

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

On morality, decency and propriety

Should an expert watch X-rated films? If they intend giving their expert opinion on the content, it is their duty!

Adultshop.Com Ltd v Members of the Classification Review Board [2008] FCAFC 79

Adultshop.Com Ltd ("Adultshop") submitted the film *Viva Erotica* to the Classification Board for classification under the Classification (Publications, Films and Computer Games) Act 1995 (Cth) ("the Act"). Adultshop contended that the film should be classified R18+. The Classification Board classified it X18+. Both classifications restrict films to viewing by persons 18 years and above. The effect of the higher X18+ classification is that films are not legally available for sale or hire in Australia, except in the Australian Capital Territory and the Northern Territory.

Adultshop applied to the Classification Review Board for review of the Classification Board's decision. The Classification Review Board confirmed the classification. Adultshop sought a review of the decision of the Classification Review Board. The application for review was dismissed by the judge at first instance. Adultshop then appealed to the Full Court of the Federal Court of Australia. The appeal was dismissed by Sundberg, Emmett and Siopis JJ.

Throughout the litigation, both parties accepted the Board's description of the film as accurate. It is substantially as follows:

The film is of 98 minutes duration. It depicts men and women having sex. There is no plot and the participants are not given names. The film contains no violence, sexual violence or coercion.

At the time of the Board's initial consideration, Adultshop submitted three experts' reports that were commissioned to answer the question:

Having regard to current community standards of morality, decency and propriety would a film primarily involving various forms of actual sexual activity, including close ups, between consenting adults but with no coercion or violence, be likely to cause offence to a reasonable adult?

Importantly, the experts did not view the film *Viva Erotica*. The expert evidence concluded that such films do not cause offence to the majority of reasonable Australian adults.



Overall, the Review Board said that it had noted and taken into account the expert evidence in its consideration of current community standards and of whether *Viva Erotica* contained depictions that would offend a reasonable adult. The Review Board said that it did not regard the evidence as definitive on either issue. Rather, the evidence was quite general in nature.

The judge at first instance noted:

I do not propose to repeat the reasons given by the Review Board for finding that the expert . . . evidence was unhelpful. Also, the Review Board did not consider that the evidence of the experts . . . addressed the specific question of whether a reasonable adult would be offended by the explicit content of *Viva Erotica*.

The Board observed that it was required by s 11(a) of the Act to take into account standards of morality, decency and propriety generally accepted by reasonable adults. It acknowledged that these are a reflection of community standards which change over time.

Although the Board accepted that expert evidence can be informative and persuasive, it said it was not at liberty to “delegate its responsibility” to make a decision on community standards to others. Later in its reasons, the Board found that the expert and survey evidence did not support the appellant’s argument that reasonable adults were not offended by the film. This was because the evidence of the experts did not address the specific question whether a reasonable adult would be offended by the explicit content of the film.

The Board concluded that taking into account all the matters mentioned in its reasons, *Viva Erotica* would cause offence to a reasonable adult and it was unsuitable for a minor to see. It found that there were no circumstances justifying a departure from the general rule in the Guidelines that “the real thing” should not be classified R18+, and that the most appropriate classification was X18+.

Significance

Expert witnesses and legal advisers alike need to take care when setting the scope of an engagement in order that it is not too narrow and asks the right questions. Input from an expert may be desirable at this point as recent changes to the Practice Direction for Expert Witnesses in the Federal Court of Australia state, “an expert may be required in the early identification of the real issues in dispute.” Such input from an expert should not be considered as affecting their independence.



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Expert evidence can be useful in determining the test of what a reasonable person may have done in a given situation. However, this type of evidence would need to be more than “informative and persuasive” in a case where a body can not delegate its responsibility of decision making.

Lastly, evidence specific to the case and not generic evidence will carry greater weight in the minds of decision makers as it has regard to the specific facts.

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