

## Investigation report no. BI-682

Summary	
<b>Licensee</b>	Channel Seven Sydney Pty Limited
<b>Finding</b>	Breach of clause 3.3.1
<b>Relevant code</b>	Commercial Television Industry Code of Practice 2015 (revised 2018) (the <b>Code</b> ) Clause 3.3.1 [present material facts accurately] Clause 3.6.1 [program promotion must comply with section 3 having regard to brevity]
<b>Program</b>	Program Promotion for <i>7News Spotlight: Killers in the Mist</i>
<b>Date of broadcast</b>	Multiple
<b>Type of service</b>	Commercial broadcasting—television
<b>Date finalised</b>	1 May 2024

## Background

In November 2023, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* (the **BSA**) into program promotions for the current affairs program: *7News Spotlight: Killers in the Mist*.

The Program Promotions were broadcast on Seven by Channel Seven Sydney Pty Limited (the **Licensee**) in the lead up to the broadcast of *7News Spotlight: Killers in the Mist* program on 28 May 2023 at 8.45pm (the **Program**).

The ACMA received a complaint raising several allegations about the Program and a program promotion associated with the Program. The ACMA assessed the allegations and declined to investigate a number of the allegations.

The ACMA has investigated the Licensee's compliance with clause 3.3.1 of the Commercial Television Industry Code of Practice 2015 (revised 2018) (the **Code**) in relation to the allegation that a program promotion inaccurately portrayed a male participant (the **Participant**), who featured in the Program Promotions, as 'a representative of Big Tobacco' (the **Allegation**).

The investigation has considered the complaint referred to above and submissions from the Licensee, extracts of which are identified in this report where relevant.

## The Program Promotions

Under section 8 of the Code, a 'program promotion' is defined as follows:

**Program Promotion** means material broadcast by a Licensee within a Program break or between Programs which is designed to promote or draw attention to a Program on the Licensee's broadcasting services and includes reference to the date and time of the Program which is being promoted.

The Licensee provided copies of 4 broadcasts that fit within the definition of 'program promotion' and appeared to be promoting the Program.

Having reviewed the 4 program promotions, the ACMA notes:

- The first program promotion (**Program Promotion 1**) was 58 seconds in duration and appeared to focus on themes including the dangers of vaping, the increase in vaping amongst children, the accessibility of vapes and that the tobacco industry is not being forthcoming in regard to the health effects of vaping. Program Promotion 1 included content that related to the Allegation.
- The second program promotion (**Program Promotion 2**) was 36 seconds in duration and focused on the same themes as Program Promotion 1 in a slightly condensed form. Program Promotion 2 included content that related to the Allegation.
- The third program promotion (**Program Promotion 3**) was 30 seconds in duration and included similar themes to Program Promotions 1 and 2 but did not focus on the tobacco industry's alleged lack of transparency about the health effects of vaping. Program Promotion 3 did not include content that related to the Allegation.
- The fourth program promotion (**Program Promotion 4**) was 20 seconds in duration and focused on the same themes as Program Promotion 3 in a slightly condensed form. Program Promotion 4 did not include content that related to the Allegation.

As Program Promotion 1 and Program Promotion 2 (the **Program Promotions**) included content regarding the Allegation, the ACMA's analysis is limited to these 2 Program Promotions.

## **Issue: Accuracy of the Program Promotions**

### **Relevant Code provisions**

#### **3.3 Accuracy and fairness**

3.3.1 In broadcasting a news or Current Affairs Program, a Licensee must present factual material accurately and ensure viewpoints included in the Program are not misrepresented.

#### **3.6 Program Promotions for news and Current Affairs Programs**

3.6.1 In broadcasting a Program Promotion for a news or Current Affairs Program, a Licensee must comply with this Section 3 as far as practicable, having regard to its brevity.

### **Finding**

The ACMA finds that the Licensee breached clause 3.3.1 by presenting material facts inaccurately in the Program Promotions.

### **Reasons**

Clause 3.6.1 requires that program promotions for news and current affairs programs comply with clause 3 as far as practicable, having regard to the brevity of the program promotion. Accordingly, clause 3.3.1, which sets out the requirements in relation to accuracy, will apply to the Program Promotions subject to clause 3.6.1. To assess the accuracy of a program promotion under clause 3.3.1, the ACMA considers:

- > What does the material convey to the ordinary reasonable viewer?
- > Was the material factual in character?
- > If so, did it convey a material fact or facts in the context of the relevant report?
- > If so, was the factual material accurate?

If the material is content that would breach clause 3.3.1, the ACMA then considers:

- > Having regard to the brevity of the program promotion, was compliance with clause 3.3.1 reasonable in the circumstances?

The ACMA's investigation focused on the Allegation, that is, whether the Participant was inaccurately portrayed as a representative of the tobacco industry.

#### **What does the material convey to the ordinary reasonable viewer?**

As noted in Attachment A below, when assessing content, the ACMA considers the meaning conveyed by the material, including the natural, ordinary meaning of the language, context, tenor, tone, images and any inferences that may be drawn. This is assessed according to the understanding of an 'ordinary reasonable' viewer. Accordingly, due consideration must be given to both the visual and audio content that is broadcast.

The ACMA notes the Program Promotions contained the following audio and visual content:

Audio	Visual
Narrator – Yet Big Tobacco wants Australia to turn a blind eye.	Medium close-up side view of the Participant shown walking; mid shot of the Participant seated, shown talking (with no audio) while he makes hand gestures; close-up side view of a female teenager blowing smoke from their mouth.
Participant – Nicotine is relatively benign.	Mid shot of a young male breathing out smoke while walking towards the camera; a close up of the Participant talking in sync with the audio.
Narrator – How can you possibly say that?	Medium close-up shot of an interviewer talking in sync with the audio.
Participant – Are you suggesting I'm hiding the evidence?	Close-up shot of the Participant talking in sync with the audio.

Program Promotion 1 also contained this content:

Audio	Visual
Narrator – What they have failed to tell you about the poisons our kids are breathing in.	Close-up side shot of a female adult blowing smoke from their mouth; over-the-shoulder shot of a male adult blowing smoke from his mouth while sitting on a seat in public with two children sitting on either side of him; extreme close-up side shot of the lips of a female blowing smoke from their mouth.

The Licensee submitted to the ACMA:

The Licensee disagrees that the Program Promotion conveyed to the ordinary reasonable viewer that [the Participant] is a representative of the tobacco industry or represented the views of the tobacco industry. The precise nature of the [Participant's] links to the tobacco industry were never included in the Program Promotion because: it was not material to the Program Promotion...

[...]

[T]he Licensee rejects the [...] suggestion that the Program Promotion materially conveyed to the ordinary reasonable viewer that [the Participant] was a representative or represented the views of 'Big Tobacco' in an official capacity. Rather, the [the Participant's] viewpoint was accurately and fairly characterised in the Program Promotion in so far as the [Participant's] [...] connections to the industry.

The Licensee further submitted:

The Licensee strongly refutes that the Program Promotions materially conveyed that the Participant – unnamed and without any audio elements at the time of the relevant voiceover – was a representative of the tobacco industry. It is not clear who the Participant is in this part, or throughout the Program Promotions. As such, this aspect of the Program Promotions is not determinative that the Participant was a representative of Big Tobacco.

The ACMA notes that when the voice-over refers to 'Big Tobacco wants Australia to turn a', the Participant is shown prominently, by himself, on screen talking (albeit without audio) and making strong hand gestures. The Participant is seated at a table in a corporate office/meeting room wearing a grey suit as if he is being interviewed. The combination of the voice-over audio with the visuals would likely convey to the ordinary reasonable viewer an association between the Participant and the tobacco industry.

The Licensee further submitted that while the Program Promotions may have presented the Participant as having an 'association' with the tobacco industry and having views that 'align' with that industry, this was not sufficient to 'give rise to a determination that the Participant was a representative of Big Tobacco'.

The Licensee also submitted that the Participant appearing in the Program Promotion 'seated at a table...wearing a grey suit as if he is being interviewed' is how he appeared in the interview within the Program and 'it is not clear' how this had 'any bearing' regarding how 'the Participant was portrayed to the ordinary reasonable viewer'.

In the broadcast, the Participant's voice is then heard as he makes the statement 'nicotine is relatively benign' with a front on close-up shot of the Participant being shown on screen as he says, 'relatively benign'.

Regarding the statement 'nicotine is relatively benign', the Licensee submitted:

While the ordinary reasonable viewer may have understood this to be a view of the tobacco industry, it is a step too far to conclude that this audio element materially conveyed that the Participant was a representative of Big Tobacco.

A front on close-up shot of the Participant is also shown in the Program Promotion as the Participant says, 'are you suggesting I'm hiding the evidence?'.

The Licensee further submitted:

It is clear that the Participant's question is in response to being questioned about his assertion that nicotine is "relatively benign". The Licensee submits the ordinary reasonable viewer would interpret it in this way. It does not necessarily follow that the ordinary reasonable viewer would link the Participant as a representative of Big Tobacco.

The ACMA notes the Licensee's submissions above, however, the ACMA has regard to all relevant contextual indicators in determining what the material conveyed to the ordinary reasonable viewer. In this case, the relevant audio and visual elements broadcast during the segment are considered collectively.

The ACMA considers that, in combination, the timing of the statement 'yet Big Tobacco wants Australia to turn a blind eye' while showing the Participant on the screen for the first time indicates to viewers that the Participant was a representative of the tobacco industry.

Further, that the Participant is conveyed as a representative of the tobacco industry is then strengthened by:

- Immediately including the Participant's statement that nicotine is 'relatively benign' - a position that is likely to have been understood by the ordinary reasonable viewer to be a position shared by the tobacco industry.
- The Participant's statement 'are you suggesting I'm hiding the evidence?', noting that hiding evidence has previously been attributed in the Program Promotion to 'Big Tobacco' who want 'Australia to turn a blind eye'.

As noted above, it is the ACMA's view that all the contextual factors will have a role in determining the meaning conveyed to the ordinary reasonable viewer. While the Licensee may not have had a role in what the Participant wore to the interview, his appearance, in combination with other relevant contextual factors, distinguishes him from other persons shown in casual attire in the Program Promotion and reinforces the portrayal of him as a representative of the tobacco industry.

Regarding Program Promotion 1, the audio of the Participant stating, 'are you suggesting I'm hiding the evidence?' is immediately followed by the narrator stating, 'what they have failed to tell you about the poisons our kids are breathing in'. The ACMA considers, that in the context the statement appears, the ordinary reasonable viewer would have understood 'they' to be a reference to the tobacco industry.

The ACMA considers that the Participant's reference to 'hiding the evidence' immediately followed by an assertion that the tobacco industry is not being forthcoming would further strengthen the ordinary reasonable viewer's understanding that the Participant was a representative of the tobacco industry.

The Licensee further submitted that the Program Promotions 'sought to highlight' the Participant's 'public statements in support of' and 'connections with' the tobacco industry.

The Licensee also submitted:

There are multiple ways the Program Promotions could have been interpreted by an ordinary reasonable viewer (such is the nature of short "promos" as they are known – they summarise the themes of a whole program in snippet form) and, where this is the case, the ACMA should acknowledge the multiple available meanings in its assessment of what the Program Promotions conveyed and not prefer one inference over another.

While the ACMA acknowledges the Licensee's submission above, it is open for the ACMA to make findings on what the broadcast material conveyed to an ordinary reasonable viewer.

The ACMA does not consider that the ordinary reasonable viewer would have been able to distinguish, from the broadcast content in the Program Promotions, that the Participant was not a representative of Big Tobacco but rather had 'connections' to the tobacco industry.

The Licensee further submitted:

[...] an ordinary reasonable viewer would be well aware that program promotions generally are intended to provide a heightened ‘snapshot’ of a program to entice viewers to watch the program.

[...]

Program promotions are inherently transient in nature and ordinary reasonable viewers should be considered by the ACMA to be cognisant of the level of accuracy that can be realistically expected from such materials.

As noted above, the ACMA relies on the ‘ordinary reasonable viewer’ test to ascertain the meaning conveyed by the material. The fact that the relevant material was broadcast as a program promotion is a relevant contextual factor that the ACMA has considered. Once the meaning conveyed has been ascertained by reference to the ‘ordinary reasonable viewer’, it is then for the ACMA to determine compliance with the Code by assessing the accuracy of that material against the requirements of the relevant provision. The ACMA notes that compliance with clause 3.3 only applies in respect of a program promotion for a news or current affairs program ‘as far as practicable, having regard to its brevity’. This is addressed further below.

Consequently, given the cumulative effect of the relevant audio and visuals, the ACMA’s view is that the ordinary reasonable viewer would have understood that the Participant was a representative of the tobacco industry.

#### **Was the material factual in character?**

The Licensee submitted to the ACMA:

[...] the only specific, unequivocal fact that could have been presented to the viewer in the portion of the Program Promotion that featured the [Participant] is the tobacco industry’s desire for Australians to ignore the harmful impacts of nicotine e-cigarette products.

The Program Promotion does not present as a specific, unequivocal fact that the [Participant] is a representative of ‘Big Tobacco’ and shares its views. In fact, the [Participant] is not even named in the Program Promotion.

The ACMA considers that the question of whether the Participant was a representative of the tobacco industry, is factual material that is specific, unequivocal, and capable of independent verification. While the Participant was not identified by name in the Program Promotions, the ACMA considers that this is not determinative of whether the material is factual in character.

#### **Did the factual assertion convey a material fact or facts in the context of the promotion?**

The Licensee submitted to the ACMA:

Conveying who is a representative of ‘Big Tobacco’ is not a material theme presented in the Program Promotion, especially in circumstances where the [Participant] is not named. Rather, as outlined above, the material themes centre around the harms of e-cigarettes and differing views surrounding those harms.

The Licensee further submitted:

[...] the Licensee reiterates that the official capacity in which the Participant represented his views, which were in line with those of the tobacco industry, cannot be considered a material fact in the context of the Program Promotions.

It is the ACMA's view that a theme of the Program Promotions is that the tobacco industry is not being forthcoming regarding the health effects of vaping. Specifically, the Program Promotions convey that the tobacco industry 'want' the Australian public to 'turn a blind eye'.

Further, Program Promotion 1 also conveys that the tobacco industry has been disingenuous by 'fail[ing] to tell you about the poisons'. In this context, the ACMA considers that the factual assertion that the Participant is a representative of 'Big Tobacco', who is understating the dangers of nicotine and challenging the fact that evidence is being hidden, would be a material factual assertion.

#### **If the Program Promotion did convey material facts, is such material accurate?**

The Licensee submitted that the Participant's 'publicly expressed views have been both supportive of and aligned with the position taken by the tobacco industry regarding e-cigarette products', specifically referring to a previous quote from the Participant (made during a previous broadcast) that:

I think 'Big Tobacco' is actually more trustworthy and more pro-health in this than many of the public health bodies in Australia. They are producing credible research. They're producing products which save lives. Public health in Australia is opposed to that, and I think that's wrong. I think they're actually costing lives by campaigning against vaping.

Further, the Licensee submitted to the ACMA that the Participant had authored research papers using research that had been produced by the [name of foundation], an organisation that is funded by 'one of the world's largest tobacco companies'.

The Participant is a medical doctor with a special interest in smoking cessation. The Participant has a website, which notes:

I have worked in tobacco treatment for over 40 years, helping smokers quit, teaching health professionals about smoking and vaping, writing articles in peer-reviewed journals, research and advocacy for tobacco harm reduction.

Under the Participant's bio on his website it states:

#### **Publications**

[The Participant] is a strong believer in evidence-based medicine, i.e. using treatments that are proven to be effective in scientific studies. He has participated in many research studies on how to quit smoking and has published many articles in peer-reviewed medical journals.

[...]

#### **Disclosures**

[The Participant] has never received funding from any electronic cigarette or tobacco company. His vaping advocacy is entirely self-funded.



It is also noted on the Participant's website that he is the Founding Chairman of a registered health promotion charity dedicated to raising awareness of low-risk nicotine products as a substitute for smoking for smokers who can't quit.

The ACMA viewed the charity's website and notes that the Participant was the founding Chairman of the organisation, which was established in 2017. However, the Participant stepped down from the Board in 2021. According to the charity's 'funding' webpage, it notes:

[The charity] is funded by public donations. We do not accept donations from tobacco companies or their subsidiaries or from the vape industry.

All donations are untied and all spending is at the discretion of the [the charities] Board of Directors, in line with the written objectives of the organisation and our Constitution.

Two vaping businesses provided funding for the initial legal and website costs of establishing [the charity].

The ACMA notes that the Participant has promoted nicotine 'vaping' products as a healthier alternative to cigarette smoking and as an aid for people who wish to quit cigarette smoking. The ACMA acknowledges that this is likely a view shared by the vaping industry.

We also note that a charity, which was co-founded by the Participant accepted funding from 2 vaping businesses for 'initial legal and website costs'. Further, the ACMA acknowledges the Licensee's submission regarding links between the Participant and the tobacco industry.

However, the ACMA also notes the 'disclosure' statement on the Participant's website and considers that the information provided by the Licensee is not sufficient to support the assertion that the Participant is a representative of the tobacco industry.

Therefore, the ACMA considers the material fact that the Participant is a representative of the tobacco industry was not accurate.

### **Having regard to the brevity of the program promotion, was compliance with clause 3.3.1 reasonable in the circumstances?**

The Licensee submitted to the ACMA that the 'precise nature of the [Participant's] links to the tobacco industry were never included in the Program Promotion' because 'the Licensee was not required to do so given the brevity of the Program Promotion'.

The Licensee submitted:

[...] given the brevity of a 60-second program promotion and the diversity of issues and views covered by the program, it was necessary to edit sections of the Participant's interview for inclusion in the Program Promotions. The purpose of including elements of the Participant's interview was to balance out the contradictory views of other interviewees about the harms and negative impacts of vaping.

While the ACMA acknowledges the brevity of the Program Promotion may have limited the Licensee's capacity to provide detailed information about the Participant, the Licensee chose to combine the images of the Participant with the relevant statement about 'Big Tobacco' and the subsequent extracts from the interview with the Participant, in such a way that the ordinary reasonable viewer would have understood that the Participant was a representative of the tobacco industry.

The ACMA considers that the brevity of the Program Promotion did not render it impracticable for the Licensee to comply with clause 3 of the Code. Rather, it is the ACMA's view that the Licensee's inability to address the role of the Participant in sufficient detail, should have resulted in added caution in how the Participant was portrayed in the Program Promotion and did not mitigate the fact that the Participant was inaccurately portrayed as a representative of the tobacco industry.

Accordingly, the ACMA considers, having regard to the brevity of the Program Promotion, that it was reasonable for the Licensee to ensure that the Program Promotion complied with Section 3.3.1 of the Code.

### **Conclusion**

Based on the above assessment, the ACMA considers that the Licensee inaccurately broadcast a material factual assertion, that the Participant was a representative of the tobacco industry. Accordingly, the ACMA's finding is that the Licensee breached clause 3.3.1 of the Code.

## Attachment A

### The ACMA's approach to assessing content

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

Australian courts have considered an 'ordinary reasonable' listener or viewer 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.<sup>1</sup>

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

### ACMA considerations for determining factual content:

- > In practice, distinguishing between factual material and other material, such as opinion, can be a matter of fine judgement.
- > The ACMA will have regard to all contextual indications (including subject, language, tenor and tone and inferences that may be drawn) in making its assessment.
- > The ACMA will first look to the natural and ordinary meaning of the language used.
- > Factual material will usually be specific, unequivocal and capable of independent verification.
- > The use of language such as 'it seems to me' or 'we consider/think/believe' will tend to indicate that the content is contestable and presented as an expression of opinion or personal judgement. However, a common sense judgement is required and the form of words introducing the relevant content is not conclusive.
- > Statements in the nature of predictions as to future events will rarely be characterised as factual material.
- > Statements containing argumentative and exaggerated language or hyperbole will usually indicate a subjective opinion and will rarely be characterised as factual material.
- > The identity of the person making a statement (whether as interviewer or interviewee) will often be relevant but not determinative of whether a statement is factual material.
- > Where it is clear in the broadcast that an interviewee's account is subjective and contestable, and it is not endorsed or corroborated, their allegations will not be considered as factual assertions.
- > Where an interviewee's stance is separately asserted or reinforced by the reporter or presenter, or proof of an allegation is offered so that it becomes the foundation on which a program or a critical element of the program is built, it may be considered a factual assertion.
- > Sources with expertise may be relied on more heavily than those without, in determining whether material is factual, but this will depend on:
  - > whether the statements are merely corroborative of 'lay' accounts given by other interviewees

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<sup>1</sup> *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167.

- > the qualifications of the expert
- > whether their statements are described as opinion
- > whether their statements concern past or future events
- > whether they are simply comments made on another person's account of events or a separate assertion about matters within their expertise.