



## Interstitial material on Foxtel's Arena channel

### Complaint

The ABA received a written complaint from the Nine network regarding an interstitial broadcast by the pay TV service Foxtel on the Arena on 19 January 1996. The Nine network alleged that the interstitial, one of the New Zealand scientific/educational 'Microscope' series, constituted an advertisement and was therefore in breach of s.101 of the *Broadcasting Services Act 1992*. Interstitial material may be defined as short program or material used to fill in time between the main programs.

### Relevant legislation

Section 101 of the Act states that a subscription television broadcasting licence is subject to the condition that the licensee will not broadcast an advertisement before 1 July 1997.

It also states that a person is not taken to broadcast an advertisement if the matter of an advertising character is broadcast as an accidental or incidental accompaniment to the broadcasting of other matter

and if the person does not receive payment or other valuable consideration for broadcasting the advertising matter.

As the term 'advertising' has not been defined in the Act, the ABA gave consideration to the common law term in order to determine whether the segment constituted an advertisement.

The relevant episode of 'Microscope' lasted for approximately three minutes and was concerned with a water-heating system, the Carrier Hotshot. The episode featured a simple demonstration of the effectiveness of the system as well as verbal and diagrammatic explanations of the system's principles. Throughout the episode both the company name, Carrier, and the product name, Carrier Hotshot, were frequently visible. The price of the water-heating system was also mentioned.

### Decision

After viewing the episode and taking comments from Foxtel into consideration, the ABA came to the conclusion that the licensee, Foxtel Cable Television Pty

Limited, had breached s.101 of the Act by broadcasting this particular episode of *Microscope*. The ABA took into account the following factors in arriving at its decision:

- the High Court of Australia has ruled that a broadcast can still be deemed to be an advertisement even though its main object may be to inform or entertain;
- although the Carrier Hotshot system is not commercially available in Australia the Federal Court has ruled that it is not necessary that there be a business or commercial element to advertising in the sense of it necessarily being associated with the derivation of profit;
- the frequency with which the Carrier company name was displayed during the episode could be considered to constitute an advertisement for that company and its products;
- as the episode was solely concerned with a particular item whose brand name was both prominently shown and mentioned throughout the episode the advertising matter could not be said to have been either accidental or incidental.

### The codes

Commercial television, commercial and community radio, the ABC and SBS all operate under codes of practice, while other broadcasting sectors are well advanced in the development of their respective codes. The ABA supervises the operation of the codes and performs an independent adjudicator role where complaints are not resolved between the complainant and the broadcaster concerned.

Primary responsibility for compliance with the codes and for resolving complaints rests with the broadcasters. If a station fails to answer a complaint within 60 days, or if the response is unsatisfactory, then the complaint can be referred to the ABA for investigation.

### Investigations

The ABA is required to investigate unresolved complaints and to inform complainants of the results of such investigations.

The ABA can also investigate complaints about the national broadcasters, the ABC and SBS.

The ABA also investigates complaints about matters relating to the standards for children's television or Australian content on television, the standards for subscription broadcasting, subscription narrowcasting and open narrowcasting, and complaints in relation to any type of broadcasting service where the complaint relates to a possible breach of the Act or conditions of licence.

The ABA has a range of sanctions available to it in the event of a breach of a code of practice, program standard or licence condition. Any action taken depends on the seriousness of the breach.

### Action taken

As a result of the ABA's finding Foxtel instituted the following measures to ensure as far as possible that a similar breach did not occur in the future:

- advising all Foxtel channel producers of the ABA's decision and the basis for that decision;
- issuing all Foxtel's channel producers with guidelines to ensure future compliance and instructing them to refer doubtful cases to Foxtel's legal department;
- conducting and a training session by Foxtel's lawyers for all in-house producers during which the relevant licence condition was explained and its implications discussed.

As a result of the preventative steps taken by Foxtel and the fact that the pay TV operator has not previously breached the licence condition, the ABA decided not to take the matter further.