



Investigation Report No. 1698

File no.	2006/0833
Licensee	3AW Southern Cross Radio Pty Ltd
Station	3AW Melbourne
Type of service	Commercial radio broadcasting service
Name of program	<i>The Overnights</i>
Date of broadcast	28 April 2006
Relevant legislation	Section 139(3) of the <i>Broadcasting Services Act 1992</i>

Investigation conclusion

The Australian Communications and Media Authority finds that the licensee of 3AW, 3AW Southern Cross Radio Pty Ltd, broadcast three ‘tobacco advertisements’ in *The Overnights* program on 28 April 2006.

The tobacco advertisements were not an accidental or incidental accompaniment to the broadcast of other matter.

This conduct could constitute an offence under section 139(3) of the *Broadcasting Services Act 1992* because the broadcast of a tobacco advertisement in contravention of the *Tobacco Advertising Prohibition Act 1992* is a breach of the licence condition set out at clause 8(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992*.

Although this report relates to conduct that could constitute an offence under the *Broadcasting Services Act 1992*, giving a copy of the report to the Director of Public Prosecutions is not warranted in this instance.

The complaint

On 1 May 2006, the Australian Communications and Media Authority (ACMA) received a written complaint alleging that the licensee of 3AW, Southern Cross Radio Pty Ltd, had broadcast advertisements for Camel cigarettes during a radio play. The complainant alleged that the licensee had failed to edit out the cigarette advertisements despite having an opportunity to do so.

The program

The Overnights is a weekday program broadcast from 12 midnight to 5.30 am. The subject of the complaint was material broadcast during an archival radio play broadcast from 3.00 am to 3.30 am. The play had been originally sponsored by the makers of Camel cigarettes. The broadcast included the following announcements.

How mild can a cigarette be? Smoke Camels and see. Yes, prove for yourself how mild Camels are. In a recent coast-to-coast test of hundreds of men and women who smoked Camels, and only Camels, for 30 days, noted throat specialists reported not one single case of throat irritation due to smoking Camels.

[Approximately 3.00 am, following the introduction to the play]

And now, a brief intermission and time for a few thoughts on smoking. How mild can a cigarette be? Smoke Camels and see. In a recent coast-to-coast smoking test, hundreds of men and women smoked Camels, and only Camels, for 30 days, an average of one to two packs a day. Noted throat specialists examined the throats of these smokers every week—made a total of 2,470 examinations—and they reported not one single case of throat irritation due to smoking Camels. Make the Camel mildness test yourself. If at any time you're not convinced that Camels are the mildest cigarette you've ever smoked, return the package, with the unsmoked cigarettes, to the makers of Camels and you'll receive its full purchase price plus postage. When you buy Camels, remember: Camels by the carton are the best buy.

[Approximately 3.11 am, between Acts I and II of the play]

How mild can a cigarette be? Smoke Camels and see. Make the Camel 30-day mildness test, as so many people are doing. For example, [GB], the World Series pitching hero, made his own Camel 30-day test. He smoked only Camels for 30 days and then said, 'Camels are the mildest cigarette I ever smoked.' Try Camels. See how Camels' choice tobaccos, properly aged and expertly blended, give you rich, full flavour and cool, cool mildness. See how Camels suit your T-zone to a tee. In a recent coast-to-coast smoking test, hundreds of men and women smoked only Camels for 30 days. Noted throat specialists examined these smokers' throats every week, and reported not one single case of throat irritation due to smoking Camels. Try Camels. If at any time you're not convinced that Camels are the mildest cigarette you've ever smoked, return the package, with the unused cigarettes, to the makers of Camels and you will receive its full purchase price plus postage.

[Approximately 3.26 am, at the conclusion of the play]

Assessment

The assessment is based on submissions received from the complainant and the licensee and a compact disc copy of the broadcast provided by the licensee.

Relevant legislation

The provisions of the *Broadcasting Services Act 1992* that are relevant to this investigation are sections 139(3) and 178(2), and clause 8(1)(a) of Schedule 2.

The provisions of the *Tobacco Advertising Prohibition Act 1992* (the TAP Act) that are relevant to this investigation are sections 8(a), 9(1), 13 and 14.

The relevant legislative provisions are at Attachment A to this report.

Complainant's submission

The complainant submitted that:

3AW put to air a play called *Command Decision* which was made in 1949 and sponsored by Camel cigarettes and contained two (2) one minute adverts about the pleasures of smoking Camel. During the whole replay, neither 3AW nor [the presenter] attempted to edit these ads out. They must have known of the ads, as they would have pre-played the drama so as to program it correctly, together with the fact that they have, at their disposal, a seven-second delay.

Licensee's submission

Submission of 19 May 2006 in response to the complaint

Submission concerning jurisdiction of ACMA

The licensee submitted that:

It is respectfully submitted that it is not the role of ACMA to determine whether there has been a breach of the *Tobacco Advertising Prohibition Act 1992* (the TAP Act). The offences established by the TAP Act are criminal offences, to which Chapter 2 (other than Part 2.5) of the Criminal Code applies under section 5A of the TAP Act. A determination of breach of the TAP Act could only be made by a criminal court applying the criminal standard of proof, following the laying of a charge by the DPP.

It is submitted that the role of the ACMA in these circumstances can only be to consider whether there has been a breach of the licence conditions if and when a prosecution has been successfully brought by the DPP. Moreover, it would be prejudicial to a licensee to effectively have to defend itself in respect of this matter to ACMA in circumstances where it might also be called to do so by a federal court.

Submission concerning the broadcast

The licensee also submitted that:

Without limiting the arguments that could or might be brought by the licensee in respect of a charge of breach of the TAP Act in respect of the broadcast, I note that:

- The licensee is not a manufacturer, distributor or seller of cigarettes;
- The references to Camel Cigarettes were made as part of an archival radio broadcast, at the initiative of the licensee and not at the request of any other person;
- The licensee did not receive any direct or indirect benefit for publishing the references to Camel Cigarettes; and
- The references to Camel Cigarettes were incidental to the broadcast of the radio play (which in its entirety lasted over 35 minutes).

In light of these matters, it is submitted that either or both of sections 19 and 20 of the TAP Act would apply to the broadcast, such that it would not be open to a court to find any breach of the TAP Act by the licensee.

Submission of 25 September 2006 in response to Preliminary Investigation Report

Submission concerning jurisdiction of ACMA

In response to the Preliminary Investigation Report the licensee made further submissions in relation to ACMA's jurisdiction to make a finding that the licensee had breached clause 8(1)(a) of Schedule 2 to the Broadcasting Services Act. It stated:

It is clear from the words 'in contravention of' appearing in section 8(1)(a) of Schedule 2 of the (Broadcasting Services Act) that the alleged breach of the licence condition (which ACMA has the authority to investigate under section 149(1) of the (Broadcasting Services Act) is dependent entirely upon a finding by a Court of competent jurisdiction applying the correct rules of evidence and standard of proof, that there has been a contravention of the TAP Act. Such a finding by a court of competent jurisdiction is a pre-condition to any finding that the licence condition in clause 8(1)(a) has been breached.

The words in the legislation are to be distinguished from those which were used by ACMA in its preliminary report that 'the alleged breach in this instance relates to the licence condition to not broadcast a tobacco advertisement within the meaning of the TAP Act.' Had parliament intended there only to be a finding by ACMA that a licensee not broadcast a tobacco advertisement with the meaning of the TAP Act, it would not have drafted the licence condition in section 8(1)(a) to specifically include the requirement of a contravention, which, given section 13 of the TAP Act is a criminal provision, is something that can only be determined by a Court of competent jurisdiction applying the beyond reasonable doubt standard of proof.

Submission concerning the broadcast

The licensee also made a further submission in respect of the defence available to it under section 14 of the TAP Act, relating to the accidental or incidental broadcast of a tobacco advertisement, in a situation where the licensee does not receive payment for the advertisement. It stated:

In respect of subsection (a) [of section 14] it is sufficient that the person, in this case the licensee, broadcasts the alleged tobacco advertisement **either** as an accident **or** incidental accompaniment. The legislation does not require both. [emphasis supplied]

In its preliminary report, ACMA has stated that it is ‘clearly not the case’ that the broadcast of the alleged tobacco advertisements could have been an accident (according to the definition set out in that report) on the basis that ‘there was ample opportunity for the licensee to edit the tobacco advertisements out of the recording prior to its broadcast’.

In the licensee’s submission, whether or not there was ample opportunity for the licensee to edit the alleged tobacco advertisement is irrelevant to the question of whether the broadcast of the alleged tobacco advertisements was accidental or not.

In its preliminary report, ACMA has relied on the Macquarie Dictionary’s definition of the word ‘accidental’ as being ‘happening by chance or accident, or unexpectedly’.

In turn, the Macquarie Dictionary defines ‘unexpected’ as being ‘unforeseen; surprising’.

The New Shorter Oxford English Dictionary gives the relevant meaning of ‘accidental’ as being ‘happening by chance, undesignedly, or unexpectedly’ (4th ed 1993).

The licensee submits that the broadcast of the alleged tobacco advertisements during the play ‘Command Decision’ was accidental in accordance with all of the above definitions on the basis that [the presenter] (and therefore the licensee) did not expect the alleged tobacco advertisements to occur during the play of the archival piece as he was unaware of the existence until they had already been broadcast.

The licensee also repeated its earlier statement that ‘it did not receive any direct or indirect financial benefit or otherwise for broadcasting the advertisement’.

Findings

ACMA finds that:

- During *The Overnights* program of 28 April 2006, the licensee of 3AW broadcast three ‘tobacco advertisements’.
- The tobacco advertisements were not an accidental or incidental accompaniment to the broadcast of other matter.
- This conduct could constitute an offence under section 139(3) of the *Broadcasting Services Act 1992* because the broadcast of a tobacco advertisement in contravention of the *Tobacco Advertising Prohibition Act 1992* is a breach of the licence condition set out at clause 8(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992*.

Reasons

Whether sections 19 and 20 of the TAP Act are applicable to the broadcast

The licensee argued that either or both of sections 19 and 20 of the TAP Act would apply to the broadcast. Those provisions do not apply in this case, as under section 10(2) of the TAP Act, *publishing* a tobacco advertisement does not include *broadcasting* a tobacco advertisement.

Whether ACMA has jurisdiction to make a determination under the Broadcasting Services Act

The licensee, on 19 May 2006, submitted that ‘it is not the role of ACMA to determine whether there has been a breach of the *Tobacco Advertising Prohibition Act 1992*’ and that ACMA can only ‘consider whether there has been a breach of the licence conditions if and when a prosecution has been successfully brought by the DPP’.

On 25 September 2006, it submitted that, by using the words ‘in contravention of’, Parliament intended that ACMA’s jurisdiction ‘is dependent entirely upon a finding by a Court of competent jurisdiction’.

ACMA does not accept that the words ‘in contravention of’ require a Court finding before any determination can be made. Section 147(b) of the Broadcasting Services Act provides for persons to make a complaint to ACMA about breaches of a licence condition, and under section 149(1) of the Act, ACMA must investigate the complaint. The alleged breach in this instance relates to the licence condition, at clause 8(1)(a) of Schedule 2 to the Broadcasting Services Act, to not broadcast a tobacco advertisement within the meaning of the TAP Act. The issue is therefore whether the licensee’s conduct could constitute an offence under section 139(3) of the Broadcasting Services Act, because the broadcast of a tobacco advertisement in contravention of the TAP Act is a breach of the licence condition set out at clause 8(1)(a) of Schedule 2 to the broadcasting Services Act.

Whether the licensee broadcast a tobacco advertisement

According to the definition of a ‘tobacco advertisement’ at section 9(1) of the TAP Act, any audible message that gives publicity to, or otherwise promotes or is intended to promote, smoking, or the purchase or use of a tobacco product, or a trademark, or which mentions any other words (for example, a brand name) that are closely associated with a tobacco product, satisfies the definition of a ‘tobacco advertisement’.

In this instance, the broadcast gave publicity to smoking, the purchase and use of a tobacco product, and the brand name, Camel. The audible messages broadcast were promotional in nature of both smoking as a desirable activity and Camel cigarettes as a tobacco product of choice. This was borne out by the announcements including alleged medical evidence that Camel cigarettes are ‘smooth’ and ‘mild’ and thus do not cause ‘throat irritation’. The announcements also advised smokers that if they were ‘not convinced that Camels are the mildest cigarette you’ve ever smoked’, they could receive the full purchase price and postage in return. Further, the announcements encouraged the bulk purchase of Camel cigarettes, with the statement ‘Camels by the carton are the best buy’.

For the above reasons, the licensee broadcast three tobacco advertisements.

Whether the material was an ‘accidental or incidental accompaniment’ to the broadcast of ‘other matter’

Section 14 of the TAP Act provides that a person may broadcast a tobacco advertisement if it was an accidental or incidental accompaniment to the broadcast of other matter, and if the person does not receive any direct or indirect benefit for broadcasting the advertisement.

Accidental accompaniment

The definition of ‘accidental’ is ‘happening by chance or accident, or unexpectedly’ (Macquarie Dictionary, Third Edition). This means that section 14 of the TAP Act refers to a situation where a tobacco advertisement ‘happens by chance or accident, or unexpectedly’ in a broadcast.

In its submission of 25 September 2006, the licensee argued that the broadcast was ‘accidental’ because it was unaware the play contained tobacco advertisements until they had been broadcast. In other words, the licensee argues that it is sufficient for the broadcast of the advertisement itself to be ‘accidental’ for the defence to apply.

ACMA is of the view that ‘accidental’, in this context, refers to how the tobacco advertisement came to be broadcast as part of the broadcast of ‘other matter’. The broadcast of the radio play – the ‘other matter’ – was intended. There is nothing to indicate that the tobacco advertisement was not intended to go to air or that it happened by chance or unexpectedly. It could not, therefore, be said that the broadcast of the tobacco advertisement was ‘accidental’. In this case, there was ample opportunity for the licensee to edit the tobacco advertisements out of the recording before it was broadcast.

Incidental accompaniment

In the *Rothmans* case,¹ the Full Federal Court stated (at 691):

It is not difficult to think of circumstances under which a licensee might televise matter of an advertising character as an incidental accompaniment of televising other matter; for example a televised news item shows a street scene with advertising billboards in the background. The transmission may be accidental, in the sense that the staff of the licensee do not notice the background billboard. But it may also be deliberate. The action – which represents a genuine news item – happens to take place in front of the billboard so that if the news item is to be used the billboard must also be shown. Under such circumstances the exclusion of ‘incidental accompaniment’ would apply.

In the *Rothmans* case, the Court found that the offending advertisements were not ‘incidental’ to the relevant ‘other matter’.

In the *United Telecasters*² case, the High Court was required to consider whether it was open to a jury to conclude that the broadcast of matter was an incidental accompaniment to the broadcast of other matter. The High Court referred to the definitions for ‘incidental’ in *The Shorter Oxford Dictionary* and *The Macquarie Dictionary*.

The *Shorter Oxford Dictionary* defines ‘incidental’ as:

1. Occurring or liable to occur in fortuitous or subordinate conjunction with something else; casual...
2. Casually met with....

The *Macquarie Dictionary* definition of ‘incidental’ includes:

‘happening...in fortuitous or subordinate conjunction’ with the ‘other matter’ [...2nd ed (1987)]

Toohey and McHugh JJ, in the *United Telecasters* case, said (at 612):

In the context of s100(10) of the Act, the word ‘accompaniment’ seems to refer to matter of an advertising character which occurs ‘in company with’ the broadcasting or televising of ‘other matter’. Hence ‘matter of an advertising character’ will not be an ‘accidental or incidental’ ‘accompaniment’ unless it is broadcast or televised contemporaneously with the ‘other matter’. In that setting, the adjective ‘incidental’ must mean ‘happening ... in fortuitous or subordinate conjunction’ with the ‘other matter’.

In the *United Telecasters* case, the Court found that the offending advertisements were not ‘incidental’ to the relevant ‘other matter’. Toohey and McHugh JJ’s judgment demonstrates the importance of the determination as to *what the advertisement is* and *what the other matter is*. In the *United Telecasters* case, their Honours considered coverage of the pre-match Winfield Spectacular. They pointed out that it was open to the jury to conclude that the

¹ *Rothmans v Australian Broadcasting Tribunal* (1985) 5FCR 330

² *Director of Public Prosecutions v United Telecasters Sydney Limited* (1990) 168 CLR 594

Winfield brand name, the red and white colours of the dancers' costumes, and the familiar 'A frame' design associated with the Winfield brand were relevant matters of an advertising character—and that the music, dancing and configurations were *'the other matter'*. On this point, their Honours noted:

If the matter of an advertising character was confined to those three aspects, we doubt that the jury could be reasonably satisfied beyond reasonable doubt that the advertising matter was *not* incidental to the televising of the Spectacular.

Their Honours also noted that it was open to the jury to conclude that 'the whole of the Winfield Spectacular was matter of an advertising character or at all events that the matter of an advertising character dominated and therefore was *not incidental* to the televising of the Spectacular' [emphasis added].

In this investigation, the licensee broadcast matter of an advertising character that was not an incidental accompaniment to the broadcast of other matter. The tobacco advertisements were not unobtrusive and did not constitute background accompaniment to the radio play. They were a distinct part of the broadcast.

The tobacco advertisements did not occur 'contemporaneously with' the broadcast of the 'other matter'; and were not 'happening ... in fortuitous or subordinate conjunction' with the 'other matter', that is, the radio play. In this regard, the tobacco advertisements were not an 'incidental accompaniment' to the broadcasting of 'other matter'.

Direct or indirect benefit

The licensee submitted that it did not receive any direct or indirect benefit (financial or otherwise) for broadcasting the tobacco advertisements and in the absence of any evidence to the contrary, the licensee was permitted to broadcast the tobacco advertisements.

Whether the tobacco advertisements come within section 14 of the TAP Act

As mentioned above, section 14 of the TAP Act provides that a person may broadcast a tobacco advertisement if it is broadcast as an accidental or incidental accompaniment to the broadcast of other matter, **and** if the person does not receive any direct or indirect benefit for broadcasting the advertisement. In this investigation, the licensee has satisfied only one and not both requirements to come within section 14 of the TAP Act.

Action taken

In its 25 September 2006 submission, the licensee said that it

will take steps to ensure that all future archival broadcasts are considered and reviewed prior to broadcasting, so that any potentially unlawful material is identified and removed from any further proposed broadcasts.

ACMA considers that this action is an appropriate response to the compliance issues raised by the investigation and will continue to monitor the licensee's performance in this regard.

Section 178(2) of the Broadcasting Services Act provides that ACMA has discretion to give a copy of a report to the Director of Public Prosecutions if the report relates to conduct that could constitute an offence under the Broadcasting Services Act or another law of the Commonwealth. This is the first time the licensee has been found to have broadcast tobacco advertisements in a manner which could constitute an offence. For that reason and because the licensee has decided to take the action referred to above, ACMA considers that giving a copy of this report to the Director of Public Prosecutions is not warranted in this case.

Decision

The Australian Communications and Media Authority finds, for the above reasons, that:

- The licensee of 3AW, 3AW Southern Cross Radio Pty Ltd broadcast three ‘tobacco advertisements’ in *The Overnights* program on 28 April 2006.
- The advertisements were not an accidental or incidental accompaniment to the broadcast of other matter.
- This conduct could constitute an offence under section 139(3) of the *Broadcasting Services Act 1992* because the broadcast of a tobacco advertisement in contravention of the *Tobacco Advertising Prohibition Act 1992* is a breach of the licence condition set out at clause 8(1)(a) of Schedule 2 to the *Broadcasting Services Act 1992*.
- Although this report relates to conduct that could constitute an offence under the *Broadcasting Services Act 1992*, giving a copy of the report to the Director of Public Prosecutions is not warranted in this instance.

The Common Seal of the
Australian Communications and Media Authority
was affixed to this document in
the presence of:

Signature of Member

Signature of Member

Name (please print)

Name (please print)

Dated this 7th day of December 2006

ATTACHMENT A

Relevant legislation – tobacco advertisements

Broadcasting Services Act 1992

Part 10—Remedies for breaches of licensing provisions

Division 3—Action in relation to breaches by licensees

139 Offence for breach of conditions of licences and class licences

- (3) A person is guilty of an offence if:
 - (a) the person is a commercial radio broadcasting licensee; and
 - (b) the person engages in conduct; and
 - (c) the person's conduct breaches a condition of the licence set out in subclause 8(1) of Schedule 2.

Part 13—Information gathering by the ACMA

Division 2—Investigations

178 Report on investigation

- (2) If a report on an investigation relates to conduct that could constitute an offence under this Act or another law of the Commonwealth, the ACMA may give a copy of the report or of a part of the report to the Director of Public Prosecutions.

Schedule 2 Standard conditions

Part 4 - Commercial radio broadcasting licences

8 Standard conditions of commercial radio broadcasting licences

- (1) Each commercial radio 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.

Tobacco Advertising Prohibition Act 1992

Part 2—Interpretation

8 Defined terms

In this Act, unless the contrary intention appears:

Australia includes all the external Territories except Norfolk Island.

broadcast means transmit by means of:

- (a) a broadcasting service within the meaning of the *Broadcasting Services Act 1992*.

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 trademark 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 respect of articles 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).

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.

Penalty: 120 penalty units.

14 Accidental or incidental broadcast permitted

A person may broadcast a tobacco advertisement if:

- (a) the person broadcasts the advertisement as an accidental or incidental accompaniment to the broadcasting of other matter; and
- (b) 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).