

# ACMA Investigation

## Live hosted entertainment radio programs: Adequacy of community safeguards for the protection of participants

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# Chapter 1: Introduction

On 11 August 2009, the Australian Communications and Media Authority (**the ACMA**) commenced an investigation, under section 170<sup>1</sup> of the *Broadcasting Services Act 1992 (the Act)*, into whether current industry practice and regulatory arrangements provide adequate protections for participants in live hosted commercial radio programs.

This report documents the investigation's findings.

## Purpose

The purpose of the investigation is to determine the nature of community concerns relating to participants in live hosted commercial radio programs and, whether the current regulatory arrangements, including the *Commercial Radio Australia Codes of Practice and Guidelines 2004 (the codes)* and industry practice are operating effectively to provide appropriate safeguards that address those concerns.

The ACMA's decision to investigate this matter was in part prompted by the public reaction to the 29 July 2009 broadcast of the *Kyle and Jackie O Breakfast Show (the lie-detector broadcast)* in which a 14 year-old child was attached to a lie-detector and asked questions about her sexual conduct and truancies. The lie-detector broadcast, in addition to the results of the ACMA's commissioned research *Attitudes to Radio Content 2009* and the recent rise in complaints about commercial radio content, highlighted potentially broader issues about the treatment of participants and subjects in some types of live hosted entertainment programs on commercial radio.

In issuing the terms of reference the ACMA noted that:

the broadcasting sector should generally be able to experiment with program genres and styles which may be attractive to its audiences. However, the strength of community concern expressed in relation to some hosted live entertainment programs and the ACMA's own assessments indicate that there is emerging evidence that current regulatory arrangements may not be keeping pace with industry practice and community standards.

## Terms of reference

The terms of reference state that the investigation will consider:

- 1/ the level and specific nature of community concern in relation to these types of program elements, using the facts and circumstances of the recent 2DayFM episode [the lie-detector broadcast] as a key case study;
- 2/ the practices, processes and protections already in place in the industry in relation to participants and subjects in such programming elements, particularly children;
- 3/ whether industry practices and provisions in the industry's code are sufficient to meet the community's concerns in this area;
- 4/ if not, what additional regulatory arrangements would need to be put in place and what would be the most effective regulatory response; and

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<sup>1</sup> Section 170 of the *Broadcasting Services Act 1992* provides:

The ACMA may conduct investigations for the purposes of the performance or exercise of any of its broadcasting, content and datacasting functions (as defined in the *Australian Communications and Media Authority Act 2005*) and related powers.

5/ any other relevant matters.

## Defining live hosted entertainment programs

The primary focus of the investigation is the regulatory arrangements and industry practices relating to live hosted entertainment programs on commercial radio, with a particular emphasis on stunts, pranks and competitions in programs.

For the purposes of the investigation the ACMA has defined live hosted entertainment radio programs as those that feature one or more of the following elements:

- > a 'live' host, as in one or more persons operating a microphone, introducing songs or transitioning from one program element to another – some program elements may be pre-recorded such as interviews, nonetheless this is not considered to change the category of programming;
- > some audience interaction including:
  - > open-line conversations – for example when audience members are asked to phone in and tell anecdotes about a particular theme;
  - > competitions – for example being the fifth caller to 'name that tune' or participating in quizzes or stunts for a prize;
  - > stunts – may include audience members appearing in the studio or some other location participating in some physical activity, or the hosts themselves doing some activity, for example *Pigs Might Fly*<sup>2</sup> or *Will it Deep Fry*<sup>3</sup>; or
  - > pranks – including 'gotcha' calls where the program host prank-calls another party or sets up a scenario in which an audience member calls an unsuspecting friend.

Generally speaking, live hosted entertainment programs are hybrid programs featuring a mix of music, interviews and one or more of the programming elements identified above. The ACMA's desk-based research shows the majority of commercial radio licensees broadcast programming that falls within the scope of the investigation, for example, most breakfast or drive time programs broadcast by commercial radio licensees could be classed as live hosted entertainment radio<sup>4</sup>.

In addition, the ACMA notes that many of the metropolitan-based live hosted entertainment programs reach a greater audience share by syndicating across networks and markets, either in their entirety through live simulcasts or as highlights packages. For example, Austereo's *Kyle and Jackie O Breakfast Show* is broadcast from 6-9am Monday to Friday on 2DayFM in Sydney and is syndicated as the 'Hour of Power' in all other capital markets<sup>5</sup>.

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<sup>2</sup> A stunt broadcast on 92.5 GoldFM (the Gold Coast) in which radio hosts attached helium balloons to a piglet in an attempt to see whether they could make it float.

<sup>3</sup> A common segment broadcast on Nova's *Merrick, Rosso and Kate Breakfast Show* in which the hosts attempt to deep fry various objects.

<sup>4</sup> The ACMA examined the websites of 251 commercial radio stations in both metropolitan and regional areas in order to understand programming formats. Of the sites examined 14 stations clearly did not broadcast programs within the scope of the investigation, for example racing channels. 49 stations had insufficient information available to determine the type of programming content, for example, the website was under construction.

<sup>5</sup> The *Kyle and Jackie O Hour of Power* is a one hour highlights package of the *Kyle and Jackie O Breakfast Show* broadcast daily from 6-7 pm Monday to Friday on: SAFM Adelaide, B105 Brisbane, FoxFM Melbourne, NXFM Newcastle and 929 Perth [source: [www.austereo.com.au](http://www.austereo.com.au)].

Similarly, DMG's *Merrick and Rosso and Kate* is broadcast weekdays from 6-9 am on Nova969 in Sydney and distributed to other stations in the Nova Network<sup>6</sup> as an hour package broadcast from 6-7 pm weeknights.

Other network programs such as DMG's *Ryan, Monty and Wippa* on the Nova Network<sup>7</sup>, Austereo's *The Hamish and Andy Show* and *Hot30* on the Today Network<sup>8</sup> and *The Life with Roy and HG* on the Triple M Network<sup>9</sup> are simulcast live across Australia.

The ACMA notes Commercial Radio Australia's submission that programs broadcast on a seven-second delay are not 'live' and therefore do not fall within the scope of the terms of reference for this investigation. However, as outlined above, the definition for live hosted entertainment programs is not based upon the technology used to deliver the broadcast, but rather the nature of the programming itself, that is, a person live 'in studio' interacting with listeners and other members of the community.

Talk back programs, while containing elements of live hosted entertainment programs, are generally categorised as news and current affairs programs. The Australian Broadcasting Authority's *Commercial Radio Inquiry*<sup>10</sup> defined news and current affairs programs as:

a program focussing on social, economic or political issues of immediate relevance to the community including interviews and commentaries dealing in depth with news items ... Apart from mainstream current affairs programs, this may include, but is not limited to, programs such as news and current affairs specials, talkback radio, documentaries and magazine-style programs insofar as they focus on social, economic or political issues of immediate relevance to the community<sup>11</sup>.

In view of the fact that the current codes contain specific provisions dealing with the protection of participants in news and current affairs programs<sup>12</sup>, this investigation is not intended to further examine news and current affairs programs.

## Methodology

The ACMA is an evidence-based regulator and in addition to drawing on its own experience in overseeing the co-regulatory scheme for commercial radio, its assessment of this matter is informed by the following key items:

### Submissions

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<sup>6</sup> The Nova Network comprises 91.9 Adelaide, 106.9 Brisbane, 100.3 Melbourne, 93.7 Perth and 96.9 Sydney [source: [www.novafm.com.au](http://www.novafm.com.au)].

<sup>7</sup> *Ryan, Monty and Wippa* is broadcast on the Nova Network from 4-6pm weekdays.

<sup>8</sup> The Today Network includes SAFM Adelaide, B105 Brisbane, FM104 Canberra, FoxFM Melbourne, NXFM Newcastle, 929 Perth and 2DayFM Sydney. The Today Network broadcasts live *The Hamish and Andy Show* from 4-6pm weeknights and *Hot30* from 7-10pm weeknights [source: [www.austereo.com.au](http://www.austereo.com.au)].

<sup>9</sup> The Triple M Network comprises 104.7 Adelaide, 104.5 Brisbane, 105.1 Melbourne, Mix94.5 Perth and 104.9 Sydney. The Triple M Network broadcasts live *The Life with Roy and HG* from 4-7pm on Mondays and Fridays [source: [www.austereo.com.au](http://www.austereo.com.au)].

<sup>10</sup> In 1999 the Australian Broadcasting Authority held an Inquiry to investigate the commercial arrangements and on-air conduct of presenters on 2UE, 3AW, 5ADD, 5DN and 6PR.

<sup>11</sup> *Commercial Radio Inquiry Final report of the Australia Broadcasting Authority*, Australian Broadcasting Authority 2000, page 17.

<sup>12</sup> *Commercial Radio Australia Codes of Practice and Guidelines 2004*, Code 2 provides protections for participants in news and current affairs programs with respect to privacy.

At the commencement of the investigation, the ACMA invited the public and industry to make a submission against the terms of reference. The closing date for submissions was 30 September 2009. The ACMA received a total of 60 submissions, 12 from the public and 48 from industry, including, its peak representative group, Commercial Radio Australia. The submissions received from industry represent more than half of Australia's 273 commercial radio licences<sup>13</sup>. The submissions are available on the ACMA's website.

### **Community Attitudes to Radio Content 2009**

The *Community Attitudes to Radio Content 2009* report was prepared for the ACMA by Ipsos MediaCT. The report presents the findings of a national telephone survey undertaken in February 2009, of Australians aged 15 years and over. A nationally representative overall sample was achieved, of which 1423 were radio listeners.

Amongst other things, the research explores: the broad radio listening behaviours and preferences of Australians aged 15 years and over; the extent and nature of community concerns about radio content; attitudes towards inappropriate radio content, and views on the potential for certain types of content to impact secondary audiences, including children.

### **Analysis of complaints and investigations**

The ACMA has examined the complaints it has received about material broadcast on commercial radio, including those about the lie-detector broadcast, to identify whether there is a discernable community concern about the relevant programming elements and if so, the nature of those concerns.

These submissions have assisted the ACMA in making an assessment of the level and nature of community concern, as well as informing it about current practices already in place in the industry.

The evidence base for this investigation is examined at chapters 2–4 below, while the ACMA's findings against the terms of reference and relevant recommendations are set out at chapter 5.

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<sup>13</sup> Commercial Radio Australia represents 260 of Australia's 273 commercial radio licensees. In addition, submissions were received from Macquarie Southern Cross Media (on behalf of 38 licences); Super Radio Network (36 licences); Fairfax (15 licences); Australian Radio Network (12 licences); Austereo (contributed 10 submissions for each of its licences); DMG (10 licences); ACE Radio (contributed 5 submissions for its licences); Capital Radio and Grant Broadcasters provided submissions for their various independent and joint ventures; and various other independent licences including Resonate Broadcasting and Hot Tomato.

# Chapter 2: An assessment of community concern

## Overview

The first term of reference seeks to gauge the level and specific nature of community concern in relation to the relevant programming elements of live hosted entertainment radio programs.

The ACMA's assessment of the level and nature of community concern is drawn from:

- > the circumstances of and reaction to the broadcast of *The Kyle and Jackie O Breakfast Show* on 29 July 2009 (the lie-detector broadcast);
- > submissions to the investigation received from both industry and the public;
- > an analysis of complaints to the ACMA about commercial radio content; and
- > the ACMA's commissioned *Community Attitudes to Radio Content 2009 – Research Report* (the research report).

The concerns in relation to live hosted entertainment programs identified in the research fall into two broad categories. The first is about protecting participants, particularly children, from exploitation while the second relates to the protection of children from exposure to inappropriate content, in particular sexual references and offensive language.

### **Protection of participants**

The evidence highlights a general community concern that participants in live hosted entertainment radio are vulnerable to exploitation. The reaction to the lie-detector broadcast suggests that this general concern is greater when the participant involved is a child.

The majority of public submissions and over half of the 150 written complaints received (by the ACMA) about the lie-detector broadcast cited concerns that a child was put in the situation in the first instance, irrespective of the mother's consent and of the outcome of the broadcast. Many noted that the broadcast was ill-conceived, with no regard given to the welfare of the child involved.

The ACMA's complaints data also highlights concerns about the treatment of participants including, for example, that the person has been spoken to inappropriately by the presenter or has been exploited, abused, or humiliated. The ACMA's *Reality Television Review*<sup>14</sup> identified similar concerns about the treatment of participants such as harassment, bullying and exploitative conduct.

The research reveals a community expectation that radio stations will obtain the permission of the victim of a prank call prior to broadcasting that call. The research also revealed specific concerns about the victims of pranks (for example: *it's not funny for the person being pranked / when they trick people it's nasty*) and the level of personal information being revealed by participants in order to win a prize (for

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<sup>14</sup> In October 2006, pursuant to a direction from the Minister for Communications, Information Technology and the Arts, the ACMA commenced an investigation into whether the regulatory arrangements for television programming on commercial free-to-air television provided adequate community safeguards. The ACMA's findings were published in *Reality Television Review – Final Report* on 30 March 2007.

example: commercial radio station going into people's personal lives and setting people up for personal phone calls ... it was just too much personal information from a person of the community ... tell a story win a prize).

### **Protection from exposure to inappropriate content**

The complaints data indicates that advertising, in particular advertising for sexual health products, is a growing area of concern for listeners. This concern forms part of a broader concern directed towards programming that some listeners considered inappropriate for minors. These complaints have covered a range of subject areas including but not limited to: advertisements for sexual health products; inappropriate language in song lyrics; and concerns that live hosts were encouraging drug use.

Consistent with the complaints data, the research reports a decline in tolerance for swearing and coarse language and shows a general concern about children being exposed to certain material broadcast on commercial radio including offensive language and sexual references. Over half of radio listeners indicated they were either very or moderately concerned that some content on the radio was not suitable for children under 15 years. The survey further reports that sex-related advertisements is a new category of concern for listeners, with respondents expressing concern that children were listening at the time of the broadcast.

## **The lie-detector broadcast**

As noted above, the public reaction to a stunt broadcast during the *Kyle and Jackie O Breakfast Show* on 29 July 2009 identified potentially broader concerns about the treatment of participants in live hosted entertainment radio programs.

The ACMA received 170 written and telephone complaints about the matter, including 14 complaints that met the requirements of the Act<sup>15</sup> and, pursuant to section 149 of the Act<sup>16</sup>, investigated whether in broadcasting the relevant material the licensee of 2DayFM met its obligations under the codes.

A brief overview of the circumstances of the broadcast and the ACMA's findings in the matter are outlined below.

### **Case Study: The Kyle and Jackie O Breakfast Show – 29 July 2009**

On 29 July 2009, the *Kyle and Jackie O Breakfast Show* aired, live, a stunt in which a 14 year old participant was asked questions by her mother about her sexual history and truanancies while attached to a lie-detector. After the girl was asked whether or not she had 'had sex', she stated that she had been raped. The broadcast was concluded shortly thereafter.

In assessing whether the broadcast was compliant with the licensee's obligations under the Codes, the ACMA made a number of observations about the content, including: the key participant was a child; the key participant was put in a vulnerable position, over which she did not appear to have control; and the key participant stated that she was 'scared' at the commencement of the segment.

The ACMA concluded that the broadcast breached the Codes stating:

<sup>15</sup> Section 148 provides that if a person has made a complaint to a broadcaster about a matter covered by a code of practice and has not received a response from the broadcaster, or has received a response but remains dissatisfied, then that complaint may be referred to the ACMA.

<sup>16</sup> Section 149 of the Act provides that the ACMA must investigate complaints referred to it under section 148 of the Act unless the complaint is frivolous, vexatious or not made in good faith.

the ordinary reasonable listener, being reasonably tolerant and accepting of diversity and taking account of the audience of the licensee's service who may have an even more tolerant or liberal approach, would consider that the content offended against contemporary standards of decency<sup>17</sup>.

The ACMA further noted that interviewing a child about sexual activity is not indecent *per se*, however in this instance:

it was the manner of the segment that offended against contemporary standards of decency...including the purported use of a lie detector to sensationalise and render as mere entertainment what might in a different context be an acceptable topic for a radio broadcast<sup>18</sup>.

Over half of the 150 written complaints made to the ACMA about the broadcast expressed a concern that the regulatory environment permitted a minor to be attached to a lie-detector and questioned about their sexual experiences, irrespective of the outcome of the broadcast and the mother's giving of consent.

The complaints investigated by the ACMA also raised the following concerns about the broadcast:

- > invasion of privacy;
- > protection of children;
- > protection of the values of children and teenage listeners;
- > treatment of participants in radio stunts;
- > a licensee's general abuse of community trust; and
- > the trivialising of sexual abuse.

These matters were not pursued in the ACMA's investigation of the broadcast because it was considered that they did not fall within the scope of the codes. In particular, the codes do not currently contain any provisions relating to children.

The public reaction to the broadcast and the complaints received by the ACMA highlight a general concern that commercial radio is able to exploit its participants. The case study indicates that this concern is particularly heightened when the participant involved is a child.

## Complaints data

The complaints data in this section refers to all complaints about commercial radio programming received by the ACMA. It incorporates code complaints that have been investigated by the ACMA pursuant to section 149 of the Act, as well as contacts from the public expressing concern about commercial radio content which have yet to follow the process established by the codes, and therefore have not been investigated by the ACMA.

### ***What is a code complaint?***

Code 5 outlines the procedure for dealing with complaints about commercial radio content. Clause 5.2 states:

For the purposes of this Part, a complaint is an assertion:

- (a) made in writing by letter or fax by a person who provides his or her name and address;

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<sup>17</sup> Investigation Report 2266, page 11.

<sup>18</sup> Investigation Report 2266, page 12.

(b) to a licensee or a person at the radio station concerned who is acting with the apparent authority of the licensee;

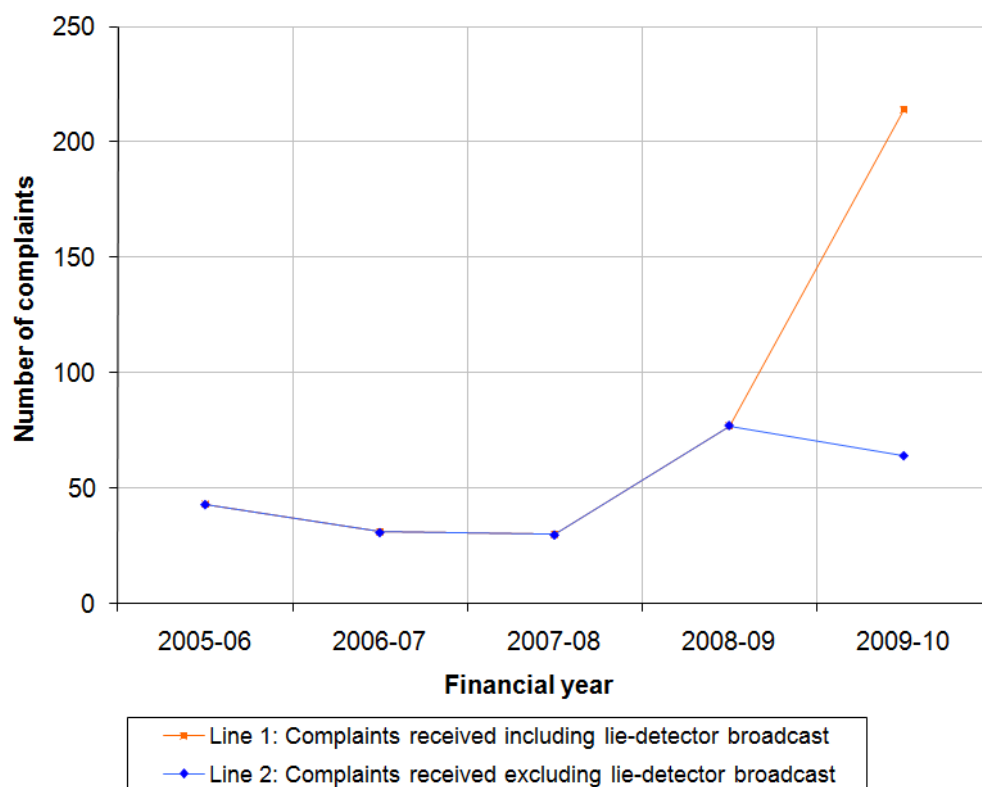
that the licensee has broadcast matter which, in the opinion of the complainant, breaches these Codes. Complaints need not specify the section of the code to which the complaint relates, but must adequately identify the material broadcast and the nature of the complaint.

The ACMA's role in relation to the complaints process is outlined at **Appendix 1**.

### Complaints to the ACMA about commercial radio content

While complaints to the ACMA about commercial radio remained at low levels from 2005-06 to 2007-08, the numbers have increased over the last 18 months (Figure 1).

Figure 1: Complaints to the ACMA concerning commercial radio content by financial year



Analysed on a financial year basis, complaints to the ACMA remained at a steady level before beginning to increase in 2008-09. The sharp spike (demonstrated by Line 1 in Figure 1) in 2009-10 is in large part due to the lie-detector broadcast.

However, on an adjusted basis, discounting the increased number of complaints received in relation to the lie-detector broadcast (as demonstrated by Line 2 in Figure 1), complaints received over the first six months of 2009-10<sup>19</sup> exceed the number for all complaints across 2007-08 and more than half of complaints received in 2008-09.

A growing area of concern for listeners appears to be advertising, in particular advertising for sexual health products during times of the day when young children are listening. This concern is part of a broader concern about children being exposed to inappropriate content.

<sup>19</sup> Complaints received by the ACMA during the period 1 July 2009 to 31 December 2009.

Steadily increasing since 2007-08, the complaints have covered a range of subject areas including but not limited to:

- > advertisements for sexual health products;
- > offensive conduct of radio presenters; and
- > inappropriate language and sexual themes, including in song lyrics.

In 2009, complaints about matter broadcast on live hosted entertainment programs including stunts, pranks and competitions, are varied and have included<sup>20</sup>:

### ***Dearly Departed***

*Dearly Departed* was a competition which had the basic premise of reuniting estranged relatives. The contestant was provided the opportunity to be reunited with an estranged relative, with the duration of the reunion dependant on the number of questions about the relative the contestant was able to answer correctly. The concern about this competition was that it 'caused unnecessary stress or emotional distress to participants of a radio competition'<sup>21</sup>.

### ***Heartless Hotline***

Each episode of the *Heartless Hotline* series of competitions featured a participant telling their 'hard luck story' and being offered money or a requested prize. The participant was allowed to keep the prize, provided that no other audience member called within 30 seconds to claim the prize off them. If an audience member called to claim the prize, the episodes would provide the original participant the opportunity to confront that audience member, an interaction which generally involved the participant pleading with the audience member not to take the prize. Complaints cited a concern that 'playing with emotions of people in such [a] circumstance is inappropriate and immoral'<sup>22</sup>.

### ***Home or Away***

Similar to *Dearly Departed*, *Home or Away* was a competition that centred on the reunion of estranged relatives. In this instance, a contestant was required to choose between three doors; behind one was an estranged relative. If the contestant chose the incorrect door, there would be no reunion. Complaints about that broadcast cited a concern that the competition 'exploit[ed] guests' emotions for 'entertainment'<sup>23</sup>.

### ***Pigs Might Fly***

*Pigs Might Fly* was a radio stunt in which helium balloons were tied to a piglet to see if it would fly. Complainants were concerned about cruelty to animals, stating that the segment showed a 'sickening, bullying lack of humanity'<sup>24</sup>.

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<sup>20</sup> As at the time of this report:

- > the ACMA had finalised Investigation 2194 about the *Triple M Porn Star Competition* and concluded that the broadcast did not breach code 1.5(a).
- > complaints about *Dearly Departed*, *Home or Away*, and *Pigs Might Fly* were under investigation by the ACMA. These complaints were being assessed about code 1.5(a).
- > complaints about *Heartless Hotline* did not meet the requirements of section 148 of the Act and therefore have not been investigated by the ACMA.

<sup>21</sup> ACMA Complaint 19606.

<sup>22</sup> ACMA Complaint 19098.

<sup>23</sup> ACMA Complaint 19649.

<sup>24</sup> ACMA Complaint 19664.

## ***Porn Star Competition***

In this competition, audience members were encouraged to send in photos of themselves posing as a pornographic star for a chance to win a walk-in role on a pornographic movie. Complaints about this competition expressed a concern that the 'content is totally inappropriate for radio that any child has access to ... surely such blatant discussions about pornography and competitions encouraging people to send in photos is not appropriate on radio in the middle of the day'<sup>25</sup>.

## ***Prank/stunt calls***

The ACMA has received and investigated several complaints about prank/stunt telephone calls. Complaints about these calls have varied including the use of derogatory language<sup>26</sup> and the impact the calls have on participants.

For example, a stunt call in which a participant was encouraged to call a friend to 'confess' an affair compelled a complaint to the ACMA wondering about the 'catastrophic fall-out' and questioning whether it is 'in good taste or in the public good, for a broadcaster to be the catalyst for the misery, social dislocation ... stress and poor mental health that will result from this five minute stunt?'<sup>27</sup>

On 13 March this year, the ACMA breached 3Fox Melbourne in relation to a broadcast involving a 'prank' call. The complainant in that matter was the victim of the prank call and submitted that throughout the prank she became 'very emotional and was further traumatised ... was dismayed and shocked at the content of the call and became disturbed ... at this point, the presenters interrupted and informed [complainant] that it was a joke'. The breach finding in that investigation concerned issues of consent.<sup>28</sup>

The complaints data indicates that, as well as concerns about the broadcast of inappropriate material, there is a community concern about the treatment of participants in live hosted entertainment programs.

## **Submissions: Community concern**

As outlined above, to assist with its investigation, the ACMA sought comments from the public against the investigation's terms of reference. The ACMA received 60 submissions from both industry and the public.

### **Submissions from industry**

The ACMA received 48 submissions representing industry, including one from industry group Commercial Radio Australia.

In relation to the question of the level of community concern about live hosted entertainment radio programs, industry submitted that a 'lack of community concern' in this area is demonstrated by the low level of complaints about stunts, prank calls, competitions and challenges.

Commercial Radio Australia also submitted that *Community Attitudes to Radio Content* research does not show significant levels of community concern, noting that the 2009 results are similar to those recorded in the Australian Broadcasting Authority's 2003

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<sup>25</sup> ACMA Complaint 19123.

<sup>26</sup> ACMA Complaint 19125.

<sup>27</sup> ACMA Complaint 19363.

<sup>28</sup> ACMA Investigation 2059.

study. It further noted that the research shows that 75.5 per cent of survey respondents believed that the subject matter covered by radio presenters is usually suitable for the time of day it is broadcast<sup>29</sup>.

### Submissions from the public

Twelve submissions were received from the public including eight from individual members of the public and four from the following organisations:

- > the NSW Children's Guardian;
- > the Victorian Child Safety Commissioner;
- > the Communications Law Centre at the University of Technology Sydney (**Communications Law Centre**); and
- > the Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee (**NSW Young Lawyers CET**).

The four submissions from organisations shared a common concern that the codes as currently drafted do not contain any provision that protects minors participating in live hosted entertainment programs.

In relation to the lie-detector broadcast the Victorian Child Safety Commissioner and the NSW Young Lawyers CET noted a concern that the broadcast was allowed to continue after it became apparent that the child was uncomfortable. NSW Young Lawyers CET submitted<sup>30</sup>:

We believe the clear inappropriateness of the [lie-detector broadcast] gives rise to three key concerns:

- (a) that such content is able to pass internal approvals for broadcast in the first place;
- (b) that such content is continued to be broadcast, despite the early warning signs that broadcasting should cease; and
- (c) that presenters may not be adequately trained or educated on how to deal with the outcome of such broadcasts.

We believe that these issues represent at best a failure of 2DayFM to appropriately train staff on issue identification and resolution or to have pre-production processes in place to approve content, and at worst, a complete disregard for the wellbeing of participants and the intended audience.

The NSW Young Lawyers CET, further expressed concerns about '... a pattern of behaviour that involves exploitation of the disadvantaged for the entertainment of others'<sup>31</sup>. In that regard it cited the *Heartless Hotline* series of competitions as an example.

The eight submissions received from individuals focused on the lie-detector broadcast.

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<sup>29</sup> Commercial Radio Australia submission page 2.

<sup>30</sup> Law Society of NSW Young Lawyers Communications, Entertainment and Technology Law Committee submission, page 4.

<sup>31</sup> Law Society of NSW Young Lawyers Communications, Entertainment and Technology Law Committee submission, page 5.

Several submissions raised concerns about the suitability of commercial radio programming for children<sup>32</sup>, and suggested that programming was not in line with community standards, including comments such as:

If the purpose of the Code is to prevent the broadcast of programs which are unsuitable, having regard to prevailing community standards and attitudes, then [the stations] need to be aware that [they] may not be aware of the community's standards and attitudes!<sup>33</sup>

and

...I think they have betrayed the community and its standards and as such should be counselled in appropriate behaviour rather than that which they consider conducive to ratings.<sup>34</sup>

Concerns regarding the use of children as participants in radio shows were raised in the context of the lie-detector broadcast. One submission noted:

2DAY FM cannot use its ignorance of [the participant's] personal history as an excuse. They should never have placed her in that position in the first place. If the child's mother didn't have the sense to understand this, 2DAY FM should have.<sup>35</sup>

Four submitters also noted that Kyle and Jackie O have a history of humiliating people to increase ratings, including for example, speaking to a caller inappropriately<sup>36</sup>.

Condemnation of the lie-detector broadcast was not universal. One submission noted:

...the public has always had the choice of listening or changing the channel

and

If people don't like Kyle they don't HAVE to listen or watch him. We have choices for a reason.<sup>37</sup>

## **Research report: *Community Attitudes to Radio Content***

The ACMA commissioned Ipsos MediaCT to undertake the *Community Attitudes to Radio Content 2009* study. The research updates 2003 research commissioned by, the ACMA's predecessor, the Australian Broadcasting Authority and is being used by the ACMA to inform its review of the commercial radio standards and the commercial radio industry's review of the current codes<sup>38</sup>.

The report presents the findings of a national telephone survey, conducted in February 2009, of Australians aged 15 years and over. A national representative overall sample was achieved of which 93 per cent were radio listeners.

The survey examined the attitudes of Australian radio listeners, with a focus on matters relating to the Code and the three program standards for disclosure, advertising and compliance that apply to commercial radio broadcasting services.

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<sup>32</sup> Bryan, Kerry, Rahme, Thomas and Hancock submissions.

<sup>33</sup> Bryan submission.

<sup>34</sup> Barker submission.

<sup>35</sup> Thomas submission.

<sup>36</sup> Hancock, Barker, Kerry and Rahme submission. Hancock in particular cited an interaction between a caller and Kyle Sandilands in which Kyle said to the caller 'piss off you stupid bitch'.

<sup>37</sup> Philips submission.

<sup>38</sup> Section 123 of the *Broadcasting Services Act 1992* outlines the requirements for the development of industry codes of practice. Section 123(1) states Parliament's intention is that the industry develop the codes in consultation with the ACMA, taking account of any relevant research conducted by the ACMA.

Items covered in the research that are of particular relevance to this investigation include:

- > the extent and nature of community concerns about offensive radio content;
- > attitudes towards inappropriate radio content; and
- > views on the potential for certain types of content to impact secondary audiences, including children.

The key relevant findings of the research report are set out at **Appendix 2**.

The attitudes<sup>39</sup> component of the research relevantly showed that:

- > 85 per cent of respondents agreed or strongly agreed with the statement *a phone call made by a radio station as an embarrassing joke should only be broadcast with the permission of the person or people involved*; and
- > 48 per cent of listeners also agreed or strongly agreed that *some radio competitions encourage behaviour that is dangerous or anti-social*.

The concerns<sup>40</sup> component of the research reports that just over one fifth (22 per cent) of radio listeners had concerns about the broadcast of inappropriate content on radio in the last 12 months.

Of the broad categories of concerns identified in the research, the following are particularly relevant to this investigation:

- > tricks, pranks competitions – 4 per cent of concerned listeners;
- > offensive language, including vulgarity and coarse language used by presenters, and featuring in song lyrics – 20 per cent of concerned listeners;
- > the immature attitudes of presenters including presenters putting others down and stupid behaviour – 14 per cent of concerned listeners; and
- > sexual references, usually sexually suggestive discussion by presenters – 11 per cent of concerned listeners.

In the category of concerns relating to tricks, pranks and competitions, respondents cited concerns about the victims of the pranks (for example: *its not funny for the person being pranked / when they trick people its nasty*) and concerns about the level of personal information being revealed by participants in the programs (for example: *Commercial radio stations going into people's personal lives and setting people up for personal phone calls ... it was just too much personal information from a person of the community*).

In addition to the specific concerns of the 22 per cent of concerned listeners, almost half of all radio listeners indicated a general concern that children may be exposed to unsuitable content, particularly sexual references and offensive language. This concern is consistent with the ACMA's complaints data which, as outlined above, indicates concerns about the potential for children to be exposed to certain material, including sexual references (for example, advertisements for sexual dysfunction remedies) and offensive language.

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<sup>39</sup> The attitudes component of the research reflects the part of the survey in which respondents were asked to indicate their level of agreement with a number of statements.

<sup>40</sup> The concerns component of the research refers to the part of the survey in which respondents were asked the open-ended question "Have you heard anything on radio in the last 12 months that caused you concern or that offended you?" Respondents who answered 'yes' to this question were then asked further questions to identify the nature of their concerns or offence.

# Chapter 3: The current rules

## Overview

The second term of reference requires an examination of the practices, processes and protections concerning the protection of participants that are already in place in the commercial radio industry. This chapter examines the current rules, while *Chapter 4: Industry practice* below looks at practices and processes employed by industry to comply with the rules and to protect participants.

Australia's commercial radio industry operates within a co-regulatory framework established by the Act. Under the co-regulatory framework, the commercial radio industry is required to comply with three types of regulation in relation to program content: codes, standards and licence conditions. Each type of regulation represents a different level of government intervention. For example, representing the lowest level of intervention, codes of practice are industry-driven regulations which confer, on the broadcasters themselves, the responsibility for regulating program content in a manner that is consistent with community standards.

A brief overview of the regulatory framework for the commercial radio industry is at **Appendix 1**.

The codes are currently the only regulatory mechanism applicable to the programming elements that are the subject of this investigation.

Relevantly, Code 1 (detailed below) contains provisions dealing with program content and language, including sex and sexual behaviour. Code 6 (also detailed below) provides some safeguards for participants by requiring licensees to obtain consent before broadcasting the words of an identifiable person on the radio. Code 6 prohibits the broadcast of the words of an identifiable person unless that person has been informed in advance, or a reasonable person would be aware that the words may be broadcast. In the case of words which have been recorded without the knowledge of the person, code 6 prohibits the broadcast of words of an identifiable person unless that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

Code 6 is titled *Interviews and Talkback Programs* however, the wording of the code itself does not limit its operation to only these types of programs. This is consistent with industry's approach – submissions from industry indicate that code 6 is applied to all programming.

There is no Code registered that specifically relates to children, either as a program participant or as a member of the audience.

Industry has submitted that the current rules, contained in codes 1 and 6, are adequate in providing safeguards for participants in live hosted entertainment programs. In addition, it has submitted that codes dealing with children are not required because children do not form part of the target audience of commercial radio services<sup>41</sup>.

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<sup>41</sup> See, for example, Commercial Radio Australia, WIN Corporation and Capital Radio Network submissions.

On the other hand, public submissions have expressed a concern that the current codes are inadequate in providing protection for children, and to a lesser extent disadvantaged persons<sup>42</sup>, as participants in live hosted entertainment radio programs.

## The current rules

As noted above, the codes are currently the only regulatory mechanism applicable to the programming elements that are the subject of this investigation.

As required by section 123 of the Act, the codes were developed by Commercial Radio Australia and registered by the ACMA's predecessor, the Australian Broadcasting Authority, on 23 September 2004.

The codes aim to ensure that commercial radio broadcasters have regard to prevailing community standards in broadcasting material, while protecting their right to responsible freedom of speech<sup>43</sup>. The codes deal with matters including decency, accuracy and fairness in news and current affairs, advertising, Australian music, and the broadcast of emergency information. They also establish a mechanism for handling complaints from the public about compliance with the codes.

Section 123 of the Act sets out the matters to which codes of practice may relate, including the provision of programming that is consistent with community standards and methods that provide for the protection of children from harmful material. These matters are currently addressed by codes 1.5–1.7 and 6. These provisions are applicable to all commercial radio content and are of particular relevance to this investigation.

### **CODE OF PRACTICE 1: PROGRAMS UNSUITABLE FOR BROADCAST**

#### **Purpose**

- 1.1 The purpose of this Code is to prevent the broadcast of programs which are unsuitable, having regard to prevailing community standards and attitudes.

#### **Definition**

- 1.2 In this code "programs" means all matter broadcast.

[...]

#### **Program Content and Language, including Sex and Sexual Behaviour**

- 1.5 (a) All program content must meet contemporary standards of decency, having regard to the likely characteristics of the audience of the licensee's service.  
(b) The gratuitous use in a program of language likely to offend the anticipated audience for that program must be avoided.
- 1.6 Licensees must not broadcast audio of actual sexual acts.
- 1.7 Licensees must not broadcast a feature program which has an explicit sexual theme as its core component unless it is broadcast between 9.30 pm and 5.00 am and an appropriate warning is made prior to commencement of the program and at hourly intervals during broadcast of the program.

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<sup>42</sup> See Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee and Communications Law Centre submissions.

<sup>43</sup> *Commercial Radio Australia Codes of Practice and Guidelines 2004*, page 3.

- 1.8 Nothing in clause 1.7 prevents a licensee from broadcasting a program at any time, of the kind referred to in that clause, if the program is in the public interest, including discussion or debate about current events.

## **CODE OF PRACTICE 6: INTERVIEWS AND TALKBACK PROGRAMS**

### **Purpose**

The purpose of this Code is to prevent the unauthorised broadcast of statements by identifiable persons.

- 6.1 A licensee must not broadcast the words of an identifiable person unless:
- (a) that person has been informed in advance or a reasonable person would be aware that the words may be broadcast; or
  - (b) in the case of words which have been recorded without the knowledge of the person, that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

Code 6 is particularly relevant in terms of audience participation. As outlined above, it prohibits the broadcast of the words of an identifiable person unless that person has been informed in advance, or a reasonable person would be aware that the words may be broadcast. In the case of words which have been recorded without the knowledge of the person, code 6 proscribes the broadcast of words of an identifiable person unless that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

Code 1 addresses community standards generally and applies to all broadcast content. Code 1.5 provides that in assessing community standards licensees must have regard to the likely characteristics of their audience. This acknowledges that different audiences will have varying opinions and will naturally find different content acceptable.

The industry has also developed guidelines to assist in the interpretation of the Code. The guidelines included in the current code are:

- > *Guidelines for the broadcast of emergency information;*
- > *Guidelines on the portrayal of indigenous Australians on commercial radio;*
- > *Guidelines and explanatory notes on the portrayal of women on commercial radio;*  
and
- > *Guidelines and explanatory notes on the portrayal of suicide and mental illness on commercial radio.*

The ACMA has also developed the *Privacy Guidelines for Broadcasters* which provide an overview of the way in which the ACMA assesses complaints by listeners or viewers which allege breaches of the privacy provisions in the codes. While the privacy guidelines are not legally binding, they are intended to assist broadcasters in complying with their code obligations. The current codes provide for privacy in news and current affairs content only and are therefore not strictly relevant to this investigation.

Aside from the implicit acknowledgement, in code 1.5, that some content is suited to some audiences and not others, the current codes (and guidelines) do not have regard to children as either audience members or participants.

While the Codes provide some safeguards for participants in relation to matters of consent, there are no general provisions dealing with the treatment of participants in live hosted entertainment radio programs.

While the ACMA acknowledges that, notwithstanding the codes lacking in this area, the ACMA was able to investigate and breach the licensee of 2DayFM in relation to the lie-detector broadcast; there remains some doubt over whether code 1.5(a) provides any protections for participants in programs that do not feature the same combination of factors as the lie-detector broadcast<sup>44</sup>.

## Submissions: The current rules

### Industry

Generally, industry submitted that the current codes provide adequate protection for participants. Industry submitted that the current arrangements apply to all programming elements including those of particular relevance to this investigation. Industry provided examples of operating practices that help to ensure compliance with these codes. These practices are explored in further detail at *Chapter 4: Industry practice* below.

Industry submitted that code 1.5 contains the broader, overriding content obligation – that all content meets ‘contemporary standards of decency’. The second part of the code, that consideration is given to the likely characteristics of the audience, recognises differences in programming content across different stations, thus maintaining diversity in programming.

In relation to code 6, industry submitted that the code applies to all programming, including elements such as stunts, pranks and competitions. For the purposes of clause 6.1(a), industry submitted that where a member of the audience calls into a program, it is reasonable to expect that they are aware they are being recorded. Industry submitted that the introduction of more prescriptive consent provisions, such as a requirement for written consent, are not warranted, and would be impractical and burdensome.

With respect to the issue of children and radio, Commercial Radio Australia submitted that as children do not form part of its members’ target audiences, child-specific provisions within the codes are not considered appropriate<sup>45</sup>.

### Public

As noted above, submissions from organisations shared a common concern that the Codes as currently drafted do not contain any provision that protects minors, and to a lesser extent a concern that no protection is provided to disadvantaged persons.

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<sup>44</sup> The unique circumstances of the lie-detector broadcast are set out in investigation report 2266 and include: the participant was a child being publicly questioned about her personal or private affairs; the participant appeared to object to the line of questioning; the participant was under the Australian legal age of consent for sexual acts; the participant was placed in a vulnerable position over which she appeared to have no control; and the participant stated that she was ‘scared’ at the commencement of the segment.

The ACMA is currently investigating three complaints about the treatment of participants in three separate broadcasts including *Dearly Departed*, *Home or Away* and *Pigs Might Fly*. The assessment of these matters will be made against code 1.5(a).

<sup>45</sup> See Commercial Radio Australia submission, page 5.

The NSW Children’s Guardian’s submission noted the special provisions for children in the United Kingdom Ofcom Broadcasting Code and made a number of recommendations focusing on ensuring that: children are treated with dignity and respect free of exploitation and humiliation; that the best interests of a child take precedence over all other considerations; and that:

...parental consent for a child’s involvement should never override other considerations as to a child’s best interests or a child’s right to refuse to participate in the program.<sup>46</sup>

NSW Young Lawyers CET similarly noted that ‘there are no provisions or (Codes of Practice) within the Code that deal specifically with participation of underage people in Programs’ and that the codes do not provide for any protection against ‘possible exploitation of underage or disadvantaged persons.’<sup>47</sup>

The submission recommended a number of changes, including that additions are made to the code or a standard is developed that:

[requires] radio broadcasters to have in place suitable training programs and internal processes to pre-approve or identify questionable content which may be included in Programs ...

[prohibits] the exploitation of any person (subject to prior consent which should have suitable caveats) during any Program. Particular attention ought to be given to minors, disadvantaged persons and anyone without legal capacity;

... guidelines on how to regulate the participation of individuals ...

... guidelines on how to regulate the participation of individuals under 18 or 16 ... exploitation of minors should be prohibited, regardless of parental consent;

[requires] radio broadcasters to implement a short broadcast delay and a “kill switch” which could be used by radio broadcasters to terminate a broadcast in appropriate situations.<sup>48</sup>

The submission also recommended that the ACMA consider:

- > providing guidance to broadcasters as to the time slots which require particular care, such as “school run” times in the morning and afternoon when minors are more likely to be exposed to commercial radio programs; and
- > requiring broadcasters to take care in respecting a minor’s physical, mental or emotional welfare when participating in pre-recorded or live hosted entertainment programs.

The Communications Law Centre submitted:

[T]here should be specific protection for minors on radio programs in order to protect minors ... Such a provision is required in order to deter and punish any form of exploitation or abuse of minors that could occur by the hosts of radio programs. Currently there is not sufficient provision to protect children and their privacy. Protection is needed for children most notably because of their special vulnerability.<sup>49</sup>

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<sup>46</sup> See New South Wales Office for Children submission, page 3.

<sup>47</sup> See Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee submission and Communications Law Centre submission, pages 7 and 10.

<sup>48</sup> See Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee submission and Communications Law Centre submission, page 11.

<sup>49</sup> Communications Law Centre at the University of Technology, Sydney submission, page 2.

The Victorian Child Safety Commissioner noted ‘the fact that the codes of practice do not even include the word ‘child’ indicates the inadequacy of the current arrangements to protect children.’ He concluded by stating:

Regulatory arrangements need to be put into place that create effective and enforceable mechanisms relating to the way in which broadcasters interact with and present material about children...<sup>50</sup>

Both the NSW Children’s Guardian and the NSW Young Lawyers CET identified the United Kingdom’s independent regulator, the Office of Communications, or Ofcom, as an example of good practice when it comes to developing and maintaining industry codes of practice that provide adequate protection for minors<sup>51</sup>.

Details of the Ofcom provisions and the current regulatory arrangements for radio broadcasting in other jurisdictions are further explored at **Appendix 3**.

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<sup>50</sup> The Victorian Child Safety Commissioner submission, page 3.

<sup>51</sup> See Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee submission, page 12, and New South Wales Office of the Children’s Guardian submission, page 3. The latter submission also notes the New Zealand Broadcasting Standards Authority’s Radio Code, particularly the privacy principles.

# Chapter 4: Industry practice

## Overview

In sourcing information about industry practices surrounding the relevant programming elements, the ACMA primarily drew from the 48 submissions provided on behalf of industry.

The submissions showed that industry practices provide some important safeguards for protecting participants, including for example, internal policies about broadcasting the words of non-staff, processes for obtaining consent and either pre-recording or broadcasting segments on a slight delay to allow the editing of potentially inappropriate content.

Submissions indicated that live hosted entertainment programs are generally broadcast on a slight delay, ranging from 7 to 10 seconds – this allows use of a ‘dump button’ to prevent inappropriate content from going to air, providing an additional level of protection.

These practices are entrenched through regular staff training.

While the majority of industry submissions rejected the need for children to be specifically catered for in the codes, some submitted that policies surrounding the broadcast of certain material at times when children are likely to be listening provide a level of protection against exposure to potentially harmful material.

## Industry practice

### Consent

As outlined at *Chapter 3: the current rules* above, code 6 serves to prevent the unauthorised broadcast of statements by identifiable persons. While code 6 is titled *Interviews and Talkback Programs*, the ACMA understands that industry generally interprets this Code to apply to all programming.

The submissions from industry indicate that licensees have measures in place to obtain consent from participants prior to broadcasting statements that make them identifiable.

There is general agreement within industry that when a person contacts the station, it is reasonable to assume that they are aware they may be recorded and therefore have implicitly consented to the broadcast. Nonetheless, measures for obtaining consent and policies for dealing with participants are generally applied.

For example, Prime Radio indicated that when a caller contacts their station their telephone number is recorded and the station then telephones the caller back to record the call to tape, thus enabling a further confirmation of consent<sup>52</sup>.

Ace Radio submitted that their policy regarding ‘telephone calls and interviews live to air’ was that ‘any non-staff member of ACE radio must be pre-recorded before being put to air – unless they are put to air in 7 second delay’. Ace Radio further submitted

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<sup>52</sup> See submission from Prime Radio, page 2.

that its policy is to first ensure that the individual knows they are being recorded and then to obtain permission to broadcast the material that may identify the individual<sup>53</sup>.

Similarly, Hot Tomato submitted its workplace policies handbook provides that in the event of a live interview (no delay), the subject is informed that the call will go live, and in the event of a recorded interview, the subject is informed that the call is being recorded for broadcast at a later time<sup>54</sup>.

Some licensees submitted that they pre-record all calls being put to air, and these calls are edited in accordance with standards of taste and decency. Callers are notified that they will be put to air before the broadcast; being asked 'We'll be playing your call in (x) minutes, is this ok?' and if inappropriate content is found during play-back the call would not be aired<sup>55</sup>.

### ***Stunts, pranks and competitions***

Most licensees submitted that 'stunt' and 'prank' segments are pre-recorded and the 'victim's' permission is sought prior to broadcast<sup>56</sup>, some obtain permission after playing the call back to the victim<sup>57</sup>. When consent is not obtained, the recording is destroyed.

Most licensees have policies around contacting individuals to appear on a program. In most cases where the radio station contacts a party, the conversation is pre-recorded and then the party is given the opportunity to consent to the call being aired, or otherwise<sup>58</sup>. One radio station stated that 'in no instance should a radio station contact a person or persons live to air without their consent or knowledge'<sup>59</sup>.

In relation to stunts or competitions that require participant presence in the studio, licensees ensure that the full terms and conditions are explained and consent forms are signed by each participant. It is Macquarie Southern Cross Media's policy that only participants who have nominated themselves and who have completed a consent form can participate in physical stunts<sup>60</sup>.

The vast majority of licensees indicated that more onerous requirements for obtaining consent would be impractical, with specific opposition to stations having to obtain written consent. Fairfax indicated that 'their listeners would be less inclined to provide information... if they were always required to provide a written record of their contribution to the station'<sup>61</sup>. DMG stated that a requirement for a person 'to first listen to a recording and then sign a legalistic consent form would be too impractical'<sup>62</sup>.

### **Children**

In relation to the protection of children, industry submissions were generally focussed on children as members of the listening audience and the potential for them to be exposed to inappropriate content.

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<sup>53</sup> Ace Radio submission.

<sup>54</sup> Hot Tomato submission.

<sup>55</sup> For example, South Coast and Tablelands Broadcasting Pty Ltd submission.

<sup>56</sup> For example, Macquarie Southern Cross Media Pty Limited submission.

<sup>57</sup> For example, Coast FM submission.

<sup>58</sup> South Coast and Tablelands submission.

<sup>59</sup> South Coast and Tablelands submission.

<sup>60</sup> Macquarie Southern Cross Media Pty Limited, submission page 3.

<sup>61</sup> Fairfax submission.

<sup>62</sup> DMG Radio submission.

Austereo, however, commented on children as participants, indicating that as of 29 July 2009 they had introduced ‘additional structures and procedures in order to protect the physical and emotional welfare of minors and vulnerable people during the making of broadcast segments.’<sup>63</sup>

### ***Protection of children from exposure to inappropriate content***

All industry submissions argued that the inclusion of children-specific provisions in the codes is not necessary. This position reflects the view that commercial radio stations do not broadcast any children’s programming, nor do children represent a target audience for any stations.

Some networks and licensees did, however, indicate an awareness of times when children were more likely to be listening, in particular during ‘school run’ times in the mornings and afternoons.

Macquarie Southern Cross Media (representing 66 regional radio licences), submitted that while they do not target children in their programming, they are mindful that children will form part of their audience at varying times of the day. In that respect, the network recognises ‘family time zones’<sup>64</sup> which are taken into account when considering programming content, including the scheduling of advertisements.

Similarly, Prime Radio indicated that they have ‘an expectation that children may be listening across any day part...with the type of content... reflect[ing] that’.

South Coast and Tablelands Broadcasting Pty Ltd submitted that it was ‘mindful of adolescent listeners, with programs careful not to blatantly endorse the use of alcohol, drugs, violence or sex in an unlawful or offensive manner.’<sup>65</sup>

On the other hand, WIN Corporation stated that if its target adult audience did not consider the content appropriate for children ‘then they are able to take the decision to change their radio station of choice, or alternatively entertain the children with more specific forms of child targeted media’<sup>66</sup>.

### **Training/Education**

The vast majority of licensees indicated that they have systems in place to train staff on the application of the codes. Many licensees indicated that they have ‘induction’ courses for new staff and that this induction is followed up with annual ‘refresher’ courses.

The information provided in the submissions in relation to staff training is consistent with the requirements of the *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000* which was introduced to ensure community safeguards operate effectively by promoting compliance with the requirements of the Act, standards and the codes<sup>67</sup>.

The standard provides that:

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<sup>63</sup> Austereo submissions on behalf of 2DayFM, B105FM, SAFM, 929FM, TripleM Sydney, Triple M Melbourne, FoxFM, Triple M Brisbane, Mix94.5 and TripleM Adelaide.

<sup>64</sup> Macquarie Southern Cross Media Pty Limited submission. Family zones are defined as being 7am to 8.30am and 2.30pm to 4.30pm Monday to Friday.

<sup>65</sup> South Coast and Tablelands Broadcasting Pty Ltd submissions on behalf of 2WSK and 2ST.

<sup>66</sup> WIN Corporation Pty Ltd submission, page 2.

<sup>67</sup> *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000*, section 3.

## **6. Requirements for compliance program**

- 1) A licensee must formulate, implement and maintain a compliance program to ensure compliance with the requirements of the Act, standards and the codes.
- 2) The compliance program must contain the following elements:
  - (a) a formal written compliance policy;
  - (b) designation of a senior officer with primary responsibility for organisational compliance with the policy;
  - (c) provision of copies of the compliance policy, standards and codes to all members of staff in all operational areas of the licensee;
  - (d) establishment of a formal training program for all members of staff in all operational areas of the licensee, to be conducted at induction and at least once a year;
  - (e) a monitoring strategy for the compliance program; and
  - (f) an annual audit of compliance.

Failure to comply with the standard is a breach of a licence condition. The standard is currently under review by the ACMA<sup>68</sup>.

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<sup>68</sup> ACMA media release 158/2008, 18 December 2008.

# Chapter 5: Findings and recommendations

## Overview

As the ACMA indicated in its terms of reference for this investigation, it recognises that commercial radio needs to have the flexibility to provide attractive and innovative programming to continue to attract and retain its audiences. However, where issues of community concern emerge, the industry must address such concerns.

The ACMA is satisfied that there is a community concern surrounding the treatment of participants in commercial radio, and that this concern is greater when the participants are children.

The evidence considered by the ACMA in the course of this investigation includes:

- > the circumstances of and reaction to the broadcast of *The Kyle and Jackie O Breakfast Show* on 29 July 2009 (the lie-detector broadcast);
- > submissions to the investigation received from both industry and the public;
- > an analysis of complaints to the ACMA about commercial radio content; and
- > the ACMA's commissioned research *Community Attitudes to Radio Content 2009*.

The ACMA acknowledges that many licensees have practices in place that provide some important safeguards for participants. However, it considers that the community concerns are not fully addressed by the current codes. In particular, the codes do not address strong community concerns in relation to children as participants in live hosted commercial radio programs.

In the first instance, and consistent with the co-regulatory framework established by the Act, the ACMA will be calling on industry itself to address the concerns raised in the investigation through urgent and appropriate amendment to the industry's codes.

Given the concerns raised in this investigation, the ACMA considers that, to provide appropriate community safeguards, the industry codes should include specific provisions for:

- > preventing the exploitation of participants in commercial radio programs;
- > ensuring industry has practices and processes in place that provide safeguards for participants in commercial radio programs and that these are transparent to the public; and
- > dealing with children as participants in commercial radio programs, including the requirement that the best interests of the child are the licensee's key consideration, irrespective of any consent given.

Such changes will ensure that new practices are introduced across the commercial radio industry that specifically and meaningfully address the concerns of the community in relation to the treatment of children who are participants in commercial radio programs. It will also provide the industry with the opportunity to codify and make transparent to the public the practices they have in place generally to protect all participants.

If the industry does not address these matters in a timely manner through revision of codes, the ACMA has the ability to determine a program standard under section 125 of the Act.

The ACMA also notes other relevant matters that have been raised in the course of this investigation, including;

- > the appropriateness of material broadcast when children are likely to be listening, particularly in relation to offensive language and sexual references; and
- > the privacy of third parties who are implicated in broadcasts.

The ACMA considers that the former is currently addressed by Code 1.5 and that, through the complaints process, there is opportunity for the public to raise these concerns directly with industry. The ACMA will, however, continue to monitor complaints received to determine if future regulatory intervention is warranted.

In relation to privacy, while there may be some argument for extending the application of the privacy provisions in the codes to all programming rather than just news and current affairs, the ACMA will consider any action in relation to privacy in the context of the broader privacy issues raised in both the ALRC<sup>69</sup> and NSWLRC<sup>70</sup> privacy inquiries and the ACMA's own review of its *Privacy Guidelines for Broadcasters*.

## Findings and recommendations

This chapter presents the ACMA's findings against each of the terms of reference.

### **1/ The level and specific nature of community concern in relation to these types of program elements, using the facts and circumstances in the recent 2DayFM episode [lie-detector broadcast] as a key case study**

The ACMA is satisfied that the evidence provided in the research, submissions to the investigation, and the ACMA's complaints data, including those received in relation to the lie-detector broadcast, highlight a community concern about the treatment of participants in commercial radio programs.

Complaints received about stunts such as *Dearly Departed* and *Home or Away*, and the research finding that people reveal too much private information to win a prize suggests a general community concern that participants can be vulnerable to exploitation.

The reaction to the lie-detector broadcast suggests that the level of concern is greater when the participant involved is a child. The complaints data concerning the case study highlights a significant concern that a child was put in the situation in the first instance, irrespective of the outcome of the broadcast and the mother's consent.

The evidence in the research and complaints data also indicates a concern that children may be exposed to inappropriate content, in particular sexual references and offensive language.

### **2/ The practices, processes and protections already in place in the industry in relation to participants and subjects in such programming elements and, in particular, to children**

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<sup>69</sup> Australian Law Reform Commission (ALRC) Report 108 *For Your Information: Australian Privacy Law and Practice*.

<sup>70</sup> New South Wales Law Reform Commission (NSWLRC) Report 120 *Invasion of Privacy*.

Industry generally has a number of practices and policies in place which provide important protections in relation to participants and subjects in live hosted entertainment radio, including:

- > pre-recording stunts and pranks;
- > internal policies about broadcasting the words of non-staff;
- > processes for obtaining consent; and
- > broadcasting on a slight delay which enables use of a 'dump' button to safeguard against the broadcast of inappropriate content.

The industry's codes have some consent provisions, including in relation to the broadcast of stunts, pranks and competitions, which are addressed through code 6.

Importantly, however, the codes also do not currently provide any specific obligations on the treatment of children as participants in live hosted entertainment programs, neither in the code provisions themselves nor in the guidelines.

### **3/ Whether industry practices and provisions in the industry's code are sufficient to meet the community's concerns in this area**

The ACMA acknowledges that industry practices – internal policies, methods of obtaining consent and pre-recording segments – provide some important protections for participants. However, the ACMA considers the codes are not sufficiently meeting community concerns in relation to the protection of participants.

The industry codes do contain requirements for consent. However, community concern extends to the potential for participants to be exploited in such programming which is not directly addressed by the codes.

Industry practice also provides some protections. However, these practices are not entrenched in the codes and there is no recourse should a licensee not employ them. These policies may also not be publicly available or transparent to the public so that participants may not be able to find out easily what to expect when participating in a program broadcast on that licensee's service.

The codes do not currently consider the treatment of children in these programs at all. The consent provisions contain no special consideration for children, exposing them to potential exploitation, even if the consent of an adult has been given for them to take part in the broadcast. The lie-detector broadcast starkly highlights the specific issues which can arise when a child participates in these types of programs and on which the industry codes are silent.

The ACMA accepts that the lie-detector broadcast is an extreme example of activity within an industry that generally acts appropriately in relation to community standards of decency. However, the broadcast (particularly in light of the mother's consent) exposes shortcomings within the current system in that there were not sufficient safeguards within the codes to ensure the welfare of the child involved was adequately considered by the licensee prior to the broadcast.

### **4/ If not, what additional regulatory arrangements would need to be put in place and what would be the most effective regulatory response**

At the outset, the ACMA noted it did not wish to impact on industry's experimentation with programming genres. However, it is the ACMA's role to ensure that adequate safeguards are in place for addressing community concerns. Providing for the

protection of participants should not impact on industry's ability to continue its experimentation with programming.

The ACMA acknowledges that many licensees have practices in place that provide some important safeguards for participants. However, it considers that the concerns are not currently fully addressed by the codes. In particular, the codes do not address strong community concerns in relation to children as participants in these types of programs.

Where the ACMA is satisfied that a code of practice is not providing adequate safeguards, there are a number of regulatory options available to it under the Act including, the imposition of a licence condition<sup>71</sup> and the determination of a program standard<sup>72</sup>. The regulatory framework established by the Act, including an overview of these mechanisms, is outlined at **Appendix 1**.

In the first instance, and consistent with the co-regulatory framework established by the Act, the ACMA calls on industry itself to address the concerns raised in the investigation through urgent and appropriate amendment to the industry's codes.

The ACMA considers that, to provide appropriate community safeguards given the concerns raised in this investigation, the industry should develop new codes which include specific provisions for:

- > preventing the exploitation of participants in commercial radio programs;
- > ensuring industry has practices and processes in place that provide safeguards for participants in commercial radio programs and that these are transparent to the public; and
- > dealing with children as participants in commercial radio programs, including the requirement that the best interests of the child are the licensee's key consideration, irrespective of any consent given.

### ***Provisions for the treatment of children***

The lie-detector broadcast suggests the issue of the treatment of children requires regulation that goes beyond obtaining consent – it requires regulation that recognises children's special vulnerabilities and prevents them from being exploited.

Similar to the Ofcom Broadcasting Code and the New Zealand Broadcasting Authority's Privacy Principles (refer **Appendix 3**), specific code provisions for children could ensure that the best interests of the child are a licensee's key priority and is a requirement that cannot be overridden by the consent of a parent/guardian.

### ***Preventing the exploitation of participants***

Concerns revealed in the course of this investigation about the treatment of participants are not dissimilar to those identified in the ACMA's *Reality Television Review*. The ACMA notes that in response to that review, the commercial television industry has introduced a provision in its code of practice which deals with the protection of participants in reality television programs. Clause 1.9.7 of the *Commercial Television Industry Code 2010* (the **FreeTV Code 2010**) prohibits the broadcast of a program that is likely in all the circumstances to<sup>73</sup>:

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<sup>71</sup> *Broadcasting Services Act 1992*, section 43.

<sup>72</sup> *Broadcasting Services Act 1992*, section 125.

<sup>73</sup> The Commercial Television Industry Code of Practice 2010 has been registered by the ACMA and will take effect from 1 January 2010. ACMA media release MR183/2009, 18 December 2009.

1.9.7 present participants in reality television programs in a highly demeaning or highly exploitative manner.

***Demeaning:*** A depiction or description, sexual in nature, which is a serious debasement of persons, or a group of persons, within a program

***Exploitative:*** Clearly appearing to purposefully debase or abuse a person, or group of persons, for the enjoyment of others, and lacking moral, artistic or other values.

The ACMA considers that a similar code provision employed in the context of commercial radio will help to address concerns that participants in commercial radio programs can be exploited for entertainment purposes.

While the scope of this investigation was live hosted entertainment programs, the ACMA considers that any new code provisions should not differentiate between programming types. Live hosted entertainment programs cannot be clearly defined. It is the ACMA's experience that the format is experimental and often changing, and as such regulation would be difficult to apply. Common to live hosted entertainment programs are the programming elements which include audience interaction, including open-line conversations, competitions, pranks and stunts. Drafting code provisions, such as clause 1.9.7 of the FreeTV Code 2010, to set a high threshold for the prohibited material would not unduly restrict audience interaction in other programming genres such as news and current affairs.

## **5/ Any other relevant matters**

### ***Protecting children from exposure to harmful material***

While the issue of protecting children from exposure to harmful material (that is, the protection of children as members of the listening audience rather than as participants in the program) does not strictly fall within the terms of reference, concerns that children are being exposed to harmful material on commercial radio have been raised – particularly in relation to sexual themes and language.

The research shows that while it is accepted that offensive material may appeal to certain audiences and should be allowed to be broadcast, there is a general feeling that children should be protected from certain types of content.

The ACMA's complaints data also reflects a growing concern in this area.

While some licensees indicated they were mindful of the child audience and the times that children are likely to be listening, on the whole, the industry submitted that child-specific regulations are not required because children are not a target audience and the lie-detector broadcast was an isolated incident.

The ACMA acknowledges that, unlike television broadcasting, there is no classification regime applicable to radio content. However, the ACMA considers that the provisions relating to language and sexual themes in codes 1.5-1.8 and the complaints process, provide an opportunity for the public to raise these concerns directly with industry.

The ACMA will, however, continue to monitor its complaints to determine if future regulatory intervention is warranted.

### ***Privacy***

Concerns raised in the research about stunts, pranks and competitions referred to participants revealing too much personal information.

While there may be some argument for extending the application of the privacy provisions in the codes to all programming, the ACMA will consider any action in relation to privacy in the context of the broader privacy issues raised in both the ALRC and NSWLRC privacy inquiries and the ACMA's own review of its *Privacy Guidelines for Broadcasters*.

### ***Regulatory burden***

Commercial Radio Australia, and supporting licensees' submissions contended that the current regulatory requirements have a disproportionate effect on the viability of small licensees, given their low staffing levels – with staff often fulfilling a variety of roles – small stations struggle to meet their compliance obligations while maintaining focus on their core business. Accordingly, industry considers that further regulation would be burdensome for industry.

While the ACMA appreciates industry's concerns about the regulatory burden, it considers that, when balanced with community concerns in this area, the recommended code provisions represent a measured regulatory response to the protection of participants.

# Appendix 1: Regulatory framework

Australia's commercial radio industry operates within the co-regulatory framework established by the Act.

Co-regulation recognises that intervention by the government through formal regulation can be rigid, expensive to administer, and burdensome for industry. The Act enables a flexible framework in an evolving landscape, providing industry an opportunity to manage the costs associated with regulating program content. In addition, it confers, to the broadcasters themselves, the responsibility for regulating program content in a manner that is consistent with community standards.

## Co-regulation under the Act

The Explanatory Memorandum to the *Broadcasting Services Bill 1992* shows that in legislating, Parliament sought to:

establish general rules for the industry which are clear, stable and predictable; to establish minimum requirements expected of industry participants; to introduce flexibility into the regime to enable responsiveness to changing circumstances; to monitor outcomes and trends against policy objectives; and to provide a range of redressive measures to the regulatory authority to deal with breaches or adverse trends.<sup>74</sup>

This intent is reflected in the objects of the Act outlined at section 3. Objects of particular relevance to the Investigation's terms of reference are:

- 3(1)(b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
- (h) to encourage providers of broadcasting services to respect community standards in the provision of program material;
- (i) to encourage the provision of means for addressing complaints about broadcasting services; and
- (j) to ensure that the providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them.

The Act assigned separate roles for the government and industry with respect to programming content and provided three mechanisms for the regulation of programming content: codes of practice; program standards; and licence conditions.

Each mechanism carries different obligations for broadcast licensees and represents a different level of government intervention. The ACMA has a range of enforcement powers should a licensee be found in breach of its obligations. In all cases, the ACMA uses its enforcement powers in a manner that is commensurate with the seriousness of the breach.

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<sup>74</sup> The Parliament of the Commonwealth of Australia House of Representatives, *Explanatory Memorandum to the Broadcasting Services Act 1992*.

Currently, the only regulatory mechanism that applies to the type of programming that falls within the scope of this Investigation is the codes of practice. Nonetheless, a brief summary of each mechanism is provided below.

### Codes of practice

Key to the co-regulatory approach embodied in the Act is that the various sectors of the broadcasting industry are responsible for developing their own codes of practice, which are to be observed in the conduct of their broadcasting operations. The Act intends that codes of practice provide flexible, responsive and effective means for regulation.

Such codes confer direct responsibility for managing program content on the broadcaster:

It is expected that relevant broadcasting service industry groups will appreciate that it is in their interests to ensure that an appropriate balance is struck between the public interest in maintaining community standards of taste and decency, and licensees' desire to provide competitive services – such groups will be aware that [the ACMA] will have the power to impose program standards (under clause 125) where it considers that codes of practice have failed or have not been developed.<sup>75</sup>

Section 123 of the Act sets out the matters to which codes of practice may relate, including for example:

- 123(2)(a) preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry;
- (b) methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority; and
- (h) methods of:
  - (i) handling complaints from the public about program content or compliance with codes of practice; and
  - (ii) reporting to the ACMA on complaints so made.

Codes of practice are developed by the industry in consultation with the ACMA and taking account of any relevant research conducted by the ACMA<sup>76</sup>. Once developed, the codes are registered with the ACMA for regulatory guidance<sup>77</sup>. Under section 123(4)(b) of the Act, the ACMA will register a code if it is satisfied that:

- (i) the code provides appropriate community safeguards for the matters contained in the code;
- (ii) the code is endorsed by a majority of the providers of the broadcasting services in that section of the industry; and
- (iii) members of the public have had an adequate opportunity to comment on the code.

It is within this context that the *Commercial Radio Australia Codes of Practice and Guidelines 2004* (the codes) were developed by, industry group, Commercial Radio Australia and registered by the ACMA's predecessor, the Australian Broadcasting Authority.

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<sup>75</sup> Parliament of the Commonwealth of Australia House of Representatives, *Explanatory Memorandum on the Broadcasting Services Bill 1992* (commentary on clause 123).

<sup>76</sup> *Broadcasting Services Act 1992* section 123(1).

<sup>77</sup> Parliament of the Commonwealth of Australia House of Representatives, *Explanatory Memorandum on the Broadcasting Services Bill 1992* (commentary on clause 123).

### ***The ACMA's role in relation to the codes***

The ACMA's role in relation to handling complaints about alleged breaches of codes of practice is set out at Part 11 of the Act and reiterated in the individual codes of practice. The Act establishes the ACMA as 'an avenue of last recourse'<sup>78</sup>, placing the onus in the first instance on service providers to respond to their audience.

Under the framework, complaints alleging breaches of a code of practice must be referred to the relevant licensee first. If the complainant has not received a response within 60 days of making their complaint, or if they have received a response but remain dissatisfied, they may refer the complaint to the ACMA. Pursuant to section 149 of the Act, in these circumstances, unless the complaint is considered frivolous, vexatious or not made in good faith, the ACMA must investigate.

Where an investigation finds there has been a breach of a code, the ACMA may agree to accept measures proposed by broadcasters to improve compliance. The ACMA may agree measures with licensees involving action by them intended to address compliance problems effectively, for example staff training. Such measures have often proved successful in improving behaviours within licensees (and networks).

In addition, the ACMA has the following enforcement powers available:

- > acceptance of an enforceable undertaking;
- > imposition of an additional licence condition;
- > remedial directions<sup>79</sup>;
- > suspension or cancellation of a licence.

The co-regulatory system facilitates a mechanism for ongoing review of the Code; in accordance with this practice, a review of the Code commenced in 2007. This process is currently advanced.

### **Program standards**

Under section 125 of the Act, the ACMA is empowered to make program standards if it is satisfied that:

- > a code of practice has failed to provide appropriate community safeguards in relation to a matter set out at section 123(2) of the Act; or,
- > no code has been registered in relation to a matter set out at section 123(2) of the Act; and
- > a standard should be determined in relation to that matter.

Currently there are three program standards applicable to commercial radio licensees:

- > *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*;
- > *Broadcasting Services (Commercial Radio Advertising) Standard 2000*; and
- > *Broadcasting Services (Commercial Radio Compliance) Standard 2000*..

The standards are currently under review by the ACMA. In undertaking this review the ACMA will consult with commercial radio licensees the public<sup>80</sup>. If the ACMA

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<sup>78</sup> Parliament of the Commonwealth of Australia House of Representatives, *Explanatory Memorandum on the Broadcasting Services Bill 1992* (commentary on Part 11).

<sup>79</sup> If a licensee fails to comply with a remedial direction the ACMA may pursue a civil penalty, prosecute an offence, or suspend or cancel a licence.

determines that regulatory change is necessary it will carry out public consultation as required by section 126 of the Act<sup>81</sup>.

In general terms, the objectives of the commercial radio standards are:

- > to require the disclosure of commercial agreements that have the potential to affect the content of current affairs programs;
- > to ensure advertising is clearly distinguishable from all other programs; and
- > to ensure community safeguards operate effectively by promoting compliance with the requirements of the Act, standards and the codes.

In contrast to the radio codes of practice, adherence to the standards is a condition of a commercial radio broadcaster's licence and as such, under section 147 of the Act, the ACMA can receive complaints directly from the public about alleged breaches of the standards. Under section 149 of the Act, the ACMA must investigate such complaints.

If an investigation finds that a licensee breached a program standard (or licence condition), the following enforcement measures are available to the ACMA:

- > acceptance of an enforceable undertaking;
- > imposition of an additional licence condition;
- > application to the Federal Court for a civil penalty order;
- > remedial directions;
- > referral to the Director of Public Prosecutions; and
- > suspension or cancellation of a licence.

### **Licence conditions**

Schedule 2 of the Act outlines a number of standard conditions with which all broadcasting licensees are required to comply. These conditions relate to the broadcast of election advertisements, the identification of certain political matter, records of matter broadcast and advertisements relating to medicines<sup>82</sup>. The standard conditions also incorporate the prohibition on tobacco advertising as outlined in the *Tobacco Advertising Prohibition Act 1992*.

The standard conditions were legislated by Parliament and while the ACMA has the power to impose additional licence conditions, it can not vary, revoke, or make a new condition that is inconsistent with, the standard conditions<sup>83</sup>.

In addition to the standard conditions, sections 43B and 43C of the Act outline the conditions under which some regional commercial radio licensees are required to broadcast minimum levels of material of local significance and to maintain local presence levels.

As with complaints about program standards, the ACMA can receive, and is required to investigate, complaints from the public about alleged breaches of a licence condition. The enforcement options available to the ACMA in the event of a breach of a licence condition are as set out in the discussion on program standards above.

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<sup>80</sup> ACMA media release 158/2008, 18 December 2008.

<sup>81</sup> Section 126 of the Broadcasting Services Act provides: *The ACMA must, before determining, varying or revoking a standard, seek public comment on the proposed standard or the variation or revocation.*

<sup>82</sup> *Broadcasting Services Act 1992*, Schedule 2, Part 2, cls. 4-65.

<sup>83</sup> *Broadcasting Services Act 1992* sections 43, 87, 99 and 120.

## Appendix 2: *Community Attitudes to Radio Content*

Ipsos MediaCT was commissioned by the ACMA to undertake the *Community Attitudes to Radio Content 2009* study. The research updates 2003 research conducted by the ACMA's predecessor, the Australian Broadcasting Authority and is being used by the ACMA to inform its review of the commercial radio standards and the commercial radio industry's review of its current Code<sup>84</sup>.

The report presents the findings of a national telephone survey, conducted in February 2009, of 1,537 Australians aged 15 years and over. A national representative overall sample was achieved of which 93 per cent<sup>85</sup> were radio listeners (n = 1,423).

The survey examined the attitudes of Australian radio listeners, with a focus on matters relating to the Code and the three program standards for disclosure, advertising and compliance that apply to commercial radio broadcasting services.

Items covered in the research that are of particular relevance to this investigation include:

- > the extent and nature of community concerns about offensive radio content;
- > attitudes towards inappropriate radio content; and
- > views on the potential for certain types of content to impact secondary audiences, including children.

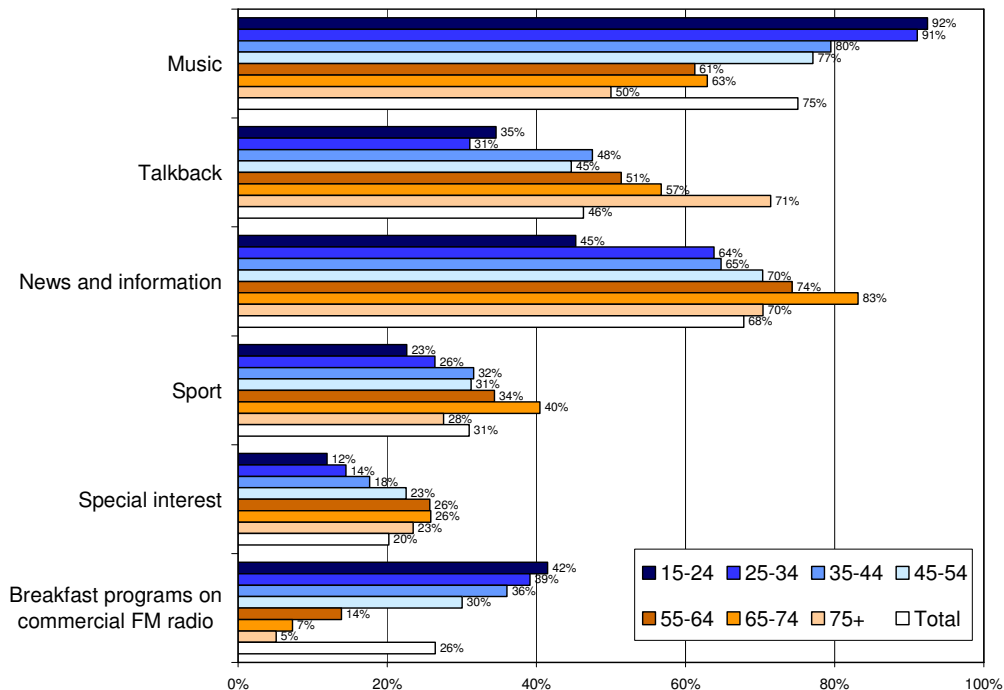
The research shows that *music* and *news and information* are the most preferred types of programming and that substantial age differences underpin listening preferences. These results are shown in figure 1 below.

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<sup>84</sup> Section 123 of the *Broadcasting Services Act 1992* outlines the requirements for the development of industry codes of practice. Section 123(1) states the intention that the codes be developed in consultation with the ACMA, taking account of any relevant research conducted by the ACMA.

<sup>85</sup> Applying a confidence interval of  $\pm 2.5$  per cent to 93 per cent, radio listening by Australians is estimated to fall between 90 and 95 per cent.

Figure 1: Radio content preferences, by age group, 2009



Base: All radio listeners, n=1,423

A fifth of radio listeners indicated they had heard inappropriate content on radio in the last 12 months and general concern that children may be exposed to unsuitable content is significantly higher – almost half of all radio listeners indicated such concern. Listeners were particularly concerned about children being exposed to sexual references and offensive language.

Sexual references and offensive language emerged as areas of concern throughout the study. Unprompted concerns about inappropriate content identified offensive language, sexual references, immature attitudes of presenters and sex-related advertisements as key categories of concern.

In 2009, radio listeners showed a small but significant increase in sensitivity toward certain types of inappropriate content since 2003, particularly to swearing and coarse language, sexual references, and the times of day when subject matter is broadcast. Increasing from an already high level of agreement in 2003, there is also a small increase in the proportion of radio listeners who agree that radio station pranks should only be broadcast with the permission of the person or people involved.

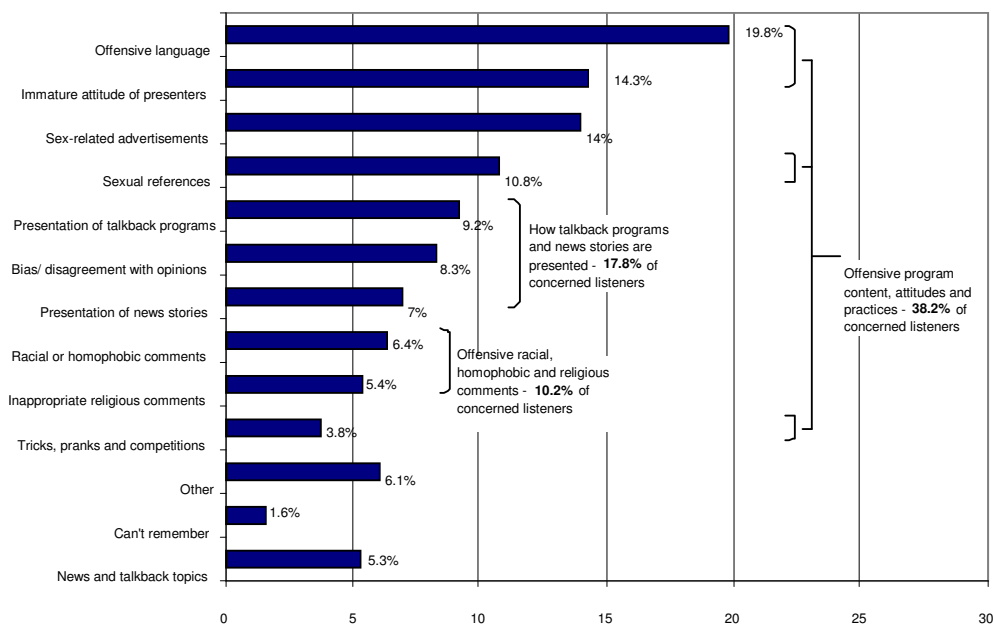
Details of the relevant key findings are outlined below.

### Community concerns about offensive radio content

When asked whether they had heard any offensive content on the radio in the twelve months prior to the survey, just over one fifth (22.1 per cent) of respondents indicated that they had heard something concerning or offensive. Commercial radio was the main source of concern for 76 per cent of concerned listeners, with commercial FM being a source of concern for 54 per cent of concerned listeners.

An analysis of the unprompted responses shows the following sources of concern (Figure 2).

Figure 2: Sources of concern and offence by concerned listeners, 2009



Base: Listeners who reported offence n=314

Percentages add to more than 100 per cent due to multiple responses

Of the broad categories of concern reported in Figure 2, the following have been identified as relevant to live hosted entertainment radio and to this investigation:

- > tricks, pranks competitions;
- > offensive language, including vulgarity and coarse language used by presenters, and featuring in song lyrics;
- > the immature attitudes of presenters including presenters putting others down and stupid behaviour; and
- > sexual references, usually sexually suggestive discussion by presenters;

The relevant categories of concern represent a significant portion of listener concerns although it is noted that these concerns have generally remained stable when compared with results from the 2003 study.

Also of note is the 14 per cent of concerned listeners raised issues about sex related advertisements. This category of concern is new for 2009 and many of the responses that fell into this category referred to a concern that children were listening at the time of the broadcast.

Examples of responses within the categories relevant to this investigation are outlined below:

**Concerns about tricks, pranks and competitions**

*The radio stations played pranks on people and this was at other people's expense. This is not funny for the person being pranked*

*Commercial radio stations going into people's personal lives and setting people up for personal phone calls ... it was just too much personal information from a person of the community.*

*On Triple M ... they were running a competition to win 3 million Zimbabwean dollars which I thought was a bit wrong.*

*I don't like the calls where they call and pretend to be someone else and making fun of people ... but it doesn't really cause me concern it just annoys me a little so I don't listen.*

*Nasty practical jokes.*

*Gotcha call went a bit too far.*

*Today ..., they called their friends and tell them to say a lie to them and the friend had to believe the lie and they called up a pregnant lady and told them that her husband is having an affair ... it was just a joke and extremely unfunny joke ... tell a shocking story and win a prize.*

*... when they trick people it's nasty*

### **Concerns about offensive language and song lyrics**

*The level of swearing and profanity.*

*I think there is a lot of swearing on the radio.*

*Lyrics of a song, my son listens to [an] FM station and I turned it [on] ... and it said 'she fucking hates me' they were a bit clever and the 'f' word was kind of not there but enough that you could fill in yourself. Which I found a bit amazing and I couldn't believe it.*

### **Concerns about immature attitude of presenters**

*On FM breakfast radio one of the announcers is rude and arrogant to people who do not agree with his views.*

*Announcers calling people idiots, it was insulting.*

*Fed up with their attitudes, putting people down and trying to be funny when they're not, that's why I've changed. I used to [listen] to a lot of commercial radio stations but they're too full of shit now.*

*I just think the people on radio are wankers, they're crude and they're thugs and they think they can say whatever they like and don't care what others think, and if someone disagrees with them they say they're weird.*

*Some of the things they do on the afternoon talkback on commercial FM are a bit silly ... they go too far with some of the silly things they do. They say things that are offensive to women.*

*Well its the way they talk and there's no content in what they talk about, it's just silly silly stuff, its dribble.*

*Stupid toilet humour, pointless childish stuff.*

*Sometimes the DJ's, I can't understand why they speak like that to entertain people.*

### **Concerns about inappropriate sexual references**

*Often when kids are getting driven to school there is inappropriate subject on the radio. A sexual subject, and you don't know the rating of the show like with TV programs.*

*Talking about Hollywood sex and what they do these days, going into different degrees of how to do things.*

*Morning program stuff was just a bit stupid, trying to get people to have affairs or something, some sort of sexual innuendo.*

*People revealing private things about themselves that they shouldn't be telling over the radio.*

*This morning - were talking about the hot weather and people might be lazy to have sex and have babies.*

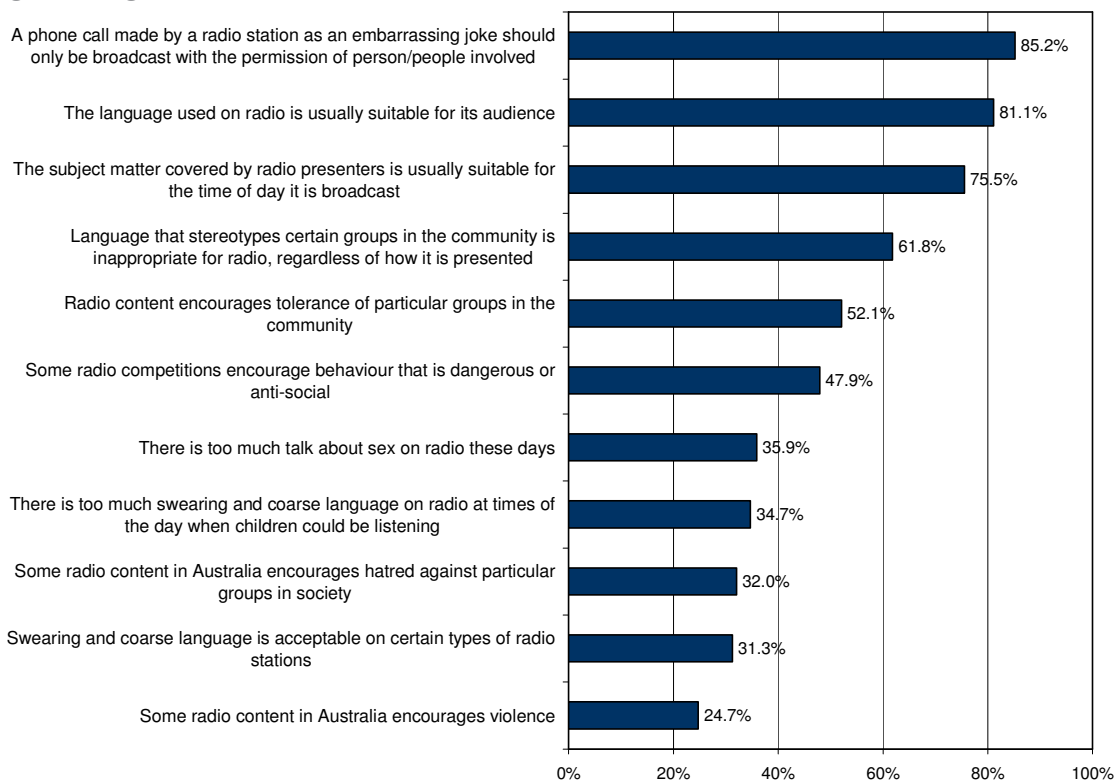
## Community attitudes towards inappropriate radio content

Respondents were presented with fourteen statements and asked to indicate their level of agreement on a five-point scale – agree, strongly agree, neither agree nor disagree, disagree, and strongly disagree.

Figure 3 presents the level of agreement with the fourteen statements. Of potential relevance to this investigation is the proportion of radio listeners who strongly agree or agree that:

- > a phone call made by a radio station as an embarrassing joke should only be broadcast with the permission of the person or people involved (85 per cent);
- > the subject matter covered by radio presenters is usually suitable for the time of day it is broadcast (76 per cent);
- > some radio competitions encourage behaviour that is dangerous or anti-social (48 per cent);
- > there is too much talk about sex on the radio these days (36 per cent);
- > there is too much swearing and coarse language on radio at times of the day when children could be listening (35 per cent); and
- > swearing and coarse language is acceptable on certain types of radio stations (31 per cent)

**Figure 3: Agreement with radio attitude statements, 2009**



Base: All radio listeners n=1,423

A comparison of the results from 2009 with those of 2003 reveals that in 2009 there is some greater sensitivity towards coarse language, sexual references, the times when some subject matter is broadcast, and the privacy of people involved in station pranks. In 2009, a higher proportion of listeners agree that there is too much talk about sex on the radio and that a phone call made as an embarrassing joke should only be broadcast with the permission of the person involved. The 2009 results also show a

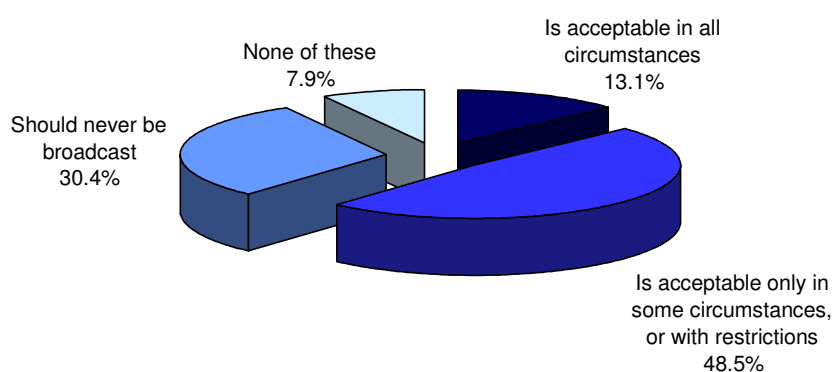
decline in tolerance for swearing and coarse language and a decline in agreement that subject matter is usually suitable for the time of day it is broadcast.

### Views on the potential for certain types of content to impact non-target audience

This section of the research sought to gauge listeners' views on whether it is appropriate to broadcast content that is offensive to non-target listeners.

The research shows that nearly half of radio listeners provided 'qualified acceptance' of offensive content to non-target audiences, indicating that it was acceptable only in some circumstances or with restrictions. Notably, 30 per cent indicated that such content should never be broadcast (Figure 4).

Figure 4: Radio content that offends non-target listeners, 2009



Base: All radio listeners n=1,423

Of the listeners who indicated 'qualified acceptance' to offensive content, 17.5 per cent suggested that offensive material should be broadcast at 'appropriate times', generally with a reference to avoiding 'child-friendly times'. Examples of suggestions received within this category are as follows:

*(Restrictions) at times when the children are on school holidays ... or when children are awake.*

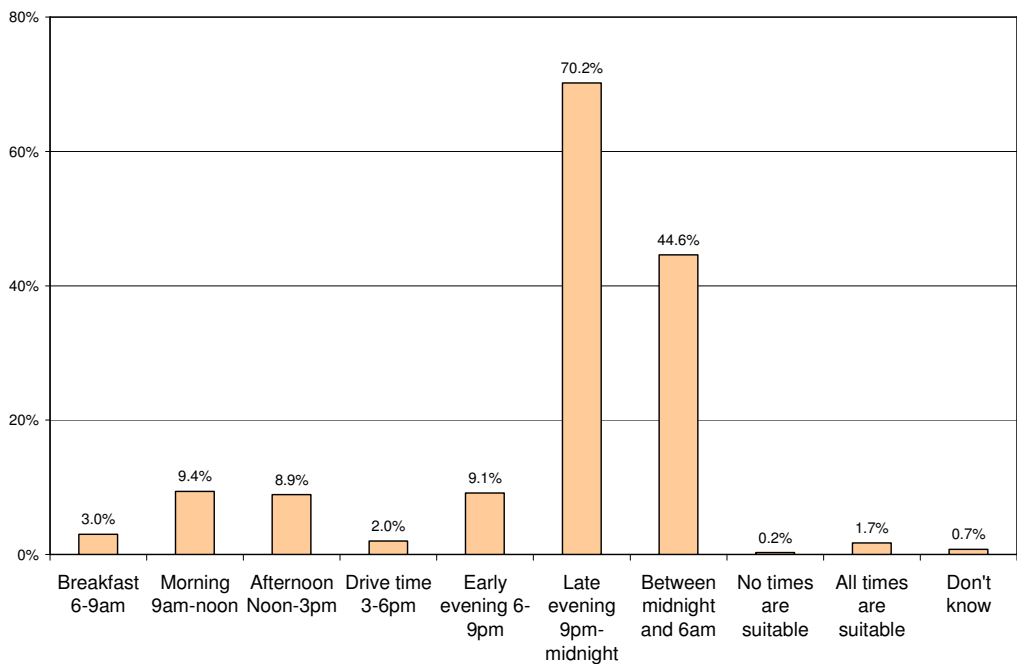
*Well I think they've got to think. It's the young people they've got to think of. Some of the things to me said on radio/TV, should not be said where young children can hear it.*

*The times they are broadcasting, for example in the morning they have to be aware that children may be listening.*

Listeners who indicated 'qualified acceptance' were asked whether they believed specific times of day would be suitable for the broadcast of such content. In all, 58.9 per cent of this group of listeners<sup>86</sup> indicated that specific times of day would be suitable, with a strong preference that offensive content be broadcast in the late night time periods (70.2 per cent preferred 9pm to midnight, and 44.6 per cent indicated midnight to 6am). Breakfast (6-9am) and Drive time (3-6pm) were the least preferred timeslots for the broadcast of offensive content (Figure 5).

<sup>86</sup> Note: the underlying n=406 represents approximately 28.5 per cent of all radio listeners. Within this group, n=308 are commercial radio listeners, therefore accounting for 30.3 per cent of all commercial radio listeners.

**Figure 5: Preferred timeslots for the broadcast of potentially offensive content, 2009**

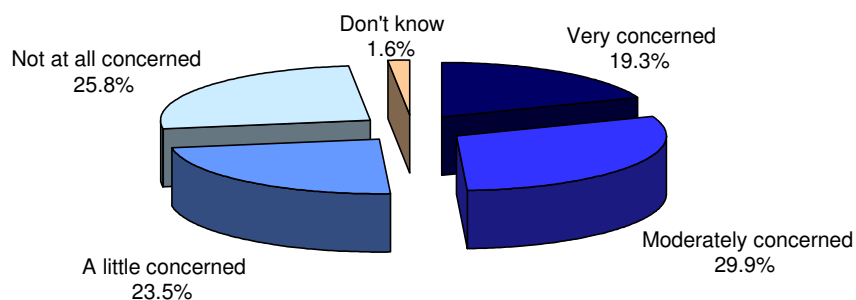


Base: Listeners who indicated specific times of day might be suitable for potentially offensive content n=406

**Views on the potential for certain types of content to impact children**

In addition to sharing their views on the suitability of broadcasting offensive material to a non-target audience, listeners were asked whether they had specific concerns about the suitability of radio content for children aged less than 15 years.

**Figure 6: Overall concern that children may hear unsuitable content, 2009**



Base: All radio listeners n=1,423

Overall, just under half of radio listeners indicated they were either very or moderately concerned that some content on the radio was not suitable for children under 15 years, with a further 23.5 per cent a little concerned.

Sexual references and offensive language were the main types of content considered inappropriate for a child audience. Examples of responses provided within these two categories are:

*Anything of a sexual nature, anything with lots of swearing, anything that could be frightening or that could give them ideas on how to do bad things.*

*Early morning programs ... and they're playing practical jokes and they are a bit too sexually oriented.*

*Adult themes, the sexual content. Also when they talk about life issues and programs that a young person could take the wrong way.*

*Offensive and bad language*

*Obscene language or racist jokes or blue jokes – dirty jokes – like on some FM radio stations.*

# Appendix 3: The international experience

In exploring options for regulatory reform, it is useful to look at how other jurisdictions regulate relevant matters. Given differences in the regulatory frameworks and broadcasting environments the codes and regulations of other jurisdictions are not directly comparable to Australia, however, an assessment of the regulations identifies various approaches which may be applied in the Australian context.

The ACMA has looked at how its international counterparts including, the United Kingdom's Office of Communications (Ofcom), New Zealand Broadcasting Authority, the United States Federal Communications Commission (the FCC), and the Canadian Radio-Television Telecommunications Commission (CRTC) together with the Canadian Broadcast Standards Council (CBSC) provide safeguards for the treatment of participants in radio broadcasts. The details of the relevant regulations are outlined in **Table 1** below.

Submissions to the investigation cited the Ofcom Broadcasting Code as a 'best practice model', particularly in light of its provisions dealing with children. All of the jurisdictions looked at have measures in place for protecting children from exposure to certain material, usually centred on restricting the broadcast of offensive material.

In relation to the protection of participants (including children), the Ofcom and New Zealand codes have been identified as preferred models. Each jurisdiction recognises children as a special group needing protection and balances that with the need for some protections and the desire to limit the burden on industry.

Table 1: International regulations concerning the protection of participants in radio broadcasts

Jurisdiction/Regulator	Regulation	Protection of participants	Children as participants	Sanctions
<p><b>United Kingdom</b> Office of Communications (Ofcom)</p>	<p><b>Ofcom Broadcasting Code</b> Created by Ofcom pursuant to the Communications Act 2003 and the Broadcasting Act 1996.</p>	<p><b>Section 8 - Privacy</b> <b>8.12</b> – surreptitious filming or recording, doorstepping or recorded ‘wind-up’ calls to obtain material for entertainment purposes may be warranted if it is intrinsic to the entertainment and does not amount to a significant infringement of privacy such as to cause significant annoyance, distress or embarrassment. The resulting material should not be broadcast without the consent of the individual involved. However, if the individual is not identifiable in the programme then consent for broadcast will not be required.</p>	<p><b>Section 1 – Protecting the Under-Eighteens</b> <b>1.26</b> – Due care must be taken over the physical and emotional welfare and the dignity of people under eighteen who take part or are otherwise involved in programmes. This is irrespective of any consent given by the participant or by a parent, guardian or other person over the age of eighteen in <i>loco parentis</i> <b>1.27</b> – people under eighteen must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes. <b>Section 8 - Privacy</b> <b>8.20</b> – broadcasters should pay particular attention to the privacy of people under sixteen ... <b>8.21</b> – where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from: &gt; A parent, guardian or other person of eighteen or over in <i>loco parentis</i>; and &gt; Wherever possible, the individual concerned; &gt; Unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent. <b>8.22</b> – Persons under sixteen and vulnerable people should not be questioned about private matters without the consent of a parent, guardian or other person of eighteen or over in <i>loco parentis</i> ... unless it is warranted to proceed without consent.</p>	<p>If Ofcom finds that a broadcaster has breached the code, it will normally publish a finding and explain why a broadcaster has breached the Code. Sanctions available to Ofcom for deliberate, serious or repeated breaches of the code include: &gt; Issuing a direction not to repeat a program; &gt; Broadcasting a correction or statement of Ofcom’s findings; &gt; A fine; and/or &gt; Revocation of a licence.</p>

<p><b>New Zealand</b> Broadcasting Standards Authority</p>	<p><b>Radio Broadcasting Code of Practice</b> Created by the Radio Broadcasters Association and Radio New Zealand and approved by the Broadcasting Standards Authority</p>	<p><b>Standard 3 – Privacy</b> <i>Broadcasters should maintain standards consistent with the privacy of the individual.</i></p> <p><b>Guideline 3a</b> – when determining privacy complaints broadcasters shall apply the privacy principles developed by the Broadcasting Standards Authority <i>Advisory opinion: Privacy Principles</i></p> <p>4. The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual in circumstances where the disclosure is highly offensive to an objective reasonable person;</p> <p>5. it is a defence to a privacy complaint that the individual whose privacy is allegedly infringed by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.</p> <p><b>Standard 6 – Fairness</b> Broadcasters should deal fairly with any person or organisation taking part of referred to.</p> <p><b>Guideline 6c</b> – contributors and participants in any programme should be dealt with fairly and should, except as required in the public interest, be informed of the nature of their participation.</p> <p><b>Guideline 6f</b> – no telephone conversation should be recorded or broadcast unless the recipient has been advised that it is being recorded for possible broadcast, or is aware (or ought reasonably to have been aware) that the conversation is being broadcast. Exceptions may apply depending upon the context of the broadcast, including the legitimate use of humour.</p>	<p>Advisory opinion: Privacy Principles</p> <p>6. children’s vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child’s privacy, broadcasters shall satisfy themselves that the broadcast is in the child’s best interest, regardless of whether consent has been obtained.</p> <p><b>Guideline 6e</b> – children and young people taking part or referred to should not be exploited, humiliated or unnecessarily identified.</p>	<p>Complaints must be made to the broadcaster first (except for complaints relating to privacy which can be referred directly to the Broadcasting Standards Authority). Unresolved complaints can be referred to Broadcasting Standards Authority for review.</p> <p>If the Broadcasting Standards Authority finds a broadcaster has breached the Radio Code, it may:</p> <ul style="list-style-type: none"> <li>&gt; direct the broadcaster to publish a statement about the complaint;</li> <li>&gt; direct the broadcaster to refrain from broadcasting, or from broadcasting advertising for up to 24 hours;</li> <li>&gt; issue an order referring the complaint, along with any guidelines or directions from BSA, back to the broadcaster for consideration and determination.</li> </ul> <p>Non-compliance with an order is an offence and the broadcaster with a penalty of up to \$100,000 applicable.</p> <p>Further, if the breach relates to a violation of privacy, the Broadcasting Standards Authority may direct the broadcaster to pay the relevant party an amount of up to \$5,000.</p> <p>The Broadcasting Standards Authority also has the power to award costs to either the broadcasters or the complainant and where a complaint is upheld; the broadcaster may also be liable to pay costs of up to \$5,000 to the Crown.</p>
<p><b>Canada</b> Canadian Radio-Television Telecommunications Commission (CRTC) (Government Regulator)</p>	<p><b>Radio Regulations 1986</b> Created by CRTC under the Broadcasting Act 1991.</p>	<p>In relation to the protection of participants, Radio Regulation 3(e) prohibits the broadcast of: Any telephone interview or conversation, or any part thereof, with any person unless:</p> <ul style="list-style-type: none"> <li>(i) the person’s oral or written consent to the interview or conversation being broadcast was obtained prior to the broadcast, or</li> <li>(ii) the person telephoned the station for the purpose of participating in a broadcast.</li> </ul>		<p>Contravention of a regulation is an offence under the Broadcasting Act, if the CRTC finds a broadcaster has breached the Radio Regulations, it may impose fines of up to \$250,000 for a first offence and \$500,000 for each subsequent offence (section 32(2))</p>

<p><b>Canada</b> Canadian Broadcast Standards Council (CBSC) (Independent voluntary industry organisation)</p>	<p><b>Radio Television News Directors Association of Canada Code of Ethics (the RTNDA Code)</b> Created by industry</p>	<p><b>Article Four - Privacy</b> Broadcast journalists will respect the dignity, privacy and well-being of everyone with whom they deal, and will make every effort to ensure that news gathering and reporting does not unreasonably infringe privacy except when necessary in the public interest. Hidden audio and video recording devices should only be used when it is necessary to the credibility or accuracy of a story in the public interest.</p> <p><b>Article Eight – Decency and Conduct</b> Broadcast journalists will treat people who are subjects and sources with decency ...</p>	<p><b>Article Eight – Decency and Conduct</b> Broadcast journalists will treat people who are subjects and sources with decency. They will use special sensitivity when dealing with children. They will strive to conduct themselves in a courteous and considerate manner, keeping broadcast equipment as unobtrusive as possible; they will strive to prevent their presence from distorting the character or importance of events.</p>	<p>If the CBSC finds that a broadcaster has breached any of its codes, it can compel that broadcaster to make an on-air announcement about that breach. The announcement must be made twice, once within three days of the decisions in prime time and again with seven days of the decision during the time period in which the breach occurred.</p> <p>The broadcaster is also required to write to the complainant to advise of the remedy and then notify CBSC including a provision of the broadcasts of the announcements.</p> <p>If a complainant is unhappy with the result of a CBSC investigation, it may be appealed to the CRTC for review.</p>
<p><b>United States of America</b> Federal Communications Commission (FCC)</p>	<p><b>FCC Rule 73.1206</b> Created by the FCC.</p>	<p><b>§ 73.1206 Broadcast of telephone conversations.</b> Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee’s intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations. [35 FR 7733, May 20, 1970]</p>	<p>N/A</p>	<p>If the FCC finds that a licensee has breached its Rules, it may impose fines of up to \$25,000 for each violation or each day to a total of \$250,000 for continuing violations.</p>