SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

REVIEW OF THE COMMERCIAL RADIO STANDARDS

RESPONSE TO THE ISSUES PAPER PUBLISHED BY THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

14 May 2010

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Commercial Radio Australia (**CRA**) welcomes the opportunity to participate in the review of the commercial radio standards (**Review**).

CRA is the peak national industry body for Australian commercial radio stations. CRA has 260 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

The commercial radio industry recognises the need for some regulation to ensure that the objects of the *Broadcasting Services Act 1992* (**BSA**) are achieved. However, such regulation must not be allowed to reach a level where it has an overwhelmingly negative effect on the ability of the industry to carry out its core service of radio broadcasting across Australia.

The *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (**Disclosure Standard**)*, Broadcasting Services (Commercial Radio Advertising) Standard 2000* (**Advertising Standard**) and the *Broadcasting Services (Commercial Radio Compliance Program) Standard* (**Compliance Standard**) (collectively, the **Standards**) are outdated and unworkable.

It is now time for the ten year old Standards to be replaced by industry Codes that deal in a contemporary and practical way with the issue of transparency of commercial arrangements in radio broadcasting.

A. RECOMMENDATIONS

The industry's recommendations are set out below, together with a summary of the underlying reasoning.

1. The Standards should be repealed.

(i) The Disclosure Standard is unnecessarily prescriptive and burdensome. It incorporates no flexibility, is almost impossible to implement and does not reflect the practical reality of commercial radio broadcasting. It fails to comply with section 4 of the BSA, which obliges the ACMA to address public interest considerations "*in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services*".

(ii) The Advertising Standard is too vague to be workable or fair. It fails to comply with section 5(b) of the BSA, which obliges the ACMA to use its powers in a manner that will "*produce regulatory arrangements that are stable and predictable*". The lack of detail in the Advertising Standard means that its interpretation by the ACMA will be unnecessarily subjective, leading to inconsistent and unpredictable outcomes.

(iii) The Compliance Standard is unnecessary. The industry is obliged by the BSA to comply with the Commercial Radio Codes of Practice (**Codes**) and, in the absence of evidence of non-compliance, there is no justification for maintaining a separate Standard. The recent ACMA compliance audit indicated extremely high levels of compliance across the industry.

(iv) There is no evidence of continuing breaches of the Standards. There have been only 9 complaints in relation to the Standards in the past 10 years, and only 5 of those were found by the ACMA to be breaches.

(v) The commercial radio industry is the only industry that is subject to such Standards. The obligations imposed on the television industry are far less prescriptive and are contained in the television codes of practice. The requirements relating to radio should be aligned with those applicable to comparable media platforms. The current lack of parity places the commercial radio industry at a significant disadvantage when competing for advertising revenue.

2. Provisions relating to disclosure, advertising and compliance should be moved into the Codes.

(i) Under the BSA, the ACMA is entitled to impose a Standard only where there is no code of practice or there is convincing evidence that an industry code is not providing appropriate community safeguards.[1]

(ii) Accordingly, the BSA contemplates that, before a Standard is unilaterally imposed by the ACMA, an opportunity is available under the co-regulatory codes of practice system for the introduction of industry codes to provide appropriate community safeguards.

(iii) After 10 years of relying on the Standards with a high level of compliance and few complaints from the public, it is now appropriate for ACMA to allow the industry (with the co-regulatory oversight of the ACMA) an opportunity to develop appropriate regulation for inclusion into the Codes.

(iv) The environment in which the regulation is now operating is very different to that into which it was introduced. Any regulation now needs only to ensure continuing compliance in an industry that is already showing high levels of compliance. This task may be best achieved through provisions in the Codes, rather than through Standards.

(v) Consistent with this suggested approach, the Productivity Commission recommended that the Disclosure Standard should be incorporated into the Codes and revised to become less prescriptive.

3. The commercial radio industry should be allowed to develop new Codes relating to disclosure, advertising and compliance, taking into account practical problems faced by the industry and issues highlighted during the public consultation process.

[1] Section 125, BSA.

(i) The commercial radio industry has never been given the opportunity to develop codes relating to transparency and the impact of commercial arrangements on editorial content. The industry would welcome the opportunity to develop codes from first principles, having regard to the ACMA's research and matters raised in the Review.

(ii) Disclosure, advertising and compliance all have great practical impact on the industry, and workable solutions can only come from a comprehensive understanding of the way in which the industry operates. The industry is best placed to provide a first draft of the new provisions, taking into account the results of this public consultation process.

(iii) The Standards were introduced to address concerns arising following incidents highlighting a lack of transparency in 2000. While the incidents involved only specific and limited presenters and licensees, the Standards were subsequently imposed on the entire industry, with almost no industry consultation. This has resulted in Standards which are, in part, out of date and unworkable from a practical perspective.

(iv) The commercial radio industry comprises 260 stations, which differ greatly in size, broadcast content, listener base and revenue. They include large metropolitan networks and small independent broadcasters in country Australia. The development of provisions that may apply to such a range of stations – if such stations broadcast relevant material – is a complex task, which must be informed by first hand practical experience. Only the industry itself has this level of relevant knowledge.

B. PRODUCTIVITY COMMISSION REPORT

1. The Productivity Commission looked at the impact of the Disclosure Standard on the commercial radio industry in its 2009 *Review of the Regulatory Burdens on Business*.[2]

2. The Government Response to the Productivity Commission's report stated that in its review of the Standards, the ACMA would be "*expected to consider the matters raised in this recommendation*".

3. The Commission recognised the significant difficulties caused to the commercial radio industry as a result of the legislation. It concluded that the objective of promoting fair and accurate coverage of issues "*could be met through more flexible disclosure requirements which could be incorporated into the Commercial Radio Codes*".

4. The Commission also noted that the "cash for comment" incident involved a relatively small number of broadcasters and concluded that the fact that "*a breach by a relatively small proportion of broadcasters has led to a prescriptive requirement in all commercial broadcasters is not in keeping with an appropriate risk management approach to regulation. That is, the regulatory remedy captured all radio broadcasters, not just those found to have breached the code*".

5. The Commission further observed that "*another indicator that the disclosure standard for commercial radio may impose an unnecessary regulatory burden on commercial radio broadcasters is the lack of a similar prescriptive arrangement for television broadcasters. The issues with respect to television are generally similar to those for radio*

[2] Government Response dated 22 December 2009.

broadcasting, yet disclosure requirements in the case of commercial television broadcasting are far less prescriptive and are dealt with through an industry code of practice".

6. The Commission suggested that the following elements should form part of a more flexible approach:

    - allow licensees to broadcast more regular disclosure announcements, rather than having to do so at the exact moment of a potential conflict of interest;
    - examine the extent to which commercially sensitive information must be divulged to achieve the objectives – disclosure of the existence of an agreement may be sufficient;
    - consider moving the disclosure requirements back into the industry code; and
    - align the provisions relating to radio as far as possible with requirements in other media platforms.

7. Accordingly, the Commission made the following recommendation:

    Recommendation 4.7 – Disclosure

    A greater risk management approach should be taken to the radio Disclosure Standard. The Australian Communications and Media Authority should revise the Disclosure Standard to make it less prescriptive. The Australian Communications and Media Authority should engage in further consultations with industry with the objective of incorporating the Disclosure Standard into Commercial Radio Codes together with greater alignment with requirements in other media platforms.

C. THE BROADER MEDIA ENVIRONMENT

Television

8. The excessive regulation surrounding disclosure, advertising and compliance places the commercial radio industry at a significant disadvantage when compared with other media platforms. This affects the industry's ability to compete effectively with other media.

9. The industry strongly urges the ACMA to strive for parity between the advertising and disclosure regulations applicable to commercial radio and television. This would ensure fairness and provide the free to air media with equal opportunity to compete for the advertising dollar.

10. The key differences in the regimes applicable to commercial radio and television are set out below.

Disclosure

11. As noted by the Productivity Commission, there are no comparable disclosure requirements imposed on the television industry, despite the similarity of the issues under discussion.

12. The only commercial arrangement disclosure obligation imposed on commercial television obliges licensees to disclose any agreement under which the licensee, presenter or independent producer endorses or features a third party's products or services in a factual program in exchange for consideration.[3]

13. There are a number of significant differences between the disclosure regime applicable to commercial television and that applicable to commercial radio:

    - *Television*: the disclosure obligation is contained in a Code of Practice.
    - *Radio*: the disclosure obligation is contained in a Standard.

    - *Television*: the disclosure may be made during or in the credits of the program. There are no prescriptive requirements other than that the disclosure announcement must be "readily understandable to a reasonable person".[4]
    - *Radio*: on-air disclosure announcements must be broadcast "at the time of and as part of" the broadcast of material caught by the Disclosure Standard.

    - *Television*: disclosure relates only to agreements to feature or endorse products in a specific program.
    - *Radio*: a much wider range of agreements are caught, including any agreement under which a presenter earns more than $25,000 per year.[5]

    - *Television*: disclosure relates only to the endorsement or feature of products or services.
    - *Radio*: disclosure relates to a much broader range of material, including: any mention of the name, product or service of the sponsor; any material that directly promotes an issue directly favourable to the sponsor; and any material in which an agent or employee of the sponsor is interviewed in relation to a matter concerning the sponsor.

Advertising

14. The regulations applicable to the television industry are more flexible than those applicable to the commercial radio industry.

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[3] Codes 1.19 to 1.23 Commercial Television Industry Codes of Practice, January 2010.

[4] Code 1.23, Commercial Television Industry Codes of Practice, January 2010.

[5] Section 6, Disclosure Standard.

15. The Commercial Television Industry Code of Practice provides that commercials in between programs, during commercial breaks or superimposed over a program, must be distinguishable by viewers from program material.[6]

16. The television codes also allow advertising within programs, provided that the material is "*distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation*".[7]

17. Radio is the subject of much more stringent regulation:

    - The requirement to differentiate advertising from other program content is contained in a Code for television and in a Standard for radio.

    - There is no equivalent to television's Code 1.18, expressly allowing advertising within programs (known as "integrated advertising"), provided that the advertisement is distinguishable from other program material.

18. The commercial radio industry would like to see an express provision in the Codes – similar to Code 1.18 in the free-to-air television codes of practice – dealing with integrated advertising in radio programming. This will improve clarity and precision.

19. The Issues Paper states that "[t]*elevision has greater flexibility as a medium in dealing with disclosure of advertising arrangements- for example such as product placement where the credits at the backend of a program can indicate sponsorship arrangements to viewers*". The commercial radio industry strongly disagrees with this statement. There is no reason why disclosure taking place by text is more effective than verbal disclosure. Verbal announcements at the end of radio programs would have exactly the same impact as text displays.

20. In any event, there is no obligation on the commercial television industry to provide text disclosure. Code 1.23 of the Commercial Television Codes of Practice allows television licensees to disclose the existence of commercial arrangements in any way that is "*readily understandable to a reasonable person*". This includes both verbal and written statements.

21. The commercial radio industry submits that disclosure of commercial arrangements and integrated advertising should be allowed at the beginning and/or end of programs, thus reflecting the risk management approach taken in relation to the commercial television industry.

Compliance

22. There are no obligations relating to the implementation, monitoring or audit of compliance programs within the television code of practice or elsewhere. There is no equivalent to the commercial radio Compliance Standard.

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[6] Code 1.16, Commercial Television Industry Codes of Practice, January 2010.

[7] Code 1.18, Commercial Television Industry Codes of Practice, January 2010.

International

23. The Issues Paper includes an extensive analysis of the regimes in the UK, Canada and Ireland. While it is useful to see the regulatory frameworks in other jurisdictions, the commercial radio industry advocates caution in relying too heavily on overseas examples.

24. The structure of the radio industry in the UK, Ireland and Canada is very different from that in Australia. All are dominated by public broadcasters and have relatively weak commercial radio sectors. By contrast, the Australian commercial radio industry is very strong, and captures a larger share of listeners than the public broadcaster.[8]

25. The ACMA recognises that the "editorial independence model" employed by some countries "*may have an economic impact and/or affect business models utilised by the industry*".[9] To replicate regulatory frameworks from countries with weak commercial radio sectors risks damaging the thriving commercial radio industry that benefits Australians.

26. Furthermore, the complexity of regulation, the context within which it operates and the way in which legislation is enforced makes it impossible accurately to compare regulatory frameworks in different jurisdictions. There is a risk of "cherry-picking" discrete elements to reach desired conclusions.

27. For example, while the UK and Ireland are given as examples of the more restrictive *ex ante* editorial independence models, the rules regarding sponsorship of programs are significantly more flexible than in Australia.

28. In the UK and Ireland there are no obligations imposed on presenters to disclose personal commercial arrangements. Nor are there any disclosure obligations regarding the mention of sponsors in current affairs programs. In the UK, the only requirement is that the mention should be editorially justified and not be promotional. In Ireland, the only requirement is that editorial independence is preserved.

29. Thus, while the UK and Ireland mandate a general "editorial independence" of current affairs programs, the regulatory regimes are much less prescriptive that that in Australia.

D. DISCLOSURE STANDARD

30. The commercial radio industry supports the objective of ensuring fair and accurate coverage of matters of public interest, including the disclosure of commercial agreements that affect the content of current affairs programs. However, the Disclosure Standard is heavy-handed, outdated and unnecessarily burdensome.

31. This section sets out the practical difficulties regarding specific parts of the current legislation, together with recommendations for change.

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[8] Page 4, Issues Paper.

[9] Page 20, Issue Paper.

Timing of on-air disclosure announcements

32. On-air disclosure announcements must be broadcast "at the time of and as part of" the broadcast of material caught by the Disclosure Standard.[10]

33. The ACMA interprets this provision as meaning that the on-air disclosure must be made "in the same breath" as the mention of the sponsor (or other material caught by the Standard).

34. The ACMA's approach causes significant difficulties for licensees in ensuring compliance with the Disclosure Standard. For example, a presenter who made the on-air announcement within 90 seconds of the relevant material was found by the ACMA to have breached the Disclosure Standard.

35. This approach – which is disruptive for the listener and difficult for the presenter – ignores the practical reality of the circumstances in which talk radio presenters operate, using unscripted, listener reactive and spontaneous material.

36. A more reasonable alternative would be to place disclosure announcements on the station website. If this is not acceptable to the ACMA, an alternative would be to allow presenters to make the announcements at the beginning or end of each segment, or, alternatively, to broadcast regular announcements listing all of the relevant commercial agreements.

Difficulty in ensuring compliance

37. The highly prescriptive nature of the Disclosure Standard makes it almost impossible to achieve compliance, no matter how vigilant management and presenters might be.

38. When talk radio presenters are on-air, there are many demands on their time and concentration. They are live-to-air and almost always unscripted. They cannot plan what callers or interviewees might say – but in the interests of a free-flowing, informative and entertaining program must react, comment and move on. All the while they are receiving instructions and information from their producers and panel operators and have to control discussion to meet strict time limits to ensure that advertisements and other segments, such as news bulletins, run as scheduled.

39. The prescriptive detail of the Disclosure Standard results in a largely unworkable regime. In particular, the prescriptive wording in section 7(3) is almost impossible to implement without making occasional mistakes.

40. For example, one commercial station was found to have breached the Disclosure Standard when the presenter referred to his sponsor as "sponsors of ours" or "sponsors" rather than "sponsors of mine". The ACMA's view was that only "sponsors of mine" was acceptable.

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[10]Disclosure announcements must be made in relation to (a) material in which the name, products or services of a sponsor are mentioned; (b) material in which an agent, employee or officer of a sponsor is interviewed in relation to any matter concerning the sponsor, its products, services or interests; (c) any broadcast requested by a sponsor based on or similar to material provided by a sponsor; or (d) a broadcast of material that directly promotes any issue directly favourable to the sponsor – section 7(1), *Disclosure Standard*.

Excessively broad scope

41. The wording in the Disclosure Standard is excessively broad. This makes it difficult to interpret and results in seemingly unintended consequences.

42. In particular, section 7(1)(a) requires disclosure announcements during broadcasts "*in which the name, products or services of a sponsor are mentioned*". Section 7(1)(d) requires disclosure announcements during broadcasts "*of any material that directly promotes any issue which is directly favourable to a sponsor*".

43. The experience of our members shows that compliance with the Disclosure Standard can result in some unusual and seemingly unintended outcomes. Examples include:

    - a presenter who has an agreement with a record company is required to make a disclosure announcement when mention is made of any artist or song signed to that record company;

    - a presenter interviewing the Prime Minister is required to make a disclosure announcement as part of the interview if the Prime Minister mentions the name of the presenter's sponsor; and

    - a presenter updating listeners on an important news event is required to declare a commercial relationship as part of the broadcast. For instance, if a presenter has a commercial agreement with Qantas and a Qantas plane crashes killing everyone on board, the presenter would need to declare as part of the broadcast that "Qantas is a sponsor of mine".

Register of commercial agreements imposes an unreasonable burden

44. The Disclosure Standard obliges commercial radio stations to keep a register of current commercial agreements between sponsors and presenters of current affairs programs. This register must be made publicly available on the licensee's website and also must be made available for public inspection at the station.[11]

45. The information that must be kept on the register is detailed and sensitive. Of most concern is the requirement to record the value of the contract as either:

    - $10,000 or less per annum;

    - $10,000 to $100,000 per annum; or

    - more than $100,000 per annum.

46. The industry sees no reason why this information should be made available to the general public. It does not help to achieve the objectives of the Disclosure Standard. If a commercial agreement exists, there is an interest that needs to be disclosed. The disclosure of consideration provides no additional benefit to listeners.

47. The requirement places radio at a disadvantage compared with other media when recruiting presenters. Television presenters are sometimes reluctant to accept radio

[11] Section 9, Disclosure Standard.

roles, as they wish to avoid the disclosure of their remuneration levels with other sponsors.

48. The requirement creates a substantial administrative burden. In particular:

    - discussions with the sponsor are usually required, particularly as the agreements commonly include a confidentiality clause;
    - the register must be available both on the station's website and at the station's offices. This creates unnecessary duplication – disclosure of the register on the station website should be sufficient; and
    - the level of detail required on the register is excessive.[12]

Provision of copies of commercial agreements

49. Presenters are further required to provide the radio station with a physical copy of all existing commercial agreements within 7 days of each agreement being entered into.[13] The ACMA insists that this provision is only satisfied where the agreement contains no redactions. Accordingly, presenters are not entitled to redact sensitive information, such as the consideration payable.

50. The basis for this requirement is unclear. The issue that the Disclosure Standard addresses is disclosure of possible conflicting interests. The presenter's remuneration and the other terms of the contract should not be relevant.

51. This provision also causes administrative difficulties. The presenters frequently are represented by agents who, understandably, will not pass on the agreements to the radio stations without written instructions from their clients. This creates delays and can make the 7 day timetable impossible to achieve.

Disclosure Standard - Costs of compliance

52. The costs of compliance with the Disclosure Standard have been far in excess of anything the legislature or regulator could have anticipated when the Disclosure Standard was first introduced.

53. One industry network estimates that external legal fees alone, per talk back station, per annum, to ensure compliance, exceed $100,000 per station in an ordinary year, when no particular issues of non compliance arise.

54. The additional internal costs associated with compliance are extremely high. One station employs two staff members specifically to ensure compliance with the Disclosure Standard. Substantial amounts of time are also devoted by presenters, producers, station managers and legal teams.

[12] Section 10, Disclosure Standard.

[13] Section 12, Disclosure Standard.

E. NATURE OF THE COMMERCIAL RADIO INDUSTRY

55. The industry urges ACMA to take into account the nature of the commercial radio industry, and the compliance burden under which it operates. Section 4 of the BSA obliges ACMA to regulate in a manner "*that does not impose unnecessary financial and administrative burdens on providers of broadcasting services*".

56. The commercial radio industry includes many small operators, who are ill equipped to deal with excessive regulatory requirements. There are 260 commercial radio stations in Australia.[14] The majority of commercial radio stations are in regional markets, with only 40 in the metropolitan areas of Adelaide, Brisbane, Melbourne, Perth and Sydney.

57. The commercial radio industry is already highly regulated. Industry specific regulations cover a wide range of areas, including disclosure, compliance, program content, advertising, cross media mergers and technical issues.

58. The industry accepts that some regulation is necessary. However, such regulation must not be allowed to reach a level where it has an overwhelmingly negative effect on the ability of the industry to carry out its core service of radio broadcasting across Australia.

59. Excessive levels of regulation makes it difficult for the commercial radio industry to remain commercially viable. This is a particular problem in regional areas, where the compliance burden is highest and the revenue base is smallest.

60. Regulatory requirements have a disproportionate effect on the viability of small licensees. Such licensees have few staff and limited infrastructure. Many staff within such organisations fulfil a number of different roles. These stations struggle to meet their compliance obligations while maintaining focus on their core business of radio broadcasting.

61. Commercial Radio Australia's members in both regional and metropolitan areas serve their local communities well, by providing listeners with programs that are relevant, informative and entertaining. Further regulation could threaten these services, as the already high compliance costs may escalate to unmanageable proportions.

F. QUESTIONS FOR COMMENT - DISCLOSURE STANDARD

1. **What are the issues that regulation in this area should be seeking to address?**
2. **Is regulation appropriate, or the best way of addressing the problem(s)? If so, what is the most appropriate regulatory model?**
3. **If regulation is necessary under any of the models, which of the regulatory mechanisms under the Act is best deployed?**

[14] 257 of those stations are members of Commercial Radio Australia.

62. The generally accepted and prevailing practices of commercial radio broadcasters have moved a long way since the introduction of the Disclosure Standard. The principles enshrined in the Standard are now commonly accepted and universally applied across the industry.

63. The Disclosure Standard originally addressed problems relating to the way in which commercial arrangements were influencing editorial content in some current affairs programs. The legislators believed that there was a "systemic" problem in some commercial radio talk back programs, and, accordingly, introduced a regime that was prescriptive and designed quickly to rectify specific problems.

64. There is now a culture of compliance across the commercial radio industry, as evidenced by the low level of Standards related complaints and breaches. In the past 10 years there have been only 9 complaints made alleging breach of the Standards. Only 5 of these complaints have been upheld by the ACMA.

65. The low number of complaints also reflects a low level of public concern. The even lower number of breaches found by the ACMA indicates that the Standards have worked effectively to remedy the problems that previously existed, and to bring about cultural change.

66. The recent ACMA industry wide compliance audit also indicated an extremely high level of compliance relating to the Disclosure Standard. There was a 100% compliance rate – in terms of developing, implementing and maintaining compliance programs – among stations whose presenters had entered into "commercial agreements" and were therefore covered by the Disclosure Standard.[15]

67. There is no longer any need to impose prescriptive legislation designed to rectify so called systemic problems in radio broadcasting. Any ongoing regulation should now be focused on maintaining the current culture of compliance, and providing a mechanism for addressing any isolated breaches that might occur in the future.

68. The commercial radio industry submits that this will be best achieved by repealing the Disclosure Standard, making the provisions relating to disclosure more flexible, and by incorporating the new provisions into the Codes.

69. The heavy-handed approach of the Disclosure Standard is no longer required; the principles reflected in the Disclosure Standard should be reviewed to reflect contemporary practices and reflected in the Codes.

70. The Disclosure Standard should be generally simplified so that radio stations are able to make disclosure in the most appropriate way, knowing that they are required to do so, but without having to get so caught up in form filling, website updating and compliance with other detailed prescriptive requirements.

71. The Codes are mandatory for all commercial radio licensees and repeated breach of the Codes can lead to loss of licence. The sanctions for breach of the Codes have been increased since the Standards were introduced. The ACMA investigates breaches of the Codes, and would have the ability to reimpose a Standard if it felt that the Codes were not providing adequate protection.

[15] Page 52, Issues Paper.

72. The new regime should be aligned with the disclosure regime applicable to the commercial television industry.

73. These proposals accord with the recommendations made by the Productivity Commission.

4. If any regulation is necessary, should it be limited to current affairs programs or should it apply to other program formats?

5. Is the current definition of "current affairs program" effective and appropriate? If not, how should it be changed?

74. The commercial radio industry strongly submits that any regulation relating to disclosure should be limited to current affairs programs.

75. The Disclosure Standard was introduced to address concerns relating to current affairs programs, which were seen as key opinion influencers. Accordingly, the objective of the Disclosure Standard is to achieve disclosure of direct commercial arrangements with on-air opinion-makers in circumstances in which those arrangements could impact on editorial content.

76. Since non current affairs programs do not present an editorial opportunity to presenters, such programs are not perceived as providing serious analysis of current affairs and hence are not as capable of influencing opinion on such matters.

77. There is little public concern over the issue of non-current affairs programs. This is reflected in the findings of the ACMA's research:

- The Issues Paper acknowledges that "*commercial radio listeners seem to be more sensitive to advertising in current affairs programs than in non-current affairs programs*".[16]

- The ACMA also notes that "*while recognising that program content of non-current affairs programs may be affected by commercial arrangements, there has not been a high number of complaints to the ACMA or its predecessor regarding this particular issue*".[17]

78. Given the original intention of the legislators when drafting the Disclosure Standard, together with the lack of current public concern over the issue of non-current affairs programs, it would not be appropriate or necessary to adopt provisions that in essence relate to editorial based programming to other program formats.

79. The problems encountered by licensees in complying with the Disclosure Standard are highlighted in Section E above. To extend this regime to all programming would be

[16] Page 21, Issues Paper.

[17] Page 22, Issues Paper.

logistically impossible, extremely costly and could threaten the survival of the commercial radio industry in its current form.

80. While the current definition of "current affairs program" has been relatively uncontroversial in its application (perhaps in part due to the very small number of investigations conducted by the ACMA into the application of the Disclosure Standard), the commercial radio industry would like the opportunity to participate in any future review of the definition, with the objective of improving precision.

81. Specifically, the commercial radio industry considers that the suggestion to substitute "substantial purpose" with "focus" would create a definition that is overly broad and very difficult to apply. Licensees would find it hard to judge whether or not a format is subject to the disclosure regulations. This would create uncertainty and would be a confusing and complex way of regulating the industry.

82. There would be a huge detrimental economic and structural impact on the industry if the Disclosure Standard were broadened. The commercial radio industry would be less attractive to advertisers and to presenters and would be less able to compete with the television industry for the advertising dollar.

6. Should any disclosure requirement be extended to apply to all commercial arrangements that have the potential to affect program content?

7. Should any disclosure requirement be widened to cover commercial arrangements with all employees associated with the licensee or its program content, if they have a connection with the production or preparation of the

83. The immense difficulties caused by the prescriptive nature of the current disclosure arrangements are set out in section E above. Any widening of the requirements would simply be unworkable.

84. Extension of the current requirements to "all commercial arrangements" with "the potential to affect program content", or to "all employees associated with the licensee or its program content" would be impossibly vague and onerous. There is no equivalent obligation for the commercial television industry or the print media industry.

85. Any provision relating to content with a "connection" to a commercial agreement is too broad to be workable. The meaning of such a requirement is unclear and might create some strange outcomes. For example, if a presenter has an agreement with Qantas, a discussion concerning the recent volcanic ash issues might be caught, even without mention of Qantas in the segment.

86. The commercial radio industry is of the view that any such regulation would be in clear breach of the ACMA's obligations under section 4 of the BSA.

8. If any disclosure requirements apply, are on-air disclosure announcements appropriate whenever there is a connection between the matter broadcast and a relevant commercial agreement?

87. It is not appropriate to impose an obligation to make on-air announcements whenever there is a connection between the matter broadcast and a relevant commercial agreement. On-air disclosure announcements are burdensome for stations, cause interruptions for listeners, and have not been shown to be particularly effective.

88. The ACMA recognises in its Issues Paper that "*there are mixed views about the usefulness and importance of on-air disclosure announcements that inform listeners about commercial arrangements*".[18]

89. The commercial radio industry submits that a better way of disclosing arrangements would be through publication on the station website. This would enable listeners to check whether arrangements exist at all times and would address the concern that listeners might miss announcements.

90. While the effectiveness of disclosure announcements might not be clear, the impact that imposing a prescriptive disclosure regime has on licensees is clearly extremely costly and burdensome. The industry questions the logic of maintaining this burden, particularly in the face of limited evidence regarding its effectiveness.

9. If any on-air disclosure requirements apply, are on-air disclosure announcements appropriate either at the beginning and end of a program, or at regular intervals during the program?

91. The ACMA research shows that 63% of listeners would not be concerned if they were made aware of a commercial arrangement at some point during the program.[19] Disclosure at the beginning or end of a program would also accord with the approach taken in the television industry.

92. The ACMA points out that the length of radio programs differs from that of television programs.[20] While this may be true in some instances, it does not justify the imposition of "same breath" disclosure. The practical difficulties of "same breath" disclosure are outlined in Section E above.

93. Disclosure could be made a permanent feature of station websites, which would enable listeners to check sponsorship arrangements at all times. As an alternative, the industry would also consider making disclosure announcements at prescribed intervals within a program.

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[18] Page 28, Issues Paper.

[19] Page 29, Issues Paper.

[20] Page 31, Issues Paper.

94. Such an approach would enable the *licensee* to control the making of required disclosures, rather than relying on the presenter to make them. It would also remove the difficulties of identifying relevant material, particularly the interpretation of section 7 of the Disclosure Standard.

95. The approach of regular disclosure is used in comparable situations. *The Broadcasting Services Amendment (Media Ownership) Act 1996* (**Media Ownership Act**) gives commercial radio licensees the option of adopting a 'regular disclosure method', requiring a radio outlet regularly to disclose a cross-media relationship in such a way and with such frequency that the prime-time audience of the commercial radio broadcaster would be reasonably likely to be aware of the cross-media relationship.

96. The explanatory memorandum to the Media Ownership Bill notes that the regular disclosure method is provided as an option in the case of radio, because commentary on radio is generally unscripted.

97. Clearly, the legislature has recognized that the unscripted nature of radio makes a requirement for 'spontaneous' disclosure too onerous for radio licensees. It is difficult to see why current affairs disclosure should be treated differently from cross media ownership disclosure.

10. Should the form of words be prescribed by regulation?

98. The commercial radio industry strongly opposes the current requirement that announcers must used prescribed words. The industry is not aware of any other medium that must comply with such an obligation. Nor is it aware of any other jurisdiction in which such an obligation is imposed.

99. The ACMA has found that licensees have breached the Disclosure Standard in instances where a presenter has missed one word of the prescribed wording. The expectation that presenters can remember and recite exact phrases during a talk-back program indicates a lack of understanding of the spontaneous and unscripted nature of talk-back radio. It is almost impossible for presenters to comply with such an obligation without making mistakes.

100. The Issues Paper justifies the requirement to use prescribed words on the basis that listeners must know that the presenter has an individual arrangement with a sponsor, as this "*may have a greater influence on the material presented by that individual, than if the agreement is with the licensee*".[21] The commercial radio industry submits that this justification is ill-conceived. The objective of the Disclosure Standard is to inform listeners when there is a commercial arrangement with a presenter that may affect the broadcast content, such that the listener knows to treat the presenter's comment with caution and the objective of the Standard is therefore achieved.

101. The Issues Paper also raises the possibility of using pre-recorded disclosure announcements inserted into the program as necessary.[22] While this may be a useful

[21] Page, 32, Issues Paper.

[22] Page 33, Issues Paper.

option in some circumstances, in many cases, this would be practically unworkable. Talk-back radio is unscripted and fast-flowing. The insertion of a pre-recorded announcement "in the same breath" as the mention of the sponsor would be very hard to manage. It would also create an unacceptable level of interruption to the programming.

102. The commercial radio industry urges the ACMA to remove the requirement for prescribed words. Licensees should be able to make the disclosure in any form they like, provided that it is clear to the reasonable listener. Such an approach would be aligned with that taken in relation to the television industry.

11. Are the register and notification requirements of the Disclosure Standard appropriate, efficient and effective?

12. If not, how and when might relevant information be registered and notified to licensees, the public and the ACMA?

13. What regulation, if any, is appropriate where advertisers and sponsors pay for or contribute to "production costs" in the contemporary marketing and program integration practices?

103. The register and notification requirements of the Disclosure Standard are not appropriate. They extend far beyond the level needed to inform listeners of the existence of a commercial interest. See Section E above.

104. At a minimum, the following changes should be made to the existing regulations:

- The obligation to specify the amount or value received by the presenter in the register of commercial agreements should be removed.
- The requirement for the register of current commercial agreements to specify the amount or value of the benefit received by the presenter should be removed.[23]
- The register should include agreements where the benefits received by presenters exceed a material threshold (e.g. more than $1,000 per month). Whether the benefit received only just exceeds this material level, or greatly exceeds it, is irrelevant – it is the fact that a benefit is received that should be disclosed.

105. The current requirement that payment of production costs by an advertiser or sponsor must be disclosed every hour should be amended so that licensees may make such disclosure on their websites. This would enable listeners to have continuous access to the information and would reduce interruptions to programming.

[23] Section 10(5), Disclosure Standard.

G. QUESTIONS FOR COMMENT - ADVERTISING STANDARD

15. Is regulation necessary to address the issue that advertising may not be clearly distinguishable from other program material?

16. If so, what is the most appropriate approach to address the issue that advertising is not clearly distinguishable?

17. If regulation is necessary, what is the most appropriate regulatory mechanism (codes, standards, licence conditions)?

18. If regulation is necessary, should it apply to all program formats or are different requirements appropriate to different formats?

106. The obligation to make advertising distinguishable from other programming is contained in the Codes. The commercial radio industry submits that no further restrictive regulation is necessary, particularly given the high compliance levels shown by the industry since the Advertising Standard was introduced.

107. Accordingly, the Advertising Standard should be repealed, and its provisions reviewed and updated by the commercial radio industry and then placed in the Codes.

108. Further, the industry submits that advertising as part of the programming should be expressly permitted, to bring radio into line with the television industry.

109. The Commercial Television Industry Code of Practice expressly provides that commercials in between programs, during commercial breaks or superimposed over programs, must be distinguishable by viewers from program material.[24]

110. The television codes also expressly allows advertising within programs, provided that the material is "*distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation*".[25]

111. In the interests of clarity and certainty, a similar approach should be taken in relation to commercial radio. The industry receives repeated requests from advertisers who would like to promote products within program material, as they do in television. There is no reason why the radio industry should not be able to offer the same opportunities to advertisers as the television industry offers.

112. There should be flexibility as to the means by which the material may be made distinguishable from other program material – by disclosure announcement, labelling or

[24] Code 1.16, Commercial Television Industry Codes of Practice, January 2010.

[25] Code 1.18, Commercial Television Industry Codes of Practice, January 2010.

some other form of differentiation as the licensee sees fit. This also would reflect the position in the television industry.

113. The commercial radio industry is likely to suffer significant commercial disadvantage if the regulations relating to advertising on radio are not brought into line with those applicable to comparable media. The industry is entirely reliant on advertising revenue and overly burdensome regulations will have a severe negative effect on the commercial viability of the industry.

114. Further, the ACMA should not underestimate the sophistication of the listening audience. Listeners are familiar with advertising integrated into content on television, cinema and in print. The commercial radio industry urges the ACMA to take this into account when assessing the appropriate level of regulation.

115. The commercial radio industry is of the view that the approach suggested above should be taken in relation to all radio formats. Advertising is common to all formats and there is no need to create a more complex system of different frameworks for different formats, particularly when the Disclosure Standard already imposes an additional burden on broadcasters of current affairs programs.

116. The general principles of distinguishing advertisements from other content apply equally across the various formats and, as in television, the licensees are best placed to decide what type of differentiation will be most effective.

19. If any transparency and separation requirements apply, should detailed rules addressing presenters and newsreaders also apply?

20. If any transparency and separation requirements apply, should detailed rules addressing cues and placement also apply?

21. If any transparency and separation requirements apply, should rules addressing particular practices also apply (e.g. live reads, interviews)?

117. The commercial radio industry strongly urges the ACMA to avoid imposing further prescriptive requirements on the industry relating to specific advertising practices. We suggest that the industry should have the opportunity, in the context of the Codes, to develop codes of conduct that are practical and realistic, having regard to contemporary practices and trends in commercial radio broadcasting.

118. The Issues Paper identifies certain practices which it considers hard to identify.[26] Its conclusions are based on a sample of 6 clips containing different types of advertisements – live reads, talkback discussion and commentary/interviews.

119. As a preliminary comment, the commercial radio industry would be concerned if any substantive changes to the existing regulation were made on the basis of such a small sample and inconclusive findings.

[26] Issues Paper, pages 42 to 43.

120. The industry would resist strongly the imposition of any detailed transparency and separation rules, prescribing how such advertisements might be produced and broadcast. This would have an overwhelmingly negative impact on the industry in terms of its ability to compete with other media and hence on its advertising revenue.

121. The international approaches that the ACMA refers to are all from countries with weak commercial radio sectors. The thriving Australian commercial radio sector would be severely weakened if similar restrictions on advertising were imposed.

22. Is the current definition of "advertisement" under the Advertising Standard the most appropriate definition, having regard to contemporary advertising practices on commercial radio?

23. If not, and a broader definition were adopted, what are potential implications for (a) listeners; (b) licensees); (c) advertisers?

122. The commercial radio industry considers that the current definition of "advertisement" under the Advertising Standard is generally appropriate.

123. The Issues Paper raises the issue of whether the provision of "consideration" should continue to be part of the definition of an advertisement.[27] The industry's view is that it should.

124. It would be hugely problematic for the industry if drawing public attention to a product could constitute advertising. The removal of the requirement for consideration from the definition would have a number of problematic effects:

- if a newsreader read a news story that involved mention of products in relation to which the station had an advertising agreement, the piece could be classed as an advertisement;
- a telephone call in which a listener discussed an experience s/he has had with a product could be classed as an advertisement; and
- innocent mention of a product in a discussion between presenters/interviewees could be classed as an advertisement.

125. Almost all formats of radio involve a significant proportion of talking, either by presenters alone, or between presenters and listeners or interviewees. During these conversations mention of companies, products and services may be made. Such mentions will usually be unscripted, form a natural part of the conversation and are often prompted by the listener/interviewee, rather than the presenter.

126. It would be unreasonable if such "innocent" mentions were to constitute advertisements, simply because the station has an advertising agreement in relation to that product or service. The existence of a commercial arrangement in relation to a product should not preclude the mention of that product in a news or discussion program.

[27] Issues Paper, page 47.

127. The classification of all references to station advertisers as advertisements would stifle discussion and spontaneity in commercial radio. The radio industry would strongly resist such an unwarranted interference in programming.

128. The effect on news broadcasts would be equally unreasonable. If a licensee had an arrangement with Telstra, and Telstra featured in a news story, then that story could conceivably be classed as an advertisement. If so, the newsreader would then need to "distinguish" that story from the other stories in the bulletin. This would create an unacceptable level of interference with journalistic freedom to broadcast topical news, and it would become difficult to broadcast positive news stories about station advertisers.

129. No other industry in Australia is regulated by reference to such a broad definition of advertisement. The television industry uses the definition in the AANA Advertiser Code of Ethics, which requires "payment or other valuable consideration".

130. The definition used in the radio industry should be consistent with definitions used in other industries. To impose a broader definition on the radio industry alone would unfairly disadvantage the industry and would be confusing to stations, listeners and advertisers.

H. QUESTIONS FOR COMMENT – COMPLIANCE STANDARD

25. Is regulation necessary to address and promote compliance with regulatory obligations?

26. If regulation is necessary, what is the most appropriate regulatory mechanism(codes, standards or licence conditions)?

27. If any controls apply, should these continue to capture the full range of regulatory obligations or should they be limited to the codes of practice?

28. If any compliance program requirements apply, what elements and reporting requirements would be appropriate?

131. The Compliance Standard was introduced 10 years ago, to address a lack of awareness in the industry relating to the Codes and other regulatory obligations. The industry is now extremely well informed and has a strong compliance culture.

132. The ACMA research indicates extremely high levels of compliance among commercial radio stations. It showed 100% compliance with the requirement to develop, maintain and implement compliance programs among stations with current affairs programming and 96% compliance across the rest of the industry.[28]

133. DBM Consultants made the following recommendations following their compliance audit:

[28] Issues Paper, page 52.

- The ACMA should emphasise the importance of a formal written policy and of conducting internal audits as a part of a compliance program.
- The ACMA should give positive feedback to those with Commercial Agreements in areas where they are complying with the *Compliance Program Standard* to encourage continued compliance.
- The ACMA should work particularly with Section 40 and Independent licensees to improve compliance with the *Compliance Program Standard*.[29]

134. DBM highlighted a number of areas – including more positive feedback – where the ACMA should provide more help to licensees. It did not highlight any significant compliance problems within the industry.

135. Since 2005, there have been only 19 breach findings under the Codes, 3 breach findings under the Standards and 2 breach findings relating to other licence conditions under the BSA.[30] This indicates a high level of compliance within the industry. The systemic problems that the Compliance Standard was introduced to address have been resolved.

136. In these circumstances, it is inappropriate that the Compliance Standard should continue in force. There is no current evidence of systemic compliance problems within the industry. Inevitably, there will be occasional breaches of the Codes by licensees, as in any industry, but this does not justify the imposition of an industry wide Standard.

137. If a licensee repeatedly breaches the Codes, the ACMA has the power to impose a licence condition on that licensee. This is a more appropriate remedy than a Standard imposed on the entire industry.

138. Again, it is worth noting that the television industry has no equivalent to the Compliance Standard. The commercial radio industry urges the ACMA to strive for parity between comparable industries.

If you would like to discuss any aspect of this submission, please contact Joan Warner, Chief Executive Officer of Commercial Radio Australia, on 02 9281 6577.

[29] DBM Consultants – *Compliance with Compliance Program Standard* 2009

[30] Issues Paper, page 55.