

# Review of the commercial radio standards Report

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# Executive summary

The Australian Communications and Media Authority (the ACMA) has conducted a wide-ranging, evidence-based review of the three commercial radio standards dealing with advertising, commercial influence and compliance programs. The aim of the review was to ensure that regulation of commercial radio in these areas continues to deliver appropriate and contemporary community safeguards.

Taking into account the substantive research conducted for the review and the submissions made to the review—by the commercial radio industry, the advertising industry, public interest advocacy groups and individual citizens—the ACMA has decided to:

- > **Regulate advertising on commercial radio through a program standard** with new elements that more effectively promote community standards and provide more stable and predictable regulation—until such time as the commercial radio industry has in place an appropriate code of practice dealing with advertising.
- > **Regulate commercial influence on commercial radio through a program standard** based on a disclosure model, with new elements to more effectively promote community standards and provide adequate community safeguards as well as reduce the financial and administrative burdens on licensees.
- > **No longer regulate compliance with regulatory obligations through a program standard**, but rely on existing provisions of the *Broadcasting Services Act 1992* (the Act) to deal with breaches on an individual licensee basis to reduce the regulatory, financial and administrative burdens on licensees.

These reforms are seen by the ACMA as the best regulatory outcomes given the importance citizens place on commercial radio services for the provision of information and entertainment and the influence these services have in the community.

# Overview

## Review of the commercial radio standards

In 2000, the three commercial radio standards were determined by the ACMA's predecessor, the Australian Broadcasting Authority (the ABA), after it identified in the *Commercial Radio Inquiry 2000* that the industry codes of practice existing at that time for commercial radio were not operating to provide appropriate community safeguards.

The Broadcasting Services (Commercial Radio Advertising) Standard 2000 (referred to in this document as 'the Advertising Standard') was determined in order to ensure that commercial radio licensees made all advertising on commercial radio distinguishable as advertising to listeners.

The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (referred to in this document as 'the Disclosure Standard') was determined to ensure that relevant commercial agreements, particularly with respect to current affairs programming and presenters, were disclosed to listeners and notified to the ACMA.

The Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 (referred to in this document as 'the Compliance Standard') was determined to provide minimum requirements for licensees to ensure that licensees and their staff were made aware of their regulatory obligations.

In 2008, the ACMA announced a review of the commercial radio standards to consider the effectiveness, efficiency and appropriateness of the regulatory arrangements under the three standards. The ACMA conducted extensive research to inform the review, releasing three pieces of research in early 2010 and a further two reports in early 2011.<sup>1</sup> The ACMA consulted on its issues paper in early 2010. Informed by the research and the submissions made to the issues paper, the ACMA released the options paper in early 2011.<sup>2</sup> All submissions received, including those to the options paper, have informed the ACMA's final view on the reform of the standards presented in this report.

## From options paper to reform

In the options paper of March 2011, the ACMA suggested a number of possible reform options for the three existing commercial radio standards.

In respect of the Advertising Standard, the options were to:

- > vary aspects of the current program standard to more effectively promote community standards and provide more stable and predictable regulation; or
- > revoke the current program standard in favour of an industry code to reduce the regulatory burden on industry.

In respect of the Disclosure Standard, the options were to:

- > vary aspects of the current program standard (maintaining a disclosure model) to more effectively promote community standards, provide adequate community safeguards and reduce financial and administrative burdens on licensees; or
- > revoke the current program standard in favour of an industry code to reduce the regulatory burden on industry; or

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<sup>1</sup> The ACMA's research reports are available on the ACMA website at: [www.acma.gov.au/WEB/STANDARD/pc=PC\\_311945](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311945).

<sup>2</sup> The ACMA's issues paper, submissions to the issues paper and the options paper are available on the ACMA website at: [www.acma.gov.au/WEB/STANDARD/pc=PC\\_311945](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311945).

- > vary the current program standard based on an editorial independence model to provide more stringent community safeguards.

In respect of the Compliance Standard, the options were to either:

- > vary aspects of the current program standard to address some financial and administrative burdens on licensees; or
- > revoke the current program standard to reduce the regulatory, financial and administrative burdens on licensees with the ACMA to utilise existing powers under the Act to deal with individual licensee compliance with regulatory obligations.

Another option for the ACMA was to maintain the status quo by retaining the commercial radio standards as they are.

### **Submissions received in response to the options paper**

All submissions received in response to the options paper have been published on the ACMA's website.<sup>3</sup>

The ACMA received one submission from a website development company that supported the proposals to maintain (with some variation) the three current commercial radio standards.

The ACMA also received two submissions from the commercial radio industry: one from DMG Radio network and one from industry representative Commercial Radio Australia (CRA). These submissions supported a move away from regulation in program standards to industry codes. Support was also given to those ACMA proposals that reduced the financial and administrative burden on commercial radio licensees.

Included as part of CRA's submission was:

- > A report by the Competition Economists Group (CEG) setting out a critique of the ACMA's economic research report *Reform of the Commercial Radio Standards: A review of expected economic costs 2011*
- > A report by Professor Stan Glaser setting out a critique of the ACMA's attitudinal research presented in the reports *Community attitudes to radio content 2010* and *Listener attitudes to advertising, sponsorship and influence on commercial radio 2010*.

### **Response to CEG's critique of the ACMA's economics research**

Having considered CEG's report, the ACMA notes that the CEG analysis is consistent with the overall conceptual framework used by the ACMA. In particular, the CEG analysis agrees that commercial agreements and spot advertising are likely to be at least to some extent substitutes—the principal conjecture in the ACMA's analysis. Additionally, there is agreement that the potential for undisclosed commercial agreements to colour current affairs issues and public policy debates 'provides a basis for some restrictions relating to current affairs programmes.'<sup>4</sup>

As outlined in the ACMA options paper, the ACMA analysis did not seek to provide a cost benefit analysis of the options presented. Some of the main benefits, such as a reduction in the commercial influence on the reporting of current affairs and the right of the citizen to be able to clearly distinguish advertising material, are not amenable to an economic impact analysis. In addition, the costs are very difficult to measure as they

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<sup>3</sup> [www.acma.gov.au/WEB/STANDARD/pc=PC\\_311945](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311945).

<sup>4</sup> CEG report attached to CRA submission to the ACMA's options paper, June 2011, p. 47.

depend on a number of economic assumptions and the data that would ideally inform robust estimates is not available.

CEG provided estimates of the economic impact of some of the options, particularly banning live reads. The ACMA notes the two largest costs estimated by the CEG analysis, nuisance costs to listeners and the costs to advertisers, are particularly difficult to estimate. The ACMA is not convinced that these costs are likely to be as high as estimated in the CEG report. For example, CEG estimates nuisance costs of \$291 million to listeners if regulation of integrated advertising is increased by the ACMA. This estimate is based on an American study conducted in 1999 using a figure derived from what Americans would be prepared to pay for radio free from advertisements. As revealed later in the CEG report, this might not be a good basis for indicating current nuisance costs to listeners of commercial radio in Australia.<sup>5</sup> The ACMA is also not persuaded by CEG's assertion that the economic benefits to listeners from advertising being clearly distinguishable from editorial content are likely to be zero or negative. CEG does not support this assertion with economic literature or references and does not examine commercial radio listeners' consumption patterns to any degree.<sup>6</sup>

Nevertheless, the ACMA has taken CEGs cost estimates into account in formulating its final proposals, and has formed the view that the benefits of the proposals outlined in this paper outweigh the costs to industry.

### **Response to Professor Glaser's critique of the ACMA's attitudinal research**

The crux of Professor Glaser's criticism was his assessment of 'shortcomings in questionnaire design' in *Community attitudes to radio content 2010* and similar attitudinal questions in *Listener attitudes to advertising, sponsorship and influence on commercial radio 2010*.

While social researchers and academics can often differ in approaches to research design, the ACMA's attitudinal research was devised and conducted in line with accepted and high standards of industry practice. A number of the points raised by Professor Glaser had been considered by the research team during the questionnaire development process. Ultimately, the final questions represented judgements made about how to best gauge attitudes to complex media policy issues based on previous research among radio listeners, question testing, and the need to replicate some questions from an earlier 2003 ACMA study to understand any shifts in community standards. While the ACMA accepts that, in some instances, questions from 2003 could have been improved, this was outweighed by the value of time series analysis.

Undertaking research among radio listeners provides the ACMA with valuable input from citizens who would normally not participate in policy processes. The ACMA regards this research as providing an important contribution to its total evidence base, which informs the exercise of judgment that the ACMA's regulatory functions demand.

### **Overview of the ACMA's decision to reform the standards**

Given the findings of the review set out in the options paper and taking into account all the submissions received during the review, the ACMA has decided on a set of reforms that strengthen regulation where it is most critical to address the relevant policy problems but also lessens the burden on industry where it is appropriate. The ACMA believes that the best regulatory outcome would be to:

- > **Vary aspects of the Advertising Standard** to more effectively promote community standards and provide more stable and predictable regulation – until

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<sup>5</sup> CEG report attached to CRA submission to the ACMA's options paper, June 2011, pp. 10, 39-40.

<sup>6</sup> CEG report attached to CRA submission to the ACMA's options paper, June 2011, pp. 32-33.

such time as the commercial radio industry has in place an appropriate code of practice dealing with advertising.

- > **Vary aspects of the Disclosure Standard** (maintaining a disclosure model) to more effectively promote community standards, provide adequate community safeguards and reduce financial and administrative burdens on licensees.
- > **Revoke the Compliance Standard** to reduce the regulatory, financial and administrative burdens on licensees.

The elements of the proposed varied standards are set out in sections 1.3 and 2.3 of this paper as well as in more detail in the draft instruments to be released following the publication of this report. The ACMA proposes that the varied standards have a start date of 1 March 2012.

# 1. Advertising

## 1.1 Decision

The policy problem sought to be addressed by the introduction of the Advertising Standard in 2000 was that listeners should not be misled into believing promotional material has greater credibility because it has not been distinguished as an advertisement.

The ACMA acknowledges that the policy problem has decreased somewhat since 2000 due to improved industry awareness and behaviour. The ACMA is persuaded that advertising could be regulated through an industry code of practice, although the ACMA will require the commercial radio industry to produce an appropriate code before the ACMA will revoke the standard.

The ACMA will continue to regulate advertising on commercial radio using a program standard with key changes to address more instances of advertising and to provide stability and predictability to the regulation—until such time as the industry produces an appropriate advertising code of practice.

## 1.2 Reasons for decision

The two reform options for the Advertising Standard suggested in the options paper were to:

- > vary aspects of the current program standard to more effectively promote community standards and provide more stable and predictable regulation; or
- > revoke the current standard in favour of an industry code to reduce the regulatory burden on industry.

### 1.2.1 Decision on regulation—program standard or industry code

In response to the options paper, CRA submitted that there was no case for more regulation under the proposal to continue regulation through a varied program standard; therefore the ACMA should allow an industry code of practice to regulate advertising.<sup>7</sup>

Given the history of the Advertising Standard and how seriously the policy problem was regarded in 2000, the ACMA could not support movement to a code-based solution to the problem unless there was convincing evidence that:

- > the policy problem had diminished significantly; or
- > the importance placed by citizens on being able to distinguish advertising was significantly less; or
- > industry could provide sufficient community safeguards through a code.

CRA argued that the policy problem had diminished and citizen concern was less because listeners were now exposed to, and more used to, integrated advertising in various media.<sup>8</sup> CRA also submitted that adequate community safeguards would exist as its co-regulatory code structure was stable. It suggested that incorporating the advertising regulation into the codes of practice would be more user-friendly for citizens than separate rules in codes and standards.<sup>9</sup>

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<sup>7</sup> CRA's submission to the ACMA's options paper, June 2011, p. 19.

<sup>8</sup> CRA's submission to the ACMA's options paper, June 2011, p. 20.

<sup>9</sup> CRA's submission to the ACMA's options paper, June 2011, p. 22.

The ACMA is of the view that the policy problem has diminished since 2000. Tighter regulation appears to have increased industry awareness of the problem and improved standards of behaviour. Accordingly, so long as an industry code provides sufficient community safeguards, a program standard may no longer be necessary. However, the ACMA requires industry to develop an appropriate code on advertising before the ACMA will revoke the program standard regulating advertising.

For these reasons, the ACMA will vary aspects of the current Advertising Standard to more effectively promote community standards and provide more stable and predictable regulation. This varied standard will remain in place, with a view to revocation, until such time as the commercial radio industry has developed an appropriate code of practice dealing with advertising.

### **1.2.2 Decision on elements of the proposed varied standard**

The current Advertising Standard has the following elements:

1. It applies to all program formats on commercial radio.
2. It requires advertising to be distinguishable and has an explicit definition of 'advertising' and 'consideration'.
3. It does not explicitly state that an advertisement must be distinguishable at the time the content is broadcast.
4. It uses a 'reasonable listener test' to assess whether advertising is distinguishable from other program material.

The variation to the standard as presented in the options paper had the following elements:

1. Maintain the application of the standard to all program material.
2. Expand the definition of 'consideration' to include both direct and indirect benefits and interests.
3. Explicitly require advertising to be distinguishable at the time the commercial material is broadcast.
4. Regulate integrated advertising in one of the following ways:
  - A. maintain the 'reasonable listener test' but apply the research concerning listeners' particular difficulties in distinguishing integrated advertising in making its decisions; or
  - B. prohibit integrated advertising (such as live reads); or
  - C. explicitly state in the program standard that integrated advertising must:
    - contain details of the commercial sponsor at the start of the advertisement; and
    - have the tone and style of an advertisement.

Submissions received during the review, including those from the commercial radio industry, agreed that the application of the regulation to all program material assists in reducing complexity.

The remaining elements prompted differing views from submitters to the options paper. These are discussed below.

#### *Definition of 'consideration'*

Investigations conducted by the ACMA demonstrate that all kinds of advertising/promotion is broadcast by licensees despite not being explicitly referred to in the relevant advertising agreement. The ACMA is concerned to ensure that all advertisements are distinguishable to listeners—and this is best managed by the suggested introduction of a more comprehensive definition of 'consideration'. The

ACMA would apply the regulation sensibly and not include incidental or unintentional mentions of products or entities, keeping in mind that the intent of the regulation is to ensure that all advertising is distinguishable to listeners.

Both DMG and CRA's submissions to the options paper disagreed with the ACMA's view that a more comprehensive definition of consideration is needed.<sup>10</sup> CRA advised that the wider definition would be unpredictable, difficult to enforce and impose a substantial cost burden on industry.<sup>11</sup>

The ACMA is not persuaded that the definition would be unpredictable or difficult to enforce. As for cost burden, the ACMA wishes to balance the cost to industry with the benefits to citizens. Accordingly, the ACMA holds the view that in this respect the cost to industry is not unreasonable or unnecessary given the benefits to citizens.

#### *Distinguishable 'at the time'*

When assessing whether an advertisement is 'distinguishable' under the Advertising Standard, the ACMA considers that it must be distinguishable at the time it is broadcast. Therefore, the proposal to explicitly require advertising to be distinguishable *at the time* is simply making an existing implicit requirement explicit.

DMG and CRA disagreed with the need for this variation. CRA advised that this explicit requirement will require more airtime per advertisement in order to include a disclosure announcement and consequently the requirement would be costly to administer.<sup>12</sup> DMG submitted that the question of 'when' an advertisement is distinguishable should be left to the ACMA to determine in the context and circumstances surrounding each particular advertisement—the explicit requirement diminishes the ability of the ACMA to consider the context and circumstances around each situation.<sup>13</sup>

The ACMA disagrees that this requirement means advertisements need to be longer in duration or require a disclosure announcement—it simply requires that the advertisement is *distinguishable*, that is, has the appropriate cues or signals that listeners know and recognise as indicating an advertisement.

#### *Integrated advertising*

Listener research conducted for the ACMA indicated that integrated advertising (namely, less structured, more interactive and multi-faceted advertising often including the use of talkback, discussions or expert interviews) was the most difficult for listeners to distinguish as advertising. For this reason, the ACMA suggested in the options paper that instead of maintaining the 'reasonable listeners test' for integrated advertising it could be either:

- > prohibited; or
- > in a program standard explicitly requiring that it must:
  - contain details of the commercial sponsor at the start of the advertisement; and
  - have the tone and style of an advertisement.

Various submissions received during the review expressed concern about over-regulating such advertising practices. The advertising industry submitted (in response to the issues paper) that further evidence would be required to establish the public

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<sup>10</sup> CRA's submission to the ACMA's options paper, June 2011, p. 23. DMG's submission to the ACMA's options paper, May 2011, p. 2.

<sup>11</sup> CRA's submission to the ACMA's options paper, June 2011, p. 23.

<sup>12</sup> CRA's submission to the ACMA's options paper, June 2011, p. 25.

<sup>13</sup> DMG's submission to the ACMA's options paper, May 2011, p. 2.

benefit of requiring a higher level of regulation.<sup>14</sup> In response to the options paper both DMG and CRA expressed serious concerns about the suggested prohibition or explicit requirements for integrated advertising – submitting that such changes would mean a loss of revenue for licensees.<sup>15</sup> CRA also submitted a report by CEG that estimated the cost to industry of prohibiting integrated advertising would be \$378 million, most of this cost comprising the ‘nuisance’ cost to consumers of increased spot advertisements to replace the integrated advertising.<sup>16</sup>

Having considered the policy problem to be addressed, and the submissions received, the ACMA considers that the 'reasonable listener test' is sufficiently flexible to address the policy problem without prohibiting or further regulating integrated advertising specifically. Integrated advertising can be a valuable advertising practice while still being distinguishable to the reasonable listener. The ACMA has concluded that integrated advertising should not be prohibited or expressly regulated other than by the reasonable listener test to be applied in an investigation (for example when complaints are made about compliance with the standard).

### **1.3 The advertising elements of the proposed varied standard**

The elements regarding advertising to be incorporated in the proposed varied program standard are:

1. Advertising provisions will apply to all program material.
2. 'Consideration' will be defined expansively to capture:  
*any money, service or other valuable consideration or benefit that is directly or indirectly paid, or promised to or charged or accepted in respect of the material broadcast.*
3. Advertising will be required to be distinguishable at the time it is broadcast.
4. The 'reasonable listener test' will be maintained.

As stated above, the ACMA acknowledges that advertising could be regulated through an industry code—if sufficient community safeguards are provided under the code. Accordingly, should the industry develop an appropriate code of practice for dealing with advertising, the ACMA will consider revoking the standard. However, until such time as an appropriate code is registered, the ACMA will vary the Advertising Standard and continue to regulate under this standard.

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<sup>14</sup> Australian Association of National Advertisers' submission to the ACMA's issues paper, May 2010, p. 3.

<sup>15</sup> DMG's submission to the ACMA's options paper, May 2011, p. 3.

<sup>16</sup> CEG report attached to CRA submission to the ACMA's options paper, June 2011, pp. 32-46.

## 2. Fair and accurate coverage of matters of public interest

### 2.1 Decision

The Disclosure Standard was developed by the ABA to address the finding that commercial influence can undermine the fair and accurate coverage of matters of public interest. While during the review some support was shown from public advocacy groups for a new approach based on editorial independence, the ACMA has decided to maintain a program standard based on a disclosure model with some key changes.

The ACMA's decision also acknowledges industry concerns about the financial and administrative burdens of the standard by seeking to reduce those burdens where possible and practical to do so. The changes would more effectively promote community standards, provide adequate community safeguards and reduce financial and administrative burdens on licensees—which were identified in the review as deficiencies of the existing standard.

### 2.2 Reasons for decision

The three reform options for the Disclosure Standard suggested in the options paper were to:

- > vary aspects of the current program standard (maintaining a disclosure model) to more effectively promote community standards and to provide adequate community safeguards; or
- > revoke the current standard in favour of an industry code to reduce the regulatory burden on industry; or
- > vary aspects of the current program standard, based on an editorial independence model, to provide more stringent community safeguards.

#### 2.2.1 Decision on regulation—program standard or industry code

In response to the options paper, CRA submitted that there was no case for more regulation under the suggested variations to the standard; therefore the ACMA should allow an industry code of practice to regulate commercial influence.

The ACMA is of the view that the policy problem remains significant and serious. As such, the ACMA could not agree to an industry code on commercial influence unless there was convincing evidence that the industry could provide sufficient community safeguards through a code.

CRA contended that there is a strong case for reducing regulation, relying largely on the fact that its code structure was stable.<sup>17</sup> Industry preference for a code is clear, but no compelling case was put forward to outweigh the evidence identified in the options paper that the potential for commercial influence to undermine the fair and accurate coverage of matters of public interest requires community safeguards delivered through a program standard.

For these reasons, the ACMA has decided that the Disclosure Standard should be varied rather than revoked. Of the two suggested variations to the standard, industry preferred a disclosure model, arguing that an editorial independence model would

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<sup>17</sup> CRA's submission to the ACMA's options paper, June 2011, p. 22.

represent an unjustified 'seismic shift' in the way licensees and the entire industry does business.<sup>18</sup>

The ACMA agrees that maintaining the disclosure model provides adequate community safeguards, without requiring the complete separation of commercial content and editorial material. Accordingly, of the three reforms offered in the options paper the ACMA has elected to vary aspects of the Disclosure Standard (maintaining a disclosure model) to more effectively promote community standards and provide adequate community safeguards.

### **2.2.2 Decision on elements of the proposed varied standard**

The current Disclosure Standard has the following elements:

1. It applies to current affairs programs only.
2. It defines 'commercial agreements' and 'consideration'.
3. It relates to commercial agreements entered into by program presenters.
4. It imposes no requirement for separation of commercial and other material, so long as there is disclosure.
5. It requires on-air disclosure at the time of broadcast and in a prescribed scripted form.
6. It requires licensees to:
  - > keep a public register of commercial agreements between sponsors and presenters of current affairs programs
  - > notify the ACMA of such agreements.

The variation to the standard as presented in the options paper had the following elements:

1. Expand the application of the regulation to more than just current affairs programs, in order to cover other material of public interest. Regulation could apply to:
  - A. factual programs, including current affairs and infotainment programs. Current affairs programs would be defined as in the current standard. Infotainment programs would be defined as meaning 'a program that has the dominant purpose of presenting factual material in an entertaining way'; or
  - B. all public interest material whenever broadcast, regardless of the format of the program.
2. Expand the definition of 'consideration' to include both direct and indirect benefits and interests.
3. Expand the application of the regulation to require licensees to be responsible for:
  - > presenters agreements (same as the current definition); and
  - > licensees agreements where a relevant presenter has an actual or beneficial interest in the licensee company; and
  - > any other agreements where the person concerned has significant influence on the content of material broadcast. The onus will be on the licensee to determine who are the persons associated with the broadcaster that may significantly influence program content.
4. Maintain the disclosure requirement—separation of commercial and other content would not be required so long as an on-air disclosure announcement is made.
5. Relax the prescription on the form of on-air disclosure announcements by removing the list of acceptable phrases and instead require an 'identifiable sponsorship

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<sup>18</sup> DMG's submission to the ACMA's options paper, May 2011, p. 4.

announcement' at the time of, and as part of the relevant content that makes clear to listeners that there is a relevant commercial relationship.

6. Relax the register and notification requirements. Require licensees to keep a publicly available online register for the information of citizens and the ACMA. Further, licensees will be required to provide further information on commercial agreements to the ACMA upon request.

Submissions received during the review, including those from industry, generally agreed on:

- > maintaining the disclosure requirement (rather than requiring complete separation or editorial independence); and
- > relaxing the prescription on the form of announcements; and
- > relaxing of the register and notification requirements.

The remaining elements generated differing views from submitters to the options paper. These are discussed below.

#### *Application to current affairs programs, factual programs or all public interest material*

Attitudinal research conducted for the ACMA indicated that many listeners placed importance on the content of current affairs programs being free from commercial influence. The ACMA also noted that matters of public interest can be covered in programs other than current affairs programs. For these reasons, the ACMA suggested in the options paper that the regulation could be extended to apply to:

- > factual programs, including current affairs and infotainment programs; or
- > all public interest material whenever broadcast, regardless of the format of the program.

Various submissions received during the review expressed concern over any extension of the regulation beyond current affairs programs holding that non current affairs programs do not provide serious analysis of public interest material and do not have the same ability to influence opinion.<sup>19</sup> DMG most recently submitted that 'infotainment' was too ambiguous a term and may be interpreted to encompass a very broad number of programs.<sup>20</sup> CRA's submission to the options paper also provided an estimate by CEG that extending the standard to factual programs would impose a cost to industry of \$2.6 million.<sup>21</sup>

Having considered the policy problem to be addressed and the submissions received, the ACMA considers that the application to only current affairs programs (as defined in the current standard) is sufficient to address the problem and an extension is not justified, noting that there are very few, if any, influential 'factual programs' on commercial radio that would not fall within the current affairs definition.

#### *Definition of consideration*

Investigations conducted by the ACMA demonstrate that current affairs presenters may make commercial mentions of a product or entity despite that mention not being explicitly referred to in the relevant commercial agreement.<sup>22</sup> The ACMA is concerned to ensure that listeners are made aware that such mentions result from commercial agreements. The ACMA has expressed the view that this could be most effectively achieved by introducing a more comprehensive definition of 'consideration'.

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<sup>19</sup> For example, Austereo's submission to the ACMA's issues paper, May 2010, p. 7.

<sup>20</sup> DMG's submission to the ACMA's options paper, May 2011, p. 3.

<sup>21</sup> CEG report provided in CRA's submission to the ACMA's options paper, June 2011, p. 47-54.

<sup>22</sup> See the ACMA investigation into various licensees including the licensee of 3AW, Radio 3AW Melbourne Pty Ltd (Investigation Report No. 2422), available at: [www.acma.gov.au/WEB/STANDARD/pc=PC\\_310232](http://www.acma.gov.au/WEB/STANDARD/pc=PC_310232).

CRA disagreed with the ACMA's view that a more comprehensive definition of consideration is needed. CRA advised that the wider definition would be unpredictable, difficult to enforce and impose a substantial cost burden on industry.<sup>23</sup>

The ACMA is not persuaded that a more comprehensive definition of consideration would be unpredictable or difficult to enforce. The ACMA would apply the revised standard, mindful that its purpose is to ensure that listeners are made aware when mentions of products or entities result from commercial agreements. The ACMA does not accept that an expanded definition would render unlawful purely co-incidental or unintentional mentions of the products or entities with which licensees or their presenters have commercial arrangements.

The ACMA's decision in this regard is also consistent with the findings of the previous chapter and the definition of consideration for use in the varied standard for advertising.

#### *Application to certain commercial agreements*

Investigations conducted by the ABA and the ACMA demonstrate that a licensee's commercial agreement can result in commercial influence in a current affairs program and deliver benefits to a current affairs presenter even where the presenter is not party to the relevant agreement.<sup>24</sup> The ACMA is concerned to ensure that such situations are regulated, so that the coverage of matters of public interest is not distorted by commercial interests. For this reason, the ACMA suggested in the options paper that the regulation might apply to all of the following agreements:

- > presenters agreements (same as the current definition); and
- > licensees agreements where a relevant presenter has an actual or beneficial interest in the licensee company; and
- > any other agreements where the person concerned has significant influence on the content of material broadcast. The onus would be on the licensee to determine who are the persons associated with the broadcaster that may significantly influence program content.

Industry submissions in response to the options paper strenuously argued against this broadening of the current regulation. CRA and DMG submitted that it would be unreasonably onerous, unnecessarily burdensome and impose a very large cost if licensees were responsible for the wide range of agreements suggested.<sup>25</sup> CRA submitted that the cost increase resulting from this change for industry would be \$3.5 million.<sup>26</sup> Further, it was argued that this change would not guarantee improved compliance or community safeguards in any tangible way.<sup>27</sup> DMG also argued that the broadening would be inconsistent with the 2000 findings that listeners consider announcers to be in a position of trust—not other station employees.<sup>28</sup>

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<sup>23</sup> CRA's submission to the ACMA's options paper, June 2011, pp. 23, 29.

<sup>24</sup> See the 2004 ABA investigation into the licensee of 2GB, Harbour Radio Pty Ltd available at: [www.acma.gov.au/WEB/STANDARD/pc=PC\\_310230](http://www.acma.gov.au/WEB/STANDARD/pc=PC_310230) where talkback presenter Alan Jones was not party to a commercial agreement between Telstra and Macquarie Radio Network (the parent company of the licensee) but owned shares in Macquarie Radio Network and was entitled to 20 per cent of the increase in the value of the company that occurred as a result of his role as presenter on 2GB.

<sup>25</sup> CRA's submission to the ACMA's options paper, June 2011, pp. 29, 30. DMG's submission to the ACMA's options paper, May 2011, pp. 3, 4.

<sup>26</sup> CEG report provided in CRA's submission to the ACMA's options paper, June 2011, pp. 14-15.

<sup>27</sup> DMG's submission to the ACMA's options paper, May 2011, p. 4.

<sup>28</sup> DMG's submission to the ACMA's options paper, May 2011, p. 4.

The ACMA agrees that the last and broadest category of agreements suggested above may impose unreasonable burdens on licensees and extends beyond the main concern, being the influence of presenters. However, the ACMA holds that where a current affairs presenter receives benefits under a licensee agreement, this should be regulated in order to more comprehensively address the policy problem. Therefore, the ACMA has decided that the varied standard will apply to presenter's agreements (as defined in the current standard) as well as licensee agreements where presenters receive benefits.

#### *Timing of on-air disclosure*

The current standard requires an on-air disclosure announcement 'at the time of, and as a part of' each instance of the broadcast of sponsor-related material. As described in the options paper, the ACMA suggested maintaining this requirement.

Industry submitters have voiced a preference for disclosure announcements to be permitted at 'logical program breaks' or at 'regular intervals' during programs.<sup>29</sup>

The ACMA has considered these submissions but notes that the rationale of an announcement 'at the time of and as part of' the sponsored material is the clarity and immediacy of the link between the material presented and the sponsor concerned. The ACMA remains convinced that the maintenance of the timing requirement for on-air disclosures is critical to effectively address the policy problem. Further, it is arguable that some of the impost of this requirement will be lessened by the flexibility granted in the form on announcements to be permitted under the proposed variation.

## **2.3 The commercial influence elements of the proposed varied standard**

The elements regarding commercial influence in the proposed varied program standard are:

1. Commercial influence provisions would apply to current affairs programs (as per the definition in the current standard).
2. 'Consideration' will be defined expansively to capture:  
*any money, service or other valuable consideration or benefit that is directly or indirectly paid, or promised to or charged or accepted in respect of the material broadcast.*
3. Licensees will be required to be responsible for:
  - > presenter agreements (same as the current definition); and
  - > licensee agreements where a relevant presenter has an actual or beneficial interest in the licensee company.
4. Licensees will be required to make an 'identifiable sponsorship announcement' at the time of, and as a part of, the relevant content that makes clear to listeners that there is a relevant commercial agreement.
5. Licensees will be required to keep a public online register of commercial agreements for the information of citizens, and licensees will be required to provide further information on those agreements to the ACMA when requested.

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<sup>29</sup> CRA's submission to the ACMA's options paper, June 2011 at p. 32. DMG's submission to the ACMA's options paper, May 2011, p. 4.



# 3. Compliance programs

## 3.1 Decision

The intention behind the Compliance Standard was to ensure that licensees were aware of, and took seriously the requirements to comply with regulatory obligations under codes of practice, licence conditions and program standards. The industry compliance survey indicates an improved compliance culture across industry since 2000, and it seems there is limited concern from citizens about this matter.

For these reasons, the ACMA has decided to revoke the Compliance Standard, instead relying on provisions of the Act to enforce compliance with regulatory obligations. This enforcement is expected to be on an individual licensee basis.

## 3.2 Reasons for decision

The two reform options for the Compliance Standard suggested in the options paper were to:

- > vary aspects of the current program standard to lessen the financial and administrative burden on licensees; or
- > revoke the current standard to reduce the regulatory, financial and administrative costs on licensees.

### 3.2.1 Decision on regulation—program standard or not

In response to the options paper, CRA strongly supported the proposal to revoke the Compliance Standard.<sup>30</sup> Industry also advised throughout the review that the standard imposed unnecessary financial and administrative burdens on licensees.<sup>31</sup>

Given the history of the Compliance Standard and how seriously the policy problem was regarded in 2000, the ACMA required evidence that the policy problem has diminished significantly in order to revoke the standard.

Research produced for the ACMA on industry compliance with the requirements of the Compliance Standard indicates that the vast majority of surveyed licensees had in place the required mechanisms. These research findings were supported by industry submissions throughout the review. Most recently, DMG submitted that irrespective of the presence of such regulation, it would continue its compliance program activities.<sup>32</sup>

The research and submissions indicate that industry as a whole is aware of its regulatory obligations, has an overall compliance culture, and is likely to maintain sufficiently appropriate mechanisms.

For these reasons, the ACMA is satisfied that the policy problem has sufficiently diminished since 2000. Of the two reforms offered in the options paper, the ACMA has decided to revoke the Compliance Standard.

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<sup>30</sup> CRA's submission to the ACMA's options paper, June 2011, p. 33.

<sup>31</sup> Austereo's submission to the ACMA's issues paper, May 2010, p. 14.

<sup>32</sup> DMG's submission to the ACMA's options paper, May 2011, p. 5.

## 4. Conclusion

Taking into account the substantive research conducted for the review and the submissions made to the review the ACMA has decided to:

- > **Regulate advertising on commercial radio through a program standard** with new elements that more effectively promote community standards and provide more stable and predictable regulation—until such time as the commercial radio industry has in place an appropriate code of practice dealing with advertising
- > **Regulate commercial influence on commercial radio current affairs programs through a program standard** based on a disclosure model, with new elements to more effectively promote community standards and provide adequate community safeguards as well as reduce the financial and administrative burdens on licensees.
- > **No longer regulate compliance with regulatory obligations through a program standard**, but rely on existing provisions of the Act to deal with breaches on an individual licensee basis to reduce the regulatory, financial and administrative burdens on licensees.

The draft instruments varying the standards for advertising and disclosure will be released for comment following publication of this report.

It is intended that the changes articulated in this report, come into effect from 1 March 2012.