

- (3) No descriptions of the qualities of any wine, beer, or spirit, etc., are allowed in any advertisement.
- (4) Advertisements may refer to:
 - (a) Details of the points of sale and the service, e.g., location, hours of sale, details of parking, delivery, and type of sale (wholesale or retail).
 - (b) Description of the general range of merchandise, e.g., "A full stock of New Zealand and overseas wines, New Zealand and imported spirits and cordials, and a wide range of beer in cans, bottles, and flagons."
 - (c) Details of any associated service, such as entertainers, dancing, etc.
- (5) Advertisements for alcohol must not be presented from licensed premises, whether wholesale or retail.
- (6) Advertisements associated with alcohol must not be presented in association with or during programmes directed specifically at children.

Until June 1978, rule 1.11 did not refer to regulation 14, Broadcasting Regulations 1977, because the relevant amendment was not passed until then. Subsections (1) and (2) of regulation 14 have no relevance to the matters before the Tribunal. Subsections (3) and (4) were added by the Broadcasting Regulations 1977, Amendment No. 3 (S.R. 1978/171). The opening statement of the rule used to read:

"No station shall broadcast any advertisement which directly or by implication . . . is designed to promote the general consumption of alcoholic beverages. Advertisements may only be made in accordance with the following conditions."

In the new rule the general statement is replaced by a direct quotation of regulation 14 (3) and (4) and the rule then goes on to state:

"To meet the requirements of this regulation the warrant holder must ensure that all advertisements associated with the sale of alcohol meet the following conditions."

The same specific conditions (1) to (6) were repeated.

It seems clear that the Broadcasting Rules Committee has interpreted the regulation as merely restating the conditions that previously existed.

However, there are important differences—(1) The condition implied in warrants by regulation 14 stands on its own and is not subject to the detailed rules which applied to the previous general statement in rule 1.11. In interpreting that general statement the broadcaster would until June 1978 have seen specific types of advertising then listed which were clearly contemplated as suitable for broadcast under the rules. They were an extension of, rather than an interpretation of, the opening statement.

That is not the case with the condition now imposed in all warrants. The Tribunal considers it must therefore take regulation 14 (3) on its own, quite separately from the rules, when endeavouring to determine whether there has been a breach of that condition. The rules cannot modify the condition imposed by regulation 14 (3).

(2) The previous rule referred to an advertisement which "is resigned to promote . . ." Regulation 14 (3) does not refer to the design or purpose of the advertisement. (It does refer to the purpose of payment.)

(3) The previous rule 1.11 referred to an advertisement which ". . . is designed to promote the general consumption of alcoholic beverages." (Emphasis added.) Regulation 14 (3) now says that the advertisement that should not be broadcast is one that promotes the consumption of liquor.

So there are two fundamental differences in the rules. The purpose of the advertisement is no longer relevant, just the effect. The previous intent was to avoid the promotion of the general consumption of liquor by advertisements designed for that purpose.

The rules remain in force and we have in each complaint determined whether or not we consider the advertisement complied with the rules which purport to permit specific types of advertising. In doing so we do not necessarily accept that those rules can modify the prohibition in regulation 14 (3).

At the request of the Tribunal, Mr Darby, for the corporation, made helpful submissions on both the background and the legal interpretation and application of the regulation and rules. Similarly, submissions were also made by Mr Turner. It is appropriate that we should discuss those matters before turning to the individual complaints.

Mr Darby outlined the history which led to the passing of the amendment to regulation 14. It arose out of a decision of the Special Rules Committee, on which the Chairman of the Tribunal sat which approved new radio liquor advertisement rules for a limited period of 1 year based on the rules permitted by the Independent Broadcasting Authority, United Kingdom. The Minister sought voluntary agreement from private radio stations that the new rules should not be applied.

When this was not achieved, the Government brought down the Order in Council which amended the existing Broadcasting Regulations to impose a new condition in warrants of all stations, both radio and television—Regulation 14 (3) and (4).

Mr Darby submitted the intention of Government was to restore the status quo. The Tribunal considers that, in a matter of interpretation of a regulation which imposes a condition, it may not take account of public statements made by the Minister. To do so would leave the interpretation of the law in the hands of the Executive and that is obviously not the intention of the Broadcasting Act 1976.

It is well established that in these circumstances a Tribunal should not look to the Executive for interpretative guidance. We do not find the Tribunal's obligation to have regard to the general policy of the Government in relation to broadcasting should be applied to the interpretation of a statutory regulation. Furthermore, the Tribunal is required to act judicially in relation to each complaint.

Mr Darby referred to a previous decision (No. 8/78) in which the Tribunal found that an advertisement, which featured a Leopard can, constituted an advertisement for Leopard brand beer and found that the programme promoted the consumption of liquor. The corporation had assumed that this was because of the brand name which was also a breach of the rules.

Mr Darby conceded regulation 14 (3) was short but not simple. He urged upon us an interpretation in which three elements would have to be established to constitute a breach of the condition:

- (a) That the advertisement promotes the consumption of liquor; and
- (b) That it is a programme for which payment is made for that purpose; and
- (c) That payment is made to the holder of the warrant.

He said it was significant that the regulation referred to the consumption of liquor, not to the sale of liquor, so that what is purported to be prohibited is a programme that promotes the consumption of liquor.

He put it to us thus—

The *Shorter Oxford Dictionary* (1959 reprint) at page 1597 gives the definition.

"2. To further the growth, development, progress or establishment of anything; to further, advance, encourage".

Because of the faintly American ring of the word "promote", reference to the definition in *Websters Third New Dictionary* may be appropriate. At page 1918 the relevant definitions appear as:

"4 (a) To contribute to the growth, encouragement or prosperity of; further encourage.

(c) To present (merchandise) for public acceptance through advertising and publicity".

Mr Darby submitted:

- (1) Some element of furtherance, encouragement, advancement, or an endeavour to gain acceptability for the consumption of alcohol was a necessary ingredient of a programme before it fell to be considered within the prohibition set out in the condition imposed by the regulation.
- (2) Reference to the availability of liquor for sale (not specified by brand name), which is what the rules allow, is not a furthering, or advancing, or encouraging the consumption of liquor, and such advertisements are not in breach of the condition imposed by regulation 14.

In his submission, such advertisements were directed at consumers and say to consumers, in effect, "your supplies are available from X rather than Y or Z".

They do not promote, or encourage, or advance, or endeavour to gain acceptance for the consumption of liquor as such. In contrast, he said one could cite advertisements for products such as those relating to personal hygiene which positively extol the virtues of the product and clearly imply one is in danger of being a social outcast if one does not use it.

As to elements B and C, payment has to be made to the holder of the "warrant for the purpose"—the purpose being the promotion of the consumption of alcohol.

In light of the definitions referred to above, Mr Darby submitted that when payment is made by an advertiser to the corporation for an advertisement drawn in accordance with the present rules, payment is not being made for the purpose of the promotion of the consumption of alcohol. The purpose of the advertisement is to identify a legitimate trading service available to the community.

Further, it was submitted that, on the wording of the regulation before an advertisement can be said to breach the regulation it is necessary to demonstrate that payment