

ACCIDENTAL OR INCIDENTAL CIGARETTE

The Australian Broadcasting Tribunal has released a Draft Policy Statement on accidental or incidental advertising for cigarettes or smoking.

Licensees are banned from broadcasting or televising direct advertising for cigarettes or smoking by the **Broadcasting and Television Act**.

The ban does not prevent the broadcasting or televising of matter of an advertising character, if it is accidental or incidental to the matter being broadcast, and if the licensee does not receive payment or valuable consideration for it.

The statement says the broadcasting or televising of advertising matter relating to cigarettes will not be regarded as "accidental" if the circumstances of the broadcast or telecast show that it is more likely than not that the licensee intended to promote a particular brand of cigarettes, or cigarette smoking in general.

The Tribunal has also noted that the Draft Statement is intended to

avoid the need for more specific action, but that failure to comply with the letter and the spirit of the law may lead to the determination of Standards relating to incidental cigarette advertising.

Written comments on the Draft Policy Statement should be lodged with the Secretary, at PO Box 1308, North Sydney, NSW, 2060, by 5 pm, 27 August 1983.

DRAFT POLICY STATEMENT

Advertising Matter Relating to Cigarettes or Cigarette Tobacco

1. INTRODUCTION

1.1 Sub-section 100 (5A) of the Broadcasting and Television Act 1942 ("the Act") states that —

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

Sub-section 100 (10) of the Act states —

"A reference in sub-section ... (5A) ... to the broadcasting or televising ... of an advertisement shall be read as not including a reference to the broadcasting or televising of matter of an advertising character as an accidental or incidental accompaniment of the broadcasting or televising of other matter in circumstances in which the licensee does not receive payment or other valuable consideration for broadcasting or televising the advertising matter."

1.2 The purpose of this Policy Statement is to outline the principles the Tribunal will apply in the administration of sub-sections 100 (5A) and (10) of the Act.

2. AN ADVERTISEMENT FOR, OR FOR THE SMOKING OF, CIGARETTES OR CIGARETTE TOBACCO

2.1 The Act does not define the circumstances in which matter amounts to an advertisement for, or for the smoking of, cigarettes or cigarette tobacco. In the Tribunal's opinion, any matter which can be reasonably said to promote cigarettes, or encourage the smoking of cigarettes, falls within sub-section 100 (5A), whether or not it displays or mentions the name of a brand of cigarettes or of a cigarette manufacturer. Advertising matter which displays or mentions the name of a cigarette manufacturer, but does not explicitly promote cigarettes, or encourage cigarette smoking, may still fall within sub-section (5A) if the overall effect can be reasonably said to promote the consumption of all that company's products, of which cigarettes may be one.

2.2 An advertisement (for any purpose) may be constituted by sound effects, music or spoken words and/or the visual display of names, logos, slogans or other identifiably promotional material, whether occupying full screen, or in titles of events, in backdrops or billboards, or on clothing, vehicles, etc.

2.3 Illustrations of matter which would, in the Tribunal's opinion, be covered by sub-section 100 (5A) are provided in the following hypothetical examples:-

Example A: X manufactures a very popular brand of cigarettes which are sold under the brand name "Y". X also sells a much smaller number of pipes and cigarette lighters under the name "Y". A television advertisement by X shows a pipe and a lighter with the slogan: "Y — the best in quality".

Example B: X sponsors a television talk show. Part of the arrangement is that the host conducts some interviews in front of a backdrop which displays the Brand "Y" logo and the slogan "the best in quality".

Example C: Brand "Z" is commonly identified in the public mind with a certain musical theme, and a western image. A televised item shows a cowboy on a horse lighting a cigarette, with the musical theme in the background, but Brand "Z" is not specifically identified.

2.4 Some kinds of advertising are not covered by sub-section 100 (5A). Advertisements concerning the adverse medical effects of cigarette smoking are not prohibited. Also, promotional material for companies whose activities include the manufacture of cigarettes is not prohibited, provided it could

ADVERTISING — POLICY STATEMENT

not reasonably be said to be an advertisement for the cigarettes produced by the company. For example, a diversified manufacturer (whose products include cigarettes) may wish to promote itself as a vigorous company expanding into new fields and creating new jobs. This would be permissible if the advertisement did not directly or indirectly promote the cigarettes produced by the company. Such corporate promotion is less likely to be at risk where the company name is not readily identified with its tobacco products. In cases where a company name is also a brand name, considerable care should be exercised.

3. ACCIDENTAL OR INCIDENTAL ADVERTISING

3.1 Sub-section 100 (10) of the Act provides an exception from sub-section 100 (5A) in circumstances where "matter of an advertising character" —

- (a) is an "accidental or incidental accompaniment" of other broadcast or televised matter; and
- (b) "the licensee does not receive payment or other valuable consideration" for broadcasting or televising it.

3.2 Accidental or Incidental Accompaniment:

The broadcasting or televising of advertising matter relating to cigarettes will not be regarded as "accidental" if the circumstances of the broadcast or telecast show that it is more likely than not that the licensee intended to promote a particular brand of cigarettes or cigarette smoking, in general. For example, television coverage of a sporting event which refers extensively to the fact that the event is sponsored by Brand "Y", and incorporates Brand "Y's" logo into the program titles, would be prima facie evidence of intention to promote Brand "Y". A similar inference might be drawn if televised interviews with personalities in a sporting (or other) event are all conducted in front of a backdrop advertising Brand "Y", when other interview locations are available which do not show such a backdrop.

3.3 Even where advertising matter for cigarettes is not deliberately broadcast or televised, it will not be within sub-section 100 (10) if it is not an 'incidental accompaniment', ie if it dominates a spoken segment of visual scene, or is a substantial part of the segment or scene. These are questions of judgement and it is not possible to provide any precise or comprehensive tests on the matter. However, questions of 'tone' and 'frequent repetition' are factors in determining these questions.

3.4 Payment or Valuable Consideration:

The exception under sub-section 100 (10) in relation to cigarette advertising applies only where a licensee does not receive 'payment or other valuable consideration' for broadcasting or televising the matter in question. Direct payments to the licensee are expressly included whether or not they are made by a manufacturer or retailer of cigarettes. 'Valuable consideration' has been defined in law to consist either of 'some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other': *Currie v. Misa* (1975) L.R. 10 Ex. 162. Provision of goods or services will, of course, be included as 'valuable consideration'.

3.5 More difficult questions arise where a licensee has itself paid for the rights to televise a sporting event, and each party knows and accepts that 'incidental' perimeter cigarette advertising will take place, and that it cannot practicably be avoided in the telecast. The licensee obtains 'valuable consideration' from the sporting body, ie the right to televise the event, but this will not normally be "valuable consideration for ... televising the advertising matter", and hence that limb of sub-section 100 (10) will normally apply in those circumstances.

3.6 The situation would be quite different if the evidence showed that an agreement was for the right to televise a sporting event in exchange for —

- (a) payment by the licensee; and
- (b) an express or implied undertaking by the licensee to televise the perimeter advertising, especially if it appeared that a discount had been allowed to the licensee by reason of the undertaking. Not only could this amount to "valuable consideration for ... televising the advertising matter", but it would probably result in a finding by the Tribunal that the televising of the advertising matter was not an 'incidental accompaniment' of the telecast of the sporting event.

4. ENFORCEMENT

4.1 It is an offence under section 132 of the Act to fail to comply with sub-section 100 (5A), rendering a licensee liable to a fine not exceeding \$10,000.

4.2 By virtue of section 129 of the Act, sub-section 100 (5A) is a condition of a licence; any breaches will be taken into account at the next occasion on which the performance of the licensee is reviewed: see sub-paragraphs 86 (11B) (c) (iii) and 88 (1) (a) (iii).

4.3 This Policy Statement is intended to avoid the need for more specific action. However, the Tribunal points out that failure to comply with the letter and the spirit of sub-sections 100 (5A) and (10) may lead to the determination of Standards relating to incidental cigarette advertising.