

1982 we had occasion to consider each of the 12 monthly issues of that year. In March 1983 we were asked to consider the issues for January, February and March of 1983 and although the current hearing is technically in respect of June, July and August 1983 we have had supplied to us the remaining issues for 1983. The end result is that every issue for 2 years, ended in December 1983, will have received our consideration. We do not think it necessary to reiterate what was said in earlier decisions and in particular in decisions 1033, 1038, 1053, and 1054.

A perusal of these decisions will indicate clearly the Tribunal's view of this publication. It was noted in 1979 in Decision No. 936 that "this magazine remains on the borderline". The position has not changed since 1979. Indeed as our decisions indicate, the borderline was crossed in the issues of May and June 1980, the issue of November 1981, the issues of January, March, April, July, August, September and October 1982, and the issue of January 1983. All these issues were classified as being indecent.

We have taken the opportunity of again looking at the issues previously classified. This has been done to ensure that some degree of uniformity is achieved. However, we must comment that, as we have noted previously, there is a lack of consistency in these publications which, if anything, appear to be getting worse rather than better.

Before considering the specific issues it is useful to record that the format of each is maintained along the same lines, as *Penthouses* previously considered by the Tribunal. The magazine usually contains 200 pages which, curiously, include the back and front covers. There are advertisements, some of full page and other less than full page, spread throughout. They occupy roughly 25 percent of each issue. The last 40-50 pages contain the advertisements for sexual aids and for ancillary publications, some of which we suspect could be classified as indecent. *Forum* and *Call Me Madam*, both of which are concerned with sexual matters, appear near the beginning of each issue and may be continued in later pages. The serious articles occupy about 25 percent of each issue but one has, in many cases to hunt for the remainder of each article towards the end of the issue. Features such as "Vietnam Veteran Advisor" and "Advise and Dissent Comment" appear regularly. Cartoons, most of which are sexually orientated occupy about 15-20 pages. They are of varying size, some being full page and other to a third to a half page.

There are normally three pictorial sections which occupy 40-45 pages. Unlike the articles which are segmented, the pictorial sections are not. The publication is so constructed that the reader is almost compelled to look at the pictorial sections.

Mr Robertson made lengthy submissions and set out the background to the present situation. He said that Decision 1038 was concerned with the May and June issues of June 1980 which can be called conveniently *Caligula Issues*. He accepted that these particular issues were uncharacteristic and unlikely to be repeated. He then went on to say "the shadows cast by the strictures on that occasion should not cloud the present issue." This hearing concerns regular editions of the magazine which have been refused entry by Customs because they appear to conflict with the guidelines provided by the 'Tripartite Test' developed in Decisions 1033, 1053 and 1054. He accepted that our reasons for developing the guidelines were to allow the distributor and Comptroller to know where they stood in relationship to particular issues. He went on to say that the guidelines selected have been expressed in a way which has hardened into a rigid rule, the automatic application of which can be unfair to the magazine as a continuing publication.

Mr Robertson then said that a second problem emerged from the words of the test itself. We quote from his written submissions because it seems to use better to do so rather than attempt to precis.

"A second problem emerges from the wording of the test itself. Its basis appears to be the view that *Penthouse*, in its general mix of contents, is of borderline acceptability: it is "tipped over the brink" by the appearance in the portfolios of scenes of a specified nature which are deemed to be injurious to the public good. The test describes such scenes in very general terms, and in words which make no allowance for the tone or mood of the pictorial or of its actual impact upon adult readers. The test selects certain aspects of the pictorials: multiplicity of models, lesbianism, mixtures of sex and violence and high degrees of intimacy, and deems these incidents to be injurious to the public good. Whether or not they are so injurious, however, must depend on more than an automatic application of a verbal test to the portfolio in question. Each category of the test pivots on the word "depiction". But what sort of emphasis, or explicitness, is required to amount to "depiction"?"

Unlike hardcore pornography, actual sexual connection is never photographed (sic) in *Penthouse*: some acts may be simulated or suggested, but are never actually committed in front of the camera. The "degree of intimacy" is never actual intimacy. "Violence" may appear as a theme in a pictorial, but it is never more than a story peg, presented in stylized fantasy rather than realistically. The same point could be made in relation to what are described as "lesbian acts". The test, by focusing upon the physical incidents present in the photographs, begs the question

of how the depictions, in the hand of adults, actually injure the public good. Mere multiplicity of models cannot of itself work injury, and it cannot be asserted that a magazine appealing to men would work directly to promote lesbianism.

It is against this background that the publishers respectfully invite the Tribunal to consider a broader and more contextual approach to *Penthouse* magazine, considering it as an overall package in the hands of adults and bearing in mind its established reputation as an international publishing enterprise. It is submitted that such an approach is justified pursuant to section 11, with its emphasis on the political and social character and importance of the publication, its dominant effect and honesty of purpose, and its contribution to the interests of learning. It is submitted that a 15A order does not constitute a finding of approval, let alone of respectability, but amounts to an objective recognition of the fact that it cannot be proven to be injurious to the public good according to the statutorily enumerated tests."

In Decision 1053 we expressly refrained from laying down hard and fast rules and in Decision 1054 we described the Tripartite Test as setting 'broad guidelines'. This was expressly because of what was said in *Waverley Publishing Company v Comptroller of Customs* 1980 1, NZLR 631 at page 641, line 37, Jeffries J said:

"The importance of Waverley is that it was an early decision which analysed the central thrust of the Act in its definition of 'indecent', and the directions of section 11. It also set out to give practical future guidance by itself defining categories into which publications could be placed. No doubt the Tribunal thought this course necessary as the definition of 'indecent' was not particular, and the direction of section 11 general. I realise its usefulness in the practical functions of the Tribunal, noting how frequently it has been applied since 1968. However, there are observations which now need to be made. First, convenient, easily applied categories, can, gradually, usurp the directions of Parliament contained in the Act. Interpretation cannot become itself legislation, and the law reports abound in comments of that nature. Secondly, the general words of the Act give it a timelessness which enables it to be current in deciding standards at any one time. The Waverley decision is now 12 years old, and if there is one statement that has been consistently made in the last 4 to 5 years it is how much community standards of acceptability, or otherwise, have changed. A point I expand later is that the word 'indecent' in the statute has a wide meaning embracing subjects not necessary included in the dictionary meaning of the word. Thirdly, the decision was, as this one is, concerned with individual publications each of which must have its calibration against the Act, not another decision concerned primarily with other publications. Fourthly, the decisions themselves were directly concerned with naturist publications with which this decision is not. Those last two points have relevance, I think, in this case because appellant's counsel in argument attempted to trace easing, or liberalising, of standards through the application of Waverley over the years."

The reason for our reference to guidelines was because of the uncertainty which existed in the mind of the importer. Therefore broad guidelines were laid down. It would be unfortunate that having laid down guidelines for the benefit of the importer it should now be suggested that we have now become too rigid in our approach in this matter and in particular in our approach to this publication. The rigid approach which we are suspected of using is simply because the publication itself maintains a somewhat rigid format.

The serious articles which we accept as being of a very high standard occupy only about 25 percent of the publication compared with somewhere between 30-40 percent of the publication concerned with items of a sexual nature. If the advertising content of a sexual nature were added it can be claimed with justification that the publication is dominantly concerned with sex. If the serious articles were increased in volume and the pictorial sections were reduced or alternately made of such a character that we would be prepared to classify them with an age restriction then it may well be not only that such a classification would be more or less automatic but what is far more important so far as the publishers and distributors are concerned a restriction order would probably be available.

Indeed a perusal of our decision relating to *Girlie* type magazines clearly indicates a flexible approach in the classification of this type of publication.

In our view the dominant effect on readers must of necessity relate more to sexual content than to the serious articles. The construction of the publication almost necessarily makes that so.

Dealing with the second problem it was Mr Robertson's submission that the Tribunal's view of *Penthouse* was that because of its general mix of content—which was of borderline acceptability—it was tipped over the brink by the pictorial sections of the nature mentioned in the earlier decisions. We have already given our reasons for classifying as indecent those issues which contain pictorials with a "multiplicity of models, lesbianism, mixtures of sex and violence and high degrees of intimacy". We have also indicated why we consider those issues as injurious to