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**SENATE COMMUNITY AFFAIRS LEGISLATION  
COMMITTEE**

**INQUIRY INTO TOBACCO ADVERTISING  
PROHIBITION**

**SUBMISSION BY  
FREE TV AUSTRALIA**

**16 JUNE 2004**

This submission is made by Free TV Australia (formerly, Commercial Television Australia (**CTVA**)), the representative body for all Australian commercial free to air television licensees, in response to the Senate Community Affairs Legislation Committee Inquiry into Tobacco Advertising Prohibition. Free TV Australia appreciates the opportunity to make this submission to the Committee.

This submission comments on the Exposure Draft of the *Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004*.

Free TV Australia (then CTVA) recently lodged a submission with the Commonwealth Department of Health and Ageing in response to a *Tobacco Advertising Prohibition Act 1992* Issues Paper, August 2003 ("**Issues Paper**"). Amongst other matters, the Issues Paper sought comment on whether the Act should be amended to prohibit tobacco product placement. Free TV Australia understands that the Department of Health and Ageing is currently considering the submissions made in response to the Issues Paper. CTVA's submission to the Department commented on tobacco product placement and other broad issues concerning tobacco advertising.

## **1 The Tobacco Advertising Prohibition (Film, Internet and Misleading Promotion) Amendment Bill 2004 ("the Bill").**

This Bill proposes a number of amendments to the *Tobacco Advertising Prohibition Act 1992* ("**TAPA**"), including:

- widening of the definition of "tobacco product" and "tobacco advertisement" (sections 2,3 & 4);
- a new offence of knowingly or recklessly, screening a film or television program made after 1 July 2004 containing a product placement of a tobacco product (section 7); and
- a new offence of knowingly or recklessly, demanding, soliciting, offering or accepting any direct or indirect benefit for the inclusion in Australia or Norfolk Island on or after 1 July 2004 in a television program, film or computer game, any depiction or image of a tobacco product, a tobacco advertisement or the smoking of tobacco (section 7).

The new offences attract penalties far in excess of the penalties for other TAPA offences. For corporations, the offences attract a maximum fine of \$550,000 (5000 penalty units, compared to \$66,000 (600 penalty units) for other TAPA offences.

Free TV Australia opposes these amendments on the following basis.

- Existing tobacco advertising restrictions in Australia are already extremely comprehensive.
- The proposals to widen the definition of "tobacco product" and "tobacco advertisement" are unnecessary, confusing and will impose unjustified compliance costs on broadcasters.
- It will be very difficult for a broadcaster to ensure it does not screen a film or television program containing a tobacco product placement. Broadcasters have no knowledge or control over tobacco product placement in independently produced program content and do not usually have rights to edit licensed program content. The effect of such an offence would be that many films, series, documentaries and overseas sporting events would not be able to be broadcast in Australia.
- The new offence of knowingly or recklessly accepting a benefit for tobacco product placement is unnecessary. Such conduct is already caught by the offence of publishing a tobacco advertisement. If a further offence is introduced, it should attract the same penalty as other TAPA offences.

These reasons are expanded and explained below.

## 2 Existing regulation is extremely comprehensive

The current tobacco advertising restrictions in the Tobacco Advertising Prohibition Act 1992 (“TAPA”) are comprehensive, are consistent with advertising restrictions in other first world countries, and have the flexibility to capture new activities that are genuinely tobacco promotions.

In the case of television broadcasters, compliance with the TAPA is taken very seriously and for good reason. Tobacco advertising is one of a limited number of issues which are considered serious enough to be regulated directly under the Broadcasting Services Act, as a condition on a broadcasting licence, as well as under the TAPA. Therefore, in addition to penalties arising directly from the TAPA, contravention of the TAPA amounts to a breach of a licence condition. Under the Broadcasting Services Act, penalties for breach of a licence condition include substantial fines (of up to \$2,200,000) and can also result in suspension or cancellation of the broadcasters’ licence.

Broadcasters comply with both the letter and the spirit of the TAPA. In addition to the high penalties that could result from failure to comply with the advertising prohibitions, broadcasters recognise and are committed to the values of public health which underpin the prohibition on tobacco advertising. This commitment can be seen through the broadcast of community service announcements, editorial and program content which seek to educate viewers about the health risks of tobacco smoking, as well as through the broadcasters’ record of compliance with existing regulations.

In addition to the prohibition on tobacco advertising, the depiction of tobacco in program content is also regulated. Program content is co-regulated by the Broadcasting Services Act (administered by the ABA), industry codes of practice in the case of commercial and subscription television broadcasters and charters in the case of the national broadcasters. Through these co-regulatory systems, program and editorial content is regulated in accordance with community standards.

The Commercial Television Industry Code of Practice aims to limit the exposure of children to content of an adult nature, by dividing each broadcast day into classification zones. Only material which is suitable for a particular classification can be broadcast within that zone. Both the “G” and “PG” classification requirements require that the use of legal drugs (such as tobacco and alcohol) must be handled with care. The “G” classification also requires that imitable and dangerous behaviour should only be shown when absolutely justified by the storyline or program context and then only in ways that do not encourage dangerous imitation.

The ABA has registered existing industry codes on the basis that they provide appropriate community safeguards. Viewer complaints in relation to tobacco depictions in program content is very low. The community’s satisfaction with the level of protection provided by the existing regulation is also evidenced by the fact that no submissions in relation to tobacco were made to the recent Commercial Television Industry Code of Practice Review. In addition, ABA research into community concerns about television content does not show any concern in relation to the depiction of tobacco use<sup>1</sup>.

Free TV Australia is strongly of the view that the current regulation through the TAPA, the BSA and industry codes of practice provides adequate community safeguards in reducing the public’s exposure to messages and images that may persuade them to start or continue smoking or to use tobacco products.

It is on this basis that Free TV Australia submits that there is no need for additional or different regulation of tobacco advertising in broadcasting services.

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<sup>1</sup> ABA “Research into Community Attitudes to Violence on Free to Air Television”, March 2003. Over 1200 people were surveyed in relation to their attitudes to television content. When asked if there was any aspect of what is currently shown on television that concerns them around 1% mentioned drug use/references. Tobacco use was not specifically referred to at all.

### 3 No need for wider definition

There is no need for the proposed widening of the definition of “tobacco product” or the widening of the meaning of “tobacco advertisement”. What constitutes a “tobacco advertisement” is already defined and interpreted very broadly. Case law has demonstrated that the term “tobacco advertisement” can encompass very indirect and discrete promotion, such as the broadcast of:

- an entertainment display in which dancers wore the red and white colours associated with the Winfield brand (*Director of Public Prosecutions v United Telecasters Sydney Ltd (1990) 168 CLR 594*);
- an interview with a celebrity, during which the celebrity smoked a cigarette and held a cigarette packet with the brand name visible (*TCN Channel Nine Pty Ltd v Australian Broadcasting Authority (2002) FCA 896 (18 July 2002)*).

The proposed amendment in clause 4 of the Bill would expand the meaning of “tobacco advertisement” to include any image, message or communication that gives publicity to, or otherwise promotes or is intended to promote any “colour or colour schemes” or “combination of words, designs and colour schemes” that are closely associated with a tobacco product (whether also closely associated with other kinds of products) “including the words “mild”, “light” and “menthol” and phrases including “low tar”, “super mild”, “ultra mild”, “extra mild”, “ultra light” and “special filter” or any other image, message or communication by any means associated with tobacco products.”

Free TV Australia submits that this amendment is not only unnecessary, it is confusing and will impose unjustified compliance costs on broadcasters. Many of the words set out in the Bill, are used in relation to a number of food products. Further, the existing definition is already very broad and it is difficult to see why a further even broader catch all “any other image, message or communication by any means associated with tobacco products” is needed or justified. These additions, simply create confusion for broadcasters and others who must ensure they do not breach the advertising prohibition.

### 4 Screening of films containing tobacco product placement

The Bill proposes to introduce a new offence that “a person or regulated corporation must not, knowingly or recklessly, screen a film or television program, made after 1 July 2004 containing a product placement of a tobacco product, in Australia or Norfolk Island on or after 1 July 2004”.

It will be very difficult for a broadcaster to ensure it does not commit this offence. Broadcasters have no knowledge or control over tobacco product placement in independently produced program content, particularly foreign program content. Will a broadcaster be “reckless” if a foreign movie contains a scene with characters smoking cigarettes and before screening the movie in Australia the broadcaster has not enquired whether the cigarettes were depicted in the movie in return for a benefit to the maker of the film? To whom would the broadcaster direct the enquiry? A myriad of individuals and corporations are involved in making and distributing movies and other program material – actors, directors, producers, financiers and distributors.

In relation to foreign program content, normal business practice is that Australian broadcasters acquire packages of rights to broadcast foreign content from major foreign distributors. Australian broadcasters are certainly not in a position to dictate licence terms to these distributors. Further, even if a broadcaster was in a position to dictate terms, it is most unlikely that a distributor would have knowledge of, or be in control of, any product placement arrangements.

Further, content licence terms usually include obligations requiring the broadcaster to uphold the artistic integrity of the content being supplied and obligations not to interfere with

the moral rights of the underlying rights holders. As such, a broadcaster will not usually be entitled to edit program content to remove or pixelate any images that may have been included as a result of a product placement arrangement.

Broadcasters will be forced to treat the possibility of committing this offence very seriously, given that a corporation committing the offence is liable to pay a maximum fine of \$550,000 (5000 penalty units). This is far in excess of the penalties for other TAPA offences committed by a corporation (which are set at 600 penalty units or \$66,000).

Free TV Australia submits that the unfortunate effect of introduction of this offence would be that many films, series and documentaries would not be able to be broadcast in Australia.

If this offence is introduced, television broadcasters may also be prevented from televising overseas sporting events, such as the International Grand Prix, which is sponsored by a tobacco manufacturer.

The proposed new offence imposes a heavy burden on Australian broadcasters and the Australian public who will miss out on foreign programs and foreign sporting events. Given that Australia already has extremely comprehensive tobacco advertising restrictions, the potential incremental public health benefit which may result from eliminating further tobacco images in broadcast material, seems totally out of proportion with the burden imposed.

## **5 Further offences unnecessary**

Finally, Free TV Australia submits that the new offence of knowingly or recklessly accepting a benefit for tobacco product placement is unnecessary. Such conduct is already caught by the offence of publishing a tobacco advertisement. If Parliament believes a further offence is necessary, Free TV Australia submits that it should attract the same penalty as other TAPA offences.