restriction order over it expired in December 1981. This we did in decision No. 936 and it seemed to us desirable that we could also indicate our views on the merits of the present publications so that if there is a dispute with our findings in either case it may be desirable that they could all be dealt with at once (since they concern issues of the same magazine).

All this has meant a substantial delay (which we regret) in the importers obtaining a ruling from the Tribunal, as we note the publications were seized on 6 January 1981, although they did not come before us until 21 July 1981.

We deal now with the various issues raised by the consideration of the magazines.

Jurisdiction: It is common ground that in decision No. 936 (December 1979) the Tribunal made a restriction order under section 15A of the Act. This had the effect of automatically classifying all subsequent issues of *Penthouse* until 21 December 1981 as indecent in the hands of persons under the age of 18.

It can be seen that the 2 issues of concern fall within that time period (they being May and June 1980 issues).

The significance of the restriction order is that we received submissions from Mr Bruce Armstrong (an importer of the publications) to the effect that the Customs Department had made an application for a classification of *Penthouse* while the restriction order was still in force.

We take the thrust of Mr Armstrong's submission to be that the Tribunal had no jurisdiction to consider a separate classification of a publication which was under a restriction order, unless at the same time an application was made under section 15A (4) of the Act for the terms of the restriction order to be revoked or varied.

It is clear that the Comptroller of Customs did not make any such application and Mr Armstrong stated in his submission that the Comptroller had not given him notification of whether the hearing was in respect of an application relating to the restriction order, or whether it was merely to determine the indecency of each issue in question.

At the hearing (where only the Comptroller was represented), Mr Leloir conceded that an application under section 15A (4) had not been made. He sought leave (should it be necessary) to amend the Comptroller's application for a classification to include an application to revoke or vary the terms of the restriction order in respect of the present publications.

Neither the importers, nor the public, nor the distributors, had notice of the Comptroller's late application, nor was there anyone present at the hearing to oppose the application.

It is obviously fundamental to the principles of natural justice that an opposite party be fully and fairly informed of steps in proceedings in which he is involved. Those principles are really embodied in section 14 (4) of the Indecent Publications Act which requires the proceedings before the Tribunal to be advertised. In our view, the Comptroller cannot be permitted to amend the proceedings at the hearing (unless by consent) in circumstances where an opposite party may be deprived of a prior opportunity of assessing and commenting on the application.

Although our ruling on this part of the Comptroller's submission is not necessarily an end of the considerations we must give to the issues, we have nevertheless made particular reference to our views should a similar situation arise in future.

In relation to the jurisdiction issue the Comptroller's primary submission was that even although a section 15A restriction order was in force, the Tribunal could still consider for classification the individual issues of magazines which were covered by restriction orders. He relied upon the Tribunal's previous decision in No. 845, which concerned circumstances in which more or less the same situation as at present arose. It may be helpful to set out at some length what the Tribunal said on that occasion.

> "Mr Heron submitted that there being no formal application under section 15A (4) the Tribunal was not empowered to deal with any of the issues before it. Indeed, as we understand it, he submitted that while a restriction order remained in force, the Tribunal has no authority to deal with any issue of that serial publication except by way of an application under section 15A (4).
>
> We reject Mr Heron's submission, although we agree that we are not empowered in the present state of this application to revoke or vary the restriction order already made.
>
> The purpose of the restriction order is to provide an additional authority to the Tribunal for the purpose of giving a basis, for up to 2 years, for future dealings with a serial publication, for the guidance of those concerned and to avoid the necessity of frequent applications to the Tribunal for individual classifications. It does not, in our view, take away or cut down the functions of the Tribunal under section 10 of the Act to determine and classify any individual issues. If this were not so, a classification less than indecent would be a charter to the publisher to do as he liked subject only to variation of the restriction order.
>
> The words (in section 15A (3) namely "(other than an issue whose character has been determined by the Tribunal or the Supreme Court)") clearly imply that a separate and individual classification can be made in respect of an issue of a periodical subject to a restriction order."

As we have already mentioned, we had some hesitation in accepting the view adopted by the Tribunal in decision 845. This is because of the working of section 15A (2), which deems each issue to have the classification which has been determined by the restriction order. As that classification applies automatically to any single issue for the length of the restriction order, it seemed a matter of common sense that issues within that range should not be referred again to the Tribunal for further classification.

However, after a close consideration of the wording of the Act, it appears to be an inescapable conclusion that the words in section 15A (3) (referred to by the Tribunal in the passage quoted above from decision 845) can only apply to the situation where issues within the time span of the restriction order have been referred to the Tribunal. This must be so, because there is no other way an issue could come before the Tribunal other than by reference for classification pursuant to section 14 of the Act. (The provisions of section 14A and section 20 do not contain procedures which affect our statement of the general position in relation to the wording in section 15A (3).)

For all the above reasons, we find therefore that even although a serial restriction order is in effect in respect of the 2 issues under consideration, we still have jurisdiction to classify them.

The dominant effect of the magazine as a whole, and the literary and social merit and character of the magazine:

We have considered the broad issues in relation to *Penthouse* in decision No. 1033. We do not propose to reiterate what we said there. We would like to note that our view there that the pictorial side of the magazine has deteriorated is reinforced by the content of the present publications.

The unique feature of the present issues is their reference to the film *Caligula*, which was a joint production between Bob Guccione (the editor and publisher of *Penthouse*) and filmmaker Franco Rossellini.

The most objectionable scene is in a 13-page portfolio at page 141 of the June 1980 issue. This set of photographs features lesbian love scenes between 2 young women. The photographs are grossly explicit. In the context in which they appear in the issue, the photographs have no literary or artistic merit.

In the context of the film, it appears that the scenes were included in the film because of a degree of subterfuge by Guccione. It appears that he shot the scenes with a skeleton film crew at night when the set was deserted. Guccione discloses as much in the course of an unusually frank interview on the film at page 150 in the May 1980 issue of *Penthouse*.

In the May 1980 issue, a less explicit, but still disturbing portfolio of photographs from the film is shown from pages 68–89. The film has not been shown in New Zealand and from our assessment of the photographs and theme and nature of the film, we think it unlikely that it would be permitted hereby for some time to come, if at all.

Although the Tribunal is to have regard to the literary or artistic merit of the issues, we do not think we can be accused of adopting a philistine approach if we say that we are unimpressed with the photographs as alleged reflections of the tempestuous time of Caligula's reign.

The admissions made by Guccione in the course of the interview already referred to indicate that the splits that develop between him and the other persons heavily involved with the production (i.e. Franco Rossellini and Gore Vidal) resulted from his inclination to include explicit sex scenes unnecessary to the narrative of the film.

In the circumstances we have little hesitation in finding that (whatever the lack of honesty of purpose of the film) there is a distinct lack of honesty in the printing of the lesbian love scenes on their own in the June issue. We find in the same broad way as we did in respect of the November issue of *Penthouse* in decision No. 1033 that when the cumulative effect of the photographs is considered with the other extreme aspects of the publication the magazine crosses the bounds of decency and becomes injurious to the public good.

We also find the May 1980 issue of *Penthouse* indecent because of the sex and violence depicted in the *Caligula* excerpt at pages 68–89. At best the pictures are shown out of context. At worst they are some of the highlights from a film that