

# Is Tobacco Sponsorship Advertising?

Katrina Henty examines the ABT Grand Prix inquiry which found  
that tobacco sponsorship was not tobacco advertising

**H**ave you noticed the enthusiasm with which tobacco companies approach the sponsorship of sporting events? Following the October decision of the Australian Broadcasting Tribunal in relation to the 1990 Australian Grand Prix, it looks like this trend is set to continue.

The Tribunal has effectively identified as a 'loop-hole' in the prohibition against tobacco advertising contained in the *Broadcasting Act 1942* provision under which tobacco advertising may be broadcast as an 'incidental accompaniment' of a broadcast.

In November 1990, following submissions received from the anti-smoking group, Action on Smoking and Health Ltd (ASH), the Tribunal decided to initiate an inquiry into the broadcast of the 1990 Australian Grand Prix by the Nine Network and other regional stations.

ASH submitted that the broadcast was in breach of Section 100(5A) of the *Broadcasting Act* which prohibits a licensee from broadcasting an advertisement for, or for the use of, cigarettes, cigarettes products or other tobacco products.

## No accident

**I**t was conceded by the Nine Network that the sponsorship images for tobacco companies and their products broadcast during the 1990 Australian Grand Prix were advertisements for the purposes of Section 100(5A) of the Act. However, it was argued that the broadcast fell within the exemption set forth in Section 100(10) of the Act which provides that:

*"A reference in sub-section (5A) ... to the broadcasting of advertisements ... shall be read as not including a reference to the broadcasting of matter of an advertising character as an accidental or incidental accompaniment of the broadcast of other matter in circumstances in which the licensee does not receive payment or other valuable consideration for broadcasting the advertising matter."*

There was no evidence that any payment or other consideration was received by the Nine Network for broadcasting the tobacco sponsorship images and it was conceded by the Network that the broadcast of those

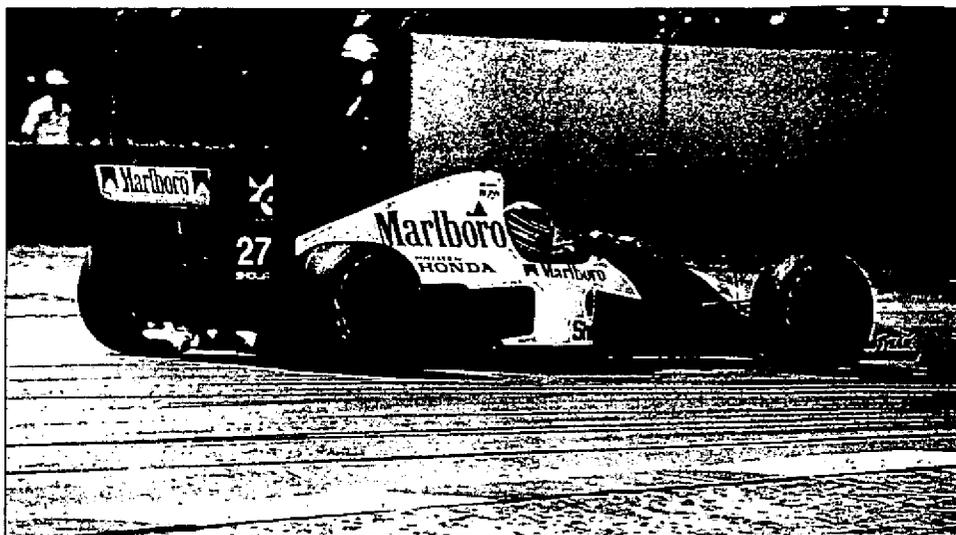


Photo courtesy of the Australian Formula 1 Grand Prix Board

images was not an accidental accompaniment of the broadcast.

Accordingly, the sole question before the Tribunal was whether the broadcast of the sponsorship images was an incidental accompaniment of the broadcast of the Australian Grand Prix.

## Program analysis

**T**he Tribunal carried out a content analysis on the broadcast, narrowing down the relevant portions of the broadcast by identifying only those which contained tobacco sponsorship imagery. The Tribunal then conducted a detailed content analysis of this part of the broadcast. The types of sponsorship imagery counted were sponsor's names, logos, colours and messages. It was found that tobacco sponsorship imagery was clearly visible on 653 separate occasions.

The Tribunal referred to the decisions of *DPP v United Telecasters Sydney Ltd* (1990) and *Rothmans and Benson & Hedges v Australian Broadcasting Tribunal* (1985) in reaching the conclusion that incidental should be interpreted to mean "in subordinate conjunction with". It assessed the 653 occurrences of tobacco advertising as constituting a "significant amount of broadcasting time" but, applying an objective test, concluded that the advertising material was in this case

subordinate to and, therefore, only incidental to the broadcast as a whole.

It is clear from the Tribunal's decision that, although it believed its conclusion represented a correct interpretation of the relevant provisions of the *Broadcasting Act*, it did not believe that those provisions accurately reflected the policy of the Act. The Tribunal stated:

*"The present provisions of the Act provide only an illusory restriction. If the legislature intended or now considers that these provisions form an effective restraint to the advertising or televising of tobacco products, it is not achieving its objective or intent."*

The Tribunal went on to challenge both the politicians and the legislative draftsman with its closing statement:

*"This is not a complex area of regulation but it is one that requires clear and precise policy, adequately reflected in legislation."*

The Tribunal was constrained by the words of the legislation and reached what the writer believes to be the correct decision within those limitations. If it is truly Parliament's intent to prohibit tobacco advertising, Parliament must legislate to ban the display of tobacco advertisements at sporting and other events which are to be broadcast.

*Katrina Henty is a solicitor with Gilbert & Tobin, of Sydney.*