Investigation report no. BI-358

| Summary |  |
| --- | --- |
| **Licensee** | Channel 9 South Australia Pty Limited |
| **Station** | Nine |
| **Type of service** | Commercial—television |
| **Name of program** | *Underbelly Files: Chopper -* program promotion |
| **Date of broadcast** | 28 December 2017 |
| **Relevant code** | Commercial Television Industry Code of Practice 2015 |
| **Date finalised** | 6 March 2018 |
| **Decision** | No breach of clause 2.1.1 [classification] |

Background

In February 2018, the Australian Communications and Media Authority (the ACMA) commenced an investigation under section 170 of the *Broadcasting Services Act 1992* (the BSA) into a program promotion for the mini-series *Underbelly Files: Chopper* (the promotion).

The promotion was broadcast on Nine by Channel 9 South Australia Pty Limited (the licensee) on 28 December 2017 at 5.20 pm.

The ACMA received a complaint alleging the promotion was unsuitable for broadcast during the sports program *The Ashes: Fourth Test - Australia v England*.

The ACMA has investigated the licensee’s compliance with clause 2.1.1 of the Commercial Television Industry Code of Practice 2015 (the Code).

The promotion

*Underbelly Files: Chopper* is a two-part drama mini-series, classified MA15+ and described on the Nine website as:

The untold story of Mark 'Chopper' Read, Australia's most notorious gangster. After vowing to go straight, Chopper is drawn back to the underworld by his feud with Alphonse Gangitano and a violent bikie boss.[[1]](#footnote-2)

The promotion consisted of a montage of apparent shots from scenes in the mini-series, voice-overs and text displayed on screen, accompanied by sound effects and music.

The promotion was broadcast during a PG classification zone, and was approximately 30 seconds long.

A video and audio transcript of the promotion is at **Attachment A**.

Assessment and submissions

When assessing content, the ACMA considers the meaning conveyed by the material, including the natural, ordinary meaning of the language, context, tenor, tone, images and any inferences that may be drawn. This is assessed according to the understanding of an ‘ordinary reasonable’ viewer.

Australian courts have considered an ‘ordinary reasonable’ viewer to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.[[2]](#footnote-3)

Once the ACMA has ascertained the meaning of the material that was broadcast, it then assesses compliance with the Code.

This investigation has taken into account the complaint (at **Attachment B**) and submissions from the broadcaster (at **Attachment C**). Other sources are identified in this report where relevant.

Issue: Classification

Relevant Code provisions

2. Classification and proscribed material

2.1 Classification – General rules

2.1.1 Subject to the exceptions in section 2.3, all Programs and non-Program material (including Program Promotions) must be:

a) classified in accordance with the criteria set out at Appendix 1; and

b) broadcast in accordance with the classification zones set out at section 2.2.

[…]

**2.2 Classification zones**

2.2.1 **PG Classification zone.** Material that has been classified C, P, G or PG may be broadcast at any time.

[…]

**Appendix 1: Television Classification Guidelines**

[…]

The suitability of material for broadcast will depend on the context, frequency and intensity of key elements such as violence, sexual behaviour, nudity and coarse language, and on the time of day at which it is broadcast. It will also depend on such factors as the merit of the production, the purpose of a sequence, the tone, the camera work, the relevance of the material, and the treatment; be it dramatic, comedic or documentary.

These factors must be all taken into account and carefully weighed. This means that some actions, depictions, themes, subject matter, treatments or language may meet current community standards of acceptability in one Program, but in another Program may require a higher classification, or be unsuitable for television. In other circumstances sequences that clearly depict comedy or slapstick behaviour may reduce the classification.

[…]

**The Parental Guidance Recommended (PG) Classification**

Material classified PG may contain adult themes or concepts but must be mild in impact and remain suitable for children to watch with supervision. All elements must be justified by context.

*Violence:* Depictions of violence must be inexplicit and restrained. More leeway is permitted when the depiction is stylised and/or unrealistic.

*Sex:* Depictions of and verbal reference to sexual activity must be restrained.

*Nudity:* Restrained depictions of nudity are permitted.

[…]

*Themes:* The treatment of social or domestic conflict and psychological themes should be carefully handled. Supernatural or mild horror themes may be included.

Finding

The licensee did not breach clause 2.1.1 of the Code.

Reasons

Clause 2.1.1 requires that, subject to limited exceptions, all programs and non-program material must be classified in accordance with the criteria set out at Appendix 1 of the Code and broadcast within the time zones specified in section 2.2.

The complainant submitted to the licensee:

We were upset that our 14 year old and our 8 year old were subject to a network ad for "Underbelly" (rated MA) during a family timeslot in the cricket. We feel the ad was graphic in nature and the content was inappropriate for a family timeslot. Our family raced to switch channels but were disappointed that we had to. I feel this might be a breach of the advertising standards, particularly in relation to the time of day broadcast, and the type of program it was broadcast in.

The licensee responded to the complainant:

Nine wishes to assure you that all material required to be classified under the Code is carefully reviewed and considered by trained classifiers, and any scheduling of classified material is strictly scheduled in accordance with the permitted time zones in the Code. In this instance, whilst the program Underbelly Files: Chopper is classified MA, the material broadcast in the Promotion was separately reviewed and classified and was containable at a PG rating.

Underbelly Files: Chopper is a two part mini-series exploring the untold, uncut story of notorious gangster Mark ‘Chopper” Read as he struggles to reconcile his two competing identities – Chopper, the colourful underworld figure, and Mark Brandon Read, the man who craved a quiet life far from the public arena. In keeping with the themes of the program, the tone of the Promotion is mild in impact, and all elements presented are justifiable in context.

Whilst we understand that you have indicated concerns that the Promotion broadcast was not appropriate for family viewing, we do not consider that the material as broadcast is of such a level as to have breached the PG guidelines.

We note the Promotion broadcast at 5:20pm, as stated in your complaint, is during a PG rated time zone. In this regard, PG rated Promotions are permitted to be broadcast in a PG rated time zone.

The licensee submitted to the ACMA:

As Nine considers the promotion does not breach the PG guidelines, it follows that the Promotion has not been scheduled in breach of the Code.

To assess compliance, the ACMA has considered whether the relevant content in the promotion can be accommodated at the PG classification, based on the material it contains and the promotion’s treatment of that material. The ACMA has then considered whether or not the promotion was broadcast in accordance with the classification zones set out in the Code.

**Does the content in the promotion meet the PG classification criteria?**

To determine whether the promotion was classified appropriately, the ACMA has assessed the relevant classifiable elements—violence, sex, nudity and themes—against the requirements of the PG classification category in the Code.

Appendix 1 of the Code provides that material classified PG may contain adult themes or concepts but must be mild in impact and remain suitable for children to watch with supervision. All elements must be justified by context.

The promotion had a dramatic and dark tone throughout, in keeping with the mini-series’ adult themes of crime and violence. The promotion involved thematic matter associated with notorious criminal, Mark ‘Chopper’ Read that the ordinary reasonable viewer would expect in a promotion for a drama program about a well-known figure from the criminal underworld.

In the promotion, references to violence were made through on-screen text and accompanying voiceovers such as ‘cold blooded killer’, ‘notorious hit man’, and ‘legendary underground criminal’; and through visual depictions such as Chopper walking calmly away from a suspicious explosion. Additionally, as submitted by the licensee, a close-up image of Chopper’s gold-toothed grin that was shown immediately before the concluding titles may be suggestive of a sense of menace and criminal intent.

The promotion included a brief depiction of Chopper holding a hand-gun. The ACMA agrees with the licensee’s submission that:

In relation to the depiction of Chopper Read lowering a drawn gun - there is no depiction of the gun being fired, and again, it is not clear to viewers whether the gun was fired or not. Whilst both excerpts may be suggestive of an earlier act of violence, the actual depiction of the act of violence is absent.

The ACMA notes that the promotion included a shot of a standing couple as they embraced each other to kiss. At PG restrained depictions of nudity are permitted. The woman, who appeared to be topless, had her back to the camera and no nudity was visible. To the extent that the scene may have alluded to sexual activity, its impact was no greater than mild.

The ACMA considers that the promotion’s treatment of the adult themes of crime and violence was carefully handled. The predominantly text-based and verbal references to Chopper’s reputation mitigated the impact while the brief visual depictions of criminal activity were implied and lacked detail. For example, the licensee’s submission noted in relation to the depiction of Chopper walking away from the explosion:

[that] it is not clear whether the explosion was triggered by a third party or by Chopper Read.

The depictions and references to violence were inexplicit and restrained. While the promotion dealt with adult themes the impact did not exceed mild and was suitable for children to watch with supervision. All classifiable material was justified by the context.

The ACMA considers that the promotion was classified in accordance with the PG classification requirements at Appendix 1 of the Code. Accordingly, the promotion complies with clause 2.1.1(a).

**Was the promotion broadcast in the appropriate classification zone?**

As set out in clause 2.2.1 of the Code, PG classified material may be broadcast at any time. As the program complies with the PG classification criteria, its broadcast complied with the Code classification zone requirements.

Accordingly, the licensee did not breach clause 2.1.1(b) of the Code.

Attachment A

Video and audio transcript of the program promotion for the mini-series *Underbelly Files: Chopper*, broadcast on Nine on 28 December 2017

| SHOT | ON SCREEN TEXT | ON SCREEN VISUAL | AUDIO |
| --- | --- | --- | --- |
|  | MA15+ classification logo  [appears for the first 6 seconds]  Channel 9 logo  HD  [appears for the first 25 seconds]  [They all appear at the bottom right-hand corner of the screen] |  |  |
| 1*.* | COLD BLOODED | COLD BLOODED (Text over a black background which includes bursts of red & blue colours) | BACKGROUND MUSIC STARTS – OPERATIC STYLE – plays throughout.  MALE VOICE-OVER: He was a cold blooded killer. |
| 2. |  | Medium close-up shot of Chopper as he walks along a street, at night, and past an explosion – which appears to be coming from the side of a building (in the immediate background). |  |
| 3. | NOTORIOUS | NOTORIOUS (Text over a black background which includes bursts of red & blue colours) | SOUND EFFECT – Resembles a gun being cocked.  MALE VOICE-OVER: Australia’s most notorious hit man. |
| 4. |  | Medium close-up shot of a topless couple kissing. A female is shown from the rear kissing Chopper and running her hand from his shoulder to his face. A number of tattoos are visible on Choppers upper torso. |  |
| 5. |  | Medium close-up shot of Chopper facing the camera, as he lowers a hand-gun, until it is off screen. |  |
| 6. | LEGEND | LEGEND (text over a black background which includes bursts of red & blue colours) | MALE VOICE-OVER: The legendary underground criminal. |
| 7. |  | Close-up shot of Chopper’s face. He sneers with an intense look on his face. |  |
| 8. | underbelly | Underbelly (text over a black background which includes bursts of red & blue colours) |  |
| 9. | is | Is (text over a black background which includes bursts of red & blue colours) | SOUND EFFECT – Resembles a gun shot. |
| 10. | back | Back (text over a black background which includes bursts of red & blue colours) | SOUND EFFECT – Resembles a gun shot.  MALE VOICE-OVER: Brace yourself. |
| 11. | THE UNTOLD STORY | THE UNTOLD STORY (text over a black background which includes bursts of red & blue colours) | MALE VOICE-OVER: For the untold story. |
| 12. |  | Extreme Close-up shot of Chopper’s mouth as he smiles. He reveals several gold teeth. | BACKGROUND MUSIC LYRICS [It’s a jungle out there] |
| 13. | Underbelly files CHOPPER  9 logo  HD | Underbelly files CHOPPER  9 logo  HD  (text over a black background which includes bursts of red & blue colours) | MALE VOICE-OVER: Chopper is coming. |
| 14. | 2018  9 logo  HD | 2018  9 logo  HD  (text over a black background which includes bursts of red & blue colours) |  |

Attachment B

Complaint

***Complaint to the licensee dated 28 December 2017:***

We were upset that our 14 year old and our 8 year old were subject to a network ad for "Underbelly" (rated MA) during a family timeslot in the cricket. We feel the ad was graphic in nature and the content was inappropriate for a family timeslot. Our family raced to switch channels but were disappointed that we had to. I feel this might be a breach of the advertising standards, particularly in relation to the time of day broadcast, and the type of program it was broadcast in.

***Complaint to the ACMA dated 7 February 2018:***

A network ad for Underbelly Files: Chopper (rated MA) was broadcast at approx. 5.20pm on Boxing Day (26/12/17). The ad depicted graphic themes and material which I believe were outside the classification allowed at a family time in a family show, on perhaps the nation's greatest cricket watching day. The promotion for Underbelly Files: Chopper included the classification of the program as being MA. I understand there are two separate promotions that channel 9 have made to be scheduled at different times - an MA and a PG version of the promotion.

My complaint is against the idea that such a program was deemed to be appropriate to advertise during the cricket. The Australian Cricket Association works tirelessly to introduce children to cricket through MILO have a go programs and the like. Our three children were enjoying the cricket and had been watching most of the day. When this promotion came on we were horrified. Mark Read was a convicted criminal, gang member, kidnapper, arsonist and armed robber. Not the ideal Australian to parade in front of impressionable young minds.

I'm simply not happy with Channel 9's response (see the attached file). They appear to be saying "this particular promotion was deemed (by us??) to be PG and thus suitable to be broadcast during this timeslot".

I'd like to progress my complaint further.

Attachment C

Licensee’s response and submissions

***Licensee response to the complainant dated 25 January 2018:***

We write in response to your online complaint dated 28 December 2017 regarding a program promotion for the program Underbelly Files: Chopper broadcast the same date (the **Promotion**).

We understand that you have raised issues with the appropriateness of the Promotion. In particular you have expressed concern in relation placement of the Promotion during The Ashes: Fourth Test - Australia V England.

Your complaint potentially raises matters covered by the Commercial Television Industry Code of Practice 2015 (the **Code**), which has a number of relevant requirements that relate to the broadcast of program promotions, including obligations to classify programs and program promotions and schedule them in accordance with the applicable classification zones setting out the times at which material of a certain classification may be shown.

The Promotion the subject of your complaint was classified PG (Parental Guidance Recommended). The Code provides the following guidelines for the PG classification:

**Appendix 1** Material classified PG may contain adult themes or concepts but must be mild in impact and remain suitable for children to watch with supervision. All elements must be justified by context.

Additionally, the Code has sub clauses relating to the PG classification as below:

**Violence:** Depictions of violence must be inexplicit and restrained. More leeway is permitted when the depiction is stylised and/or unrealistic.

**Sex:** Depictions of and verbal references to sexual activity must be restrained.

**Nudity:** Restrained depictions of nudity are permitted.

**Themes:** The treatment of social or domestic conflict and psychological themes should be carefully handled. Supernatural or mild horror themes may be included.

Nine wishes to assure you that all material required to be classified under the Code is carefully reviewed and considered by trained classifiers, and any scheduling of classified material is strictly scheduled in accordance with the permitted time zones in the Code. In this instance, whilst the program Underbelly Files: Chopper is classified MA, the material broadcast in the Promotion was separately reviewed and classified and was containable at a PG rating.

Underbelly Files: Chopper is a two part mini-series exploring the untold, uncut story of notorious gangster Mark ‘Chopper” Read as he struggles to reconcile his two competing identities – Chopper, the colourful underworld figure, and Mark Brandon Rea, the man who craved a quiet life far from the public arena. In keeping with the themes of the program, the tone of the Promotion is mild in impact, and all elements presented are justifiable in context.

Whilst we understand that you have indicated concerns that the Promotion broadcast was not appropriate for family viewing, we do not consider that the material as broadcast is of such a level as to have breached the PG guidelines.

We note the Promotion broadcast at 5:20pm, as stated in your complaint, is during a PG rated time zone. In this regard, PG rated Promotions are permitted to be broadcast in a PG rated time zone.

While we have complied with the Code, we thank you for taking the time to write to us in relation to the Promotion particularly as viewer feedback provides an important means for Nine to ensure that its broadcast content is consistent with community standards. We also apologise for any distress or offence caused to you or your family as this is certainly not Nine’s intention and we do regret that you have had cause to write to us to voice your objections. We hope that this information helps to address your concerns, however, if you are not satisfied with this response it is open to you to refer the matter to the Australian Communications and Media Authority.

***Licensee submission to the ACMA dated 28 February 2018:***

**Program promotion for Underbelly Files Chopper broadcast by Channel Nine South Australia (Nine) - ACMA reference: 81-358**

1. We refer to your email dated 14 February 2018 relating to the broadcast of a program promotion for Underbelly Files Chopper (**Promotion**).

2. As confirmed by email of 21 February 2017, Nine broadcast the Promotion at 5.21pm on 28 December 2017 during Nine's coverage of the Cricket.

3. Nine understands the ACMA is investigating the matter under section 170 of the Broadcasting Services Act 1992 (Cth) in respect of Nine's compliance with Clause 2.1.1 [classification and scheduling] of the Commercial Television Industry Code of Practice 2015 (**Code**).

**Classification of the Promotion**

4. *Underbelly Files Chopper* (**Program**) is a drama program regarding the renowned crime figure Mark "Chopper" Read. The Program was classified MA.

5. The Promotion was separately classified Parental Guidance (**PG**) according to the content of the Promotion itself as is permitted under clause 2.1.1 of the Code. Nine denies any suggestion made that the Promotion was not containable at the PG classification. The material included in the Promotion was carefully selected to ensure that it was mild in impact, in line with the Code. Some of the excerpts in the Promotion were extracted from material of stronger impact, but the extracts themselves were carefully selected to exclude that stronger material.

6. Under the PG classification, material *"may contain adult themes or concepts but must be mild in impact and remain suitable for children to watch with supervision. All elements must be justified by context*”. The classifiable elements of the PG classification include Violence; Sex; Nudity; Language, Drugs, Suicide and Themes. Whilst Nine does not consider there to be any relevant breaches of the PG classification, the potentially relevant elements are Violence; Sex, Nudity and Themes.

7. The context of the Program Promotion is the story of Chopper Read, a notorious underground criminal, the depiction of which necessarily involves some depiction of adult themes and concepts. While Nine does not agree that the Program Promotion includes any material not containable at the PG classification level, Nine maintains that the elements of the Program Promotion must be taken in this context, and are justified by the nature of the material relating to Chopper Read's life.

8. The PG classification permits adult themes and concepts provided they are mild in impact. For the reasons set out below, the treatment of each of the relevant elements of the PG classification in the Promotion were mild in impact in accordance with the Code.

*Violence*

9. The PG element of Violence requires "Depictions of violence must be inexplicit and restrained. More leeway is permitted when the depiction is stylised and/or unrealistic". The material broadcast in the Promotion includes Chopper Read walking away from an explosion, and lowering his arm from a raised position holding a firearm. In both cases, the violence is implied rather than depicted.

10. In the first instance, the act of detonating the explosion is not included in the Program Promotion, and it is not clear whether the explosion was triggered by a third party or by Chopper Read. In relation to the depiction of Chopper Read lowering a drawn gun - there is no depiction of the gun being fired, and again, it is not clear to viewers whether the gun was fired or not. Whilst both excerpts may be suggestive of an earlier act of violence, the actual depiction of the act of violence is absent.

11. Nine understands that the lengthier scene shown in the Program in which Chopper Read lowers a drawn gun does show the gun being fired, however, this material was deliberately excluded from the Promotion in order to ensure that the Promotion itself remained mild in impact.

12. The total time of both these extracts is limited, being only several seconds out of the 30 seconds duration of the Promotion. The rest of the Promotion is largely taken up with superimposed text, and voice-overs describing Chopper Read. In the context of the overall Promotion, Nine maintains that the brief depictions of implied violence is not only mild in effect, but as part of the aggregate duration of the Promotion, very limited.

13. The closing scene of the Promotion shows a close up of Chopper Read's smile which displays a number of gold teeth, and again, while may be suggestive of a sense of menace or criminal intent, does not show any actual violence being inflicted by Chopper Read and is mild in effect.

14. In Nine's consideration, the material shown in the Promotion is inexplicit and restrained in compliance with the Code. In addition, the material shown is justified by the context of the Program.

15. The Promotion refers to Chopper Read as a "cold blooded killer" and a "notorious hit man". These statements are justified by the context of the Program, being a dramatisation of parts of Chopper Read's life.

16. The Code also permits more leeway when the depiction is stylised and/or unrealistic. Reasonable viewers would be aware that Underbelly Files Chopper is a stylised dramatisation of certain parts of Chopper Read's life. The presentation of "events " in Chopper Read's life are to be taken in this context, and are not suggestive of actual events as they occurred, but have been given dramatic treatment for the purposes of the Program.

*Sex and Nudity*

17. The PG element of Sex requires "Depictions of and verbal reference to sexual activity must be restrained." The PG element of Nudity permits "Restrained depictions of nudity".

18. The Promotion includes one brief extract showing Chopper Read kissing a woman, Margaret Cassar, who later became his wife. The actor depicting Margaret Cassar is topless in the scene, but there is no nudity shown as she has her back to the camera, and the camera shot is from the waist up only. The scene is extremely brief, lasting only 1 to 2 seconds, and is not only mild for its duration but mild in impact. There is no depiction of sex, both are standing up, and there is no implied sexual activity out of frame.

19. The lengthier scene in the Program involves some stronger material, including depiction of the couple moving from a standing position to lying down, but again, this material was deliberately omitted from the Program Promotion in order to reduce its impact.

20. The PG classification of the Code does not preclude depictions of sexual activity, but requires that they be restrained. The brief scene in the Promotion is neither detailed, or prolonged. Accordingly, Nine maintains that the extract included in the Promotion is restrained in accordance with the Code.

*Themes*

21. The PG element of Themes requires "The treatment of social or domestic conflict and psychological themes should be carefully handled. Supernatural or mild horror themes should be carefully handled. Supernatural or mild horror themes may be included."

22. The Promotion does involve some adult themes involving social or domestic conflict, including those involving criminal activities that are suggested but not depicted. There is no overt depiction of conflict or violence (as noted above). The statements "cold blooded killer" and "notorious hit man" refer to themes in the Program relating to underworld conflicts that are dramatized and depicted in the lengthier Program, but the notion of social conflict in the Promotion itself is implied rather than express.

23. Given that there is no reference to social conflict, or other graphic elements, the issues traversed in the Promotion are mild in impact, and remain within the PG classification. To the extent matters relating to social conflict are referenced, they are justified by context in compliance with the Code.

**Scheduling of the Promotion**

24. As Nine considers the Promotion does not breach the PG guidelines, it follows that the Promotion has not been scheduled in breach of the Code.

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25. For the reasons set out above, Nine maintains the broadcast of the Promotion was in compliance with the Code.

26. Nine reserves the right to make further submissions in the event that the ACMA pursues or further defines the scope of the present investigation.

1. <https://www.9now.com.au/underbelly-files-chopper/2018/episode-1>, accessed on 15 February 2018. [↑](#footnote-ref-2)
2. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-3)