted that:

- The scene depicting a 'threesome' contained 'visual depictions of sexual behaviour, including female-male oral sex, rear entry male-female penetration, male-female oral sex and female ejaculation', which cannot be considered to be 'only be implied or simulated in a restrained way'.
- Verbal references accompanying the scene are detailed, including a reference to the woman 'being about to blow'.

- The woman's naked breasts are clearly visible in a sexual context.

Licensee's submissions

In its initial submission of 4 February 2008 and in its response to the preliminary finding submitted to ACMA on 12 May 2008, Network Ten argued that the program complied with the MA classification regarding sex and nudity. In relation to depictions of nudity contained in the program, the licensee submitted that there was no depiction of genital nudity and that, 'breast nudity, including nipples, can be accommodated at the M classification.'

In relation to the visual depictions of sexual activity, the licensee submitted that ACMA's preliminary decision and reasoning appeared to be based on the unedited version of the program that had been inadvertently supplied to ACMA in the first instance. Network Ten argued that in the version of the program that was edited for broadcast, sexual activity was discreetly simulated as the facial reactions of the characters were used to imply sexual activity rather than actually portraying such activity in a detailed simulation:

Visual detail of the sex scene was partly obscured by shadows and limited in impact by the composition of the shots and verbal sexual references were brief, non-detailed and non-aggressive.

...

[A]n ordinary, reasonable viewer would not form the view that Hank had a "sudden recollection" relating to Laura's female ejaculation as the relevant material was absent (deleted) from the broadcast version.

...

As female ejaculation is not generally considered a common or well-known occurrence, it would be quite reasonable for a viewer to interpret "dude she gonna blow" as a reference to orgasm, not necessarily female ejaculation. There was a single shot of Charlie with his face clearly covered in liquid. The other shots are more ambiguous and could reasonably be interpreted to be perspiration from the sexual behaviour. Our classifiers purposefully edited the scene to delete the clear verbal and visual references to female ejaculation such that there is some ambiguity as to whether female ejaculation occurred. This serves to lessen the duration, conceptual strength and detail of the visual depiction of the material.

...

While there appears to be some liquid on Laura's body, it is unclear whether this relates to the female ejaculation or simply perspiration from the sexual activity. Furthermore, the depiction of liquid on Laura's body is very brief and only partially in camera shot with Charlie being the focus of the camera shot.

...

The impact of the scene was mitigated by the comical context and tone.

[V]isuals of Karen and Marcy searching the apartment comprised approximately thirty seconds in duration, a significant amount of the two minute scene and which serve to lessen the impact of the implied and simulated sexual behaviour.

Network Ten submitted that three-way sexual encounters, female ejaculation and male ejaculation have been considered conceptually suitable for 15 year-old viewers by the Classification Board in programs and films such as *Sex in the City*, *There's Something about Mary* and *Scary Movie 2*. It argued that youth sex education resources in Australia include material relating to ejaculation and vaginal discharge.

Finding

In relation to the broadcast of *Californication* on 29 October 2007, ACMA finds that the duration, conceptual strength and detail of the visual depiction of a 'threesome' occurring in the scene at approximately 21:18 minutes, were such that the intimate sexual behaviour depicted in the program was not discreetly implied or discreetly simulated.

ACMA therefore finds that Network Ten (Perth) Pty Ltd and Network Ten (Sydney) Pty Ltd therefore breached clauses 2.4 (Classification of Other Material) and 5.2 (MA Classification – Sex and Nudity) of Appendix 4 (Television Classification Guidelines) of the Code in relation to the program.

Reasons

The Code requires material classified MA to be suitable for viewers who are 15 years of age and specifies certain requirements for the depiction of sex and nudity in MA-classified programs, including that visual depiction of intimate sexual behaviour may be only discreetly implied or discreetly simulated.

The impact of the classifiable elements of a program may be determined by factors including the conceptual strength of the subject matter, the genre of the program, the duration of visual depictions, and the level of detail such depictions contain.

The main story line of the program is Charlie's keen interest to meet women, while separated from his former partner. Charlie and Hank subsequently meet Laura at the gym, where Charlie invites her to meet them later that evening. These events lead to a scene at 21:18 minutes, depicting Charlie, Hank and Laura engaged in a 'threesome' in Hank's bedroom. The three characters are depicted naked on Hank's bed. Laura implicitly performs oral sex on Hank, as Charlie simulates sexual intercourse with Laura. Charlie then implicitly performs oral sex on Laura, while she lies between Hank's legs, moving and moaning in apparent pleasure. Laura's moans intensify and Hank suddenly seems to recall to himself his past sexual experience with her. Hank whispers to Charlie, 'dude, she's gonna blow'. This is immediately followed by a shot of Charlie looking up in reaction to Karen and Marcy walking in on them and then visuals of Charlie's face covered with liquid while positioned between Laura's legs.

In considering whether the intimate sexual behaviour depicted in this scene was discreetly implied or discreetly simulated, and whether the depiction was relevant to the story line or program context, it is noted that:

- The program is a scripted drama series that deals with contemporary Californian mores and lifestyles. The previous scenes establish Charlie's keen desire to have

sex with other women while separated from his former partner, Laura's apparent interest in repeating a previous sexual encounter with Hank, and the likelihood that Charlie, Hank and Laura will have sex. Previous scenes also build suspense regarding Hank's initial inability to recall his past sexual encounter with Laura and his reason for subsequently avoiding her.

- The scene runs for approximately two minutes, intercut with visuals of Karen and Marcy searching Hank's apartment for the two men. The depiction of sexual behaviour remains lengthy at approximately 1½ minutes and the impact of the sexual behaviour is not sufficiently mitigated by other footage of Karen and Marcy searching the apartment.
- Although Network Ten has argued that the scene is dimly lit and sexual behaviour is only implied by the 'facial reactions of the characters', it is overtly apparent from the manner in which the three characters are posed, the simultaneous movements of the characters, and the movement of the camera across the characters' bodies, that the characters are implicitly performing oral sex and simulating sexual intercourse.
- Network Ten has argued that the liquid on Charlie's face and on Laura's body could reasonably be interpreted by the viewer to be perspiration from the sexual behaviour. However, the depiction of female ejaculation at the end of the scene is clearly established by Hank's statement to Charlie, 'dude, she's gonna blow', and subsequent shots that show Charlie's face framed by Laura's legs and covered in liquid, which is also clearly visible on Laura's body. A shot of Charlie's dry face immediately precedes the visual of his wet face which further suggests that Hank's statement relates to female ejaculation. Accordingly, the prominence of the visual depiction and related verbal references are such that female ejaculation is overtly implied, rather than discreetly implied.
- The scene includes detailed breast nudity as Laura moves in apparent pleasure while she reclines between Hank's legs and implicitly receives oral sex from Charlie. This includes a close-up shot of Laura's breasts, in which detail is emphasised by the direction of the lighting. This sexualised depiction of breast nudity adds to the impact of the scene.
- The conceptual strength of a three-way sexual encounter and Hank's sudden recollection of his previous sexual encounter with Laura further add to the impact of the material.

Network Ten has argued that subject matter such as three-way sexual encounters, female ejaculation and male ejaculation have been considered conceptually suitable for 15 year-old viewers by the Classification Board in various films and programs and that youth sex education resources in Australia include material relating to ejaculation and vaginal discharge. ACMA notes that decisions made by the Classification Board are based on the Guidelines for Classification of Films and Computer Games, which do not apply to non-film programs broadcast on commercial television, and which contain different requirements for depiction of sex. Further, the treatment of female ejaculation in examples provided by the licensee may vary according to the program genre, for example, vaginal discharge in sex education resources is presumably educational in nature. In *Californication*, the sexual behaviour is treated realistically within the context of a scripted drama that deals with contemporary Californian mores and lifestyles.

Therefore, while the scene is not irrelevant to the program's story line, ACMA is of the view that the length of the scene, the conceptual strength of the subject matter, and the amount of detail contained in the depictions of implied and simulated intimate sexual behaviour, are such that the behaviour was not discreetly implied or discreetly simulated.

Having established that the program was incorrectly classified for the above reasons, it is not necessary for ACMA to consider other requirements for sex and nudity in MA-classified programs.

Decision

The Australian Communications and Media Authority determines for the above reasons that Network Ten (Perth) Pty Ltd and Network Ten (Sydney) Pty Ltd, in relation to the broadcast of *Californication* on 29 October 2007, breached clauses 2.4 (Classification of Other Material) and 5.2 (MA Classification – Sex and Nudity) of Appendix 4 (Television Classification Guidelines) of the Commercial Television Industry Code of Practice.

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

Signature of Member

Signature of Member

Name (please print)

Name (please print)

Dated this _____ day of _____ 2008