

FEDERAL COURT OF AUSTRALIA

TCN Channel Nine Pty Ltd v Australian Broadcasting Authority [2002] FCA 896

**TCN CHANNEL NINE PTY LTD & ORS v AUSTRALIAN BROADCASTING
AUTHORITY**

N 95 OF 2002

**EMMETT J
SYDNEY
18 JULY 2002**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N95 OF 2002

**BETWEEN: TCN CHANNEL NINE PTY LIMITED
ACN 001 549 560
FIRST APPLICANT**

**QUEENSLAND TELEVISION LIMITED
ACN 009 674 373
SECOND APPLICANT**

**CHANNEL 9 SOUTH AUSTRALIA PTY LTD
THIRD APPLICANT**

**AND: AUSTRALIAN BROADCASTING AUTHORITY
ABN 16 097 897 479
RESPONDENT**

JUDGE: EMMETT J

DATE OF ORDER: 18 JULY 2002

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. the application be dismissed; and
2. the applicants pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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DATE: 18 JULY 2002
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REASONS FOR JUDGMENT

1 The applicants are the licensees in respect of commercial television licences issued under the *Broadcasting Services Act* 1992 (Cth) (“the Broadcasting Act”). On 29 November 2001, the respondent, Australian Broadcasting Authority (“the Authority”) determined that each of the applicants had breached a licence condition of its commercial television licence. By application for an order of review filed on 8 February 2002, as amended on 17 July 2002, the applicants seek orders setting aside the Authority’s decision comprising that determination and remitting the matter to the Authority for further consideration according to law.

STATUTORY FRAMEWORK

2 Under s 42(1) of the Broadcasting Act, each commercial television broadcasting licence issued under that Act is subject to the conditions set out in Part 3 of Schedule 2 to the Act. Clause 7(1)(a) of Schedule 2 to the Act provides as follows:

“Each commercial television broadcasting licence is subject to the following conditions:

- (a) the licensee will not, in contravention of the Tobacco Advertising Prohibition Act 1992, broadcast a tobacco advertisement within the meaning of that Act.”*

Under s 139(1) of the Broadcasting Act, it is an offence for a commercial television broadcasting licensee to breach a condition of a licence set out in clause 7(1).

3 The *Tobacco Advertising Prohibition Act 1992* (Cth) (“the TAP Act”) prohibits certain forms of tobacco advertising. In particular, ss 13(1) and 14 provide as follows:

“13 A person must not, knowingly or recklessly, broadcast a tobacco advertisement in Australia... otherwise than as permitted by section 14...”

14 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).”*

4 The terms “broadcast” and “tobacco advertisement” are defined in ss 8 and 9(1) respectively of the TAP Act. If program material falls within the definition of “tobacco advertisement” in s 9(1), it is a tobacco advertisement unless the material is covered by one of the exceptions set out in ss 9(1A) to 9(7) of the TAP Act. Relevantly for present purposes, s 9(7) of the TAP Act provides as follows:

“9(7) If:

- (a) apart from this subsection, something (the advertisement) would, technically, be a tobacco advertisement; and*
- (b) it is clear from the advertisement that its sole or principal purpose is to discourage smoking or the use of tobacco products;*

then, despite subsection (1), the advertisement is not a tobacco advertisement for the purposes of this Act.”

THE DECISION UNDER REVIEW

5 In October 2000, the Authority received complaints in relation to an interview contained in the “60 Minutes” program that was broadcast on 22 October 2000 by each of the applicants. The complaints were to the effect that the interview contained a tobacco advertisement in so far as it showed the actor Russell Crowe displaying a Marlboro cigarette packet while lighting and smoking a cigarette. Subsequently, the Authority received a complaint concerning the broadcast of the same footage during the following week’s “60 Minutes” program broadcast on 29 October 2000.

6 Under s 149(1) of the Broadcasting Act, the Authority must investigate a complaint made to it about an alleged breach of a condition of a licence, unless the Authority is satisfied that the complaint is frivolous, or vexatious or was not made in good faith, or, relevantly, that complaint does not relate to a breach of a condition. Under s 178(1) of the Broadcasting Act, the Authority **may** prepare a report on an investigation. Under s 179(1) the Authority may cause a copy of a report on an investigation to be published. The Authority investigated the complaints in accordance with s 149 of the Broadcasting Act and, on 29 November 2001, the Authority made a determination and published its reasons for its determination. The determination was made by the Chairman of the Authority, as the delegate of the Authority.

THE PROGRESS OF THE INVESTIGATION

7 Following receipt of the complaints, the Authority sought comment from the applicants, which was provided in December 2000. Shortly afterwards, the Authority sought comment in relation to the 29 October 2000 broadcast and comment in relation to that broadcast was also provided by the applicants in December 2000.

8 In July 2001, staff of the Authority prepared a preliminary investigation summary, which was discussed at a meeting of the Authority’s Policy and Content Regulation Committee on 2 August 2001. The Committee adopted the conclusions of the preliminary investigation summary, including a conclusion that neither of the broadcasts was permitted by s 14 of the TAP Act. Further comment was sought from the applicants in relation to the preliminary investigation report and, during September 2001, detailed submissions by solicitors advising the applicants were furnished to the Authority.

9 On 25 October 2001, the Policy and Content Regulation Committee of the Authority met again. It had before it the submissions of the applicants together with certain other materials including an analysis of the solicitors' submissions prepared by Mr Gavin Bowman of the legal section of the Authority. At that meeting, the Committee reversed its position in relation to the application of s 14 of the TAP Act to the material broadcast on 22 October 2000. It maintained its position in relation to the material broadcast on 29 October 2000.

10 On 8 November 2001, the members of the Authority met and considered the draft investigation and findings in relation to the broadcasts of 22 and 29 October 2000 and approved, by majority, the decisions taken at the meeting of the Policy and Content Regulation Committee held on 25 October 2001. It was agreed that a final version of the report be circulated to members of the Authority for comment. An inference can be drawn that a further version of the proposed report was circulated to members. The determination was then made by the chairman of the Authority, as its delegate, on 29 November 2001.

11 In the agenda paper for the meeting of 2 August 2001, the following appears:

“SENSITIVITIES

A breach finding will be sensitive for the licensees and the Nine Network, as “60 Minutes” is a flag ship program. Nine may be minded to mount a legal challenge to the ABA’s findings, particularly the ABA’s application of the ‘incidental accompaniment’ test. The ABA’s interpretation and application of the TAP Act as referred to in the [Broadcasting Services Act] is yet to be tested in a court of law. Any legal challenge may in fact be useful in having the courts define the terms contained in the TAP Act.”

In the agenda paper for the meeting of 25 October 2001, the following appears:

“SENSITIVITIES

It is apparent from the licensee’s (sic) response, and the engagement of Gilbert & Tobin, that this is a very sensitive matter. As indicated previously to the Members of the Policy and Content Committee, a breach decision by the ABA may result in agitation by the Nine Network. On the other hand, a non-breach decision may attract adverse public scrutiny.”

In the agenda paper for the meeting of 8 November 2001, the following appears:

“SENSITIVITIES

There is a significant risk that the broadcasters will seek a judicial review of this decision, especially any interpretation of ‘tobacco advertisement’ or ‘incidental accompaniment’ that is not favourable to the broadcasters.

Accordingly, the form in which the arguments are presented is of some importance. On the other hand, a non-breach decision may attract adverse public comment.”

THE AUTHORITY’S REASONING

12 The Authority’s reasons identified two separate matters that were the subject of investigation. The first was the interview segment of the program broadcast on 22 October 2000. The second was the “*Mailbag*” segment of the program broadcast on 29 October 2000.

13 The interview segment broadcast on 22 October 2000, titled “*The Likely Lad*”, consisted of an interview of Mr Russell Crowe by Mr Jeff McMullen. The interview reflected on Russell Crowe’s acting career, his music and personal life. It featured various excerpts from films in which he had appeared, including “*Gladiator*” and “*The Insider*”, as well as footage of his band, “*30 Odd Foot of Grunts*”, performing live on stage. During the interview, the camera cut between Mr McMullen and Mr Crowe, who was seated on an outside veranda. The relevant part of the exchange, as described in the Authority’s reasons, is set out in Schedule 1 to these reasons.

14 In the “*Mailbag*” segment of the program broadcast on 29 October 2000, comments from two viewers regarding the interview with Russell Crowe were broadcast. The Authority summarised those comments as being an expression of disappointment that Russell Crowe was a smoker. One viewer claimed that the on camera smoking was in defiance of the ban on tobacco advertising on television. During the relevant segment, the portion of the interview from the previous program that showed Russell Crowe smoking a cigarette and holding a Marlboro cigarette packet was also shown.

15 The Authority identified three issues that needed to be examined for the purposes of its investigation. The issues were as follows:

- (1) Whether the applicants had broadcast a tobacco advertisement within the meaning of s 9 of the TAP Act.
- (2) Whether the broadcast of the relevant material was permitted by s 14 of the TAP Act.

- (3) If the broadcast was not permitted by s 14 of the TAP Act, whether the advertisement was broadcast knowingly or recklessly.

16 The Authority concluded, in relation to Issue (1), that the relevant part of the interview broadcast on 22 October 2000 was a tobacco advertisement within the meaning of s 9(1) of the TAP Act. The applicants do not dispute the correctness of that conclusion. The Authority also concluded that the excerpt of the interview broadcast during the “*Mailbag*” segment on 29 October 2000 was a tobacco advertisement within the meaning of s 9(1) of the TAP Act and that it did not fall within s 9(7) of the TAP Act, as the applicants had contended.

17 In relation to Issue (2), the Authority considered that the tobacco advertisement broadcast on 22 October 2000 was an incidental accompaniment to the broadcast of other matter, for which no direct or indirect benefit was received by the applicants. It concluded, therefore, that the broadcast of the tobacco advertisement was permitted by s 14 of the TAP Act. However, the Authority considered that the broadcast of the tobacco advertisement on 29 October 2000 was not an accidental or an incidental accompaniment to the broadcast of other matter and was, therefore, not permitted by s 14 of the TAP Act.

18 In the light of the conclusion reached concerning the application of s 14 of the TAP Act to the tobacco advertisement broadcast on 22 October 2000, it was not necessary for the Authority to consider Issue (3) in relation to that material. However, the Authority found that, while the applicants did not knowingly broadcast the tobacco advertisement on 29 October 2000, they recklessly broadcast the tobacco advertisement on that day. There is no quarrel by the applicants in relation to that finding.

19 The Authority determined that the applicants:

- did not breach their licence conditions in broadcasting the 60 Minutes program segment that featured the interview with Russel Crowe on 22 October 2000;
- breached their licence conditions in broadcasting a tobacco advertisement in the 60 Minutes “*Mailbag*” segment on 29 October 2000.

GROUNDS OF REVIEW

20 The applicants seek review of the Authority’s decision under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (“the Review Act”) and/or s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) (“the Judiciary Act”). The Authority does not accept that its decision is capable of review under the Judiciary Act. However, the Authority accepts that the decision is capable of review under s 5 of the Review Act. Accordingly, it is unnecessary to consider the possible application of the Judiciary Act.

21 Section 5(1) of the Review Act provides that a person who is aggrieved by a decision to which the Review Act applies may apply to the Federal Court for an order of review in respect of the decision on any one or more of, *inter alia*, the following grounds:

- “(e) *that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.*
- (f) *that the decision involved an error of law, whether or not the error appears on the record of the decision*”

Under s 5(2) of the Review Act, an improper exercise of a power is to be construed as including a reference to:

- “(a) *taking an irrelevant consideration into account in the exercise of a power;*
.....
- (g) *an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.*”

It is common ground that the applicants are persons aggrieved and that the determination of the Authority is a decision to which the Review Act applies.

22 The applicants rely on three grounds as follows:

- error of law: s 5(1)(f) of the Review Act;
- improper exercise of power – irrelevant consideration: ss 5(1)(e) and 5(2)(a) of the Review Act;
- improper exercise of power – unreasonableness: ss 5(1)(e) and 5(2)(g) of the Review Act.

23 I shall deal with each of the grounds separately.

ERROR OF LAW

24 The applicants rely on four separate errors of law. Three involve the construction of s 14 of the TAP Act. The fourth involves the construction of s 9(7) of the TAP Act. It is convenient to deal with each of those sections separately.

Section 14

25 The questions relating to the construction of s 14 are concerned with the phrase “*an incidental accompaniment*”. A prerequisite of the application of s 14 is that the relevant tobacco advertisement be broadcast as “*an accidental or an incidental accompaniment* to the broadcasting of other matter”. The applicants do not quarrel with the Tribunal’s conclusion that the relevant material was not an accidental accompaniment to the broadcast of other matter. However, the applicants advanced a contention to the Authority that the excerpt of the interview with Russell Crowe that was broadcast during the “*Mailbag*” segment on 29 October 2000 was an incidental accompaniment to the broadcasting of other matter, namely, the sentiments expressed in the two letters received from viewers.

26 In its reasons, the Authority outlined its understanding of the meaning of the phrase “*an incidental accompaniment*”. In doing so, it referred to observations made by the High Court of Australia in *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 612 as follows:

“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’: The Macquarie dictionary, 2nd ed. (1987 p 881).”

27 The Authority expressed the view that a tobacco advertisement would only be regarded as an incidental accompaniment if it is subordinate to the main matter being transmitted and that, if a tobacco advertisement dominates or forms a substantial feature of a television program, scene or segment, it would not be an incidental accompaniment of the program, scene or segment.

28 The Authority also referred to observations made by the Full Court of the Federal Court in *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330 where the Court said (at page 347):

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.”

29 Thus, the Authority approached the question on the basis that for the tobacco advertisement to be an incidental accompaniment to the sentiments expressed in the viewers’ letters, the broadcast of the tobacco advertisement must happen in fortuitous or subordinate conjunction with the broadcast of the sentiments expressed in the viewers’ letters. The applicants have no quarrel with that approach to s 14.

30 The Authority’s reasoning in relation to the application of s 14 was expressed as follows:

“The visual images that constitute the tobacco advertisement do not follow in subordinate conjunction to the broadcast of the ‘other matter’. As can be seen from the transcript of the segment [see Schedule 2], the content of the viewer letters was transmitted after the interview excerpt in which the tobacco advertisement appeared.

This was not a situation where, in order to broadcast the viewer responses in the context of the Mailbag Segment it was also necessary or unavoidable to broadcast the tobacco advertisement. The repeat broadcast of the visual material constituting the tobacco advertisement was a discrete segment of itself and did not occur in company with the viewer letters. In the ABA’s view, it is difficult to see how the subject of the broadcast could be regarded as ‘incidental’ to that broadcast. In fact, it may be contended that the visual images constituting the tobacco advertisement were the subject matter of the broadcast of that matter.

The ABA is therefore of the view that the tobacco advertisement broadcast in the Mailbag Segment on 29 October 2000 was not an ‘incidental accompaniment’ to other matter and therefore not permitted by s.14 of the TAP Act.”

31 The applicants contend that the Authority misconstrued s 14 in that reasoning in that:

- it construed s 14 as requiring that the broadcast of a tobacco advertisement be absolutely contemporaneous with, or immediately after, the broadcast of the other matter;
- it construed s 14 as requiring that the broadcast of a tobacco advertisement be necessary or unavoidable in conjunction with the other matter; and
- it proceeded on the basis that the broadcast of a tobacco advertisement immediately prior to the broadcast of other matter could not be in subordinate conjunction to that other matter.

32 The applicants' criticism of the Authority's reasoning in relation to s 14, in essence, is that the Authority assumed that s 14:

- required that the tobacco advertisement must be broadcast at the precise instant that the other matter is broadcast or, at least, must follow and not precede the other matter;
- required that the broadcast of the tobacco advertisement with the other matter must be necessary or unavoidable.

33 I do not understand the Authority to dispute that, if such constructions of s 14 were adopted, they would be erroneous. Rather, the Authority contends that it did not adopt either of those approaches in its application of s 14 but correctly identified the language and purpose of s 14 of the TAP Act as being similar to the legislation under consideration in the *Rothmans* and the *United Telecasters Cases*, such that the observations made in those cases provided guidance as to the proper interpretation of s 14 of the TAP Act.

34 No complaint is made by the applicants in relation to the Authority's conclusion as to the approach to be taken to the consideration of the application of s 14, namely, that a tobacco advertisement would only be an incidental accompaniment if it is subordinate to the main matter and if it dominates or forms a substantial feature of a television program, scene or segment, it will not be an incidental accompaniment of that program, scene or segment. The question is really whether, in the passage cited above (paragraph [30]), the Authority was doing no more than apply s 14 in accordance with the approach that it said it would adopt.

35 There is no error of law in making a wrong finding of fact – *Waterford v Commonwealth* (1987) 163 CLR 54 at 77. Further, the reasons of an administrative decision maker should not be construed minutely and finely with an eye keenly attuned to legal error – *Minister of Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. The Authority observed in its reasons that the application of s 14 was a matter of judgment that must be made having regard to the facts of a particular case. That must be correct. The Authority contends that its conclusion concerning the application of s 14 was a finding of fact in the particular circumstances of this case.

36 The observations made by the High Court of Australia in *Wu Shan Liang's Case* may not be of great significance in relation to reasons that have been formulated carefully and deliberately with the possibility of judicial review clearly in mind. The decision under review was made on behalf of the Authority by its Chairman, with the assistance of considered legal advice, in the light of detailed legal submissions made on behalf of the applicants by their solicitors. The Authority's determination was not that of a lay administrator made without assistance. It is fair to conclude, therefore, that the Authority's reasoning of 29 November 2001 represents the result of consideration and deliberation by the members of the Authority and its staff, including legal advisers, in the expectation that the reasons would be carefully analysed by the applicants and their advisers and by members of the public generally. Thus, the reasons should be understood as a deliberate and considered statement by the Authority of its reasoning process.

37 Nevertheless, the Authority properly advised itself of the construction of s 14 of the TAP Act, as requiring a consideration of whether the broadcast of the tobacco advertisement happened in fortuitous or subordinate conjunction with the broadcast of the sentiments expressed in the viewers' letters. On the other hand, in its conclusion, the Authority referred to the fact that the tobacco advertisement did not "**follow** in subordinate conjunction to" the broadcast of the other matter. It referred to the fact that the content of the viewers letters "**was transmitted after** the interview excerpt in which the tobacco advertisement appeared". The Authority also observed that this was not a case where, in order to broadcast the sentiments expressed in the viewers' letters "**it was also necessary or unavoidable to broadcast the tobacco advertisement**".

38 However, I do not read those comments as detracting from the construction of s 14 that had previously been adopted by the Authority. The comments represent the Authority's reasons for making the judgment that it was called upon to make, having regard to the facts of the particular case before it. It may be that they are not particularly compelling reasons for making the judgment in question. It may be that, if I were standing in the shoes of the Authority, I would reach a different conclusion. It may be that the Authority's conclusion was wrong. However, those matters alone would nevertheless not be a basis for concluding that the Authority had made an error of law. I am not persuaded that the Authority's determination involved an error of law in relation to s 14.

Section 9(7)

39 The applicants had advanced the contention to the Authority that s 9(7) applied because it was clear from the tobacco advertisement, when viewed in its context, that its sole or principal purpose was to discourage smoking. Part of the context of the tobacco advertisement was its broadcast as an introduction to viewers' comments that were highly critical of smoking and of Russell Crowe's behaviour in showing himself smoking.

40 In dealing with the application of s 9(7) of the TAP Act, the Authority made the following observations:

"While the comments made by viewers to the Mailbag Segment represent the viewpoints of those viewers, the Mailbag Segment has the tone of a dispassionate review of correspondence rather than expressing opinion on the hazards or otherwise of cigarette use.

Further, the segment does not appear to have the sole or principal purpose of discouraging smoking or the use of tobacco products. Rather, its dominant purpose appears to be that of airing responses of viewers to material broadcast.

The ABA is therefore of the view that subsection 9(7) of the TAP Act does not apply to the particular circumstances of this matter, as the Mailbag Segment does not have, as its sole or principal purpose, the discouragement of smoking or the use of tobacco products."

41 The applicants contend that, in considering the application of s 9(7) of the TAP Act, the Authority erred because it considered the purpose of the broadcast of the segment of which the tobacco advertisement formed part, rather than consider the purpose of the broadcast of the tobacco advertisement in its context. The applicants contend that, instead of

focussing on the question whether the relevant anti smoking purpose was clear from the tobacco advertisement, in its context as an introduction to viewers' comments, which were highly critical of smoking, the Authority focussed on the purpose of the "Mailbag" segment as a whole. There is no real issue between the parties as to the correct construction of s 9(7) of the TAP Act. The question rather involves the correct construction of the Authority's reasons.

42 There is an element of ambiguity in the reasoning of the Authority relating to s 9(7). The essence of the applicants' complaint is that the Tribunal considered the purpose of the "Mailbag" segment of the 60 Minutes program in the abstract, rather than the purpose of the "Mailbag" segment in the particular program in question. Thus, the Authority observed that the dominant purpose of the "Mailbag" Segment *"appears to be that of airing responses of viewers to material broadcast"*. It considered that the "Mailbag" segment had *"the tone of a dispassionate review of correspondence"*.

43 However, at the beginning of its reasons, the Authority identified the second matter that is the subject of its investigation report as being *"Mailbag Segment, 60 Minutes, 29 October 2000"*. A transcript of part of the broadcast of 29 October 2000, as contained in the Authority's reasons, is set out as Schedule 2 to these reasons. The Authority's reasons describe the "Mailbag" segment in the following terms:

"The Mailbag Segment broadcast comments from two viewers regarding the Interview with Mr Crowe. In summary, the viewers expressed disappointment that Mr Crowe was a smoker. One viewer claimed that the on camera smoking by Mr Crowe was in defiance of the ban on tobacco advertising on television. During the Segment, the portion of the Interview showing Mr Crowe smoking a cigarette and holding the Marlboro cigarette packet was shown."

44 I consider that, on a fair reading of the Authority's reasons as a whole, the observations made by the Authority refer to the "Mailbag" segment in the narrower sense just described. I consider that the Authority did no more than make a finding of fact on the question of whether or not the sole or principal purpose of the segment was to discourage smoking. I do not consider that the Authority misdirected itself as to the correct construction of s 9(7) of the TAP Act.

IMPROPER EXERCISE OF POWER – IRRELEVANT CONSIDERATION

45 The applicants contend that, in making its determination, the Authority took into account an irrelevant consideration, namely the consideration that “*a non-breach decision may attract adverse public scrutiny*” or that “*a non-breach decision may attract adverse public comment*” as set out in the agenda papers for the meetings held on 25 October 2001 and 8 October 2001 respectively. The chairman of the Authority, who made the decision as its delegate, was present at both of those meetings.

46 I was invited to draw an inference that a concern about adverse publicity was taken into account by the Authority simply because Authority staff drew the attention of the members of the Authority to that consideration on two occasions in the course of deliberations. However, there is no reference in the Authority’s reasons to the possibility of adverse public scrutiny or adverse public comment. The reasons run to some twenty-six pages of analysis of the law and consideration of the tobacco advertisement and other material.

47 I do not consider that such an inference is warranted. The only inference that I would draw from the inclusion of the references in the agenda papers is that the matter should be dealt with carefully and with due deliberation. I would not draw the inference that the decision maker had regard to the possibility of adverse public scrutiny or comment as a reason for making the determination of 29 November 2001.

IMPROPER EXERCISE OF POWER – UNREASONABLENESS

48 The applicants contend that it was irrational for the Authority to find that the relevant footage was an incidental accompaniment to other matter broadcast on 22 October 2000 yet reach the opposite conclusion in respect of the broadcast of 29 October 2000. However, the context in which the tobacco advertisement appeared on 22 October 2000 was quite different from the context in which it appeared on 29 October 2000. I do not consider that this basis is one that would justify a conclusion that no reasonable person could have reached different conclusions in respect of the two broadcasts.

49 Additionally, the applicants contend that no reasonable decision maker could have concluded that the tobacco advertisement was not broadcast as an incidental accompaniment

to the broadcasting of the sentiments expressed in the viewers' letters. This contention is really a reiteration of the arguments advanced in relation to s 14. Reaching an erroneous conclusion is not reaching a conclusion that is so unreasonable that no reasonable person could have made the decision. It may be, as I have said, that if I were in the shoes of the Authority I would have reached a different conclusion. That, however, is irrelevant. I do not consider that this ground is made out.

CONCLUSION

50 It follows from what I have said that the application should be dismissed with costs.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 18 July 2002

Counsel for the Applicant: Mr J. Griffiths SC & Mr K. Andronos

Solicitor for the Applicant: Gilbert + Tobin

Counsel for the Respondent: Mr S. Gagelar SC

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 17 July 2002

Date of Judgment: 18 July 2002

SCHEDULE 1

TRANSCRIPT EXCERPT

‘60 Minutes’ Interview with Mr Russell Crowe on 22 October 2000

Title: ‘The Likely Lad’

- Introduction by reporter Jeff McMullen
- Russell Crowe’s band ‘30 Odd Foot of Grunts’
- Discussion of Russell Crowe’s acting career: performance in films ‘Romper Stomper’, ‘LA Confidential’, ‘The Insider’, ‘Gladiator’
- Discussion of Russell Crowe’s music
- Discussion of media speculation about Russell Crowe’s personal relationships

Visual Content	Voice (Speaker)	Narrative Content
Scene from movie ‘Gladiator’	Jeff McMullen (voice over)	If this life of yours were really a movie – if we had it all – at this point the critics
Cut to head and shoulder shot of Russell Crowe (facing camera).	Jeff McMullen (v/o)	are saying, “wonderful, bravo”,
Russell Crowe puts a cigarette in his mouth with his right hand.	Jeff McMullen (v/o)	but what are you going to do with the rest of the movie?
RC raises his left hand in cupped position, which is also holding a cigarette packet bearing the brand name, ‘Marlboro’ is visible to the camera. RC lights cigarette with his right hand, puts the cigarette packet down (off screen) and inhales and exhales the cigarette. He removes the cigarette from his mouth with his right hand.	No voice Russell Crowe	Sound of flint of cigarette lighter igniting flame. Sound of RC inhaling cigarette smoke. Probably a dance sequence, Jeff I think. Um its all about waves though, mate,
Cut to head and shoulder shot of Jeff McMullen, nodding	Russell Crowe	And they come and they go, right?
Head and shoulder shot of RC.	Russell Crowe	So once they’ve set you up as the bad guy, then they can write all these stories about you as a good guy. And once everybody believes you’re a good guy, then they can bring out the bad guy stuff again. And it’s all just bollocks, you know. Life is far more complicated than that.
Camera remains on RC. RC draws backs and smokes cigarette.	Jeff McMullen (v/o)	Having built you up, though, into this Hollywood hero, you’re

Visual Content	Voice (Speaker)	Narrative Content
		expecting, that that will come, that someone will want to cut you down?
Camera remains on RC (head and shoulder shot)	Russell Crowe	Oh, of course, you know and its probably the very next film.
Head and shoulder shot of Jeff McMullen, nodding	Russell Crowe (v/o)	As soon as I do one that
Head and shoulder shot of Russell Crowe	Russell Crowe	doesn't quite work, you know, the knives will be out. I mean, they're already out, they're just being sharpened you know. They're glinting in the sun. (Laughs).

SCHEDULE 2

TRANSCRIPT EXCERPT

‘60 Minutes’ Interview with Mr Russell Crowe on 29 October 2000

Visual Content	Voice (Speaker)	Narrative Content
Mid shot of Richard Carlton. Background features a superimposed graphic (stopwatch) and text containing the text: Mail PO BOX 600 WILLOUGHBY N.S.W. 2068 FAX: 1300 659 929 www.ninemsn.com.au	Richard Carlton	He’s been called the next Brando. He’s talented, arrogant and seldom out of the news. But it’s not Russell Crowe’s movies or his romance with Meg Ryan that has prompted so many letters this week. It’s his weakness: his weakness for the demon weed.
Film excerpt ‘The Insider’.	Russell Crowe	“You manipulated me into this”... “You greased the rails”. (<i>Soundtrack from ‘The Insider’</i>)
Film excerpt ‘The Insider Continues.	Richard Carlton (voice over)	Jeff McMullen met the actor who won an Oscar nomination playing an anti-tobacco activist in “The Insider”.
Film excerpt ‘The Gladiator’.	Richard Carlton (v/o)	And achieved world fame in ‘Gladiator’.
[Cut to excerpt from the previous week’s interview with RC]		
RC lights a cigarette with a cigarette lighter held in his right hand. His left hand is cupped around the lighter and holds a cigarette packet bearing the brand name, Marlboro. The word ‘Marlboro’ is clearly visible to the camera. He puts the cigarette packet down (off screen) and	No voice	Sound of flint of cigarette lighter igniting flame.
inhales and exhales the cigarette. He removes the cigarette from his mouth with his right hand.	Richard Carlton (v/o)So what’s next?

Camera remains on RC	Russell Crowe	Probably a dance sequence, Jeff I think. Um its all about waves though, mate,
Head and shoulder shot of Jeff McMullen, nodding	Russell Crowe (v/o)	And they come and they go. As soon as I do one that
Head and shoulder shot of RC	Russell Crowe	doesn't quite work you know, the knives will be out, you know. I mean, they're already out. They're just being sharpened you know. They're glinting in the sun.
Excerpt from viewer letter containing the text: "Watching Russell Crowe, I was thinking what a great bloke. A down to earth, athletic and sensitive Aussie handling fame so well.. until he lit up a fag and sucked down a few carcinogens. Shame on you Russell. You are not the next Brando, you're the next Yul Brynner." R. Matheson Yarragon VIC 3823	Richard Carlton (v/o reading text from viewer letter)	Watching Russell Crowe, I was thinking what a great bloke. A down to earth, athletic and sensitive Aussie handling fame so well...until he lit up a fag and sucked down a few carcinogens. Shame on you Russell. You are no the next Brando, you're the next Yul Brynner.
Excerpt from viewer – letter containing the text: "I thought cigarette advertising was banned on TV but Russell Crowe made certain that Marlboro packet got pride ofplace when he lit up. Nice move Russell, you sure know yourcamera angles. But did you also know that those cigarettes can kill you?" K.Lynch Southport QLD 4215	Richard Carlton (v/o, reading text from viewer letter)	And this. I thought cigarette advertising was banned on TV but Russell Crowe made certain that Marlboro packet got pride of place when he lit up. Nice move Russell, you sure know your camera angles. But did you also know that those cigarettes can kill you?