

Restrictions on tobacco advertising

The future for tobacco advertising in print and "sponsorship" advertising on television

Ian McGill examines new legislation regulating the advertising of tobacco products in the print media

The *Smoking and Tobacco Products Advertisements (Prohibition) Act, 1989*, ("the Act") came into effect on 28 December 1990.

The Act is an integral step in the Federal Government's continuing strategy to reduce smoking in the community. The Act is commendably short: nevertheless it does raise issues of concern and interest to print publishers.

In this article, the exemption for publication of accidental or incidental advertising matter is also briefly considered. However, in almost all cases publishers would receive consideration for the publishing of the advertising matter. Where consideration is received by the publisher the exemption does not operate.

Sponsorship

In a media release dated 27 December 1990, Peter Staples, the Minister for Aged, Family and Health Services stated that the ban implemented by the Act would release funds which the tobacco companies presently use to promote their products and that they could therefore be expected to seek sponsorship opportunities which will enable them to reach the widest possible audiences.

The Minister's press release stated:

"Sponsorship is another form of advertising that the Federal Government is examining ... it is particularly insidious because it links smoking with healthy, sophisticated and enjoyable activities, thereby conflicting with health messages designed to protect our children."

Although the prohibition does not, as yet, affect tobacco sponsorships it may affect the advertising of tobacco sponsorships in the print media.

The prohibition in the Act

Section 5(1) of the Act provides that:

"Subject to Section 6 [the Act does not apply to media printed outside Australia and not intended for distribution or use in Australia], a corporation must not publish or cause to be published, in a print medium an advertisement:

- (a) for smoking; or
- (b) for, or for the use of:
 - (i) cigarettes; or

- (ii) cigarette tobacco; or
- (iii) other tobacco products."

The penalty for a contravention of Section 5 is \$60,000.

For the purposes of Section 5 "smoking" means inhaling or puffing the smoke of cigarettes or cigars of any composition or tobacco in any form: Section 3(1) of the Act.

The prohibition in Section 5(1)(b) of the Act is identical to the prohibition in Section 100(5A) of the *Broadcasting Act 1942 (Cth)*. By Section 5(1)(a) of the Act, the prohibition has been extended to "smoking". Presumably this slight change in emphasis from the *Broadcasting Act* proscription is to capture "lifestyle" advertising not directly related to cigarette products.

It is reasonably clear, therefore, that a number of the reported decisions on the operation of the *Broadcasting Act* prohibition are directly relevant to the consideration of the ambit of the prohibition in Section 5 of the Act.

Publication

The proscribed activity in the Act is the publication of the offending advertisement after 28 December 1990.

The Act defines "published" but only so as to exclude from its operation communications to a person in the tobacco trade or in a tobacco product trade.

The Explanatory Memorandum and Second Reading Speech for the Act are not helpful in providing further definition. In its natural construction the term "published" means "made public" and in the context of the printed word would presumably embody the distribution of all copies to retailers for the purposes of sale to the public.

The ordinary and natural meaning more or less corresponds with the meaning of the word "published" in other Commonwealth legislation, such as the *Copyright Act 1968* as well as judicial consideration of that legislation.

Accordingly, printed material supplied or made available to the public before 28 December 1990 could continue to be sold after that date. The matter would be "published" upon completion of the distribution of the matter to retailers.

On the other hand, if matter was distributed to retailers not for the intention of immediate sale to the public but for sale to the

public after 28 December 1990 then the prohibition in the Act would bite.

For this reason, the conservative and proper advice to publishers is that all printed matter which carries tobacco or tobacco product advertisements should have been distributed prior to 28 December 1990 to retailers with instructions that they be immediately made available to the public. If this was done, sales of the matter after 28 December should not infringe the Act.

The meaning of "advertisement"

The question in every case is whether the printed matter published is an advertisement for smoking cigarettes.

The term "advertisement" is not defined in the Act. However, material designed or calculated to draw public attention to a product or to promote its use may constitute an advertisement: *Deputy Commissioner of Taxation v Rotary Offset Press* (1971) and on appeal (1972), *Rothmans of Pall Mall (Australia) v The Australian Broadcasting Tribunal* (1985).

Whether or not any matter published will be considered to be an advertisement for smoking, for or for the use of cigarettes:

- (a) will be determined objectively without regard to the intentions of the publisher in publishing the matter; and
- (b) is a question of fact for the judge or a jury to determine in a prosecution under Section 5(1).

That is, extrinsic evidence is admissible (and would, for example, be placed before the jury) to prove that the words, symbols or images in the published matter were designed or calculated to promote smoking or cigarettes or the use of cigarettes.

The *Rothmans* case and others are authority for the following series of important propositions:

- Even a single word, such as the product name is capable of conveying a message, through an association of ideas, to an informed audience.
- A corporate name can be so closely identified with a product that the mention of the name brings the product to mind.
- Matter can be designed or calculated to draw public attention to a product or to promote its use without explicit description or exhortation (and may be of a subliminal character).
- Many advertisements are calculated to enhance the general reputation or corporate image of an advertiser -

however, the fact that a particular advertisement may have that propensity, or that it may be produced with that intention, does not preclude its characterisation as an advertisement for smoking or for cigarettes.

- An advertisement need not mention the word "cigarette" (or "smoking") or contain a picture of it (or that activity) - it is possible to convey a message through an association of ideas.

In Section 5(1) of the Act, the advertisement must be "for" smoking or cigarettes. The meaning of this word is narrower than "in relation to". In the *Rothmans* case, the Federal Court held that the word "for" should be read as meaning "in favour of" or "on behalf of". The prohibition is against advertisements tending to promote or support cigarettes and their use and not against those advertisements of the contrary tendency.

Practical examples

In *Director of Prosecutions v United Telecasters Sydney Limited* (1990) the issue was whether a particular telecast was a contravention of the prohibition in the *Broadcasting Act*. The telecast consisted of coverage or glimpses of the following:

- dancers dressed in red and white;
- a banner showing the words "Winfield Cup 1984"; and
- an A frame situated at the perimeter of the football ground which carried an advertisement for Winfield cigarettes.

In the case, the High Court of Australia stated that evidence of extrinsic facts was admissible to prove that the words, symbols or images televised were calculated to promote the use of cigarettes or the practice of smoking.

At the trial, evidence was admitted in the form of a packet of Winfield cigarettes and a colour photograph of an advertisement hoarding which showed an open packet of Winfield cigarettes with the words "Five Smokes Ahead of the Rest" and "Anyhow Have a Winfield 25's". Both exhibits showed the name Winfield upon a packet of cigarettes and showed the packet to be coloured red and white.

The jury had no difficulty in determining on the basis of this extrinsic evidence that the telecast was an "advertisement" for Winfield cigarettes.

"Test cricket - field of battle"

In the *Rothmans* case material in a film advertisement showed two medieval knights in a slow motion sword fight. The visual content progressed to show cricketers in the same stylised fashion, with the voice track echoing the field of battle motif. The final part of the advertisement included

extracts from previous test matches (including Benson & Hedges coat of arms and distinctly lettered name in gold, on black, together with a voice overstating "proudly sponsored by the Benson & Hedges company").

The Australian Broadcasting Tribunal concluded that this was an advertisement for cigarettes within the meaning of the relevant prohibition in the *Broadcasting Act*.

The Tribunal gave the following reasons:

"The issue in this advertisement is whether the sponsorship announcement, including the use of the Benson and Hedges, arms and colours, breaches sub-section 100(5A). The name and arms of the Benson and Hedges Company are, in the public mind, associated almost exclusively with cigarettes, notwithstanding some other activities undertaken by Benson and Hedges. An advertisement placed by Benson and Hedges (rather than the relevant sporting body) which gives as much prominence to promoting the Benson and Hedges Company as this advertisement does, can reasonably be assumed to be intended to promote, or obtain goodwill for the only product universally identifiable with that company, namely cigarettes. It should be noted that the simple mention of the name Benson and Hedges as part of the title of the event would not itself lead to this conclusion in the absence of the strong visual images at the end of the advertisement which closely parallel (although in "negative") the design of the Benson and Hedges cigarette packet.

...The Tribunal is of the opinion that a reasonable person would regard the sponsorship announcement, in all the circumstances, as seeking indirectly to promote Benson and Hedges cigarettes."

The Federal Court upheld the Tribunal's decision: it stated that it was for the Tribunal to determine, as a matter of fact, the relationship between the name and coat of arms of the company, each of which was used in the advertisement, and the cigarettes which it produced.

An appeal court dealing with a decision at first instance under the Act, would take a similarly non-interventionist approach on such a factual determination.

There is one aspect of this decision that publishers should be aware of: the Tribunal held that the simple mention of the name "Benson and Hedges" as part of the title of an event would not of itself lead to a conclusion that it was an advertisement for cigarettes. For similar reasons the names of cigarette companies associated with sponsored sporting and other events would arguably not, of themselves, lead to a conclusion that publication of those words amounts to advertising for cigarettes or for smoking.

However, even in those instances the advertisements for those sponsored events would have to be carefully vetted to ensure that there was not associated or editorial

matter that could lead to the suggestion that the advertisement was not for the particular sponsored event. Particular attention needs to be focused on the layout and "get-up" of the advertisement for the sponsored event and care taken to ensure that undue prominence is not given to the name of the tobacco sponsor.

Australian Ballet sponsorship

The other advertisement considered in the *Rothmans* case involved a ballerina who explained the forthcoming program of the Australian Ballet. The Benson and Hedges coat of arms and distinctly lettered name in gold on black, together with a voice overstating "proudly sponsored by the Benson and Hedges Company" was included.

The Tribunal determined that the sponsorship announcement was an advertisement for cigarettes within the meaning of the relevant prohibition of the *Broadcasting Act*.

In giving its reasons, the Tribunal stated that the advertisement contained a sponsorship announcement which was identical to that attached to the test cricket advertisement "Field of Battle". The Tribunal stated:

"For the reasons expressed in relation to that advertisement, the Tribunal is of the opinion that a reasonable person would regard the sponsorship announcement, in all the circumstances, as seeking indirectly to promote Benson and Hedges cigarettes."

The Federal Court found that there was no error of law involved in the Tribunal's decision.

Accidental or incidental advertising

In cases where a publisher does not receive payment or consideration for publication of matter of an advertising character then consideration must be given to the exemption in Section 5(2) of the Act.

The finder of fact in any prosecution must be able to conclude beyond reasonable doubt that the publication of matter of an advertising character was not an "accidental or incidental" accompaniment to the publication of other matter.

Accordingly, if the mere name of a tobacco company can be regarded as "matter of an advertising character" then it will be necessary to identify other matter that accompanies it.

In the *United Telecasters* case, all judges clearly held that to activate the exemption the advertising matter must be published contemporaneously with the "other matter" and must be published in some fortuitous or subordinate conjunction with that other matter.

If the advertising matter is self contained and is not merely incidental to other matter

published then the finder of fact would be entitled to hold that the publisher was not exculpated by the exemption.

Conclusion

In all cases where a publisher contemplates the publication of matter for a corporation which produces only a tobacco product, the proscription in the Act must be considered. In these cases, it may be that the publication of the corporate name will draw attention to the product with which that name is so closely identified.

Arthur Chesterfield-Evans details the campaign that has been waged against "sponsorship" of broadcast events and other TV programming by tobacco companies

The fuss over the cigarette advertising associated with the Adelaide Formula 1 Grand Prix in November 1990 was the most recent salvo in a long war by health groups to get tobacco promotion off TV.

In 1976 the *Broadcasting and Television Act* was amended to ban cigarette ads on TV, but Section 100(5A) still allowed "accidental or incidental" advertising.

This led to a huge rise in sponsorship of sport and culture by tobacco companies. Health interests protested to the Broadcasting Tribunal, which ruled against Rothmans and Benson & Hedges ads in a number of cases in the early 1980s.

The tobacco companies challenged the Tribunal's rulings in the Federal Court. The Court upheld decisions regarding "promotional" commercials such as "Field of Battle" which promoted the Benson & Hedges cricket, but said the Tribunal was in error in calling the 1982 "Winfield" Rugby League Grand Final an advertisement. In *Benson & Hedges v Australian Broadcasting Tribunal* (1985) the Federal Court set the test as follows:

"Does the material, on its face and as a whole, appear to be designed or calculated to draw public attention to, or to promote the sale or use of, cigarettes or to promote the practice of smoking?"

The decision still left the status of perimeter advertising unclear.

1984 - the "Winfield Spectacular"

The situation was not satisfactory to the health interests. The Non-Smokers Movement of Australia (NSMA) alleged that Channel 10 (United Telecasters) had breached the Act during the

It is important to ensure that, where the corporate name of the cigarette manufacturer is given prominence, the publisher will need to be in a position to convince the finder of fact in any subsequent prosecution that the publication of that name was not calculated to draw public attention to smoking, cigarettes or to promote the use of cigarettes. In all cases, the publisher will have to be certain that the advertisement, viewed objectively, was calculated to draw public attention to a matter other than cigarettes or smoking.

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telecast of the 1984 Winfield Rugby League Grand Final. They alleged that much of the game was an advertisement, including the commentary. The magistrate limited the definition of an "advertisement" to a short segment, and the "Winfield Spectacular" was chosen. This involved the unfurling of a huge Winfield flag by dancers while the "Winfield theme" was played. A helicopter shot afforded the TV audience a better view of the flag than the live spectators had.

Channel 10 was committed for trial and the Director of Public Prosecutions (DPP) took up the case. At the end of the hearing, Judge Sinclair summarised the issues for the jury as:

1. Was the "Winfield Spectacular" broadcast as part of the 1984 Rugby League Grand Final an advertisement for Winfield cigarettes?
2. If so, was the advertisement "accidental" or "incidental" within the scope of the provisions of the *Broadcasting and Television Act*, and therefore excepted from the prohibition?

After five and a half hours deliberation, and reports of loud arguments coming from the jury room, a jury found them guilty. Channel 10 appealed to the Supreme Court on the grounds that the display of cigarette marketing material by the prosecution during the trial was inadmissible evidence. The Supreme Court upheld the appeal, and the DPP appealed to the High Court, which upheld the original conviction on 15 February, 1990 (*DPP v United Telecasters*).

This series of appeals took nearly five years. NSMA again sued over a 1989 Winfield Cup League semi-final. Channel 10 were committed for trial, with the whole telecast being allowed as evidence (*McBride v United Telecasters*, 1990). But this second time the DPP declined to take up the case.

The Grand Prix case

Even after the High Court decision there was no clear ruling on perimeter advertising. NSMA asked Channel 9 for an assurance that there would be no cigarette advertising material associated with the Adelaide Formula 1 Grand Prix including no cigarette brand names on the cars, drivers, pit crew or perimeters and that commentators not make gratuitous references to brand names.

When Channel 9 failed to give these assurances, NSMA asked the Federal Attorney General for his "fiat" to apply for an injunction. When he declined NSMA pressed ahead in the NSW Supreme Court.

The Non-Smokers' evidence showed billboards being painted and a car with Marlboro on it. It also pointed out that a media analysis of the 1989 Grand Prix had shown that the Marlboro name or logo appeared on screen 35.7 per cent of the sample time. Photos and a videotape of the British and German Grands Prix showed the differences in advertising there. The final piece of evidence was that the perimeter Marlboro signs were orange rather than red, and that such an orange colour would look red on TV. This suggested that the signs existed for the TV audience rather than the trackside spectators.

In giving his verdict on 2 November 1990, Justice Needham seemed impressed by the evidence but ruled that NSMA did not have standing to bring the case.

The Broadcasting Tribunal has now agreed to examine whether Channel 9 breached the Act during the Grand Prix telecast. Its findings will affect other telecasts like the cricket and the Winfield Cup.

The solution?

Democrat Senator Janet Powell moved an amendment to close the "accidental or incidental" loophole in the *Broadcasting Act*. This had much support from the AMA and Cancer Councils, but was defeated by the major parties. This was probably because the sports lobby opposed any solution that did not give them an alternative source of funding. A Health Promotion Foundation on the Victorian model, which hypothecates a percentage of tobacco excise to replace sponsorship, is therefore probably necessary to placate those interests. The question is whether the Government will introduce it.

Dr Arthur Chesterfield-Evans is a member of the Non-Smokers Movement of Australia. This article was prepared with the assistance of The NSMA's solicitors, Cashman & Partners of Sydney.