FEDERAL COURT OF AUSTRALIA

Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority [2014] FCAFC 32

Citation:	Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority [2014] FCAFC 32
Appeal from:	Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority [2013] FCA 812
Parties:	**CHANNEL SEVEN ADELAIDE PTY LIMITED v AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY**
File number:	NSD 1814 of 2013
Judges:	**TRACEY, FLICK AND ROBERTSON JJ**
Date of judgment:	21 March 2014
Catchwords:	**BROADCASTING** – broadcasting of a tobacco advertisement – statutory offence – breach of condition of licence – whether necessary to prove broadcasting and consequence of broadcasting – requisite physical and fault elements of offence – whether physical element of the offence consists only of conduct – whether intention the fault element – whether necessary to prove the intention of the broadcaster to broadcast a tobacco advertisement – whether tobacco advertisement an incidental accompaniment to the broadcasting of other matter **CRIMINAL LAW** – physical and fault elements of offence – whether one or two physical elements – fault element of recklessness
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 *Broadcasting and Television Act 1942* (Cth) ss 100(5A), 100(10) *Broadcasting Services Act 1992* (Cth) s 143, Sch 2, cl 7(1)(a) *Criminal Code* (Cth) ss 3.2, 4.1, 5.1, 5.2 5.3, 5.4, 5.5, 5.6 *Criminal Code Act 1995* (Cth) sch 1 *Customs Act 1901* (Cth) s 233B *Defence Force Discipline Act 1982* (Cth) s 33(b) *Judiciary Act 1903* (Cth) s 39B *Tobacco Advertising Prohibition Act 1992* (Cth) ss 3, 5A, 9

	13, 14
	Explanatory Memorandum, Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill (Cth) 2001
Cases cited:	*Action on Smoking and Health Ltd v Australian Broadcasting Tribunal* (1992) 27 ALD 709 *Channel Seven Adelaide Pty Ltd v Australian Communications and Media* Authority [2013] FCA 812, (2013) 137 ALD 227 *Director of Public Prosecutions v United Telecasters Sydney Limited* (1990) 168 CLR 594 *Hann v Commonwealth Director of Public Prosecutions* [2004] SASC 86, (2004) 88 SASR 99 *He Kaw Teh v The Queen* (1985) 157 CLR 523 *Li v Chief of Army* [2013] HCA 49, (2013) 303 ALR 397, (2013) 88 ALJR 110 *R v Reynhoudt* (1962) 107 CLR 381 *R v Saengsai-Or* [2004] NSWCCA 108, (2004) 61 NSWLR 135 *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330, (1985) 58 ALR 675 *TCN Channel Nine Pty Ltd v Australian Broadcasting Authority* [2002] FCA 896
	Leader-Elliott I, "Case and Comment": *Narongchai Saengsai-Or* (2005) 29 Crim L J 55
Date of hearing:	24 February 2014
Date of last submissions:	11 February 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	98
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1814 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**CHANNEL SEVEN ADELAIDE PTY LIMITED** **Appellant**
AND:	**AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY** **Respondent**

JUDGES:	**TRACEY, FLICK AND ROBERTSON JJ**
DATE OF ORDER:	**21 MARCH 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Court made on 14 August 2013 be set aside and in lieu thereof:

   (i) the decision of the respondent made on 23 March 2012 that Channel Seven Adelaide Pty Limited, in relation to the broadcast of the news segment "Cheap Cigarette Imports" on *Channel Seven News* on 18 July 2010, breached the licence condition at clause 7(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992* be set aside; and

   (ii) the respondent pay the applicant's costs of the application for judicial review.

3. The respondent pay the appellant's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1814 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**CHANNEL SEVEN ADELAIDE PTY LIMITED** **Appellant**
AND:	**AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY** **Respondent**

JUDGES:	**TRACEY, FLICK AND ROBERTSON JJ**
DATE:	**21 MARCH 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

TRACEY AND ROBERTSON JJ

Introduction

1 This appeal concerns a condition to which the commercial television broadcasting licence of the appellant was subject, cl 7(1)(a) of Sch 2 to the *Broadcasting Services Act 1992* (Cth): "the licensee will not, in contravention of the *Tobacco Advertising Prohibition Act 1992* (Cth), broadcast a tobacco advertisement within the meaning of that Act".

2 The proceedings were by way of judicial review of the conclusion of the respondent ("the ACMA") on 23 March 2012 that the appellant breached that licence condition.

3 We are grateful to Justice Flick for setting out the background to this appeal and the relevant statutory provisions.

Grounds of appeal

4 There are two major grounds of appeal, the first concerning the identification of, broadly, the physical and fault elements of the offence created by s 13 of the *Tobacco Advertising Prohibition Act* and the second the construction of s 14 of that Act and the question of advertising being an "incidental accompaniment" to the broadcasting of other matter.

5 As to the first major ground of appeal, the appellant's primary submission was that there are two distinct physical elements in s 13 of the *Tobacco Advertising Prohibition Act*, broadcasting material first where that material will be moving pictures et cetera and secondly where that material which is broadcast has a character identified in s 9(1) of the *Tobacco Advertising Prohibition Act*, being the definition of tobacco advertisement. It would follow, so the submission went, that there would be a separate fault element for each applying the *Criminal Code* system: intention for the first, because it is conduct, and recklessness for the second because it is best seen as a circumstance in which the conduct takes place, although it can also be seen as a result.

6 The appellant's submission in the alternative on this ground of appeal was that there is one physical element and intention is the relevant fault element, but the relevant intention is not merely as to broadcasting the material but also as to the character of what is broadcast: the alleged offender had to understand the character of what was broadcast, that is the moving picture et cetera was one that gave publicity to or otherwise promoted or was intended to promote smoking or the other matters listed in s 9(1) of the *Tobacco Advertising Prohibition Act*.

7 It was common ground that if the appellant succeeded on either of these submissions the appeal should be allowed.

8 As we have said, the second of the two major grounds of appeal was the question of advertising being an "incidental accompaniment" to the broadcasting of other matter. By s 14 of the *Tobacco Advertising Prohibition Act* a person may broadcast a tobacco advertisement if the person broadcasts the advertisement as, relevantly, an incidental accompaniment to the broadcasting of other matter and the person does not receive any direct or indirect benefit for broadcasting the advertisement. It was common ground that there was no direct or indirect benefit within the meaning of s 14(b).

Consideration

Elements of the offence

9 As to the first major ground of appeal, the appellant submitted it was referable to ground 1 before the primary judge which was in the following terms:

> The decision involved an error of law because, in finding that the applicant had contravened s. 13 of the TAP Act, the respondent considered that it was sufficient for it to find that the applicant intended to broadcast the material which the respondent

> determined to be a tobacco advertisement within the meaning of sub-section 9(1) of the TAP Act, whereas on the proper construction of s. 13 of the TAPA and ss. 3.1, 3.2, 4.1, 5.2, 5.4 and 5.6 of the *Criminal Code* (Cth), the respondent also had to be satisfied that the applicant either:
>
> (a) intended to promote one of the matters identified in paragraphs (a)-(f) of s.9(1); or
>
> (b) was reckless as to the circumstance or result that the material broadcast would give publicity to or otherwise promote one of those matters.

10 In our view it is clear that the ACMA reasoned that the offence provided for in s 13 of the *Tobacco Advertising Prohibition Act* contained a single physical element, that of broadcasting a tobacco advertisement. The ACMA also reasoned that the licensee intended to broadcast the material in the segment, and that included material which fell within the definition of a tobacco advertisement in s 9. On that basis, the ACMA said the licensee had therefore contravened s 13, whether or not it intended to promote tobacco, or advertise tobacco, and whether or not it was aware that the material fell within the terms of s 9 of the *Tobacco Advertising Prohibition Act*.

11 It was common ground that the identification of the elements of an offence directs attention to the law creating the offence.

12 It was also common ground that the question could be tested by substituting the terms of s 9(1) for the words "tobacco advertisement" in s 13 with the result that the offence involved broadcasting any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote, relevantly, smoking or the purchase or use of a tobacco product.

13 In our opinion, the better construction is that the physical element of the offence consists only of conduct; that intention is the fault element for that physical element in accordance with s 5.6(1) of the *Criminal Code*; and the person broadcasting must be proved to intend to broadcast and advertise one of the matters in s 9(1)(a)–(f), that is, that the material broadcast gives publicity to, or otherwise promotes or is intended to promote, relevantly, smoking or the purchase or use of a tobacco product or a range of tobacco products.

14 We do not accept that the offence is complete when any material is broadcast: the intention must extend to the character or nature of the material broadcast.

15 Both the appellant and the respondent relied on the decision of the New South Wales Court of Criminal Appeal in *R v Saengsai-Or* (2004) 61 NSWLR 135 which concerned the offence created by s 233B(1)(b) of the *Customs Act 1901* (Cth) in the following terms:

> **233B Special provisions with respect to narcotic goods**
>
> (1) Any person who:
>
> …
>
> (b) imports into Australia any prohibited imports to which this section applies or exports from Australia any prohibited exports to which this section applies;
>
> …
>
> shall be guilty of an offence.

16 Justice Bell, with whom Wood CJ at CL and Simpson J agreed, said at [72] and [74]:

> I consider that the physical element of the offence created by s 233B(1)(b) is one of conduct: the act of importing into Australia any prohibited import to which the section applies. In respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the *Criminal Code* (Cth) apply. Intention is the fault element.
>
> …
>
> It is appropriate for a judge in directing a jury on proof of intention under the *Criminal Code* (Cth) to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods.

17 The New South Wales Court of Criminal Appeal rejected the submission of the appellant Crown that the correct way to analyse the offence created by s 233B(1)(b) in conformity with the provisions of the *Criminal Code* was that it had a physical element of conduct (the act of importing a thing into Australia); and a physical element of a circumstance in which the conduct occurred (that the thing imported is a prohibited import to which s 233B(1) applies) and that as a consequence the fault element that applied by operation of s 5.6 of the *Criminal Code* was intention for the physical element of conduct and recklessness for the physical element of a circumstance in which the conduct occurred.

18 In our opinion *R v Saengsai-Or* supports the conclusion that the broadcaster must intend not only to broadcast but also to broadcast material having the requisite character or nature of a moving picture et cetera that gives publicity to, or otherwise promotes or is intended to promote, relevantly, smoking or the purchase or use of a tobacco product or a

range of tobacco products: see s 5.2(1) of the *Criminal Code* which provides that a person has intention with respect to conduct if he or she means to engage in that conduct.

19 The words "intended to promote" in s 9(1) also support that conclusion.

20 We do not, however, accept for judicial review purposes the submission put by the ACMA that there cannot be any suggestion that the appellant did not know the nature of the broadcast because its employees and its contractors had assembled each element of it. That is not a matter for this Court given the approach of the ACMA to the question of construction.

21 In terms of s 4.1(1) of the *Criminal Code*, it provides that a physical element of an offence *may* be: (a) conduct; or (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs.

22 As to (c) we accept the submission of the ACMA that the language of "a circumstance in which conduct, or a result of conduct, occurs" is simply not apt to be applied to broadcasting a tobacco advertisement. In our opinion *R v Saengsai-Or* supports this conclusion.

23 As to (b) we also accept the submission of the ACMA that the advertising was not a result of the conduct but was the material being broadcast and it is artificial to seek to separate the two. *R v Saengsai-Or* also supports this conclusion.

24 In our view the nature of the tobacco advertisement does not extend beyond the physical element of broadcasting that material: compare *Li v Chief of Army* (2013) 303 ALR 397; [2013] HCA 49 at [27]. An advertisement either bears the character of a tobacco advertisement at the time it is broadcast or it does not. It does not acquire that character after it has been broadcast, or, put another way, the act of broadcasting does not have the potential to create a tobacco advertisement which did not exist at or before the broadcast.

25 For these reasons, we would allow the appeal.

"incidental accompaniment"

26 As to the "incidental accompaniment" grounds, the appellant submitted that these grounds were referable to ground 7A before the primary judge which was in the following terms:

> The decision involved an error of law and a constructive failure to exercise jurisdiction, in that the respondent misconstrued the notion of "incidental

> accompaniment" within s. 14 of the TAP Act as meaning material that occurs "in fortuitous or subordinate conjunction with other matter", when on its proper construction an advertisement is also an "incidental accompaniment" if it is reasonably necessary to effectuate the broadcasting of the other matter.

27 The ACMA said in its decision that, in considering the meaning of the word 'incidental', the Full Court of the Federal Court in *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330; (1985) 58 ALR 675 and the High Court in *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 referred to the definitions found in the *Shorter Oxford Dictionary* and the *Macquarie Dictionary* and the ACMA set out those definitions. The ACMA then stated that it considered that the visual images and audible messages were of an advertising character and this constituted a substantial component of, and dominated, the segment. These images and messages, it said, did not happen in fortuitous or subordinate conjunction with other matter, and were part of the main thrust of the segment.

28 The ACMA considered the submission that the tobacco advertisement material was incidental to the remaining parts of the news report relating to: (a) the stance taken by anti-smoking campaigners; (b) the explanation of the Federal Government's cigarette taxes and their effect on cigarette sales; (c) the price elasticity of cigarette demand; (d) the particular effect of cheap imports on the vulnerable and young; and (e) Coles' response to recent criticisms of its decisions to stock such products. The ACMA concluded that the visual images and audible messages, or their combination, did not appear in subordinate conjunction to material concerning those items. The material which constituted a tobacco advertisement was therefore not 'incidental' to those items. It said there were some spoken elements of the news story that did not give publicity to or promote smoking or tobacco products, but they were generally accompanied by visual images that did fall within s 9(1) of the *Tobacco Advertising Prohibition Act*.

29 The ACMA said that it did not consider that the spoken elements of the news story that did not give publicity to or promote smoking or tobacco products either separately or together formed the main thrust of the segment: they did not dominate the segment. The segment, as a whole, gave publicity to or promoted the availability for purchase at Coles of cheap tobacco products, regardless of the fact that it may have contained criticisms of Coles for making those products available. When viewed in the context of the segment as a whole, the ACMA considered that items (a) to (e) were not sufficient to constitute 'other matter' to

the broadcasting of which the rest of the material in the segment was an 'incidental accompaniment'.

30 The ACMA also said that it considered that the segment did not focus on the public health issues surrounding the availability of cheap tobacco products at Coles and the ordinary reasonable viewer would not have understood the segment to be conveying a public health message. While the segment did cover public interest issues, the material which constituted a cigarette advertisement dominated the segment and was not an incidental accompaniment to the material which covered public interest issues.

31 In so saying, the ACMA was considering and rejecting the submission put to it that the ordinary reasonable viewer would perceive the references to cigarette brands and smoking as serving an illustrative purpose only for the important public health and interest issues which were canvassed in the news program.

32 We are not persuaded that the reasons of the ACMA demonstrate legal error. The appellant submitted that the ACMA's reasoning ignored the fact that visual images and audible messages are used as an integral part of the communication of "other matter". It was submitted that even if the images and messages listed by the ACMA had the character of giving publicity to smoking and tobacco products, they simultaneously had a different character of accompanying and illustrating the information that was the subject of the news report. It was submitted that in applying s 14 to the broadcast news segment, it was not appropriate to seek to divide up and quantify the different moments considered to be advertisements and compare those with the balance of the news report in order to determine which were the "dominant" and "subordinate" parts.

33 In our opinion the words "incidental accompaniment" are ordinary words of the English language and are used in the ordinary sense. The question before the ACMA was primarily a question of fact: see *Action on Smoking and Health Ltd v Australian Broadcasting Tribunal* (1992) 27 ALD 709 per Davies J.

34 We do not read the reasons of the ACMA as mistakenly treating the facts of the matter before it as similar to the facts in either *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330; (1985) 58 ALR 675 or *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594.

35 In our opinion the ACMA did not err in first identifying the "other matter" and then asking whether what it had found to be a tobacco advertisement or tobacco advertisements was broadcast as an incidental accompaniment to the broadcasting of that other matter.

36 The reasons of the ACMA have to be read in light of the submissions put to it. In our opinion the ACMA did not accept that the tobacco advertising was serving an illustrative purpose only for the important public health and interest issues canvassed in the news program but found that the tobacco advertising dominated the segment and was not an incidental accompaniment to the matters for which the broadcaster had contended, being matters (a)–(e) in [28] above.

37 For these reasons these grounds of appeal are not, in our opinion, made out.

38 We add that the question of whether material is reasonably necessary to effectuate the broadcasting of other matter seems to us to have more to do with the character of the material as tobacco advertising and less to do with s 14 of the *Tobacco Advertising Prohibition Act*, which proceeds by reference to material *being* tobacco advertising and whether the broadcasting of it is, relevantly, an incidental accompaniment to the broadcasting of other matter. The section only operates where there is tobacco advertising and permits the broadcast of tobacco advertising there described. In our opinion, if as a matter of fact material is an essential part of, or is reasonably necessary to effectuate, the broadcasting of other matter then it may be in a particular case that that material which, considered alone, might have the character of tobacco advertising would not have that character.

Conclusion

39 For these reasons, in our opinion, the appeal should be allowed, with costs. It is necessary only to set aside the decision of the ACMA. It is not necessary to remit the matter to the ACMA as the ACMA remains seized of the complaint.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey and Robertson.

Associate:

Dated: 21 March 2014

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1814 of 2013**

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AND:	**AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY** **Respondent**

JUDGES:	**TRACEY, FLICK AND ROBERTSON JJ**
DATE:	**21 MARCH 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FLICK J

40 During the evening news on 18 July 2010 Channel Seven Adelaide Pty Limited (Channel Seven) broadcast a segment entitled "*Cheap Cigarette Imports*". The Australian Communications and Media Authority ("the Authority") investigated a complaint it had received in respect to this broadcast. The Authority ultimately concluded in March 2012 that the broadcast constituted the broadcast of a "*tobacco advertisement*" and was a contravention of s 13 of the *Tobacco Advertising Prohibition Act 1992* (Cth). That contravention also constituted a breach of a condition of Channel Seven's licence.

41 In October 2012 Channel Seven sought judicial review of the Authority's decision. That application was dismissed in August 2013: *Channel Seven Adelaide Pty Limited v Australian Communications and Media Authority* [2013] FCA 812, (2013) 137 ALD 227.

42 A *Notice of Appeal* was filed in September 2013.

43 Consistent with the conclusion of Tracey and Griffiths JJ, it is concluded that the appeal should be allowed. The reasons for so concluding, however, to some extent differ from the reasons of their Honours.

44 It is thus necessary to briefly set forth that different reasoning process.

The prohibition on tobacco advertising

45 The object of the *Tobacco Advertising Prohibition Act*, as stated in s 3, is to limit the exposure of the public to messages and images that may persuade them to start smoking, or to continue smoking or to use or to continue to use tobacco products. The object of the Act is stated to be "*to improve public health*".

46 Part 2 of the *Tobacco Advertising Prohibition Act* contains a number of definitions. Within that Part, s 9(1) sets forth the "*basic meaning*" of the phrase "*tobacco advertisement*" and ss 9(2) to (7) thereafter set forth a series of "*exceptions*". For present purposes it is sufficient to set forth ss 9(1) and (1A), which provide as follows:

> Basic meaning
>
> (1) Subject to this section, for the purposes of this Act, a tobacco advertisement is any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote:
>
> (a) smoking; or
>
> (b) the purchase or use of a tobacco product or a range of tobacco products; or
>
> (c) the whole or a part of a trade mark that is registered under the *Trade Marks Act 1955* in respect of goods that are or include tobacco products; or
>
> (d) the whole or a part of a design that is registered under the *Designs Act 2003* in relation to products that are or include tobacco products; or
>
> (e) the whole or a part of the name of a person:
>
> (i) who is a manufacturer of tobacco products; and
>
> (ii) whose name appears on, or on the packaging of, some or all of those products; or
>
> (f) any other words (for example the whole or a part of a brand name) or designs, or combination of words and designs, that are closely associated with a tobacco product or a range of tobacco products (whether also closely associated with other kinds of products).
>
> Exception – political discourse
>
> (1A) To remove any doubt, it is declared that if:
>
> (a) something (**the advertisement**) does not promote, and is not intended to promote, any particular tobacco product or particular range of tobacco products; and
>
> (b) the advertisement does not promote, and is not intended to promote, smoking; and
>
> (c) the advertisement relates solely to government or political matters;
>
> the advertisement is not a tobacco advertisement for the purposes of this Act.

47 Part 3 of the Act is titled "*Prohibition of Tobacco Advertisements*". Within Part 3, s 13(1) provides that a "*person must not broadcast a tobacco advertisement in Australia or Norfolk Island on or after 1 July 1993 otherwise than as permitted by section 14*". Section 14 provides as follows:

> **Accidental or incidental broadcast permitted**
>
> A person may broadcast a tobacco advertisement if:
>
> (a) the person broadcasts the advertisement as an accidental or incidental accompaniment to the broadcasting of other matter; and
>
> (b) the person does not receive any direct or indirect benefit (whether financial or not) for broadcasting the advertisement (in addition to any direct or indirect benefit that the person receives for broadcasting the other matter).

The July 2010 broadcast

48 The news segment broadcast in July 2010 was brief – it occupied one minute and 20 seconds.

49 As summarised in the Authority's written outline of submissions, the news broadcast reported on the Coles supermarket chain importing cigarettes and selling them at lower prices than locally manufactured cigarettes. The broadcast included:

- visual images of people smoking and a hand removing a cigarette from a packet in order to smoke,
- audible messages about, and visual images of, tobacco products available at Coles, including the caption "cheap imports",
- visual images of re-stocking of cigarette packs on a stand for sale at a petrol station, with audible messages about the difficulty such outlets have in competing with the cheap imports from Coles,
- visual images of people using tobacco products and being interviewed about their use or purchase of tobacco products: immediately following a comment of the petrol station owner that customers "just want the cheapest brands", the first man says: "If they taste equally the same or better, for sure". The second man interviewed says: "For me, personally, no. The price is irrelevant. I think you buy a brand because you enjoy that type of cigarette",
- visual images of identified brands available in Australia, including the brand Benson and Hedges, and
- audible messages about, and visual images of, the German cigarette brands that Coles was importing for sale in Australia, including images of and verbal reference to the names of the manufacturers of tobacco products, which appear on the packaging.

50 The March 2012 decision of the Authority was accompanied by detailed findings and reasons.

51 In Channel Seven's *Outline of Submissions* before the primary Judge, s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) were invoked as a source of this Court's jurisdiction.

52 The *Grounds of Appeal* now advanced for resolution are, in very summary form, whether the primary Judge erred in concluding:

- that there was only one "*physical element*" for the offence of "*broadcast[ing] a tobacco advertisement*" rather than two "*physical elements*" or, alternatively, even if there was only one "*physical element*" whether it was also necessary to prove that the broadcaster intended to broadcast matter that (for example) promoted smoking; and
- that the news broadcast was not an "*incidental accompaniment to the broadcasting of other matter*" for the purposes of s 14(a) of the *Tobacco Advertising Prohibition Act*.

Physical and fault elements of an offence

53 The reference in the *Notice of Appeal* to the "*physical elements*" of the offence created by s 13 of the *Tobacco Advertising Prohibition Act* and the reference to the requisite "*fault element*" in Channel Seven's submission have their origins in the *Criminal Code*. The importance of correctly identifying the "*physical elements*" of any offence to which the *Criminal Code* applies, in turn, affects the "*fault elements*" that it is necessary to prove in order for a contravention to be made out.

54 It is s 5A of the *Tobacco Advertising Prohibition Act* that provides that Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against the *Tobacco Advertising Prohibition Act.* The *Criminal Code* is a *Schedule* to the *Criminal Code Act 1995* (Cth).

55 Section 3.2 of the *Criminal Code* provides:

> Establishing guilt in respect of offences
>
> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
>
> (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Section 4.1(1) of the *Criminal Code* provides:

> Physical elements

A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

Section 5.1(1) of the *Criminal Code* provides:

Fault elements

A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

The *Criminal Code* goes on to thereafter separately address "*intention*" (s 5.2), "*knowledge*" (s 5.3), "*recklessness*" (s 5.4) and "*negligence*" (s 5.5). Section 5.4 provides as follows:

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Section 5.6 addresses those offences that do not themselves specify "*fault elements*" as follows:

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Prior to the introduction of the *Criminal Code*, the "*analysis of the mental states of intention, knowledge and recklessness as they bear on proof of mens rea at common law involve[d] a measure of overlap*": *R v Saengsai-Or* [2004] NSWCCA 108 at [65], (2004) 61 NSWLR 135 at 146 per Bell J (Wood CJ at CL and Simpson J agreeing). Section 5.1(1) now separately identifies four different mental elements and ss 5.2 to 5.5 thereafter proceeds to separately define each. In doing so, the "*measure of overlap*" previously enjoyed by the common law

may have been abandoned. Of present potential relevance is the meaning of "*recklessness*". Section 5.4 of the *Criminal Code*, it would seem, has not resolved all areas of factual dispute: *Hann v Commonwealth Director of Public Prosecutions* [2004] SASC 86, (2004) 88 SASR 99. Gray J there said of this word:

> [22] As earlier noted, s 5.4 of the Criminal Code provides a definition of recklessness. This definition is premised on the proposition that criminal liability should not be imposed unless the accused had knowledge of the substantial risk that his or her conduct was criminal, or knowledge of the substantial risk that his or her conduct would result in a prohibited harm.
>
> [23] In order to establish recklessness under the Criminal Code, knowledge of a risk of harm or illegality must be established and that risk must be 'substantial'. The requirement that the risk be substantial gives rise to conceptual problems and may vary depending on the context and gravity of the criminal activity. For example, a finding of recklessness with respect to conduct resulting in death is sufficient to establish the mens rea for murder. But recklessness is also an essential element of many trivial offences under federal law. This 'irreducible indeterminacy of meaning' appears to be a deliberate attempt by the Legislature to provide flexibility having regard to the vast range of offences covered by the Code.
>
> [24] The phrase 'substantial risk' raises the same issues of indeterminacy as the terms 'likely' and 'probable' in the common law. Academic and judicial commentary on the meaning of these terms is diverse. Criminal law commentators have suggested that the requirement of substantial risk varies in stringency with the gravity of the conduct that gave rise to the risk. Many agree that 'substantial risk' can include 'possible risk' in offences other than murder.
>
> [25] There appears to be no case law directly discussing the meaning of 'awareness of substantial risk' in s 5.4 of the Criminal Code. The term 'substantial risk' does not appear to be defined in Australian legal dictionaries. However Carswell's Words and Phrases, an American legal dictionary, describes the phrase as meaning 'real and apparent on the evidence presented … not a risk that is without substance or which is fanciful or speculative'. The word 'substantial' has been described in Australian legal dictionaries as 'real or of substance as distinct from ephemeral or nominal'. 'Risk' has been described as 'a possibility, chance or likelihood'.
>
> [26] In order to establish recklessness under the Criminal Code it must also be shown that the defendant was *aware* of the substantial risk. Conscious awareness of risk is required; it is not enough to show that the risk was obvious or well known.

56 The correct application of these provisions of the *Criminal Code* to an "*offence*" to which the *Code* applies may present difficulty. The application of these provisions of the *Criminal Code* to s 13 of the *Tobacco Advertising Prohibition Act* is certainly not a task free of difficulty.

57 The manner in which these provisions of the *Criminal Code* have been applied to other "*offences*" provides some guidance.

58 The application of the *Criminal Code*, and the identification of the "*physical*" and "*fault*" elements was (for example) canvassed by the High Court in *Li v Chief of Army* [2013] HCA 49, (2013) 303 ALR 397, (2013) 88 ALJR 110. Major Li was a member of the Australian Defence Force. He was involved in an incident and charged with the service

offence of having created a disturbance on service land contrary to s 33(b) of the *Defence Force Discipline Act 1983* (Cth). That was an offence to which the *Criminal Code* applied. In issue was whether the phrase "*creates a disturbance*" in s 33(b) referred to only one physical element, being conduct in respect to which the fault element was intention. That was the view of the Defence Force Discipline Appeals Tribunal. In their joint judgment, French CJ, Crennan, Kiefel, Bell and Gageler JJ charted the course of reasoning which had previously led to the conclusion that it was not necessary to prove as an element of the offence created by s 33(b), an intention on the part of Major Li to create a disturbance as follows:

> [24] The judge advocate directed the court martial that the prosecution did not need to prove that Major Li intended to create a disturbance, but instead needed to prove only that Major Li "intended to engage in the acts that amounted to a disturbance". The Tribunal found that direction to be orthodox and to involve no error, saying that what the prosecution had to prove was not that Major Li intended "to create a *disturbance*" (emphasis in original) but that Major Li "intended to conduct himself as he did". Keane CJ, Jagot and Yates JJ concluded that the Tribunal did not err in that regard, the relevant intention being "the intention to engage in the conduct alleged in the particulars" and there being "no issue as to whether that conduct was intentional". Dowsett and Logan JJ each concluded that the Tribunal had erred in that it was incumbent on the prosecution to prove not merely that Major Li intended to engage in conduct that amounted to a disturbance but that Major Li intended by engaging in that conduct to create a disturbance.

The choice to be made as to the construction of s 33(b) was then described as follows by their Honours:

> **[25]** Major Li challenges the common understanding of the judge advocate, the Tribunal and the Full Court that the phrase "creates a disturbance" in s 33(b) of the DFDA refers only to one physical element, which is properly classified as conduct. He presents alternative arguments. One is that the phrase refers to one physical element, which is properly classified as conduct consisting of both an act and a state of affairs. Another is that the phrase refers to two physical elements, one of which is properly characterised as conduct consisting of an act and the other of which is properly characterised as the result of that conduct, being a disturbance. The second of those alternative constructions is to be preferred.

In explaining why they reached that conclusion, their Honours went on to say:

> [27] In the context of the overall reference in s 33(b) of the DFDA to a person who "creates a disturbance or takes part in creating or continuing a disturbance", it is apparent that the disturbance, whether created or continuing, is something which extends beyond the mere bodily action of the person who commits the offence. The words "creates a disturbance" are naturally read as referring to the doing of an act which results in a disturbance. To create is to bring something new into existence. To create a disturbance – an interruption of order – is to do an act which results in an interruption of order.
>
> [28] The service offence created by s 33(b) of the DFDA is therefore best construed as relevantly having two physical elements, to each of which the *Criminal Code* attaches a distinct fault element. The first physical element is conduct, for which the fault element is intention: it must be proved that the defence member or defence civilian charged did the act, and meant to do the act. The second physical element is the result of that conduct, for which the fault element is recklessness: it must be proved that the act resulted in a disturbance (being a non-trivial interruption of order), and that the defence member or defence civilian

> charged either believed that the act would result in a disturbance or was aware of a substantial risk that the act would result in a disturbance and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk.

59 Some further guidance as to the manner in which an "*offence*" is to be analysed and guidance as to the correct identification of the "*physical elements*" of an "*offence*" is also provided by the decision of the New South Wales Court of Criminal Appeal in *R v Saengsai-Or* [2004] NSWCCA 108, (2004) 61 NSWLR 135. The appellant in that case, Mr Saengsai-Or, had been arrested at Sydney Airport and ultimately charged and convicted of importing prohibited goods contrary to the now repealed s 233B(1)(b) of the *Customs Act 1901* (Cth). He had imported heroin inside what appeared to be bottles of Remy Martin. Section 233B(1)(b) provided as follows:

> 233B Special provisions with respect to narcotic goods
>
> (1) Any person who:
>
> …
>
> (b) imports into Australia any prohibited imports to which this section applies or exports from Australia any prohibited exports to which this section applies;
>
> …
>
> shall be guilty of an offence.

Bell J summarised the construction of s 233B(1)(b) advanced on behalf of the Crown as follows:

> [54] In the Crown's submission the correct way to analyse the offence created by s 233B(1)(b) in conformity with the provisions of the *Criminal Code* (Cth) is that it has a physical element of conduct (the act of importing a thing into Australia); and a physical element of circumstance in which the conduct occurs (that the thing imported is a prohibited import to which s 233B(1) applies). The fault element that applies by operation of s 5.6 is intention for the physical element of conduct and recklessness for the physical element of circumstance in which the conduct occurs.
>
> [55] … If the Crown's analysis of the elements of the offence is correct it was necessary for the Judge to direct the jury that the Crown must prove intention as defined in s 5.2(1) with respect to the act of importing the Remy Martin bottles into Australia and recklessness as defined in s 5.4(1) with respect to the circumstance that the bottles contained narcotic goods.

But it was the reliance thereby sought to be placed by the Crown upon the ability to prove "*recklessness*" as opposed to "*intention*" which ultimately led to the rejection of the Crown's argument. Section 233B had previously been considered by the High Court prior to the introduction of the *Criminal Code*: *He Kaw Teh v The Queen* (1985) 157 CLR 523. The offence had there been previously analysed primarily in terms of identifying the *mens rea* necessary to constitute the offence. Brennan J had there observed that the section "*impliedly requires an intent to do the prohibited act – importing narcotic goods – and thus requires*

knowledge of the nature of the object imported": (1985) 157 CLR at 584. His Honour went on to observe:

> If there were no mental element required with reference to the object imported but merely an intent to perform the physical movements involved in importation, many innocent persons could not escape conviction.

To construe s 233B(1)(b) in the manner advocated by the Crown, according to Bell J, would have been a departure from the previous manner in which s 233B had been applied. Her Honour thus observed:

> [69] The distinction between proof that an accused person intended to import narcotic goods and proof that he or she was reckless as to the circumstance that the thing imported contained narcotic goods is to my mind a real one. The joint judgment in *Kural* contains discussion of how the Crown might prove the existence of the intention to import the prohibited imports by a process of inferential reasoning. The inquiry remains one of proof of intention. Their Honours emphasised that their comments were not designed as a direction to be given to juries but rather as guidance for trial judges in formulating directions appropriate to a given case to assist the jury in determining this factual question.
>
> [70] Recklessness with respect to a circumstance under the *Criminal Code* (Cth) invites consideration of (i) the accused's awareness of a substantial risk that the circumstance exists, and (ii) having regard to the known circumstances whether it was unjustifiable to take the risk. The latter consideration does not involve a question of fact. It requires that the jury make a moral or value judgment concerning the accused's advertent disregard of the risk.
>
> [71] I do not accept the Crown's submission that the analysis of s 233B(1)(b) for which it contends does not involve a significant change in terms of the mental or fault elements of the offence. Recklessness as defined by the *Criminal Code* (Cth) is more readily susceptible of proof than is proof of intention by reference to common law principles as explained in *He Kaw Teh* and *Kural* (or as defined in s 5.2(1)). The circumstance that s 233B was amended in anticipation of the application of the *Criminal Code* (Cth) to it and that the legislature did not make clear that it was an offence comprising both a physical element of conduct and a physical element of circumstance tells against the construction for which the Crown contends. If the legislature had intended to make proof of the offence less burdensome for the Crown it might be expected to have done so in clear terms: *Krakouer v R* [1998] HCA 43 at [63]; 194 CLR 202 at 233 per McHugh J.

Her Honour thus concluded:

> [72] I consider that the physical element of the offence created by s 233B(1)(b) is one of conduct: the act of importing into Australia any prohibited import to which the section applies. In respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the *Criminal Code* (Cth) apply. Intention is the fault element.

Section 13 – the physical and fault elements

60 The view which has prevailed to-date in the present proceeding is that a contravention of s 13 is made out if Channel Seven intended to broadcast the news segment on 18 July 2010.

61 The Authority thus concluded in its final *Investigation Report* in March 2012 that s 13 involved the proof of only one "*fault element*". Its reasons relevantly concluded:

> Commonwealth offences consist of physical elements and fault elements (see subsection 3.1(1) of the *Criminal Code Act 1995*). The offence provided for in section 13 of the TAP Act contains a single physical element, that of broadcasting a tobacco advertisement.
>
> Section 13 of the TAP Act does not specify a fault element for that physical element. In those circumstances, subsection 5.6(1) of the Criminal Code Act provides that intention is the fault element for that physical element. Subsection 5.2(1) of the Criminal Code Act provides that a person has intention with respect to conduct if he or she means to engage in that conduct.
>
> The ACMA considers that the spoken words and visual images in the segment were scripted, filmed or collected, and edited and assembled, by employees or contractors of the licensee, and intentionally broadcast in the news segment on 18 July 2010.
>
> The licensee intended to broadcast the material in the segment, and that included material which falls within the definition of a tobacco advertisement in section 9 of the TAP Act. The licensee has therefore contravened section 13 of the TAP Act, whether or not it intended to promote tobacco, or advertise tobacco, and whether or not it was aware that the material fell within the terms of section 9 of the TAP Act.
>
> The ACMA finds, for the purposes of its investigation of the complaint dated 27 July 2010, that the licensee contravened section 13 of the TAP Act by broadcasting a tobacco advertisement in Australia.
>
> As a contravention of the TAP Act has occurred, the ACMA finds that the licensee breached the licence condition at paragraph 7(1)(a) of Schedule 2 to the BSA.

In endorsing this construction of s 13, the primary Judge concluded:

> [103] … There is only one physical element: broadcasting a tobacco advertisement in Australia or Norfolk Island (otherwise than as permitted by s 14). One would not accurately or sensibly state a physical element of the offence to be, simply, "broadcasting": see, analogously, *Li v Chief of Army* (2013) 210 FCR 299 at [56]–[57]; see also the analysis in *R v Saengsai-Or* (2004) 61 NSWLR 135 at [34]–[72].

His Honour's reasons for decision, it will be noted, pre-dated the decision of the High Court in *Li v Chief of Army*, supra.

62 Both before the primary Judge and this Court, the submission advanced on behalf of Channel Seven was that the offence created by s 13 involved two "*physical elements*". The written submissions filed in this Court thus contended:

> The offence created by s. 13 of the TAP Act involves two distinct physical elements – the act of broadcasting and the circumstance (or alternatively the result) that the matter which is broadcast is a "tobacco advertisement" in the sense that it "gives publicity to, or otherwise promotes or is intended to promote" one of the matters identified in paragraphs (a)-(f) of s. 9(1) of the TAP Act.

It was common ground at the hearing that the decision of the Authority should be set aside if s 13 did involve the necessity to prove two "*physical elements*" – if that be correct, the

Authority had not addressed the "*fault element*" of each of those "*physical elements*". The alternative manner in which Channel Seven sought to impugn the decision of the Authority assumed that the Authority was correct in identifying a single "*physical element*". But, even if that be correct, Senior Counsel on behalf of Channel Seven further submitted that the single "*physical element*" of broadcasting involved the necessity to prove a "*fault element*" which had not been considered by the Authority. If either of these submissions be accepted, it was common ground that the decision of the Authority was to be set aside.

Section 13 – the necessity to prove two physical elements

63 Although Channel Seven advanced these alternative constructions to s 13, the primary manner in which it advanced its appeal was to contend that s 13 involved two "*physical elements*".

64 On this approach to the construction of s 13, it was submitted on behalf of Channel Seven that:

- the first "*physical element*" was "*conduct*" within the meaning of s 4.1(1)(a) of the *Criminal Code*, being the act of broadcasting; and
- the second "*physical element*" was the "*circumstance in which conduct, or a result of conduct, occurs*" within the meaning of s 4.1(1)(c) of the *Criminal Code*, being the "*circumstance ... or result*" of giving publicity to, or promoting one or other of those matters set forth in s 9(1)(a) to (f) of the *Tobacco Advertising Prohibition Act.*

On this approach, a contravention of s 13 required proof of:

- the act of broadcasting and the fault element of "*intention*" as defined in s 5.2 of the *Criminal Code*; and
- the "*consequence …. or result*" of the kind identified and proof of "*recklessness*" as required by s 5.6(2) of the *Criminal Code* and "*recklessness*" as defined in s 5.4 of that *Code*.

Although expressed by Senior Counsel for Channel Seven as the primary manner in which the appeal was advanced, he expressly acknowledged that this construction of s 13 was a less favourable outcome to Channel Seven than the alternative approach to s 13. This, presumably, was in recognition of the fact that "*[r]ecklessness as defined by the Criminal Code (Cth) is more readily susceptible of proof than is proof of intention by reference to*

common law principles": *R v Saengsai-Or* [2004] NSWCCA 108 at [71], (2004) 61 NSWLR 135 at 148 per Bell J.

65 This construction of s 13 should prevail. The contrary conclusion of the Authority and the primary Judge, it is respectfully concluded, was erroneous. It is in this aspect that disagreement is also expressed with the conclusions of Tracey and Robertson JJ. The construction of s 13 advocated by Channel Seven, it is considered, follows from a proper construction of s 13 as read together with the definition of a "*tobacco advertisement*" in s 9.

66 The offence created by s 13 is, according to its terms, the offence of broadcasting a tobacco advertisement. Part of the definition of a "*tobacco advertisement*" is the requirement in s 9(1) that the advertisement "*gives publicity to, or otherwise promotes or is intended to promote*..." one or other of those matters set forth in s 9(1)(a) to (f). Section 13, it is considered, cannot be construed divorced from the definition in s 9 of that which constitutes a "*tobacco advertisement*". A necessary ingredient of the offence is the broadcasting of something that falls within that definition. The definition forms part of the "*whole offence*": cf. *R v Reynhoudt* (1962) 107 CLR 381 at 387 per Dixon CJ. To construe s 13 as requiring proof merely of the act of broadcasting is to strip from the offence its essential character, namely the broadcasting of an advertisement that has the character which is the very subject matter of the Act as a whole.

67 On this approach, which it is respectfully considered to be correct, a contravention of s 13 requires proof of the "*physical elements*" of:

- "*conduct*" (s 4.1(1)(a) of the *Criminal Code*), namely the act of broadcasting an advertisement; and
- "*result of conduct*" (s 4.1(1)(b) of the *Criminal Code*), namely the result of (for example) the broadcast promoting smoking.

Although Senior Counsel for Channel Seven relied upon the second "*physical element*" as being either "*the circumstances in which conduct occurs*…" (s 4.1(1)(c)) or that second "*physical element*" being "*a result of conduct*" (s 4.1(1)(b)), the offence more accurately requires proof of the "*result of conduct*".

68 Each offence to which the *Criminal Code* applies must self-evidently be construed according to its own terms and the specific legislative context in which the offence is created. It has long been recognised that there are "*intractable difficulties*" in identifying the mental

element that is to be ascribed "*to the respective external elements of an offence*": *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 571. Brennan J there observed:

> … The distinction between the act and the circumstances which attend its occurrence is frequently of no moment, because for all practical purposes the same mental element – knowledge – is the requisite mental element ordinarily applicable both to the act and the circumstances. But if there be a legislative intention to apply a mental element to the circumstances different from the mental element applicable to the act involved in the offence, it is necessary to decide what circumstances are defined to be an integral part of the act (to which intent and therefore knowledge will ordinarily apply) and what circumstances are defined to be merely attendant (to which no mental element may be intended to apply or to which a mental element less than knowledge may be intended to apply). One of the intractable difficulties in the process of identifying the particular category of mens rea that applies to the respective external elements of an offence is the identification of the prohibited act on the one hand and the circumstances attendant on the doing of that act on the other. It is a problem involved in this case.

These "*intractable difficulties*" may only have been confounded by s 5 of the *Criminal Code*. Indeed, it has been suggested that Chapter 2 of the *Criminal Code* has "*sharpened the necessity for determining whether conduct is to be distinguished from circumstance*": Leader-Elliott I, "Case and Comment": *Narongchai Saengsai-Or* (2005) 29 Crim L J 55 at 57. Analogies with other decisions may provide some guidance as to the manner in which the particular offence under consideration may be analysed. Notwithstanding accepted differences between the offence created by s 33(b) of the *Defence Force Discipline Act 1982* (Cth) and s 13 of the *Tobacco Advertising Prohibition Act*, the correct analysis of s 13 is more akin to s 33(b) than (for example) s 233B(1)(b) of the *Customs Act*. The decision of the New South Wales Court of Criminal Appeal in *R v Saengsai-Or*, supra, it must be recognised, was in large part driven by the prior construction of the same offence by the High Court decision in *He Kaw Teh*, supra, and the absence of any reason to construe the provision differently merely by reason of the introduction in 1995 of the *Criminal Code*.

69 When construing the terms of any particular statutory offence to which the *Criminal Code* applies, no process of construction should be pursued with any objective of making it more or less easy to prove the offence in question. It is for the Legislature and not the Court to prescribe the limits of the offence. But a process of construction should be pursued which promotes the object and purpose of the legislation. In the present proceeding, the objects of the *Tobacco Advertising Prohibition Act* are those set forth in s 3 of that Act. The Legislature formed the view (in part) that the exposure of the public to messages that may persuade them to start smoking or to continue smoking should be limited: s 3(1)(a). The objective was "*to improve public health*": s 3(2).

70 To construe s 13 as not requiring proof of the consequence or result of the advertisement being broadcast, it is concluded, would be both to construe the offence:

- as impermissibly divorced from the definition in s 9;

and in a manner:

- going well beyond the objects sought to be achieved by the *Tobacco Advertising Prohibition Act.*

If the Legislature desires to impose further constraints upon tobacco advertising that is a matter the Legislature can address if it sees fit.

71 In reaching this conclusion, and as is inherent in the contrary conclusion of the primary Judge, it is necessarily recognised that the construction of s 13 is not without difficulty. It is thus prudent to also address Channel Seven's alternative submission as to the "*fault element*" necessary to be proved.

A single physical element – but proof of what fault element ?

72 The alternative construction of s 13 advanced on behalf of Channel Seven proceeded from the assumption that a contravention of that section involved the proof of only a single "*physical element*", namely the act of broadcasting. But on this alternative approach, Senior Counsel on behalf of Channel Seven again submitted that no contravention of s 13 is made out in the absence of an intention on the part of the broadcaster to give publicity to or otherwise promote one or other of those matters set forth in s 9(1)(a) to (f), or in the absence of an intention on the part of the broadcaster to promote one or other of those matters.

73 To a considerable extent, this alternative submission overlapped with the primary way in which Channel Seven advanced its appeal.

74 Justices Tracey and Robertson have concluded that the requisite "*fault element*" in respect to s 13 is that of "*intention*": at [13]. Their Honours have there concluded that "*the person broadcasting must be proved to intend to broadcast and advertise one of the matters in s 9(1)(a)-(f), that is, that the material broadcast gives publicity to, or otherwise promotes or is intended to promote, relevantly, smoking of the purchase or use of a tobacco product or a range of tobacco products*". If s 13 only involves the necessity to prove one "*physical element*", concurrence is expressed with that conclusion of their Honours. Section 13, on this

construction of the prohibition on broadcasting, would involve an offence that "*does not specify a fault element*" and would accordingly fall within s 5.6(1) of the *Criminal Code*.

75 To construe s 13 as requiring the proof of merely the act of broadcasting of material that (for example) promoted smoking, it was submitted, would be to transform s 13 into virtually an offence of strict liability. Leaving aside the potential application of a defence of an honest and reasonable mistake, the construction of s 13 embraced by the Authority and the primary Judge would be, in practice, to strip criminal conduct of the long-established need to prove what used to be referred to as an *actus reus* and a *mens rea*.

76 Such a construction, it was correctly submitted on behalf of Channel Seven, was neither supported by the text of s 13 itself nor its legislative history.

77 By reference to the terms of s 13, the offence is that of broadcasting something which falls within the definition provided by s 9. The "*whole offence*" is not to be found in s 13 divorced from the definition of "*tobacco advertisement*" in s 9.

78 A construction of s 13 which would make it an offence of strict liability is not supported by the legislative evolution of the offence itself. When the *Tobacco Advertising Prohibition Act* was first passed in 1992, s 13 provided as follows:

> A person must not, knowingly or recklessly, broadcast a tobacco advertisement in Australia or Norfolk Island on or after 1 July 1993 otherwise than as permitted by section 14.

Section 14 then provided for an "*accidental or incidental accompaniment*" to a broadcast. Immediately prior to amendments made in 2001, s 13 remained in the same terms. It was in 2001 when the phrase "*knowingly or recklessly*" was removed from s 13. But the removal of those words, it is relatively clear, was not intended by the Legislature to alter or modify the offence created in 1992. The *Explanatory Memorandum* thus provides in respect to the amendments being made:

> Items 182 to 184
>
> Sections 13 and 15 of the Act use the phrase "knowingly or recklessly". The amendments omit this phrase in each case as the appropriate fault elements are applied by the Code.
>
> Sections 13 and 15 create offences in relation to the broadcasting and publishing of tobacco advertisements respectively. (*Explanatory Memorandum, Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill* (Cth) 2001)

79 Left to one side for present purposes is the conclusion that s 13 is more akin to the offence created by s 33(b) of the *Defence Force Discipline Act* involved in the decision in

Li v Chief of Army, supra, than to the offence created by s 233B(1)(b) of the *Customs Act* involved in *R v Saengsai-Or*, supra. If attention is presently directed to the legislative evolution of s 13 and the absence of any legislative intent to vary the content of that offence over time, the reasoning of Bell J in *R v Saengsai-Or*, supra, would support a conclusion in the present proceeding that the "*fault element*" identified by Channel Seven remains an essential part of s 13 both prior to, and after the 2001 amendments.

80 Contrary to the submission advanced by Senior Counsel on behalf of the Authority, namely that s 13 cannot be read consistently with the incorporation into it of the element of "*fault*" as suggested by Senior Counsel for Channel Seven, there is respectfully considered to be no such difficulty. There is no difficulty in construing s 13 as incorporating the concept that the offence of "*broadcasting a tobacco advertisement*" may only be made out if (for example) a broadcaster has "*intentionally*" done so or been "*reckless*" as to that which it broadcasts. The submission, perhaps faintly advanced, that such a construction of s 13 would make the offence more difficult to prove where broadcasters have access to legal advice in respect to all or most of that which is broadcast is without substance. The offence means what it says. If there be any difficulty in proving a contravention of s 13 in the manner advanced by Channel Seven, that is a matter which the Legislature can address if it so wishes. In the meantime, perceived difficulties of proof provide no reason to construe s 13 other than according to its terms and in a manner which incorporates as an element of the offence the definition of a "*tobacco advertisement*" as found in s 9. But any such difficulties as were asserted on behalf of the Authority may well prove to be more illusory than real. The preference on the part of some prosecutors to undertake proof of mere "*recklessness*", for example, rather than proof of "*intention*" may be understood; but the perceived ease or difficulty of proof provides no reason to construe s 13 other than according to its terms.

81 The construction of s 13 embraced by the Authority and the primary Judge also has the necessary consequence that it restricts freedom of speech or freedom of communication. The greater the reach of s 13, the greater the constraint upon that which can be broadcast. The construction of s 13, be it either the primary manner in which Channel Seven sought to advance its case or its alternative submission, constrains the broadcaster to not "*knowingly or recklessly*" broadcast a "*tobacco advertisement*". The objects of the *Tobacco Advertising Prohibition Act* should not be so broadly construed as to impose upon a broadcaster what is for all practical purposes strict liability. Contravention of s 13, and other offences, is not – of course – a matter of only limited commercial significance. Division 3 to Part 10 of the

Broadcasting Services Act 1992 (Cth) provides for the action to be taken where an offence has been committed, including the suspension or cancellation of a licence: s 143(1).

82 Nothing in the terms of s 13 in which it is expressed, the object and purpose of the *Tobacco Advertising Prohibition Act*, or difficulties in proof of "*intention*", it is concluded, warrants construing s 13 in the manner endorsed by both the Authority and the primary Judge.

83 If s 13 is to be properly construed as requiring proof of only one physical element, this alternative submission advanced on behalf of Channel Seven should be accepted. The "*fault element*" necessary to be proved is that of "*intention*" as explained by Tracey and Robertson JJ.

Promoting

84 A separate argument advanced on behalf of Channel Seven was invoked irrespective of whether a contravention of s 13 involved the proof of one or two physical elements.

85 Even if s 13 involved the proof of only one element, this further argument was that both the Authority and the primary Judge had erred in concluding that the phrase "*give publicity to*" was not confined to something which gives "*positive publicity*".

86 Although it is unnecessary to resolve this further argument, it should be briefly addressed to be rejected.

87 As stated in the written outline of submissions:

> The use of the word "otherwise" in s. 9(1) signals an intention that "giving publicity to" and "promoting" are intended to be closely related concepts. "Promoting" something involves the distinctive element of advocating for and advancing the matter in question. Whilst the word "publicity" has different shades of meaning and can be construed broadly, the context in which it appears makes clear that the narrow shades of meaning are to be preferred …

88 There is simply no reason why the term "*promote*" should have the "*gloss"* placed upon it in the manner suggested by Senior Counsel for Channel Seven.

Section 14 – an incidental accompaniment

89 Given the conclusions as to the correct construction of s 13, it is unnecessary to separately resolve a further submission as to whether the Authority erred in rejecting Channel Seven's argument that any broadcast of material constituting a "*tobacco advertisement*" that

occurred in July 2010 was an "*incidental accompaniment*" to the broadcasting of "*other matter*" and hence fell within s 14(a) of the *Tobacco Advertising Prohibition Act.*

90 Before the Authority, Channel Seven contended that so much of the material contained within the news segment broadcast on 18 July 2010 as in fact constituted a "*tobacco advertisement*", was material that was "*incidental*" to the remaining parts of the news report being what the Authority characterised as the following "*items*":

> a) the stance taken by anti-smoking campaigners;
>
> b) the explanation of the Federal Government's cigarette taxes and their effect on cigarette sales;
>
> c) the price elasticity of cigarette demand;
>
> d) the particular effect of cheap imports on the vulnerable and young;
>
> e) Coles response to recent criticisms of its decisions to stock such products.

The Authority rejected Channel Seven's reliance upon s 14 of the *Tobacco Advertising Prohibition Act.* In doing so, the Authority clearly considered that the application of s 14 involved an assessment as to whether the matters identified were "*subordinate*" to the tobacco advertisement. In respect to items (b) and (e) for example the Authority concluded:

> There was not an explanation of the Federal Tax rise. The level of the tax and its purpose was not explained, although its purpose and effects may have been inferred. Again, items (b) and (e) were covered in the context of the main thrust of the segment, rather than forming the dominant story.

The Authority went on to conclude:

> The visual images and audible messages, or their combination, which fall within subsection 9(1) of the TAP Act, do not appear in subordinate conjunction to material concerning items (a) to (e). The material which constitutes a tobacco advertisement is therefore not 'incidental' to these items.

According to the Authority, Channel Seven could not bring itself within s 14 if the matters relied upon by it were not the "*dominant*" story or, expressed differently, if so much of the news segment as constituted a "*tobacco advertisement*" was not "*subordinate*" to the six "*items*" relied upon by Channel Seven.

91 The phrase "*incidental accompaniment*" has been considered on a number of occasions in the context of broadcasting of television programmes. Section 100(5A) of the *Broadcasting and Television Act 1942* (Cth), by way of example, provided:

> A licensee shall not broadcast or televise any advertisement for, or for the smoking of, cigarettes or cigarette tobacco.

Section 100(10) provided in part:

> A reference in subsection … (5A) … to the broadcasting or televising of advertisement or of an advertisement shall be read as not including a reference to the broadcasting or television of matter of an advertising character as an accidental or incidental accompaniment of the broadcasting or televising of other matter …

In the context of the televising of a football match sponsored by a tobacco manufacturer, in *Rothmans of Pall Mall (Australia) Limited v The Australian Broadcasting Tribunal* (1985) 5 FCR 330, (1985) 58 ALR 675, Bowen CJ, Toohey and Wilcox JJ concluded:

> Rothmans argues that the televising of the advertisement was merely incidental to the televising by ATN 7 of the football match and its associated entertainments and that, as no consideration passed from Rothmans to the television station, subs (10) applies to exempt it from the operation of subs (5A). Counsel argued that an advertisement is "incidental" if it occupies only a small part of the total time involved in a particular telecast. This submission cannot be correct. On that argument any television commercial of, say, one or two minutes duration inserted into a break in a 120 minute feature film would be "incidental" to the film. Sub-section (5A) would be rendered otiose. The *Shorter Oxford English Dictionary* defines "incidental" as:
>
> > "(1) Occurring or liable to occur in fortuitous or subordinate conjunction with something else; casual … (2) Casually met with …."
>
> The *Macquarie Dictionary* definition is almost identical.
>
> It is not difficult to think of circumstances under which a licensee might televise matter of an advertising character as an incidental accompaniment of televising other matter; for example a televised news item shows a street scene with advertising billboards in the background. The transmission may be accidental, in the sense that the staff of the licensee do not notice the background billboard. But it may also be deliberate. The action — which represents a genuine news item happens to take place in front of the billboard so that if the news item is to be used the billboard must also be shown. Under such circumstances the exclusion of "incidental accompaniment" would apply: (1985) 5 FCR at 347.

In *TCN Channel Nine Pty Ltd v Australian Broadcasting Authority* [2002] FCA 896 at [28] Emmett J cited with approval the examples provided by the Full Court as to what could potentially constitute an "*accidental or incidental accompaniment*".

92 And in *Director of Public Prosecutions v United Telecasters Sydney Limited* (1990) 168 CLR 594 a dispute again arose out of the televising of a football match. The match was sponsored by the manufacturer of "Winfield" cigarettes. The broadcaster had been prosecuted for a contravention of s 100(5A) of the *Broadcasting and Television Act 1942* (Cth), which prohibited the broadcasting of an advertisement for the smoking of cigarettes or cigarette tobacco. Again with reference to s 100(10), Brennan, Dawson and Gaudron JJ concluded:

> However, it is clear to our minds that the jury was entitled to find that the televising of the performance which preceded the televising of the football match was not only advertising

> matter but was not an accidental or incidental accompaniment of the televising of other matter. It was plainly not accidental and the only matter to which it was alleged to be incidental was the football match. But the segment in question was discrete and occupied an appreciable length of time. The only parts of the segment which could be connected with the televising of the football match were the identification of the competition and the announcement that the final match was about to commence. The segment went far beyond that and was otherwise unconnected with what followed: (1990) 168 CLR 594 at 601 – 602.

Toohey and McHugh JJ concluded:

> So the question is, could the jury conclude beyond reasonable doubt that the televising of matter of an advertising character was not an "incidental accompaniment" of the "televising of other matter"?
>
> At the trial the telecast of the Grand Final was treated as the "other matter" and the telecast of the Winfield Spectacular was treated as the "matter of an advertising character". Upon that hypothesis, the conviction of the licensee might fairly be regarded as inevitable once the jury found that the Winfield Spectacular was an advertisement in the ordinary meaning of the word.
>
> In the context of s. 100 (10) of the Act, the word "accompaniment" seems to refer to matter of an advertising character which occurs "in company with" the broadcasting or televising of "other matter". Hence "matter of an advertising character" will not be an "accidental or incidental accompaniment" unless it is broadcast or televised contemporaneously with the "other matter". In that setting, the adjective "incidental" must mean "happening ... in fortuitous or subordinate conjunction" with the "other matter": *Macquarie Dictionary*, 2nd ed. (1987), p. 881: (1990) 168 CLR 594 at 612.

Their Honours concluded that it was open to the jury to conclude that the television of the manner in which "Winfield" had been presented constituted the television of "*matter of an advertising character*" that was "*incidental*" to the television of the football. But that case had never been put to the jury.

93 The concern of the Authority in the present proceeding to determine that which was "*subordinate*" or that which was "*dominant*" presumably flowed from its application of the observations of Toohey and McHugh JJ in the *United Telecasters*, supra, decision. Their Honours had there referred with approval to the dictionary definition of "*incidental*" as meaning "*happening … in fortuitous or subordinate conjunction*" with other matter: (1990) 168 CLR at 612. But that is where, according to Senior Counsel for Channel Seven, the mistake occurred. In accordance with that submission, the Authority has erroneously applied the words in a decision of the Court, to the exclusion of, or as an exhaustive definition of the terms employed in s 14. Section 14, according to this submission, included the manner in which Toohey and McHugh JJ had construed the phrase "*accidental or incidental*" in that section; but the observations of their Honours was not to be taken as an exhaustive statement as to that which otherwise properly fell within s 14.

94 If this submission be correct, whether the content of the news broadcast constituted an "*incidental accompaniment*" was not to be necessarily analysed according to whether that content was "*subordinate*" or "*dominant*"; it could constitute an "*incidental accompaniment*" if it served some purpose separate from the broadcasting of what was otherwise a "*tobacco advertisement*". Channel Seven's written submissions thus relevantly stated:

> …Even if the images and messages listed by ACMA had the character of giving publicity to smoking and tobacco products, they simultaneously had a different character of accompanying and illustrating the information that was the subject of the news report. This is consistent with the notion of incidental "accompaniment", meaning something which occurs "in company with" other matter: *DPP v United Telecasters Sydney Limited* (1990) 168 CLR 594 at 612.

Whether or not so much of the news broadcast as constituted was "*dominant*" to other matters, Channel Seven contended that the broadcasting of what was otherwise a "*tobacco advertisement*" was nevertheless incidental to those matters it identified in "*items*" (a) to (e). If the broadcast of the news segment could be regarded as directed to the purposes identified by "*items*" (a) to (e), the broadcast of the tobacco advertisement was an "*incidental accompaniment*" to the broadcasting of "*other matter*", namely "*the subject of the news report*". The proposition that s 14 included an analysis as to the "*purpose*" of the broadcast, and was not confined to a "*quantitative*" analysis, was said to be supported by the approach of Brennan, Dawson and Gaudron JJ in *United Telecasters*, supra: (1990) 168 CLR at 601 - 602.

95 That construction of s 14 is rejected. The meaning and content of the phrase "*incidental accompaniment*" was addressed and resolved by the decision in *United Telecasters*, supra. The difficulty in Channel Seven's construction of s 14 is, with respect, that it places too much emphasis upon that which may constitute an "*accompaniment*" and too little emphasis upon that which is "*incidental*". As explained in both *Rothmans of Pall Mall*, supra, and *United Telecasters*, supra, the term "*incidental*" – according to its normal English meaning – means something which occurs "*in fortuitous or subordinate conjunction with something else…*". That is the way in which the Authority construed and applied s 14. No error emerges from the analysis of the Authority undertaken in accordance with that decision. In casting its attack upon the reasoning of the Authority as a challenge to its construction of s 14, Channel Seven presumably thought to avoid any challenge to the factual findings as to what was in fact "*dominant*" or that which was "*subordinate*". Such factual challenges would not readily be susceptible to judicial review.

96 Even if the construction of s 14 advanced on behalf of Channel Seven be correct, it is nevertheless difficult to see how any different result could have been reached by the Authority on the facts. On the approach of Channel Seven, it is accepted for the purposes of the argument that the news broadcast constituted the broadcast of a "*tobacco advertisement*". But any such broadcast was said to be "*incidental*" to the broadcast of a news segment which was reporting on (for example) "*the stance taken by anti-smoking campaigners*" and reporting on "*the explanation of the Federal Government's cigarette taxes and their effect on cigarette sales*". Given the findings of fact made by the Authority, albeit in the submission of Channel Seven on an erroneous approach to the construction of s 14, it is difficult to see how any different conclusion would have been reached. The subject matter of the news segment was the importation by the Coles supermarket chain of cigarettes and their sale at lower prices than locally manufactured cigarettes.

Conclusions

97 It is concluded that the Authority erred in its construction of s 13 of the *Tobacco Advertising Prohibition Act* and that the primary Judge, with respect, erred in not so concluding. If there be no "*mental element*" required in respect to the character of that which is broadcast, "*but merely an intent to perform the physical movements involved in [broadcasting], many innocent person could not escape conviction*": cf. *He Kaw The*, supra: (1985) 157 CLR at 584. The offence would, for all practical purposes, become an offence of strict liability.

98 It is further concluded that no error is exposed in the reasoning of the Authority or the primary Judge in respect to the construction and application of s 14 of the *Tobacco Advertising Prohibition Act.*

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 21 March 2014