Investigation report no. BI-490

| Summary |  |
| --- | --- |
| **Licensee** | Fresh Broadcasters Inc |
| **Station** | 5FBI |
| **Type of service** | Community broadcasting—radio |
| **Date of broadcast** | 29 March 2019 |
| **Relevant legislation** | Paragraph 9(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992* [the licensee will not, in contravention of the *Tobacco Advertising Prohibition Act 1992*, broadcast a tobacco advertisement within the meaning of that Act]. |
| **Date Finalised** | 30 May 2019 |
| **Decision** | No breach of paragraph 9(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992.* |

Background

On 29 March 2019, the Australian Communications and Media Authority (the ACMA) received a complaint that the licensee of 5FBI, Fresh Broadcasting Inc had broadcast an advertisement for tobacco products by broadcasting an announcement for a ‘vaping product’ (e-cigarette) which the complainant believed to be a tobacco product.

On 15 April 2019, the ACMA commenced an investigation under the *Broadcasting Services Act 1992* (the BSA) into the licensee’s compliance with paragraph 9(1)(a) of Schedule 2 to the BSA [the licensee will not, in contravention of the *Tobacco Advertising Prohibition Act 1992* (the TAP Act), broadcast a tobacco advertisement within the meaning of the TAP Act].

Assessment and submissions

The investigation has taken into account the following material:

* the complaint received by the ACMA on 29 March 2019
* a copy of the broadcast from 8.00 am to 10.00 am on 29 March 2019 (the broadcast)
* email correspondence from the licensee received by the ACMA on 1 May 2019.

Other sources used in the investigation are identified in the report, where relevant.

In assessing compliance with the licence condition at paragraph 9(1)(a) of Schedule 2 to the BSA, the ACMA firstly considers whether the advertisement is a tobacco advertisement within the meaning of the TAP Act. In this case the ACMA has considered whether the advertisement falls within the meaning of paragraph 9(1)(b) and/or paragraph 9(1)(e) of the TAP Act. If the ACMA forms the view that it is a tobacco advertisement, it then considers whether any of the exceptions in the TAP Act apply in order to determine whether or not the broadcast of the tobacco advertisement is permitted under the TAP Act.

Issue: Did the licensee broadcast a tobacco advertisement?

Relevant legislation

Schedule 2 to the BSA reads as follows:

**9 Conditions applicable to services provided under community broadcasting licences**

(i) Each community 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;

A ‘tobacco advertisement’ is relevantly defined in s.9 of the TAP Act as follows:

**9 Meaning of tobacco advertisement**

**Basic meaning**

(1) Subject to this section, for the purposes of this Act, a tobacco advertisement is any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote:

(a) smoking; or

(b) the purchase or use of a tobacco product or a range of tobacco products; or

(c) the whole or a part of a trade mark that is registered under the *Trade Marks Act 1955* in respect of goods that are or include tobacco products; or

(d) the whole or a part of a design that is registered under the *Designs Act 2003* in relation to products that are or include tobacco products; or

(e) the whole or a part of the name of a person:

(i) who is a manufacturer of tobacco products; and

(ii) whose name appears on, or on the packaging of, some or all of those products; or

(f) any other words (for example the whole or a part of a brand name) or designs, or combination of words and designs, that are closely associated with a tobacco product or a range of tobacco products (whether also closely associated with other kinds of products).

[…]

(3B) If:

(a) apart from this subsection, something (***the advertisement***) that relates to a non‑tobacco product would, technically, be a tobacco advertisement because the name, or part of the name, of the non‑tobacco product is the same as, or substantially similar to, the name, or part of the name, of:

(i) a tobacco product; or

(ii) the manufacturer, distributor or retailer of a tobacco product; and

(b) the manufacturer of the non‑tobacco product is not associated in any way with the manufacturer of the tobacco product;

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

Other relevant definitions (from the TAP Act) include the following:

**8 Defined terms**

***smoking*** means smoking tobacco products.

***tobacco product*** means:

(a) tobacco (in any form); or

(b) any product (for example a cigar or cigarette):

(i) that contains tobacco as its main or a substantial ingredient; and

(ii) that is designed or intended for human consumption or use; and

(iii) that is not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*; or

(c) a cigarette paper, cigarette roller or pipe.

Finding

The licensee did not, in contravention of the *Tobacco Advertising Prohibition Act 1992*, broadcast a tobacco advertisement within the meaning of the TAP Act, on 29 March 2019 at 9.00 am.

Reasons

The complainant submitted that:

The station in question advertised the use of Vaping products which I believed were now classed as a tobacco product. This is absolutely disgraceful for a community radio station supporting the use of tobacco products to their listeners. Aren't they supposed to be a youth community station too? This needs to be addressed and acted on immediately.

The licensee supplied a copy of the broadcast, which included a sponsorship announcement for VapeSquare at 9.00 am (the Sponsorship Announcement). A transcript of the Sponsorship Announcement is as follows:

Vape lovers listen up. VapeSquare have massively dropped prices across all SA stores. Come and grab e-juices from Charlie’s Calk Dust, Bad Drip, Psycho Bunny, IVG, plus heaps more brands at massively dropped prices. You’ll find VapeSquare and 35 Smokemart and GiftBox stores around Adelaide, from Port Augusta to Mount Gambier and everywhere in between. To see massively dropped prices, head into any Smokemart and GiftBox store, or jump online at VapeSquare.com.au. Fresh sponsor.

The licensee has submitted that:

The sponsorship messages were cleared by us after consultation with the advertising agency and the client who had vetted the scripts and consulted externally.

***Did the Sponsorship Announcement promote the purchase or use of a tobacco product?***

Paragraph 9(1)(b) of the TAP Act defines a tobacco advertisement as ‘any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote’ the purchase or use of a tobacco product or a range of tobacco products.

The language and products listed in the Sponsorship Announcement indicates that the announcement was intended to promote the use and purchase of e-juice products. The e-juice products promoted in the Sponsorship Announcement are not tobacco products for the purposes of the TAP Act, because they do not contain tobacco.

Accordingly, the licensee did not broadcast a tobacco advertisement within the meaning of paragraph 9(1)(b) of the TAP Act.

***Did the Sponsorship Announcement give publicity to the name of a person who is a manufacturer of a tobacco product?***

Paragraph 9(1)(e) of the TAP Act defines a tobacco advertisement as ‘any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote’ the whole or a part of the name of a person who is a manufacturer of tobacco products and whose name appears on, or on the packaging of, some or all of those products.

A review of the website for the retailer Smokemart, indicates that this retailer sells tobacco pipes. As defined in section 8 of the TAP Act, a cigarette paper, cigarette roller or pipe is a tobacco product. However, Smokemart is a retailer and wholesaler of products, including tobacco products,[[1]](#footnote-1) not a manufacturer as required under paragraph 9(1)(e) of the TAP Act.

Accordingly, it is the ACMA’s view that, in broadcasting the Sponsorship Announcement, the licensee did not broadcast a tobacco advertisement within the meaning of the TAP Act and therefore did not breach paragraph 9(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992*.

1. <https://www.peregrine.com.au/our-business/smokemart-giftbox/> [accessed 1 May 2019]. [↑](#footnote-ref-1)