

“whether there should be an age limit imposed on a president, while considered in a humorous way because of Yeltsin’s known drinking and memory problems, was newsworthy.” This was all that was required for fair dealing.

- The *Simply the Best* segment showed the audience casting a vote on which was the “best” variety of things, however the voting was given no context. Justice Finkelstein stated that the Panel’s discussions about what the vote was for and the various possibilities raised was justified criticism about the show’s format. On the other hand, Justices Sunberg and Hely agreed with the primary judge that the fair dealing “defence was not made out because of the paucity of the evidence which left no viable basis for comprehending, much less resolving, what was the true nature of the alleged criticism”.

THE CONSEQUENCES...

The Panel decision generates little comfort or certainty in relation to the dealings and treatment of broadcasters. On one hand, the threshold for copyright infringement has been significantly reduced. Broadcasters, editors, producers and others within the television and motion picture industries risk copyright

infringement in the making of videos of third parties’ television footage and rebroadcasting of any of the actual images and sounds. There is no requirement that the visual images so transmitted must constitute a substantial part of the original broadcast.¹³ This obviates any previous need to consider whether any harm had been inflicted on the television broadcaster’s commercial interest in the program.

Yet in the face of heightened risks of copyright infringement, the Federal Court did not perceptibly broaden third parties’ ability to establish a defence to such infringement. Rather the Federal Court highlighted in both word and deed the element of “subjectivity” in recognising that different people may reach different decisions on whether or not the defence of fair dealing applies. The Panel decision itself contains conflicting conclusions on whether or not a particular segment could be properly characterised as the reporting of news or criticism or review. For example, it appears that where humour is involved it is more difficult to establish the fair dealing defence. Ultimately, whether the defence can be established will depend on subjective judicial determinations based on questions of degree and impression. The decision is currently the subject of an application for special leave to the

High Court of Australia. Many will await the outcome of the application with great interest.

Jackie O’Brien is a Partner, Sabiene Heindl is a Senior Associate and Dana Wintermantel is a Lawyer at Allens Arthur Robinson.

1 [2002] FCAFC 146 (22 May 2002).

2 The decision of the trial judge was discussed in “Fair or Foul Dealing: The Panel and Copyright”, Golder, T and Ward, T, *Communications Law Bulletin*, Volume 20, Number 3, 2001 at page 6.

3 Section 103A of the Act.

4 Section 103B of the Act.

5 Section 10 of the Act.

6 *Report of the Copyright Law Review Committee*, 1959 (the *Spicer Report*).

7 Justice Hely at paragraph 68 [2002] FCAFC 146 (22 May 2002).

8 Justice Hely at paragraph 80 [2002] FCAFC 146 (22 May 2002).

9 Justice Hely at paragraph 82 [2002] FCAFC 146 (22 May 2002).

10 Justice Hely at paragraph 88 [2002] FCAFC 146 (22 May 2002).

11 Justice Sunberg at paragraph 2 [2002] FCAFC 146 (22 May 2002).

12 Justice Hely at paragraph 98 [2002] FCAFC 146 (22 May 2002).

13 Despite the fact that the court did suggest that in certain circumstances copyright infringement may not occur if the re-broadcast does not substantially resemble the original footage (eg, if the segment has been cropped or the sound removed) or it is very “insubstantial in duration”.

Sharing the Burden of Providing Local Content in Regional Television

John Corker comments on a recent ABA proposal for increased programming of local news and information on commercial television in regional Australia.

The Australian Broadcasting Authority (the ABA) should be congratulated for finally taking on the difficult issue of localism in regional television programming. Ensuring appropriate coverage of matters of local significance has been an object of the *Broadcasting Services Act* since 1992 but this is the first time the ABA has suggested a solution.

The proposal has the potential to be a win/win for the industry and the public but not in its current form.

In its report released on 27 August 2002 the ABA suggests that a licence condition be imposed on all regional commercial television licensees in regional Queensland, New South Wales and Victoria that requires them to broadcast a minimum amount of programs about matters of local significance by meeting a points target each week equivalent to 45 minutes of local news or 90 minutes of local information per week. Comments were sought by 31 October 2002.

What the proposal lacks is the flexibility for licensees to share this responsibility between them in the most efficient commercial manner.

Commercial television news services in regional and remote Australia have been closing down for some time. The reason is that local news programs aren’t rating as well as other programs. Significantly this has occurred in three of Australia’s largest regional markets, Wollongong, Newcastle and Canberra. The ABA has formed the view that the market is unable

to support sufficient local television news and information in regional markets and so proposes regulation to address this market failure.

"TRADING CREDITS"

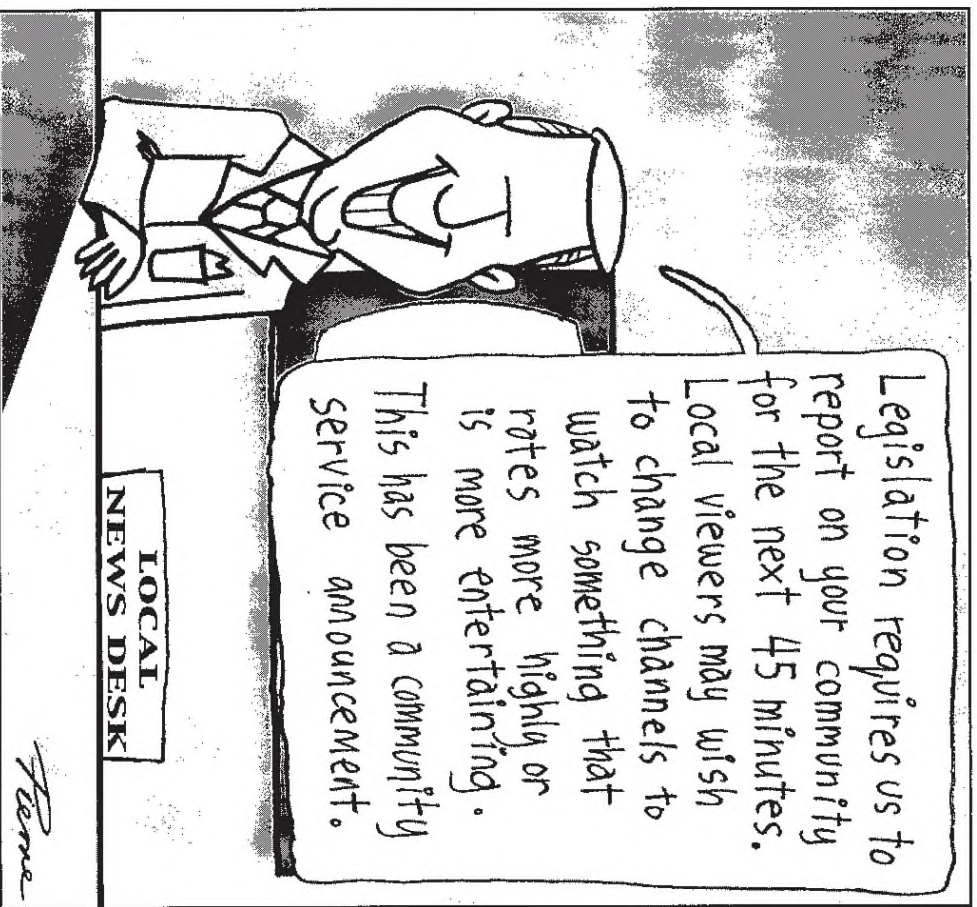
In evidence to the House of Representatives Regional Radio Inquiry last year the Deputy Chair of the ABA, Ms Lyn Maddock, suggested that the Committee consider a "trading credits" system as a way of sharing the responsibility between commercial radio broadcasters to provide for localism because, as she said, "if you had a system whereby you mandated that every station is responsible for there, being on air in the area, X minutes or X hours per day of community news, but could contract with another station to deliver on their behalf, then the station that is most efficient at producing and organising it will do so".

It is surprising therefore, that on this occasion, the option of a "trading credits" system for local news has not been suggested by the ABA. The ABA's proposal places the burden of providing local information and news directly on each broadcaster but with no capacity for any trading of responsibility.

If "trading credits" were allowed, and a single licensee provided all the local content, it is hard to see how the public would be any worse off. In fact they may be better off as the content is likely to be of a higher quality, being produced by a dedicated team that has a significant incentive to make it work commercially and the programming of local content in the same time slots will be avoided. It is not in the public interest to have head-to-head programming of local news which is quite likely to occur in a market where all three licensees are required to provide it.

DIVERSITY

One of the arguments against the "trading credits" system might be that it leads to a monopoly in the provision of local news and views that may lead to a narrowing of the diversity of local views and attitudes published in the media in the local area.



What this fails to take account of is that diversity in local news and information in regional areas is provided primarily by the diversity that exists between the news and information provided by television, the local newspaper, and radio, commercial, community and, most importantly, ABC radio, rather than the limited diversity that might be expected to occur between the three commercial television services.

COMPETITION POLICY

What about any competition policy concerns? Is it to be suggested that there is a market in local news and information for television? History indicates otherwise. In most regional centres the television local news service has been reduced to a single service provided by only one broadcaster. Any market that existed has not been able to support competition between the three television services. There is probably a market as between radio, television and newspaper for local news and information. There

is also a market for local advertisers as between television, radio and newspaper but this proposal is not likely to substantially lessen competition in either of these markets.

CONCLUSION

The *Broadcasting Services Act 1992* intends that the ABA regulate in a manner that enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on industry. If the same overall outcome, of a fixed amount of local content being broadcast, can be achieved at a lower cost to industry by using a "trading credits" system then the ABA's proposed new licence condition should allow for this.

John Corker is a Senior Associate at Clayton Utz. He was previously the General Counsel for the Australian Broadcasting Authority.