

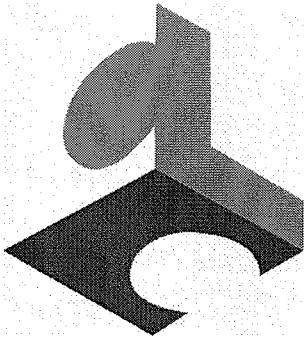


Communications Law Centre, UTS

Submission to the review of commercial radio
standards

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Executive Summary

1. The media plays an important role in supporting democracy by facilitating discussion and debate. Regulation ensures that the media fulfil this role in the public interest.
2. There is a significant public interest in ensuring transparency of the media and separation of advertising and sponsorship from program content.
3. Listeners are not always able to distinguish sponsored material from program content, and most prefer that commercial influence on programming be mitigated. Undisclosed sponsorship of programs leads to public mistrust of the media, which undermines public confidence in the media and public communications, and that is harmful to democracy.
4. Editorial independence ensures that advertising, sponsorship and program content are properly distinguished, enabling material to be presented fairly and accurately.
5. The Communications Law Centre submits that *ex ante* regulation which proscribes advertisers or sponsors from influencing program content should be adopted as the preferred regulatory model. Any reference to a sponsor or advertiser in a program itself could not be promotional and must be editorially justified.
6. In the alternative, if *ex post* regulation is maintained by way of a disclosure standard, then the disclosure standard should be extended to cover all program formats, all types of advertising and sponsorship arrangements, and to all parties concerned with production and programming.
7. Disclosure announcements should be made at the time the advertisement, product placement or integration occurs. A menu of standard disclosure statements should be retained and expanded to facilitate ease of compliance.
8. The compliance standard should be strengthened to require licensees to furnish regular reports to the ACMA.

1. Introduction

- 1.1 The Communications Law Centre, UTS ("CLC") is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to respond to the Australian Communications and Media Authority's (ACMA) request for submissions relating to the Review of Commercial Radio Standards. Our submission relates to regulation of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 ('Disclosure Standard'), the Broadcasting Services (Commercial Radio Advertising) Standard 2000 ('Advertising Standard') and the Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 ('Compliance Standard').
- 1.2 The CLC considers that current regulation of advertising and sponsorship in commercial radio is inadequate. The application of the three standards is an important first step in protecting the public interest. This review affords a valuable opportunity to address issues of current concern and ensure

that regulation is comprehensive and consistent. Although the review is directed at commercial radio, the same regulatory principles should apply across all media.

- 1.3 From the perspective of someone in the audience who is familiar with advertising media, it may be easy to discern whether or not content constitutes an advertisement or is otherwise the result of a business agreement. For these individuals it may be easy to assume that regulation is unnecessary on the assumption that everyone knows when they are seeing sponsored material. Empirical data, however, suggest that many listeners do not make this distinction automatically.
- 1.4 The *Listener attitudes to advertising, sponsorship and influence on commercial radio* report prepared for the ACMA documents a number of instances where listeners could not correctly identify advertising.¹ With one advertisement, 24 per cent believed it to be programming material, and in another 46 per cent were uncertain whether it was advertising or other programming material. These numbers are significant; it is unacceptable that advertising confuse nearly one quarter of respondents. In the most egregious example, 79 per cent of listeners were uncertain whether or not the advertisement was an advertisement or constituted other programming.
- 1.5 These are not one-off events. General findings in *Listener attitudes* show that a significant number of listeners have trouble differentiating advertising from non-advertising content. These examples demonstrate that a significant number of people can be confused even when they are being asked specifically to determine whether or not something is an advertisement. If so many people are confused when they are focusing on the material, then regulation is clearly needed in order to protect the consumer interest.
- 1.6 The ACMA's community research on the attitudes of radio listeners shows that 62 per cent of "regular commercial radio listeners also believe that it is 'extremely' or 'very' important that the actual content of current affairs programs is free from commercial influence."² Further, 81 per cent of all radio listeners agree that "on-air opinions of radio personalities should not be influenced by their personal sponsorship deals."³ This evidence strongly indicates public desire for a clear separation between advertising, sponsorship and the content of radio programming, so that there is no hidden influence on programs.
- 1.7 The key objective of the commercial radio standards (indeed, any regulation in this area) is to encourage commercial radio broadcasting licensees to be responsive to the need for a fair and accurate coverage of matters of public interest. We note that this policy reflects object 3 (g) of the *Broadcasting Services Act 1992 (Cth)* (the Act).
- 1.8 The CLC recognises the need to regulate efficiently, balancing the interests of industry, citizen and consumer as required by s 4(2) of the Act. It is necessary to have a standard of regulation which assures integrity so that the public can have confidence in the media (and for that matter advertising), by being able to recognise and distinguish news, current affairs and opinion from

¹ ACMA (2010) *Listener attitudes to advertising, sponsorship and influence on commercial radio*, p. 32.

² ACMA (2010) *Review of the commercial radio standards issues paper*, p. 24.

³ *Id*, p.23.

promotions which are paid for. The limitations in current regulation do not engender confidence and should be addressed as a matter of public importance.

2. Programs should be editorially independent from advertising and sponsorship

- 2.1 Disclosure is not sufficient to remedy the harm caused by a lack of editorial independence in commercial radio programming. Although disclosure made contemporaneously informs the listeners that a commercial interest is trying to influence them with respect to their product, it does not address the harm caused by the influence of sponsors or advertisers on the selection and presentation of program material. The introduction of a requirement for editorial independence would ensure that broadcasters cover matters of public interest fairly and accurately by removing selection bias in programming and bias in presentation. As this reflects the stated aim of regulation under s 3(g), the CLC submits that regulation require that there be editorial independence and that editorial decisions may not be influenced by advertisers and sponsors.
- 2.2 Disclosure does not preclude broadcasters from selecting and presenting material in the interests of a sponsor or an advertiser, or indeed to meet a direct contractual obligation to a sponsor or advertiser. Although a broad disclosure rule will inform listeners that content is sponsored, such disclosure in and of itself does not ensure selection and presentation of material that is free from bias and influence. In other words, content chosen because of commercial agreements displaces issues that would have otherwise have been selected for presentation based on an impartial editorial decision. The requirement of editorial independence prevents material of legitimate interest being displaced even when sponsorship is disclosed. In this way, editorial independence would underpin public confidence in the content (and in the advertisements), because each would be entirely separate.
- 2.3 A requirement for editorial independence also ensures that the program material is presented without bias. Again this increases audience confidence in the content and in the advertisements because they are entirely distinct and consumers can understand the meaning of each, each on their own terms.
- 2.4 Further, editorial independence allows ease of administration because there will be far less need for disclosure statements. Disclosures would only be required when advertisers or sponsors happen to be mentioned, from time to time, on the basis of an independent disinterested editorial decision.
- 2.5 There should be a complete prohibition, outside of commercial breaks⁴, of any reference regarding sponsors and advertisers, their companies, products, services or views of any of the previously mentioned entities or individuals unless the reference is justified on the basis of editorial independence, in which case the connection should be disclosed.
- 2.6 Advertising or sponsorship refers to any program content included in exchange for consideration, interest or benefit.

⁴ 'Commercial breaks' include live reads within commercial breaks.

- 2.7 The general requirement of editorial independence should be buttressed with additional rules which prevent product placement or undue prominence of products, services, interests, ideas, political views or ideologies. This mirrors the approach taken in the United Kingdom⁵. These rules should be codified as a general licence condition in Schedule 2 of the Act, so that they can be enforced in a similar manner to the current standards.
- 2.8 When disclosure is required (when sponsors or advertisers are referred to on the basis of an editorially independent choice) it should occur at the time of the reference on air and should be accompanied by a phrase similar to those in the current disclosure standard. The set menu of disclosure statements should be broadened to make compliance easier while retaining the current clarity and ease of understanding for the benefit of the listener.
- 2.9 Advertising and sponsorship is important not only to pay for commercial radio content, but also to inform consumers about products and services. Editorial independence together with disclosure when required from time to time will strengthen the appeal of program material and of advertisements, because the audience can understand each in its proper context. Content will be presented without any additional bias due to sponsorship and advertising, and the consumer will know when listening to advertising that it is indeed advertising, enabling them to assess each accordingly. Advertisers will also benefit from this framework, as it empowers the audience.
- 2.10 The clear distinction between program material and advertisements is a form of honesty which will attract audiences to listen.
- 2.11 Therefore, editorial independence and occasional disclosure together secure the interest of the citizen, simplifies compliance for industry, and boosts consumer welfare by ensuring the separation of advertising and sponsorship from programming content.

3. Expanded disclosure as a second-best alternative to editorial independence

- 3.1 As editorial independence strengthens transparency, we submit that this a superior approach. We envisage that a change to *ex ante* regulation will happen in consultation with the public and industry to develop stable regulatory outcomes. If our submission is not accepted, we propose in the alternative the retention of *ex post* regulation. In doing so, disclosure rules should be strengthened, and made to apply to all program types and commercial agreements where a conflict of interest gives rise to social harm.

4. Social harm and the failure to disclose

- 4.1 The problem caused by failing to disclose occurs at the time a sponsored statement is made without disclosure and the harm it causes cannot be by remedied by *ex post* remedies such as fines or sanctions. When the media fails to disclose a financial interest there are two main harms. First, failure to disclose manipulates consumers who think that what they are hearing is a sincere expression of a genuinely held belief, rather than an opinion that has been bought and this in itself is

⁵ *Id*, p.38.

harmful to the audience. This harm breeds cynicism in the audience and cynicism leads to bad faith which harms the audience, the broadcaster and the advertiser. We observe information asymmetry distorts the market place for ideas. Secondly, entrenched cynicism in public communication undermines the efficacy of the media as a facilitator of public discussion and debate. If the public discourse is harmed, then democracy is also affected. Conversely, the consequence of disclosing sponsored statements is to empower more direct discussion where genuine opinions are more easily recognised.

- 4.2 As mentioned above, the ACMA study on *Listener attitudes to advertising, sponsorship and influence on commercial radio* showed that in one case 79 per cent of listeners were uncertain as to whether or not an advertisement was an advertisement. This provides strong evidence of the need for regulation, even in today's environment characterised by improved media literacy.

5. Strengthening the disclosure standard

- 5.1 Any disclosure standard should be strengthened. A revised standard should be expanded as set out below. It should extend to all program formats and to all types of advertising and sponsorship arrangements or other circumstances that could occasion undue influence over program content. By broadening the standard to apply consistently and comprehensively, broadcasters (and the community as a whole) will have greater certainty. Industry compliance will be simplified.

Expanding the scope of the disclosure standard

- 5.2 The disclosure standard should be broadened to apply to all conflicts of interest (which includes an appearance of a conflict of interest). There should be disclosure when a licensee, employee of the licensee, or third party associated with production or payment of any program content enters into a contractual agreement (including tacit understandings and oral agreements) with an advertiser or sponsor or other third party and that product, service, brand or point of view is mentioned in the program (other than in an a commercial break). Further, disclosures should be required in the case of free or discounted products or services (above a certain threshold) that are mentioned on air. Finally, third parties who contribute to program content as a guest or interviewee on a program, should be required to disclose sponsorship or endorsement agreements if that third party makes a promotional reference during the program. In the particular instance of guests on a program, the onus would be on the guests to comply, and any regulation and penalties should extend to guests.
- 5.3 This wider standard thus captures any person who is in a position to influence the content of a program, and extends to all advertising and sponsorship practices. This mirrors the 'payment - disclosure' rule in the United States. In applying the rule, a signal is given to the public so that they know when they are hearing sponsored statements. Disclosure addresses information asymmetry by putting the audience on guard, and in this way is able to assist commercial radio's function as a marketplace of ideas, products and services and supports the ability to serve as a forum for debate and opinion.

Penalties

- 5.4 The penalties for contravening the disclosure standard should be increased. The disclosure standard is a licence condition and the seriousness of breaches in the disclosure standard should be reflected in a higher maximum range of sanctions to act as a more effective deterrent to commercial broadcasters.

Modifications to the registry

- 5.5 A register of commercial agreements should be retained. The register plays an important role in acting as a supporting mechanism for on air disclosure and enhancing accessibility for the public. The registry of commercial agreements should be available online and as a hardcopy for citizens without Internet access. The registry should include not only direct payments, but indirect payments as well, such as shares or other benefits. The brackets for reporting financial sponsorship should not have an upper limit and after \$100,000 the brackets should increase in \$100,000 increments. We note that Commercial Radio Australia finds these disclosures intrusive⁶, however public companies are required to publish senior executive salaries in similar ranges. The difference between an agreement for \$100,000 versus \$1,000,000 is an order of magnitude, and merely disclosing that there is an agreement for an amount greater than or equal to \$100,000 does not reflect the incentive one might have to portray a \$1,000,000 sponsor in a positive light. The scale of payment is important to assess what types of interest the public is confronting as the higher the payment, the more incentive one has to favour the party providing the payment.

6. Timing and form of disclosure

- 6.1 Disclosures should be made at the time the advertisement, product placement or integration occurs. There must be a clear relationship between the material broadcast and the disclosure announcement; it is not sufficient to make regular announcements throughout the course of the program or only at its commencement or conclusion. There are potential ambiguities with the latter approach, namely, there is no way for the listener to tell what proportion of material broadcast is affected.
- 6.2 Commercial Radio Australia submits⁷ that the spontaneity of talkback radio calls for a more practical approach- it is unreasonable to expect the presenter to continually interrupt their program to broadcast disclosure announcements. While we acknowledge that this intrusion should not be heavy-handed, its interpolation has significant value even if it does interrupt the flow of talk to some degree. Indeed, by interrupting the flow of discussion, the listener is better able to identify the sponsored material, as the change in subject matter and tone is obvious.

⁶ Commercial Radio Australia, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009, p. 13.

⁸ *Id.*, p. 12.

- 6.3 Almost half of all commercial AM talkback listeners (49.5%) indicate that it is 'extremely' or 'very' important that disclosure announcements are made concomitantly with the affected material⁸. Furthermore, disclosure in this manner has the potential to mitigate concern about advertising and sponsorship practices on commercial radio, especially integrated advertising and undisclosed sponsorship. Respondents were 20% less likely to be concerned about such practices if disclosure is contemporaneous. Announcements made only at the beginning and end of the program have been found to be less effective.⁹
- 6.4 Contemporaneous disclosure is also important due to the transient audience for programs in commercial radio.
- 6.5 Disclosure announcements should be made using a set menu of phrases in plain language. This approach is the most clear and direct way to communicate with the listener. We acknowledge that the list of phrases contained in the current disclosure standard is limited, therefore we would support an expansion of these 'allowable phrases' in order to make compliance less onerous for the broadcaster, whilst retaining clarity for the benefit of the listener. In the case of integrated advertisements, a standard form announcement should also apply.

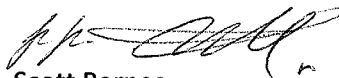
7. Comment on compliance standard

- 7.1 The compliance standard would be more effective if licensees were required to report to the ACMA regarding compliance with the six elements of the standard. While these elements of the standard are all desirable, they cannot be enforced effectively if formal reporting requirements are absent. Reporting will ensure better rates of compliance and improve public confidence in commercial radio.

Yours Sincerely,



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⁸ ACMA (2010): *Community Attitudes to Radio Content*, p. 59.

⁹ ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio.