Investigation report no*.* BI-533

| Summary |  |
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| **Licensee [Service]** | Radio 6PR Perth Pty Ltd [6PR] |
| **Finding** | No breach of paragraph 8(1)(a) of Schedule 2 [tobacco advertising] |
| **Relevant Legislation** | *Broadcasting Services Act 1992* |
| **Program** | *Breakfast with Steve Mills and Basil Zempilas* |
| **Description** | A breakfast show broadcast on weekday mornings between 5.00 am and 8.30 am |
| **Date of broadcast** | 17 September 2019 |
| **Date Finalised** | 16 January 2020 |
| **Type of service** | Commercial—Radio |
| **Attachments** | **A** - extracts of the complaint to the ACMA**B** - extracts of the licensee’s submissions to the ACMA**C** -relevant legislation and the ACMA’s assessment process |

Background

In October 2019, the Australian Communications and Media Authority (the ACMA) commenced an investigation under the *Broadcasting Services Act 1992* (the BSA) into a broadcast of *Breakfast with Steve Mills and Basil Zempilas* on 6PR on 17 September 2019 (the program).

The ACMA received a complaint alleging that *Breakfast with Steve Mills and Basil Zempilas* contained tobacco advertising. Details of the complaint are at Attachment A.

TheACMA has investigated the licensee’s compliance with its licence condition at paragraph 8(1)(a) of Schedule 2 to the BSA. Details of this provision, other relevant provisions and the ACMA‘s approach to assessing compliance are at **Attachment C**.

Issue: Tobacco Advertising

The program included a discussion about a shopping centre winning an award as ‘WA shopping centre of the year’. As part of the discussion, callers were invited to share their thoughts on the shopping centre. The following conversation took place as part of the segment:

Caller: I’m a little bit in favour of […] shopping centre, one thing I do say they have is cheap cigarettes because I normally buy a pack of Peter Jackson 20’s and it costs me just over twenty dollars for those.

Host 1: Hang on we’re not allowed to say that stuff on the radio any more but I can say there is – there is a store called Smoke Mart… but we can’t talk about …

Host 2: For that reason […]

Finding

The licensee did not breach paragraph 8(1)(a) of Schedule 2 to the BSA.

Reasons

To assess compliance, the ACMA has addressed the following questions:

* Did the licensee broadcast a ‘tobacco advertisement’ within the meaning of the *Tobacco Advertising Prohibition Act 1992* (the **TAP Act**)?
* If so, was the broadcast of the tobacco advertisement permitted under the TAP Act?

In determining whether the licensee broadcast a ‘tobacco advertisement’ under the TAP Act, the ACMA has considered whether the broadcast promoted or publicised ‘the purchase or use of a tobacco product or range of tobacco products’, as specified in paragraph 9(1)(b) of the TAP Act.

***Did the licensee broadcast a ‘tobacco advertisement’ within the meaning of the TAP Act?***

The complainant submitted the announcers were ‘promoting a tobacconist’, with one saying ‘there's a tobacconist there called 'smoke mart'.

The licensee submitted:

While the complainant is correct that the name ‘Smoke Mart’ was then referenced by the hosts (Retailer Mention), the complainant has incorrectly suggested that the hosts referred to this name as a tobacconist.

The ACMA agrees with the licensee’s submission that the hosts never said that ‘Smoke Mart’ was a tobacconist. However, given the word ‘smoke’ appears in the name of the store and in the context of a broader conversation which referenced ‘cheap cigarettes’ and ‘Peter Jackson’, a well-known cigarette brand, the ACMA considers that an ordinary reasonable listener would have understood that ‘Smoke Mart’ was a retailer of tobacco products.

A retailer is defined at section 12 of the TAP Act to include a person who ‘sells a range of products, only some of which are tobacco products’.

The ACMA considers that naming a retailer of tobacco products as part of radio broadcast that also mentioned buying ‘cheap cigarettes’ and ‘Peter Jackson’ amounted to giving publicity to, or otherwise promoting the purchase or use of a tobacco product or a range of tobacco products. Hence, the ACMA considers that the broadcast contained a ‘tobacco advertisement’ under subsection 9(1) of the TAP Act.

***Paragraph 9(3A)(c): Exceptions – management advertisements and certain advertisements as to availability of products***

Paragraph 9(3A)(c) of the TAP Act provides that an advertisement does not constitute a tobacco advertisement where the advertisement is by a retailer and where it indicates that products are available from the retailer.

The reference to ‘Smoke Mart’ was described by the licensee as a ‘spontaneous and unscripted’ moment in a live talk radio format. Therefore, the ACMA considers that the advertisement was not ‘by’ a retailer of tobacco products. Consequently, the exception under paragraph 9(3A)(c) does not apply.

Intention

The test of intention for a contravention of section 13 of the TAP Act – which prohibits the broadcast of a tobacco Advertisement – was endorsed by the majority in *Channel Seven Adelaide Pty Ltd v ACMA [2014] FCAFC 32* (at paragraphs 13-14; 18). The person broadcasting a tobacco advertisement must be proved, not only to intend to broadcast material which falls within the statutory definition of tobacco advertisement, but also to intend to promote, or give publicity to the matters at paragraphs 9(1)(a)-(f) of the TAP Act. These matters include, among other things, tobacco products.

The licensee submitted:

The hosts did not publish the Brand Mention themselves, and immediately cut off the caller when the Brand Mention took place.

The ACMA acknowledges that the references to ‘Peter Jackson’ and ‘cheap cigarettes’ being available at the shopping centre were made spontaneously by a caller who was immediately cut off by the host, who said ‘we’re not allowed to say that stuff on the radio any more’. As soon as the host referred to ‘Smoke Mart’, he further added ‘but we can’t talk about…’, before he in turn was interrupted by the other host who says, ‘for that reason’, ending all discussion relating to tobacco products or tobacco retailers.

Although the licensee broadcast material that falls within the statutory definition of a ‘tobacco advertisement’, the hosts twice indicated that they should not be discussing issues relating to tobacco products or smoking. The licensee has also submitted that neither it nor the hosts received any direct or indirect benefit from the broadcast.

Taking these two considerations into account, the ACMA does not consider that there is sufficient evidence to conclude that there was an intention to promote, or give publicity to, smoking or tobacco products by broadcasting the reference to ‘Smoke Mart’.

As the requisite intention to broadcast a tobacco advertisement has not been established, the licensee has not broadcast a tobacco advertisement in contravention of section 13 of the TAP Act.

Accordingly, the licensee did not breach the licence condition at paragraph 8(1)(a) of Schedule 2 to the BSA.

Attachment A

***Extracts of the Complaint to the ACMA* dated 17 September 2019**

[…] these two experienced announcers were discussing and I saw it promoting a tobacconist.

Went something like this. They were discussing a shopping centre which won an award- […] shopping centre.

Caller rings in and tax 'it's a great place to buy cheap cigarettes, I buy Peter Jackson $25's and they normally cost me...'

Announcer interrupts saying 'we can't talk about that on the radio' but then incredibly says 'there's a tobacconist there called 'smoke mart'

The host (pretended?) to stop the caller from talking, then actually named the shop

Attachment B

**Extracts from Licensee submission to the ACMA dated 1 November 2019**

[…]

During a 10-minute segment dedicated to discussion of the naming of the Perth shopping centre […] (the **Shopping Centre**) as 'WA Shopping Centre of the Year’, the hosts Steve Mills and Basil Zempilas invited listeners to call in to share their experiences of the centre.

After a number of callers named their favourite stores and the hosts themselves stated the names of thirteen stores at the centre, the final caller attempted to volunteer, without prompting, the price of a tobacco product that he purchases at that centre. Mr Zempilas moved swiftly to cut the caller off, stating they could not discuss tobacco products on air.

The Licensee acknowledges that the brand of the tobacco product, Peter Jackson, was mentioned by the caller (**Brand Mention**), however this was immediately curtailed by Mr Zempilas who stated:

‘Hang on, we’re not allowed to say that stuff on the radio any more.’

While the complainant is correct that the name ‘Smoke Mart’ was then referenced by the hosts (**Retailer Mention**), the complainant has incorrectly suggested that the hosts referred to this name as a tobacconist. Rather, Mr Zempilas says:

‘But I can say that there is - there is a store called Smoke Mart’

This discussion was in the context of the hosts having listed numerous retailers in the shopping centre.

Applicable Licence Condition

The ACMA has indicated that it is investigating the Licensee’s compliance with paragraph 8(1)(a) of Schedule 2 of the Broadcasting Services Act 1992 (Cth) (**Condition**), which states:

(a)  the licensee will not, **in contravention of** the Tobacco Advertising Prohibition Act 1992, broadcast a tobacco advertisement within the meaning of that Act;

[emphasis added]

The Licensee submits that neither the Brand Mention nor the Retailer Mention were broadcast in contravention of the Tobacco Advertising Prohibition Act 1992 (Cth) (the **Act**), and consequently, the Broadcast did not breach the Condition.

The Broadcast did not satisfy the definition of “tobacco advertisement” under the Act.

The Licensee submits that neither the Brand Mention nor the Retailer Mention gives publicity to, or otherwise promotes or is intended to promote any of the matters specified in section 9(1)(a)-(f) of the Act, for the following reasons:

* The hosts did not publish the Brand Mention themselves, and immediately cut off the caller when the Brand Mention took place.
* The Retailer Mention did not meet any of the criteria in sections 9(1)(a)-(f) of the Act.

The Broadcast did not intentionally give publicity to, nor promote, nor intend to promote, smoking or the purchase or use of any tobacco products.

The Brand Mention and Retailer Mention were accidental or incidental accompaniment to the broadcast of other matter.

Even if the ACMA does not agree with the Licensee’s submissions in relation to section 9 of the Act above, the Licensee submits that the Broadcast was permitted by section 14 of the Act, which states:

‘accidental or incidental broadcast of a tobacco advertisement is permitted if:

1. the advertisement is an accidental or incidental accompaniment to the [broadcasting](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/tapa1992314/s8.html#broadcast) of other matter; and
2. the [person](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/tapa1992314/s8.html#person) does not receive any direct or indirect benefit (whether financial or not) for [broadcasting](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/tapa1992314/s8.html#broadcast) the advertisement (in addition to any direct or indirect benefit that the [person](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/tapa1992314/s8.html#person) receives for [broadcasting](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/tapa1992314/s8.html#broadcast) the other matter).’

First, neither the Licensee nor the hosts received any direct or indirect benefit for broadcasting the Brand Mention and the Retailer Mention. These were spontaneous and unscripted moments in a live talk radio format.

In relation to the Brand Mention:

* the Brand Mention was made as an accompaniment to a 10 minute story about listener opinions of the Shopping Centre given that it had been awarded ’WA Shopping Centre of the Year’ by the WA Property Council and constituted no more than 6 seconds of that story;
* it was not made by the hosts of the Broadcast and they immediately cut off the caller following the Brand Mention; and
* it was clear from the Broadcast that the hosts knew that the promotion of tobacco products was not permitted.

In relation to the Retailer Mention:

* the Retailer Mention was made as a continuation of a list of 13 retailers previously mentioned by the hosts, as an accompaniment to a 10 minute story about the Shopping Centre shopping centre and constituted no more than 3 seconds of that story; and
* the Retailer Mention did not refer to the retailer as a tobacconist, but only to the retailer’s name.

Attachment C

Relevant legislation

**Schedule 2 to the BSA: Standard Conditions**

**8 Standard conditions of commercial radio broadcasting licences**

1. Each commercial radio broadcasting licence is subject to the following conditions:
2. The licensee will not, in contravention of the *Tobacco Advertising Prohibition Act 1992*, broadcast a tobacco advertisement within the meaning of that Act.

[…]

**TAP Act**

**Part 2—Interpretation**

**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).

[…]

(3A) to remove any doubt, it is declared that the following do not constitute tobacco advertisements:

[…]

1. an advertisement by a manufacturer, distributor or retailer of tobacco products indicating that tobacco products, or tobacco products of a particular kind, are available from the manufacturer, distributor or retailer, as the case may be, provided that the advertisement does not:
2. state the brand name of any individual product; or
3. contain any other matter that would enable any individual product to be identified; or
4. promote, or give publicity to, any individual product;

**12  Meaning of *manufacturer, distributor and retailer***

In this Act, a reference to a manufacturer, distributor or retailer of tobacco products includes a reference to a person who manufactures, distributes or sells a range of products, only some of which are tobacco products.

**Part 3—Prohibition of tobacco advertisements**

**Division 1—Broadcasting of tobacco advertisements**

**13 Tobacco advertisements not to be broadcast**

1. A person must not broadcast a tobacco advertisement in Australia or Norfolk Island on or after 1 July 1993 otherwise than as permitted by section 14.

[…]

**14 Accidental or incidental broadcast permitted**

A person may broadcast a tobacco advertisement if:

1. the person broadcasts the advertisement as an accidental or incidental accompaniment to the broadcasting of other matter; and
2. the person does not receive any direct or indirect benefit (whether financial or not) for broadcasting the advertisement (in addition to any direct or indirect benefit that the person receives for broadcasting the other matter).

The ACMA’s assessment process

Assessment and the ordinary reasonable Listener

When assessing content, the ACMA considers the meaning conveyed by the material, the subject of the complaint, including the natural, ordinary meaning of the language, context, tenor, tone and any inferences that may be drawn. This is assessed according to the understanding of an ‘ordinary reasonable’ listener.

Australian courts have considered an ‘ordinary reasonable’ listener to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.[[1]](#footnote-1)

Once the ACMA has ascertained the meaning of the material that was broadcast, it then assesses compliance with the legislation.

1. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-1)