

Review of the commercial radio standards

Issues paper

FEBRUARY 2010

Canberra

Purple Building
Benjamin Offices
Chan Street
Belconnen ACT

PO Box 78
Belconnen ACT 2616

T +61 2 6219 5555
F +61 2 6219 5353

Melbourne

Level 44
Melbourne Central Tower
360 Elizabeth Street
Melbourne VIC

PO Box 13112
Law Courts
Melbourne VIC 8010

T +61 3 9963 6800
F +61 3 9963 6899

Sydney

Level 15 Tower 1
Darling Park
201 Sussex Street
Sydney NSW

PO Box Q500
Queen Victoria Building
NSW 1230

T +61 2 9334 7700
1800 226 667
F +61 2 9334 7799

© Commonwealth of Australia 2010

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and enquiries concerning reproduction and rights should be addressed to the Manager, Communications and Publishing, Australian Communications and Media Authority, PO Box 13112 Law Courts, Melbourne Vic 8010.

Published by the Australian Communications and Media Authority

Contents

Abstract	1
1. Introduction	4
1.1 Context	4
1.1.1 The broader media environment	5
1.1.2 Historical approaches to regulation of commercial radio content	6
1.1.3 The Commercial Radio Inquiry	6
1.2 Current regulatory arrangements	7
1.2.1 Program standards	7
1.2.2 Codes of practice	7
1.3 Review of the commercial radio standards	8
1.3.1 The scope of the review	10
1.3.2 Approach to the review	10
1.3.3 Research component	10
1.3.4 Principles of good regulatory process	12
1.3.5 Total welfare standard	12
1.4 Submissions	12
2. Issues relating to the Disclosure Standard	14
2.1 Objective	14
2.2 Current requirements	14
2.3 Background to current requirements	14
2.4 Issues for review	15
2.5 Need for regulation	15
2.6 Scope of regulation	21
2.6.1 Program formats	21
2.6.2 Commercial agreements and arrangements	23
2.7 Operational issues	27
2.7.1 Frequency and form of disclosure	27
2.7.2 Register of commercial agreements	33
2.7.3 Payment of production costs	34
3. Issues relating to the Advertising Standard	36
3.1 Objective	36
3.2 Current requirements	36
3.3 Background to current requirements	36
3.4 Issues for review	36
3.5 Need for regulation	37

Contents (Continued)

3.6	Scope of regulation	40
3.6.1	Program formats	40
3.6.2	Distinguishing advertisements	41
3.7	Operational issues	46
3.7.1	Definition of ‘advertisement’	46
4.	Issues relating to the Compliance Program Standard	49
4.1	Objective	49
4.2	Current requirements	49
4.3	Background to current requirements	49
4.4	Issues for review	50
4.5	Need for regulation	50
4.6	Scope of regulation	54
4.6.1	Regulatory obligations	54
4.7	Operational issues	55
4.7.1	Elements of compliance program	55
	Attachment A: Regulatory mechanisms	57
	Attachment B: Questions for comment	59

Abstract

Review of the commercial radio standards

The Australian Communications and Media Authority (ACMA) is undertaking a comprehensive review of the three program standards applying to commercial radio broadcasting services that were determined by the ACMA's predecessor body, the Australian Broadcasting Authority (ABA), in response to the Commercial Radio 'Cash for Comment' Inquiry (Commercial Radio Inquiry) in 1999–2000. The ACMA is reviewing the standards with a view to ensuring they deliver appropriate community safeguards, given the current standards have been in operation for nearly a decade.

The review will consider the appropriateness, effectiveness and efficiency of current regulatory arrangements under these standards, including the extent to which they achieve their current objects and are consistent with the objects and regulatory policy of the *Broadcasting Services Act 1992* (the Act).

The focus of the review is on the provision of news and current affairs programs, including talkback, seeking to ensure that providers of commercial radio broadcasting services remain responsive to the need for transparency in relation to advertising and other sponsored content.

Issues paper

The issues paper adopts a 'first principles' approach designed to reconsider the policy decisions and regulatory solutions determined by the ABA in light of industry, community and regulatory developments since the introduction of the commercial radio standards. The ACMA has identified the following issues as appropriate for consideration against each of the current standards:

1. Whether there is a need for regulation and, if so, what model of regulation and what regulatory mechanism is most appropriate, effective and efficient.
2. If there remains a need for regulation, the scope of any regulation.
3. If there remains a need for regulation, how such regulation should be put into operation.

In reviewing these issues, the ACMA is guided by the Act, and will consider the most appropriate ways of achieving relevant objects, which are:

- > to encourage providers of commercial ... broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance (3(1)(g)); and
- > to encourage providers of broadcasting services to respect community standards in the provision of program material (3(1)(h)).

In reviewing these issues, the ACMA is also guided by relevant regulatory policy, that:

- > different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia (4(1)); and

- > broadcasting services in Australia be regulated in a manner that, in the opinion of the ACMA, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services (4(2)(a)).

This issues paper outlines industry concerns about a range of operational issues within the existing standards, as well as community interests from the perspective of listeners as citizens and consumers. Industry, citizen and consumer interests raise distinct issues relevant to the review, which include:

- > Industry – Minimising regulatory burdens on business and clarifying the application of any regulation to emerging business models.
- > Citizen – The need for listeners to be able to rely on the fairness and accuracy of coverage of matters of public interest; and the appropriate treatment of advertising/sponsorship arrangements that have the potential to affect the content of news and current affairs programs.
- > Consumer – The need for listeners to be told, in order to know, whether a particular presenter has a direct commercial interest in a subject being commented on or discussed; and the need for listeners to be able to discern whether certain broadcast material is in fact advertising in order to be in a position to know who is seeking to persuade them.

Process and timeline for the review

The ACMA announced the review in December 2008. Throughout 2009, the ACMA undertook a comprehensive program of research directed toward establishing an evidence base for the review. These reports are available on the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311945.

1. This issues paper and call for submissions is the first of up to three rounds of public consultation that will be undertaken in the review.
2. Following public consultation on this issues paper, the ACMA expects to release an options paper in the third quarter of 2010 inviting submissions on any specific options for regulation that emerge from the ACMA's research and from consultation on the issues paper.
3. If the ACMA decides that regulatory change is necessary, it will release for public comment draft variations to the existing standards or a draft of any new standard, along with draft explanatory statements. The ACMA will also seek public comment if it decides to revoke one or more of the existing standards.

Making a submission to the review

The ACMA invites submissions from interested parties on the issues and evidence set out in this issues paper, or any other issues relevant to the commercial radio standards. Submissions should be made:

By email: crsreview@acma.gov.au

By mail: Project Manager – Review of the commercial radio standards
Broadcasting Standards Section
Australian Communications and Media Authority
PO Box Q500
Queen Victoria Building NSW 1230

The closing date for submissions has been EXTENDED from **Friday 16 April 2010** to **Friday 14 May 2010**.

Media enquiries should be directed to Donald Robertson on (02) 9334 7980 or by email to media@acma.gov.au.

Any other enquiries may be directed to Project Manager – Review of the commercial radio standards on (02) 9334 7772 or by email to crsreview@acma.gov.au.

Further information about making a submission is set out in Chapter 1 – Introduction. Questions are set out in the issues paper and compiled at Attachment B.

1. Introduction

1.1 Context

The Australian Parliament has long recognised that broadcasting is ‘vital to the operation of a democratic society’ and ‘integral to developing an Australian identity and cultural diversity’.¹ The *Broadcasting Services Act 1992* (the Act) sets out Parliament’s expectations in regard to broadcasting services in Australia.

Section 4 of the Act provides, in part, that the Parliament intends that:

different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia.

broadcasting services in Australia be regulated in a manner that, in the opinion of the ACMA, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services.

Object 3(1)(g) of the Act states that a key objective of regulation is:

to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance.

The Explanatory Memorandum to the Act also states:

... the reference in this object to a fair and accurate coverage of matters of public interest recognises that for most people broadcasting is a major source of information on issues and events in the world ... It is intended that, in the reporting of events and the presentation of issues, providers of broadcasting services will report the facts and facilitate the presentation of the range of views on any particular issue. This does not mean, however, that broadcasters will be required to give equal time to every view on any particular subject.

Commercial radio broadcasting in Australia remains a highly popular and influential medium. Ninety to 95 per cent of Australians aged 15 years and over indicate they are radio listeners, with 91 per cent indicating regular listening (at least once a week). Commercial FM radio is the most popular with 54 per cent of Australians reporting they listen regularly to this type of service, followed by ABC stations (40 per cent – not including Triple J), commercial AM radio (25 per cent), Triple J (15 per cent), and community radio services (14 per cent).² Music and news and information remain the most preferred radio program formats, followed by talkback programming.³

¹ Second Reading Speech, *Broadcasting Services Bill 1992*, 2.

² Source: ACMA (2010) *Community attitudes to radio content*. The ACMA also notes that The Nielsen Company, using a diary based research methodology, found that 58 per cent of the Australian mainland capital city population listen to commercial FM radio, followed by ABC stations (not including Triple J—31 per cent), commercial AM radio (28 per cent), and Triple J (10 per cent). This comprises the total proportion of different people who tuned in to these station types at least once in an average week during the chosen time period (also known as cumulative audience). (Source: Nielsen Radio Ratings, for five mainland state capital cities, Survey 2 2009, 5.30am-12 midnight, Monday-Sunday).

³ ACMA (2010) *Community attitudes to radio content*.

Current affairs programs on commercial radio, including talkback, are considered to be a particularly important source of information and opinion for many Australians, especially older listeners.

Background research conducted by the Australian Communications and Media Authority (ACMA) indicates that approximately 58 of a total of 273 commercial radio licensees across Australia broadcast current affairs programming. Of these, approximately 80 per cent broadcast current affairs programs on AM bands and just under 20 per cent on FM bands. Nielsen data from 2009 indicates that, of stations surveyed, approximately 21 per cent of metropolitan and 35 per cent of regional commercial radio licensees broadcast news/talkback programs.⁴

Talkback radio has been a significant element of current affairs programming over many years in Australia. Talkback (or 'open-line') programming usually consists of a mix of telephone calls from listeners, pre-arranged interviews (often with politicians and others involved directly in issues of current interest), editorials, station or program promotions, commentary, advertisements, regular segments, newsbreaks and music. In the Australian context, these programs are often strongly presenter-driven, headed by personalities who exert a strong, if not indeed dominant, influence over the content (including the opinions presented) of the program. Such presenters are highly influential with their audiences who are often loyal, regular listeners.

Under current regulatory arrangements, for the 'fair and accurate coverage of matters of public interest' required by legislation to be achieved, news and current affairs coverage must be either:

- > free of commercial influence or editorially independent from sponsors or advertisers; or,
- > if such influence does exist – through sponsor and advertiser commercial arrangements with the potential to affect the content of current affairs and news programs – it must be readily transparent to listeners.

A key requirement for successful self or co-regulatory arrangements is that listeners are able to identify content of concern and complain about it to the most appropriate body. If listeners are unaware of commercial arrangements that affect the coverage of news and current affairs, they are at a disadvantage: they may be unduly influenced by paid-for commentary that they think is news or current affairs and, without knowledge it has been paid for, they are compromised in their ability to complain if this is of concern to them.

1.1.1 The broader media environment

The regulation of commercial influence on news and current affairs on commercial radio also needs to be seen in the context of the current and future media landscapes. Increasingly, Australians are receiving news and current affairs information across a variety of media.

Television 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. While the introduction of digital radio in Australia may over time provide some greater flexibility, given its capacity to deliver text and pictures to accompany audio, this is expected to remain relatively limited for the time being.

⁴ Source: Nielsen, *Metropolitan and Regional radio surveyed Markets 2009* – using Nielsen assigned station genres excluding ABC radio stations. News/Talk is defined as stations with a focus on news, current affairs and talkback programming.

Seventy-five per cent of commercial radio listeners also access the internet daily.⁵ Increasingly, commercial radio listeners are listening to radio online, downloading music files online and accessing news and current affairs online.

The highly dispersed, self-generating nature of the World Wide Web makes it quite distinct from commercial broadcasting services. The web includes a vast array of news and information. Some of this information is associated with traditional news services. These are trusted brands with extensive resources which apply the same journalistic principles to online reporting as they do to their offline products. Other information on the web is edited by the public at large or completely unattributed. New approaches—such as building media literacy skills—are emerging to better empower consumers to understand the influences behind information on the web.

The primary focus of the current review is the effectiveness, efficiency and appropriateness of current regulatory arrangements within the current environment, taking into account the implications of the changing media landscape. In this regard, the ACMA is interested in exploring options that accommodate future developments in the media environment.

This would also better inform the ACMA's positioning of the regulatory arrangements for the future, bearing in mind that the ACMA may wish to revisit such broader issues over the coming years; for example when digital radio has reached a material penetration point.

1.1.2 Historical approaches to regulation of commercial radio content

Program content on commercial radio broadcasting services has been regulated by industry codes of practice since 1993. Prior to the registration of the first codes, regulation was by Radio Program Standards and Radio Advertising Conditions determined by the then Australian Broadcasting Tribunal (ABT). Compliance with these standards was a condition of a broadcasting licence.

From 1993 until 2001, rules affecting news and current affairs programs, as well as advertising, were contained in industry codes of practice as registered by the regulator. Since 2001 these matters have been regulated by program standards as well as codes of practice.

1.1.3 The Commercial Radio Inquiry

In 2000, the Australian Broadcasting Authority (ABA) concluded the Commercial Radio Inquiry into commercial arrangements between talkback programs presenters and sponsors.⁶ The ABA noted that the agreements it examined included on-air promotion and favourable treatment of sponsors by the presenters and these arrangements were usually not disclosed to listeners. The ABA found that:

- > the commercial agreements examined by the ABA had led to a substantial failure by licensees to comply with the standards of conduct required by Codes of practice;
- > there appeared to be a systemic failure to ensure the effective operation of self-regulation particularly in relation to current affairs programs, including a lack of staff awareness of the Codes and their implications; and
- > within a significant proportion of current affairs programs, the Codes were not operating to provide appropriate community safeguards.

Based on these findings, the ABA determined three program standards applying to commercial radio licensees in 2000, which commenced in 2001.

⁵ The Nielsen Company, *Nielsen Radio Ratings, Survey 5 2009*, all people aged +16yrs unless otherwise specified.

⁶ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 102.

1.2 Current regulatory arrangements

1.2.1 Program standards

Three program standards set out to achieve relevant objects of the Act as follows:

- > The Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (Disclosure Standard) was introduced to encourage commercial radio licensees to be responsive to the need for a fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs. The standard requires:
 - > on-air disclosure of the existence of commercial agreements between presenters of current affairs programs and sponsors and payment of production costs by sponsors or advertisers;
 - > a publicly available register of such commercial agreements; and
 - > notification to the ACMA of the existence of such commercial agreements.
- > The Broadcasting Services (Commercial Radio Advertising) Standard 2000 (Advertising Standard) was introduced to encourage commercial radio licensees to respect community standards by ensuring the clear presentation of advertising. Advertisements must be presented in such a manner that the reasonable listener is able to distinguish them from other program material.
- > The Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 (Compliance Program Standard) was introduced to ensure community safeguards operate effectively by promoting compliance with the requirements of the Act, standards and the codes. A licensee must develop, implement and maintain a compliance program to ensure compliance with the Act, the standards and the codes.

The commercial radio standards are available at the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_91766.

1.2.2 Codes of practice

The Commercial Radio Codes of Practice also support the achievement of the objects of the Act and have recently been reviewed by the radio industry's representative body, Commercial Radio Australia (CRA). Of relevance to the review of commercial radio standards are:

- > *Code of Practice 2: News and Current Affairs Programs* – the purpose of this Code is to promote accuracy and fairness in news and current affairs programs. Among other things, it provides that in the preparation and presentation of current affairs programs, a licensee must ensure that factual material is reasonably supportable as being accurate; the reporting of factual material is clearly distinguishable from commentary and analysis; and viewpoints expressed to the licensee for broadcast are not misrepresented and material is not presented in a misleading manner by giving wrong or improper emphasis or by editing out of context.
- > *Code of Practice 3: Advertising* – the purposes of this Code are to ensure that advertisements comply with other Codes where applicable, and to limit the time devoted to advertisements. It includes a provision that advertisements broadcast by a licensee must not be presented as news programs or other programs.

The Commercial Radio Codes of Practice are available at the CRA website at <http://www.commercialradio.com.au>. See also the ACMA website http://www.acma.gov.au/WEB/STANDARD/pc=IND_REG_CODES_BCAST.

Although the Act does not specify a timeframe for the reviewing of codes of practice, it is common for industry groups to review their codes every three years to take into account broadcasting trends and community attitudes. The ACMA's review of the commercial radio standards and CRA's recent review of the Codes of Practice are conducted independently and pursuant to separate processes prescribed by the Act (set out in Attachment A).

1.3 Review of the commercial radio standards

The ACMA is undertaking a comprehensive review of the three program standards introduced by its predecessor, the Australian Broadcasting Authority (ABA), in 2000:

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

Introduced after the ABA Commercial Radio 'Cash for Comment' Inquiry, the standards apply to commercial radio licensees and govern:

- > the disclosure of commercial agreements that may influence the content of current affairs programs;
- > the need for advertisements to be distinguishable from other program material; and
- > compliance by licensees with their regulatory obligations.

Information about the Commercial Radio Inquiry is available on the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_310821.

The ACMA is aware of industry concerns about a range of operational issues within the existing standards which merit review. Industry members have formally requested the ACMA to review the Disclosure Standard, citing the length of time since its introduction; impracticalities related with compliance; difficulties in ensuring compliance; and changes to the regulatory environment since the standard commenced as reasons.

CRA has made public submissions recommending that the Disclosure Standard be simplified; that licensees be permitted to broadcast regular disclosure announcements rather than announcements made at exactly the same time as the broadcast of the relevant material; that the obligation to specify the amount or value received by the presenter in the register of commercial agreements be removed; and that the obligation for presenters to provide the licensee with copies of each commercial agreement be removed.⁷ In its recent review of the Codes of Practice, CRA released Draft Codes of Practice and Guidelines for public consultation proposing to amend the Advertising Code in relation to integrated advertising.⁸

Investigations and inquiries conducted by the ABA and the ACMA since the introduction of the standards suggest that the conduct addressed by current regulatory arrangements is still a feature of the commercial radio industry in Australia. The ACMA has made a number of breach findings under the standards and is aware of advertising and sponsorship practices that do not appear to fall within the ambit of the standards as drafted, despite their potential to also influence broadcast material without the knowledge of listeners.

⁷ CRA, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009.

⁸ CRA, Draft Code of Practice 3: Advertising, *Review of the Commercial Radio Codes of Practice – Public Consultation*, January 2009. The revised Codes of Practice (registered February 2010) do not contain this proposal, which is being considered in the review of the commercial radio standards.

Industry notifications indicate that the practice of presenter commercial agreements remains widespread. According to form B55 notifications, as at February 2010, 60 presenters across 19 commercial radio licensees have a total of 123 commercial agreements between them. These agreements span a range of values and obligations.⁹

In this review, the ACMA will consider whether current regulation of the relationship between commercial radio sponsors, broadcasters and audiences continues to be appropriate, by reviewing the following key issues:

1. Whether there is a need for regulation and, if so, what model of regulation is most appropriate, effective and efficient, including:
 - > the specific regulatory mechanisms which are appropriate, effective and efficient.
2. If there remains a need for regulation, the scope of any regulation, including:
 - > the program format(s) to which any regulation should apply;
 - > the person(s) to whom any regulation should apply; and
 - > the specific regulatory definitions which should apply.
3. If there remains a need for regulation, how such regulation should be put into operation, including:
 - > the form that any requirements should take; and
 - > any operational or drafting issues.

As discussed above, Parliament itself has noted the critical role that fair and accurate coverage of matters of public interest plays in Australian public life. Accordingly, the need for such fair and accurate coverage will be a critically important consideration for the ACMA.

An international comparison of regulatory approaches is instructive. While the details vary, there seem to be two broad approaches. The first can be characterised as an 'ex ante' or structural approach requiring editorial independence of programming. This is the approach adopted by the United Kingdom, Ireland and Canada with respect to public affairs programs. The second approach can be characterised as 'ex post' in which regulation does not require separation of commercial incentives from programming, but imposes sanctions following any breach of rules (normally relating to disclosure of such interests). This is the approach adopted by the United States of America in respect of all programming, and in Australia with respect to current affairs programming.

Approaches to related issues also vary internationally both in scope, level of detail, and sanctions. For example, in Australia, the ex post requirement to disclose an interest on air is buttressed by an ex ante requirement on licensees to keep records of contracts between announcers and their sponsors. In addition, the level of detail and reach of controls varies, in some cases extending to any parties involved in commissioning such arrangements. There are notable differences in the degree and seriousness of sanctions imposed for breaches of ex ante and/or ex post requirements in various jurisdictions.

The review is interested in examining these international models and whether they, or aspects of them, may be relevant or preferable in the Australian context. The relevant models are described in greater detail in Chapters 2 and 3.

⁹ Data obtained from register of commercial agreements available on the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311598. The ACMA notes that six licensees' notifications have remained static since 2001 and a further three licensees notifications have remained static since 2007.

1.3.1 The scope of the review

The review will consider the efficiency, effectiveness and appropriateness of current regulatory arrangements under the commercial radio standards, including the extent to which these achieve their current objects and are consistent with the objects and regulatory policy of the Act.

Specifically, the review will consider:

1. community attitudes, industry practice and the regulatory environment in relation to commercial arrangements that may affect the content of news and current affairs programs on commercial radio;
2. the extent to which the standards have achieved their objects, and the experience and performance of the commercial radio sector in meeting current regulatory requirements; and
3. the most effective regulatory response to the issues that emerge during the review, including alternative regulatory approaches.

The review will also consider any other relevant matters that may arise through the review process. It will be undertaken in a manner consistent with the principles of good regulatory process, outlined below.

1.3.2 Approach to the review

The ACMA takes an evidence-based approach to the consideration of issues for which it has regulatory responsibility.

As is its normal approach in such a wide-ranging review, the ACMA has incorporated an extensive research component to inform itself of relevant issues. The ACMA will also consider submissions throughout the review process and draw on its own information and experience in dealing with the matters raised by the review.

The ACMA will consult with commercial radio licensees, interested parties and the general public in the course of the review process. Given the broad scope of the review, the ACMA expects to conduct three rounds of public consultation:

1. This issues paper and call for submissions is the first round of public consultation.
2. Following public consultation on the issues paper, the ACMA expects to release an options paper in the third quarter of 2010 inviting submissions on any specific options for regulation that emerge from the ACMA's research program and from consultation on the issues paper.
3. If the ACMA decides that regulatory change is necessary, it will release for public comment draft variations to the existing standards or a draft of any new standard, along with explanatory statements. The ACMA will also seek public comment if it decides to revoke one or more of the existing standards.

1.3.3 Research component

The ACMA has undertaken a comprehensive program of research directed toward establishing an evidence base. The future role of any program standards needs to be considered in the context of community attitudes, as required by the Act. This issues paper is also informed by the ACMA's experience in administering the commercial radio standards.

The key research projects contributing to the standards review are referred to throughout this issues paper and are available at the ACMA website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311945.

A summary of each research component is outlined below.

Community attitudes research

*Community Attitudes to Radio Content*¹⁰ was prepared for the ACMA by Ipsos MediaCT. The report presents the findings of a national telephone survey, undertaken in February 2009, of Australians aged 15 years and over. A nationally representative sample was achieved, of which 1,423 were radio listeners. Amongst other things, the research explores: the importance of commercial radio as a source of news and current affairs relative to other media; attitudes towards commercial influence in news and current affairs content; and the perceived importance of disclosure announcements in current affairs programs.

*Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*¹¹ was prepared for the ACMA by Ipsos MediaCT. The report presents the findings of a nationally representative online survey undertaken in August 2009 of Australian commercial radio listeners aged 17 years and over. Amongst other things, the research explores: people's ability to distinguish advertising/sponsorship from other program material; attitudes to advertising/sponsorship practices; and concerns about advertising/sponsorship practices.

Ten focus groups were originally commissioned by the ACMA from McNair Ingenuity in May 2006¹² to explore listener attitudes to commercial influence, the sponsorship of news and current affairs programs, and disclosure on commercial radio. Almost 100 radio listeners participated in the groups that were held in Adelaide, Melbourne and Sydney. Findings from this research are included in this paper where relevant to illuminate some of the issues. It is important to note that focus group findings do not represent radio listeners generally because of the small sample. This research is unpublished.

Comparative international research

*International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*¹³ was prepared for the ACMA in June 2009 by Professor Lesley Hitchens of the Faculty of Law at the University of Technology, Sydney.

The report provides a comparative survey and analysis of policies and regulations relating to advertising and sponsorship on commercial radio, as at June 2009. It focuses on rules which are relevant to news and current affairs programming, canvassing the jurisdictions of the United Kingdom (UK), the United States of America (USA), Ireland, Canada and Germany, and includes an overview of Australian regulation in the introduction. The report provides detailed explanations of regulation in each jurisdiction as well as high-level analysis. The report finds some common core principles and practices as well as some fundamental differences in approach.

Survey of industry compliance

*Industry Compliance with the Compliance Program Standard*¹⁴ was prepared for the ACMA by DBM Consultants.

The report details the findings of a confidential self-reported survey of commercial radio licensees, undertaken in June 2009, to assess the extent of industry compliance with the Broadcasting Services (Commercial Radio Compliance Program) Standard 2000. The report explores the experience and performance of industry in meeting current requirements under the standard as well as industry attitudes to the standard.

¹⁰ ACMA (2010) *Community Attitudes to Radio Content*.

¹¹ ACMA (2010) *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*.

¹² ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio.

¹³ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

¹⁴ ACMA (2010) *Industry Compliance with the Compliance Program Standard*, prepared by DBM Consultants

1.3.4 Principles of good regulatory process

The Australian Government has endorsed the following six principles of good regulatory process identified by the 2005 Taskforce on Reducing Regulatory Burdens on Business:

- > Governments should not act to address 'problems' until a case for action has been clearly established – This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all 'problems' will justify (additional) government action.
- > A range of feasible policy options – including self-regulatory and co-regulatory approaches – need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework.
- > Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.
- > Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.
- > Mechanisms are needed to ensure that regulation remains relevant and effective over time.
- > There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.

These principles provide an important backdrop into the current review. These principles are regarded as consistent with policies articulated in the Act, namely that the ACMA should avoid imposing unnecessary financial and administrative burdens on industry. The ACMA, along with all Australian Government agencies, must clearly analyse the costs and benefits of undertaking regulatory action and needs to consider alternatives to formal regulatory action before deciding that regulation is necessary.

Another of the key elements of best practice regulation making is to review regulation once it has been in place for some time.

1.3.5 Total welfare standard

For the information of submitters, when assessing the net benefits for the community of competing regulatory options, one of the tools the ACMA uses where applicable is a Total Welfare Standard (TWS) approach. With its foundations in welfare economics, the TWS takes into account the benefits and costs to consumers and producers and the broader social impacts directly arising from a regulatory initiative.¹⁵ It is nonetheless important to note that as a separate consideration, decision makers also need to consider any particular policy objectives expressed in relevant legislation.

1.4 Submissions

The ACMA invites comments on the issues set out in this issues paper, or any other issues relevant to the commercial radio standards. Submissions should be made:

By email: crsreview@acma.gov.au

By mail: Project Manager – Review of the commercial radio standards
Broadcasting Standards Section
Australian Communications and Media Authority
PO Box Q500
Queen Victoria Building NSW 1230

Questions are set out in the issues paper and compiled at Attachment B.

¹⁵ Further information about the Total Welfare Standard is available at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311378.

The closing date for submissions has been EXTENDED from Friday **16 April 2010** to **Friday 14 May 2010**.

Media enquiries should be directed to Donald Robertson on (02) 9334 7980 or by email to media@acma.gov.au.

Any other enquiries may be directed to Project Manager – Review of the commercial radio standards on (02) 9334 7772 or by email to crsreview@acma.gov.au.

Publication of submissions

In general, the ACMA publishes all submissions it receives. However, the ACMA will not publish submissions that it considers contain defamatory or irrelevant material.

The ACMA prefers to receive submissions which are not claimed to be confidential. However, the ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for confidentiality claims.

The ACMA will not automatically accept all claims of confidentiality. The ACMA will consider each claim for confidentiality on a case-by-case basis. If the ACMA accepts a confidentiality claim, it will not publish the confidential information unless required to do so by law.

When can the ACMA be required by law to release information?

The ACMA may be required to release submissions by law under the *Freedom of Information Act 1982* (Cth) or for other reasons including for the purpose of parliamentary processes or under court subpoena. The ACMA will seek to consult submitters of confidential information before that information is provided to another body or agency, but the ACMA cannot guarantee that confidential information will not be released through these or other legal means.

Sharing of information

Under the *Australian Communications and Media Authority Act 2005*, the ACMA is able to disclose submissions to the Minister, Department including authorised officials, Royal Commissions and certain Commonwealth authorities such as the Australian Competition and Consumer Commission and Australian Securities and Investments Commission.

If information is accepted by the ACMA as confidential, the ACMA will seek to consult with the submitter of the information where the ACMA intends to share that information.

2. Issues relating to the Disclosure Standard

2.1 Objective

The object of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (the Disclosure Standard) is to encourage commercial radio licensees to be responsive to the need for a fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs.

The standard applies to all commercial radio broadcasting licensees who broadcast current affairs programs.

2.2 Current requirements

The Disclosure Standard requires licensees to broadcast:

- A. on-air disclosure during current affairs programs of commercial agreements between sponsors and presenters that have the potential to affect the content of those programs; and
- B. on-air disclosure during current affairs programs of the payment of production costs by advertisers and sponsors.

Licensees are also required to:

- C. keep a register of commercial agreements between sponsors and presenters of current affairs programs and make it available to the ACMA and the public; and
- D. ensure that a condition of employment of presenters of current affairs programs is that they comply with relevant obligations imposed by the Act, the codes and the Disclosure Standard.

2.3 Background to current requirements

At the time of the Commercial Radio Inquiry in 1999, industry codes for news and current affairs programs and advertising were in force.¹⁶ The Commercial Radio Inquiry brought to the attention of the public and the ABA a number of practices in the commercial radio industry which breached the codes, including:

- > undisclosed commercial relationships between presenters and third parties, including advertisers; and
- > undisclosed commercial arrangements between licensees and advertisers (including agreements for the use of outside broadcasts in advertising campaigns).

The ABA concluded in the Final Report of the Commercial Radio Inquiry that these practices have the potential to influence the content of programs and that there had been a significant failure in the system of co-regulation in these matters, indicating that licensees' compliance with the relevant Code provisions were inadequate.¹⁷

Accordingly, the ABA determined the Disclosure Standard, a program standard requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs. In doing so, the ABA emphasised the principle of

¹⁶ Practices were investigated under Code of Practice 2: News and Current Affairs, and Code of Practice 3: Advertising, as in force during the Commercial Radio Inquiry. Note that Code 2 was amended in 2003.

¹⁷ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 2.

‘disinterestedness’ namely that the ‘public is entitled to assume that the information content of commercial radio is disinterested except where an interest is disclosed’.¹⁸

The Disclosure Standard recognises the importance of current affairs programs in Australian society and the need for listeners to be informed of commercial interests. The Inquiry found:

Current affairs programs, including talkback radio, are an important source of information and opinion formation for many Australians, and some presenters are highly influential figures in contemporary Australian society. It is therefore desirable (and in accordance with Parliament’s objective at s. 3(g) of the Act), that the audience of a current affairs program should be able to rely on the accuracy and fairness of information imparted during that program by the program’s presenter.¹⁹

2.4 Issues for review

This is the first substantive review of the Disclosure Standard since it was introduced. The ACMA has identified the following issues as appropriate for consideration:

- > Need for any regulation – Whether regulation of commercial agreements that have the potential to affect the content of programs remains necessary and, if so, which regulatory model is most appropriate.
- > Scope of any regulation – If there remains a need for regulation, the type of program formats and commercial arrangements that should be addressed.
- > Operational issues – If there remains a need for regulation, how any regulation should be put into operation, including the form and frequency of any disclosure requirements and any other operational or drafting improvements.

Each issue is considered in turn below. Depending on the model for regulation adopted, if any, there is a range of further subsidiary issues concerning implementation detail, and whether buttressing requirements might be necessary or desirable. For example, if the ACMA were to continue with an ex post model, then further questions could include the appropriate form and frequency of any on-air disclosure requirement; the appropriate form of any register of commercial agreements (and to whom these should apply); and any other operational or drafting improvements.

The sections entitled ‘operational issues’ are in many cases framed in terms of the way those matters are addressed, and have worked, under the current Disclosure Standard. However, this should not be taken as a preference by the ACMA that the review is looking to amend the current standard. Rather, this approach towards the ‘operational issues’ has been adopted for convenience, and because the ACMA is assuming that many submitters will be familiar with, or want to comment on, the issues in that way. Submitters should, however, feel free to address underlying issues in a more general way consistent with their views on any alternate models of regulation.

2.5 Need for regulation

As noted under the Principles of Good Regulatory Practice in Chapter 1, regulation should only address ‘problems’ where a case for action has been clearly established. The background that led to the current standard is described above. It is timely to ask whether circumstances have changed, and to re-examine the regulation.

The existing Disclosure Standard has been framed largely as a response to what might be described as the ‘listener knowledge’ problem: that commercial radio listeners have

¹⁸ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 43.

¹⁹ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 43.

no way of knowing, without being told, that a particular presenter has a direct commercial interest in a subject being commented on or discussed. This is fundamentally different from most other aspects of content regulation, where listeners are able to identify potential concerns based on the content itself. In the case of vilification or factual accuracy, for example, listeners may be more readily able to identify potential breaches of regulation without explicit reference to the influences on, or even the intentions of, the presenter of a particular program. This was clearly a matter of public concern when the Disclosure Standard was introduced, and the ACMA is testing the extent to which this concern remains valid and whether there are other concerns.

Research and data

Community attitudes

Current affairs programs and news reports on commercial radio are important sources of information and opinion for many Australians, particularly older Australians.

Listeners of talkback and news and information

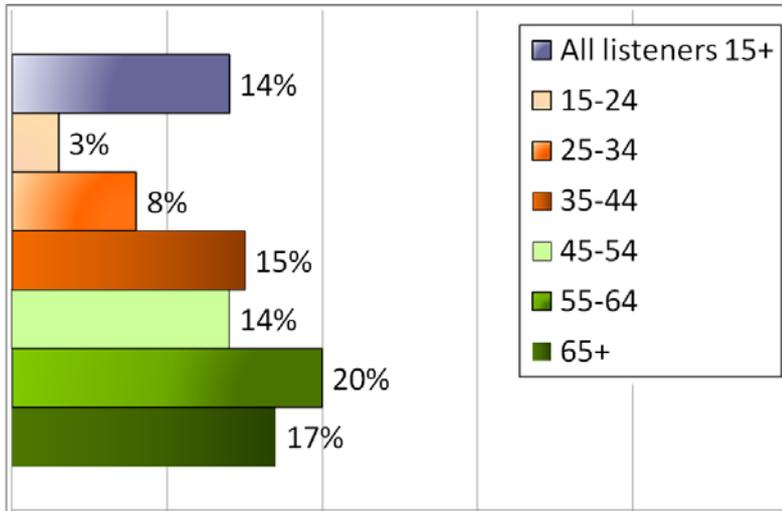
News and information and *talkback* are the second and third most preferred radio formats. Just over two-thirds of all surveyed radio listeners (68 per cent) indicate 'regular' (at least once a week) listening to *news and information*, and just less than half of all radio listeners (46 per cent) identify themselves as regular '*talkback*' listeners.²⁰

Figure 1 shows that listeners of different ages identify themselves as regular commercial AM and/or FM talkback listeners. More older listeners are regular commercial AM talkback listeners, while younger listeners tend to listen to commercial FM talkback. A similar listening pattern by age is also apparent for regular news and information listeners.

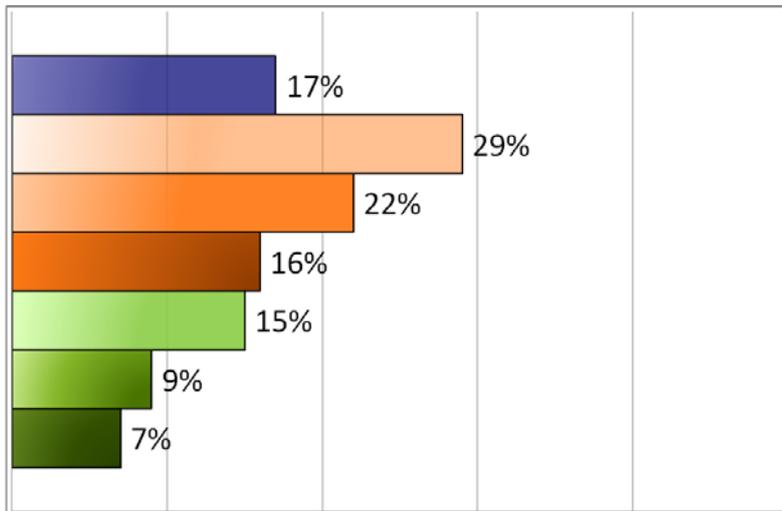
²⁰ This survey question did not specifically define 'talkback' for respondents. However for the question reported in Figure 1 there was a preceding question (Question 6.1) which identified 'current affairs' as including *on-air opinions, interviews, or discussion about current social, economic or political issues, as well as talkback programs*.

Figure 1 Proportion of regular commercial AM and FM talkback radio listeners—by listener age (years), 2009

a) % of listeners who listen regularly to commercial AM talkback



b) % of listeners who listen regularly to commercial FM talkback



Base: All radio listeners aged 15+ years n=1,423; 15-24 n=177; 25-34 n=259; 35-44 n=252; 45-54 n=267; 55-64 n=271; 65+ n=307.

Source: ACMA (2010) *Community attitudes to radio content*

In total, 29 per cent of all radio listeners (i.e. 40 per cent of commercial radio listeners) regularly listen to talkback programming on commercial radio services, which comprises those who listen to talkback on commercial AM radio (14 per cent of all radio listeners, 20 per cent of commercial radio listeners) and talkback on commercial FM radio (17 per cent of all radio listeners, 23 per cent of commercial radio listeners).

Nielsen Radio Ratings show that almost a quarter of all commercial radio listeners (24 per cent) listen to commercial AM radio talkback stations. This represents 19 per cent of all radio listeners aged 15 years and over who listen to commercial AM radio talkback

stations,²¹ slightly higher than the ACMA's finding of 14 per cent who listen to talkback programming.

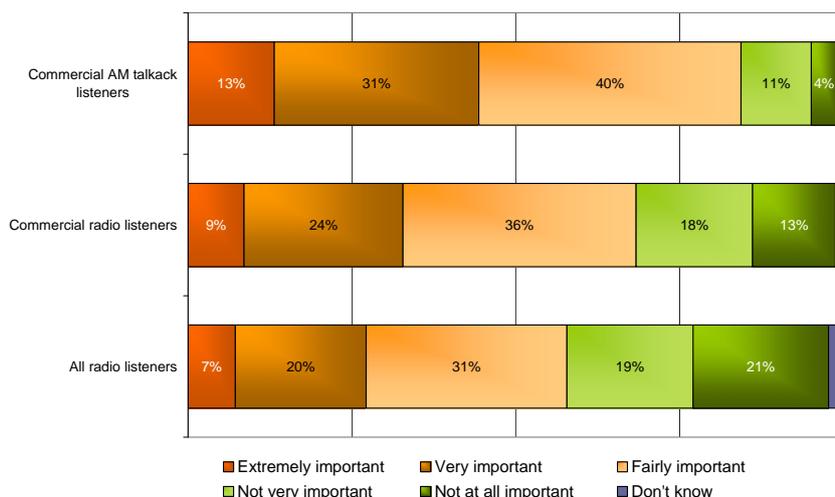
Discussion group participants mainly regard radio current affairs programming on commercial radio stations in terms of talkback programming. Talkback was seen as being varied in style and content and offering both information and entertainment. It also provided in-depth talk about newsworthy or current items of interest, and was seen most commonly as an opportunity to hear the views of other people. Some listeners were attracted to the provocative or controversial views of radio personalities.²²

Importance of current affairs (talkback) on commercial radio

People obtain news and current affairs information from a range of different media sources, with ABC television and Australian newspapers²³ being the most important sources.

Commercial radio is reported as an 'extremely' or 'very' important source of news and current affairs by just over a quarter of all radio listeners surveyed (27 per cent). More commercial AM talkback listeners regard commercial radio as an important source of news and current affairs (44 per cent) compared with other radio listener types (Figure 2).

Figure 2 Importance of Australian commercial radio as a source of news and current affairs information (includes via the internet), by listener type, 2009



Base: All radio listeners aged 15+ years n=1,423; commercial radio listeners n=1,018; commercial AM talkback listeners n=205.

Source: ACMA (2010) *Community attitudes to radio content*

A similar, but slightly higher, proportion of the commercial AM talkback listeners surveyed (50 per cent) also identified talkback programming as either 'extremely' or 'very' important in informing them about social, political or economic matters. A further 36 per cent said that talkback is 'fairly' important, and the remaining 14 per cent said that talkback is 'not very' or 'not at all' important for such information.

²¹ Nielsen Radio Ratings, Survey 2 2009, all people 15+, 5.30am-12midnight, Mon-Sun. Talkback stations include 2UE, 2GB, 3AW, 4BC, 5AA and 6PR (i.e. the main news/talk stations in the five mainland state capital cities).

²² ACMA (2006) unpublished report on community attitudes to sponsorship of news and current affairs programs on commercial radio.

²³ This includes ABC television and Australian newspaper sources via the internet.

International approaches and models

The review of international regulation²⁴ has identified a range of approaches to the regulation of advertising, sponsorship on commercial radio, including the regulation of news and current affairs programming. Of the jurisdictions that regulate for such matters (including by self-regulation), two approaches are broadly apparent. One essentially mandates ex ante editorial independence of programming (adopted by the UK, Ireland and Canada – with respect to public affairs programs). The second allows commercial arrangements that have the potential to affect the content of programming, subject to a requirement that there be disclosure of such interests (adopted by the USA in respect of all programming and Australia with respect to current affairs programming), with breaches of the disclosure rule enforced ex post.

The ex ante (editorial independence) model approaches the problem of listener knowledge by prohibiting advertisers or sponsors from having any influence over program content in the first place – albeit with corresponding financial implications for commercial broadcasters. The UK and Ireland (and Canada with respect to public affairs programming) regulate to preserve the editorial independence of programming content from commercial influence. A key element of the approach towards regulation of advertising and sponsorship is the principle that, whilst advertising and sponsorship are recognised as acceptable revenue-raising activities, commercial influence on, or interference with, the content of certain programming is not to be tolerated.

In the UK there are extensive rules regulating advertising, sponsorship and other forms of commercial influence. The Ofcom Code permits commercial radio current affairs programs to be sponsored; however, any reference to the sponsor in a program must not be promotional and its inclusion must be editorially justified. The rules in place impose regulatory obligations on the licensee only. There are no rules in place which would impose obligations on other persons such as newsreaders or presenters.²⁵ Similarly, in Ireland, a prohibition on any advertiser or sponsor exercising any editorial influence over other programming content confirms that editorial independence is also protected. In Canada, the *Code of Ethics* addresses the need to ensure that there is no influence by advertisers on the reporting of news and public affairs. Canada's focus on news and current affairs is notable and suggests that Canada adopts a position somewhere between the UK (and Ireland) and Australia.

In contrast, the ex post (disclosure) approach does not prohibit sponsor influence, but requires the disclosure or identification of such potential influence. That is, commercial influence over program content is permissible as long as the audience is aware of who is trying to persuade them. Australia, like the USA, relies on disclosure to inform the audience of commercial agreements. However, as distinct from Australia, the disclosure requirements in the USA apply to all programming and impose obligations on a range of persons additional to the licensee, including the presenter. Under the sponsorship-identification rules in the USA, a licensee has an obligation to make on-air disclosure of paid-for content. Under the related payment-disclosure rules, employees of the licensee, and third parties who are associated with the production or payment of program content, who receive consideration for the provision of content to be broadcast, must disclose that information to the licensee, so that the necessary announcements can be made. Further, the obligation is imposed on the person providing the consideration and on any other person supplying program matter who may have information about such payments to make disclosure. Breach of the rules in the USA is a criminal offence.

²⁴ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

²⁵ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

Discussion

Over the life of the Disclosure Standard, the ACMA and its predecessor (the ABA) have investigated a number of matters relating to the potential for commercial agreements (and other arrangements) to affect the content of current affairs programs. Matters concerning this potential continue to arise, albeit in small numbers.

The community attitudes research and the range of international approaches suggest that there are two possible threshold issues that regulation may seek to address and which are open for consideration as part of this review:

The first is the 'listener knowledge' problem described above – this is essentially the problem that the ex post disclosure approach seeks to address. A second issue is whether commercial interests should ever be allowed to influence or directly affect the content of commercial radio programs. Addressing that concern essentially leads towards an ex ante approach (noting the ex ante approach also addresses the listener knowledge problem by preventing the issue from ever arising).

The second, broader question is what is the most effective and efficient way of encouraging commercial radio licensees to be responsive to the need for a fair and accurate coverage of matters of public interest.

An editorial independence approach provides listeners with confidence that matters (including those of public interest) are free from commercial influence and may be a less complex regulatory requirement for industry to comply with (compared, for example, to the requirements that may be necessary for a disclosure approach). However, any editorial independence model may have an economic impact and/or affect business models utilised by industry.

A disclosure approach gives certainty to listeners that they may assume content to be disinterested, except where an interest is disclosed, though such approach invariably necessitates the imposition of prescriptive disclosure requirements on licensees in order to be effective.

If regulation is necessary, and depending on the regulatory model, a further question becomes which of the regulatory mechanisms under the Act is most appropriate. Three types of regulatory mechanism are available under the Act:

- > codes of practice developed by groups representing commercial radio licensees;
- > program standards determined by the ACMA; and
- > licence conditions imposed by the ACMA.

Details of each of these regulatory mechanisms and their respective enforcement provisions are set out in Attachment A.

-
1. **What are the issues that regulation in this area should be seeking to address? (In commenting on this, it would be helpful if submitters also had regard to the objects of the Act and the attitudinal research.)**
 2. **Is regulation appropriate, or the best way of addressing the problem(s)? If so, what is the most appropriate regulatory model (please describe key features) for addressing the problem (disclosure, editorial independence, or other approach)? Are there other models or alternatives to regulation that could be considered?**
 3. **If regulation is necessary under any of the models, which of the regulatory mechanisms under the Act (codes, standards, licence conditions) is best deployed?**
-

2.6 Scope of regulation

2.6.1 Program formats

The Disclosure Standard applies to commercial radio licensees that broadcast current affairs programs. Non-current affairs formats are not subject to any explicit disclosure requirements, even where their content may have been influenced or dictated by the commercial interests of other parties.

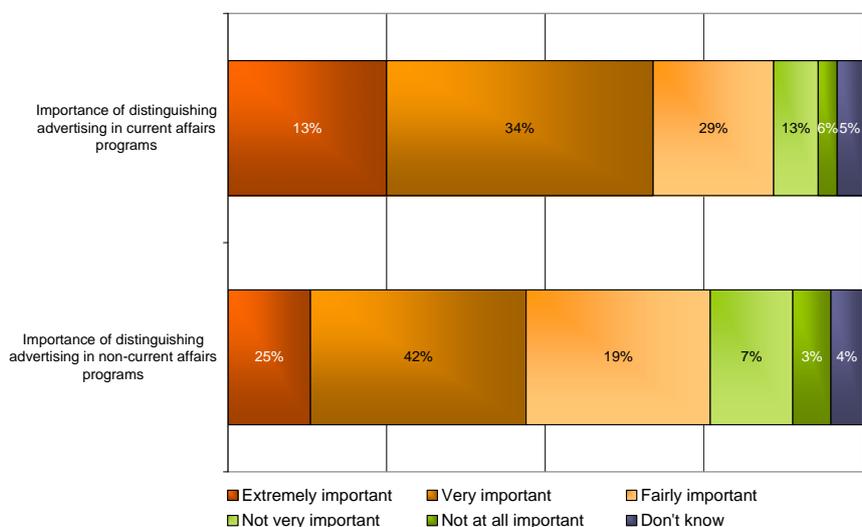
Research and data

Community attitudes

Commercial radio listeners seem to be more sensitive to advertising in current affairs programs than in non-current affairs programs. The ACMA's community attitudes research indicates that two-thirds of regular commercial radio listeners (66 per cent) believe it is 'extremely' or 'very' important to be able to make a clear distinction between advertising and other content in current affairs programs. The importance of making such a clear distinction for non-current affairs programs is comparatively less at 47 per cent (Figure 3).

Commercial AM radio talkback listeners reflect the views of commercial radio listeners generally on the importance of distinguishing advertising in these two program types.

Figure 3 Importance of distinguishing advertising from other program content in current affairs and non-current affairs radio programs, 2009



Base: Commercial radio listeners aged 15+ years n=1,018

Source: ACMA (2010) *Community attitudes to radio content*

International approaches

The ACMA's international research indicates that the focus of the Disclosure Standard on current affairs programs and program presenters serves to limit the operation of regulatory safeguards in Australia.²⁶ In the USA, disclosure obligations apply irrespective of program format – there is no distinction between news and current affairs programming and other content in the application of the sponsorship-identification rules. No special treatment is accorded news and current affairs content.

Of those jurisdictions reviewed, only Australia and Canada regulate broadly for current affairs ('public affairs') programs; however, the approach in Canada aligns with the UK and Ireland's editorial independence approach, rather than the disclosure approach, in

²⁶ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

the need to ensure that there is no influence by advertisers on the reporting of news and public affairs. The editorial independence approach in the UK and Ireland applies to all programming, irrespective of format.

Discussion

One issue for consideration in the review is whether regulation should apply to a broader range of programming than current affairs. Should such regulation also apply, for example, to a sports presenter who has a commercial agreement with a sports clothing company, or with the maker of a dietary supplement, to promote the interests of a particular sport?

An issue that arose during the Commercial Radio Inquiry was the treatment of non-current affairs programs, including sports and general entertainment programs, where presenters were found to have relevant commercial agreements. Although the ABA did not investigate these agreements and programs in any methodical way, the ABA was of the view that:

...the principle that listeners should be entitled to know by whom they are being persuaded continues to apply in the context of all programs, not just current affairs. The Authority therefore identifies the need for disclosure of relevant commercial agreements between presenters of other programs and their sponsors as a matter requiring regulatory action.²⁷

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.

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

Another issue for consideration in the review is what is included in the definition of 'current affairs program'. The current definition limits the application of the Disclosure Standard in a way that may leave some 'coverage of matters in the public interest' unregulated in terms of disclosure of commercial interests that may affect content.²⁸ Further, as the definition captures open-line discussion, which is a practice utilised in both current affairs and non-current affairs programs, it may benefit from clarification.

The Disclosure Standard applies only to licensees that broadcast current affairs programs. 'Current affairs program' is defined in the Disclosure Standard as follows:

Current affairs program means a program a substantial purpose of which is to provide interviews, analysis, commentary or discussion, including open-line discussion with listeners, about current social, economic or political issues.

The 'substantial purpose' requirement may need further consideration in light of the fluid nature of radio programming and evolving formats, and the question of whether some programs that may broadcast 'matters in the public interest' would satisfy the definition of 'current affairs program'.

Based on the reasoning of the ACMA's predecessor, the ABT, if the definition were broadened to require a 'focus' rather than a 'substantial purpose', it might encompass a broader range of programming. For example, it might encompass mainstream current affairs programs as well as programs such as news and current affairs specials, talkback

²⁷ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 94.

²⁸ The object of the Disclosure Standard is to encourage commercial radio licensees to be responsive to the need for a fair and accurate *coverage of matters of public interest* by requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs [emphasis added].

radio, documentaries and magazine-style programs that focus on social, economic or political issues of immediate relevance to the community.²⁹

The comparative strengths and weaknesses of narrowing or broadening the definition of 'current affairs program' relate to the breadth of public interest content that may be subject to community safeguards in respect of commercial agreements; the degree of certainty industry has about any regulatory obligations; and related economic impacts and/or effect on business models utilised by industry in the coverage of matters of public interest.

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

2.6.2 Commercial agreements and arrangements

Except for the provision relating to Payment of Production Costs (discussed further below), the community safeguards in the Disclosure Standard apply only in relation to 'commercial agreements' between a sponsor and a presenter of a current affairs program.³⁰ They do not apply, for example, in relation to 'commercial arrangements' between sponsors and licensees or persons or entities other than presenters. In practice, this can give rise to situations where commercial arrangements that have the potential to affect the content of current affairs programs are not required to be disclosed.

Research and data

Community attitudes

Focus group participants generally expressed the view that the same sponsorship disclosure requirements should apply in all circumstances, whether or not a commercial arrangement was with a program presenter or a licensee.³¹

More than half of commercial radio listeners aged 18 years and over (60 per cent) hold the view that *talkback radio presenters on commercial radio are paid by advertisers or sponsors for favourable comments*. Less than half (43 per cent of commercial radio listeners) believed that *advertisers or sponsors influence the content of current affairs commentary, discussion or talkback on commercial radio*. Fewer (27 per cent) believe that *talkback callers on commercial radio are screened to favour advertisers or sponsors*, and 22 per cent perceive that *news stories are omitted from news bulletins on commercial radio to 'please' sponsors or advertisers*.³²

Views on commercial influence and being able to distinguish advertising

The ACMA's community research also explored the attitudes of radio listeners to some general principles that are relevant to commercial influence and advertising.

It found that a substantial majority of all radio listeners (80 per cent) and regular commercial radio listeners (81 per cent) agree that the *on-air opinions of radio personalities should not be influenced by their personal sponsorship deals*. There has

²⁹ The definition of 'current affairs' contained in Radio Program Standard 8 – Current Affairs under the Broadcasting Act 1942 was broader than the definition in the Disclosure Standard, requiring a 'focus' rather than a 'substantial purpose'. The ABT stated that a 'focus' on social, economic or political issues was considered enough to constitute a 'current affairs program': ABT (1991) *Inquiry into Accuracy, Fairness and Impartiality in Current Affairs Programs on Television and Radio: Decisions and reasons*.

³⁰ 'Sponsor' is defined to mean: a party to a commercial agreement (other than a presenter or part-time presenter or an associate of a presenter or part-time presenter); and the party or parties who are to directly benefit from the promotional or other services provided by a presenter or part-time presenter or an associate of a presenter or part-time presenter pursuant to a commercial agreement.

³¹ ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio.

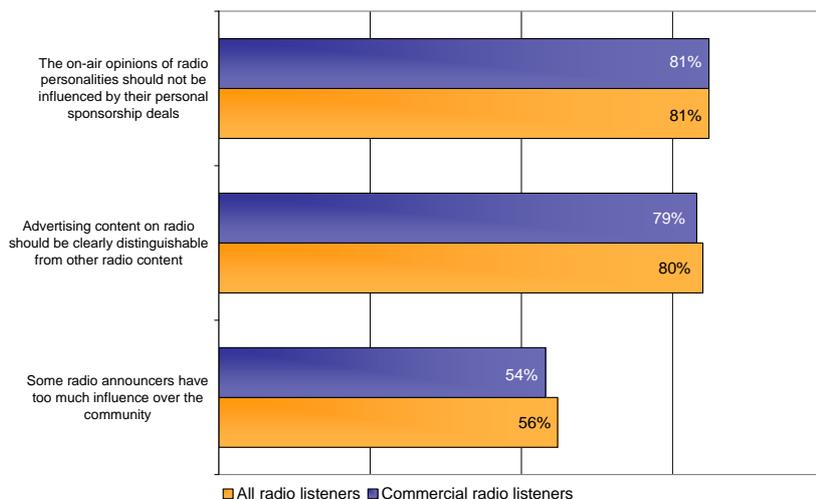
³² ACMA (2010) *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*.

been a small but statistically significant decline in agreement with this statement since 2003—a total 85 per cent of all radio listeners agreed with this statement in 2003.

A substantial proportion also agree that advertising content on radio *should be clearly distinguishable from other radio content*—79 per cent of commercial radio listeners (Figure 4).

A smaller proportion held the view that *some radio announcers have too much influence over the community*—56 per cent of commercial radio listeners.

Figure 4 Agreement with radio attitude statements by listener type, 2009

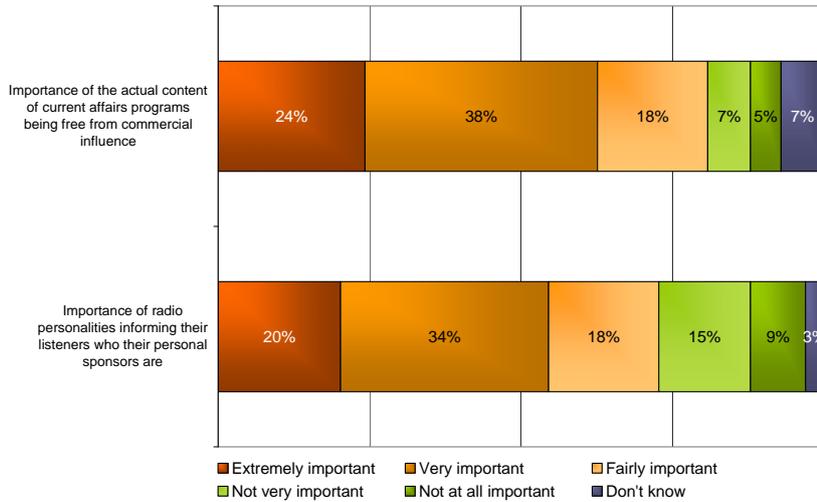


Base: All radio listeners aged 15+ years n=1,423; commercial radio listeners n=1,018

Source: ACMA (2010) *Community attitudes to radio content*

Figure 5 shows that most 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* (62 per cent). Thirteen per cent said this is ‘not very’ or ‘not at all’ important.

Figure 5 Importance of content being free from commercial influence, and informing listeners of commercial arrangements, 2009



Base: Commercial radio listeners aged 15+ years n=1,018

Source: ACMA (2010) Community attitudes to radio content

Informing listeners of commercial arrangements

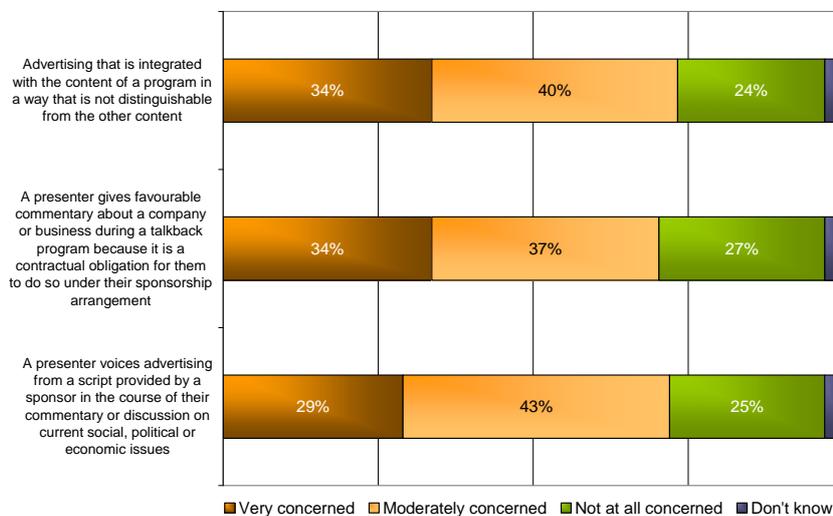
Figure 5 also shows that more than half of regular commercial radio listeners (55 per cent) believe it is either 'extremely' or 'very' important that *radio personalities inform their listeners who their sponsors are*.

Advertising practices of most concern

When asked to indicate a level of concern about a number of different statements that described certain advertising and sponsorship practices on commercial radio, more than a third of commercial radio listeners indicate being 'very' concerned about the three practices identified in Figure 6.

A total of approximately three-quarters of commercial radio listeners express some level of concern (i.e. 'very concerned' or 'moderately concerned' about these practices.

Figure 6 Top three advertising and sponsorship practices of concern, 2009



Base: Commercial radio listeners aged 18+ years N=1,214

Source: ACMA (2010) Listener attitudes to advertising, sponsorship and influence on commercial radio

International approaches

Both Australia and the USA require disclosure of certain types of agreements or arrangements. In the USA, the requirement to disclose applies to all commercial arrangements with all personnel.³³ The 'payment-disclosure rule' requires that any employee, or person, involved with the production or preparation of program content, who receives consideration for the provision of content to be broadcast, or any person who provides such consideration, must make disclosure. Breach of the payment-disclosure rule is a criminal offence. A licensee, having received such a disclosure will then have an obligation to comply with the sponsorship-identification rules, which require the licensee to broadcast a disclosure announcement of paid-for content, as if the licensee had received the consideration.³⁴

The payment-disclosure rule imposes obligations of disclosure directly on a number of different persons resulting in the provision being wide enough to cover other persons associated with the broadcaster or its program content, and who may have private commercial relationships associated with the program content, provided that they can be said to have a connection with the production or preparation of the program. The rule also imposes an obligation on the person providing the consideration.

In contrast, the Australian disclosure requirement applies only to 'commercial agreements' (as defined) between sponsors and presenters and to the 'payment of production costs' by advertisers and sponsors. That is, aside from the disclosure of 'payment of production costs', commercial arrangements between sponsors and personnel other than presenters are not required to be disclosed.

In Australia, the obligation for disclosure is on the licensee, as opposed to the presenter or other persons. In this regard, the ABA stated in the Commercial Radio Inquiry Final Report that:

It is fundamental to the regulatory scheme of the Act that it is concerned with the regulation of licensees, and not directly with their employees or presenters. In the [...] disclosure standard, the Authority has addressed the need for presenters to disclose their agreements to licensees by requiring licensees to make such disclosure a condition of their employment.³⁵

Discussion

The Disclosure Standard requires disclosure of 'commercial agreements' (as defined) between sponsors and presenters. The ACMA is aware of instances of other commercial 'arrangements' that have influenced program content, but which are not covered by the Disclosure Standard as they fall outside the definition of 'commercial agreement'. Although certain commercial 'arrangements' may affect content, and therefore give rise to the same issues as 'commercial agreements' for listeners – they are not addressed, meaning that listeners are not in a position to know that a particular presenter has a commercial interest in a subject being commented on or discussed.

For example, in 2004, the ABA conducted an investigation into the sponsorship of the Alan Jones Program on Radio 2GB through an arrangement between Telstra (the sponsor) and Macquarie Radio Network (MRN – the parent company of the licensee, Harbour Radio Pty Ltd). Under an equity sharing arrangement, Mr Jones' company was entitled to shares in MRN (the owner of 2GB and 2CH), which were to accrue over time.

³³ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

³⁴ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

³⁵ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 6.

In consequence, Mr Jones was entitled to 20 per cent of the increase in value of MRN that might occur as a result of his role as a presenter on 2GB.³⁶

The ABA found that, although one of the purposes of the arrangement was to secure the services of Mr Jones in order to promote Telstra, Mr Jones was not a party to the agreement, he did not receive consideration from Telstra, and the agreement did not impose any obligations directly upon him. The ABA therefore found that the Telstra/MRN arrangement was not a commercial agreement for the purposes of the Disclosure Standard. The ABA found that this commercial arrangement was outside the scope of the Disclosure Standard even though it may have had the potential to affect the content of a current affairs program.

In contrast, in 2003 the ABA conducted an investigation into a direct sponsorship and advertising agreement between Telstra and a John Laws' private company that commenced on August 2002. The terms of the agreement were almost identical to the terms of the agreement between Telstra and MRN. However, as this agreement was between Telstra, Mr Laws and Mr Laws' own company, it constituted a 'commercial agreement' under the Disclosure Standard.³⁷

Leaving the definition as it currently stands does not allow for safeguards in relation to other arrangements (licensee arrangements, for example) which may give rise to exactly the same issues for listeners. The comparative strengths and weaknesses of broadening the definition of 'commercial agreement' relate to the range of commercial interests having the potential to affect program content that listeners may be informed about; whether there is a reduction in regulatory certainty for industry (including advertisers and sponsors); and the consequential economic impact on business models and remuneration flexibility, which may be seen to impose constraints on the business affairs of individuals or licensees.

-
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 program?**
-

2.7 Operational issues

2.7.1 Frequency and form of disclosure

The Disclosure Standard prescribes both the frequency and the form of on-air disclosure required to be made. The rationale for prescribing the frequency and form was considered to provide for the appropriate and effective operation of the disclosure approach to regulation. However in practice this may present operational (and compliance) challenges for licensees.

Research and data

Community attitudes

Awareness and understanding of disclosure announcements

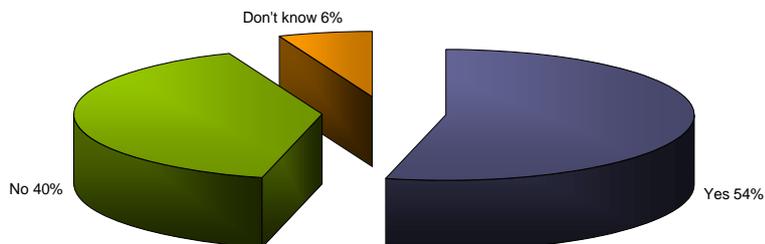
Just over half of the surveyed regular commercial AM talkback listeners reported hearing an on-air disclosure announcement (54 per cent), and 40 per cent had not heard an

³⁶ ABA (2004) *Investigation relating to sponsorship of the Alan Jones Program pursuant to an Agreement between Telstra Corporation and Macquarie Radio Network Pty Ltd*, 17.

³⁷ ABA (2003) *Investigation into Radio 2UE Sydney Pty Ltd – Sponsorship of Mr Laws by Telstra Corporation Ltd and NRMA Insurance Ltd*, 8.

announcement (Figure 7). This is higher than the 37 per cent of commercial AM talkback listeners who reported hearing a disclosure announcement in 2003.

Figure 7 Heard a disclosure announcement on commercial AM talkback radio, 2009



Base: Commercial AM talkback listeners aged 15+ years n=205

Source: ACMA (2010) Community attitudes to radio content

For the 54 per cent who had heard a disclosure announcement (n=111), 65 per cent displayed a 'good' or 'part' understanding of the meaning and purpose of these announcements (41 per cent had a 'good' understanding), 18 per cent had a limited understanding, and 17 per cent had an inaccurate understanding or 'didn't know'.

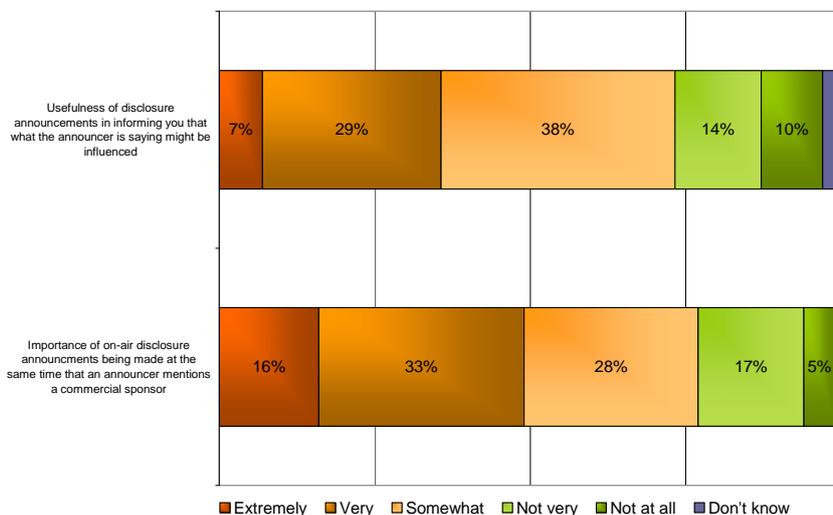
Usefulness and importance of disclosure announcements

There are mixed views about the usefulness and importance of on-air disclosure announcements that inform listeners about commercial arrangements.

Just over a third of commercial AM talkback listeners (36 per cent) rate on-air disclosure announcements in talkback programs as either 'extremely' or 'very' useful, and 23 per cent regard them as 'not very' or 'not at all' useful (Figure 8).

Almost half of commercial AM radio talkback listeners (49 per cent) indicate that it is 'extremely' or 'very' important that disclosure announcements are made at the same time that an announcer mentions a commercial sponsor. Twenty-two per cent said this was either 'not very' or 'not at all' important.

Figure 8 Views on disclosure announcements, 2009



Base: Commercial AM talkback radio listeners aged 15+ years n=111
 Source: ACMA (2010) Community attitudes to radio content

Effectiveness of on-air announcements

ACMA research indicates that making listeners aware of commercial arrangements with sponsors and advertisers by using on-air announcements, and the proximity of these announcements to advertising, can play a role in reducing listener concern about advertising in radio current affairs programs. However, the prospect of including these announcements may not eliminate concern about certain advertising practices.

The placement of an on-air announcement at the time advertising occurs is considered by survey respondents to be more effective in reducing concern than an announcement at some other point in the program. Table 1 shows that around 73 per cent of commercial radio listeners reported being ‘moderately’ or ‘very’ concerned about the two most concerning advertising practices (i.e. practices 1 and 2 in Table 1).

Fewer said they would remain concerned if made aware of a commercial arrangement at some point during the program (63 per cent), and just over half (53 per cent) said they would still be concerned (although less concerned) if made aware at the same time advertising occurs. This represents a total movement of approximately 20 per cent of survey respondents from being ‘moderately’ or ‘very’ concerned, to not being concerned at all.

Just over half of commercial radio listeners remain either ‘moderately’ or ‘very’ concerned about the two most concerning advertising practices regardless of where an announcement might be placed in the broadcast. Between 17 per cent and 19 per cent remained ‘very’ concerned about these practices.

Table 1 Changes to level of concern about advertising and sponsorship practices – where information about a commercial arrangement is announced at the time of advertising, or at some other point in the current affairs program, 2009

Advertising or sponsorship practice	Level of concern/ no concern	CONCERN (% of commercial radio listeners)		
		... without an announcement	... with commercial arrangement mentioned 'at some point' in program	... with commercial arrangement mentioned at 'same time' as advertising
1. A presenter gives favourable commentary about a company or business during a talkback program because it is a contractual obligation for them to do so under their sponsorship arrangement.	Not at all	25	35	45
	Moderately	36	37	34
	Very	37	26	19
	Don't know	2	2	2
2. A presenter voices advertising from a script provided by a sponsor in the course of their commentary or discussion on current social, political or economic issues.	Not at all	23	34	44
	Moderately	40	38	36
	Very	34	25	17
	Don't know	3	3	3

Base: Commercial radio listeners aged 18+ years N=1,214

Source: ACMA (2010) *Listener attitudes to advertising, sponsorship and influence on commercial radio*

For less concerning advertising and sponsorship practices, no concern at all is expressed by 62 per cent to 84 per cent of respondents if announcements are made at the same time as advertising.

In 2006, focus group participants who had heard sponsorship announcements at the beginning or end of a program, believed generally that their placement would have limited value in informing listeners about possible sponsor influence because they could be so easily missed.³⁸

International approaches

The sponsorship-identification rules (or 'announcement of payment for broadcast rule') in the USA are intended to ensure that audiences are aware that the programming they hear has been paid for, and to know by whom: the public is '...entitled to know who seeks to persuade them with the programming offered over broadcast stations and cable systems'.³⁹ The main legislative provision makes clear that any announcement must be made at the time of the broadcast of the relevant content:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person...⁴⁰

This is a well-established principle that was also emphasised by the ABA in the Commercial Radio Inquiry.

³⁸ ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio.

³⁹ This is a well-established principle: see, for example, FCC, *Public Notice, In re Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963).

⁴⁰ 47 USC§317(a)(1) – refer ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

Discussion

Frequency of on-air disclosure of commercial agreements

The Disclosure Standard currently requires a disclosure announcement to be made at the time of, and as part of, each instance of the broadcast of sponsor-related material.⁴¹

The rationale for this frequency is to inform listeners of the existence of the commercial agreement at the time matters involving a sponsor are discussed. The policy underlying the frequency requirement of a disclosure announcement was recently considered by the Federal Court of Australia:

The spoken word is the vehicle used to shape views on radio current affairs programs... because of its orality, publication in a radio broadcast conveys a transient message. [...] the transience both of what is spoken on-air during a radio broadcast and of the listening audience (who may tune in or out at any time and, when tuned in, may pay closer or lesser degrees of attention) underlie the policy behind the disclosure standard's insistence on the presenter making a disclosure announcement contemporaneously each time one of his or her sponsor's name, products or service is mentioned.⁴²

Industry has submitted that the requirement for disclosure to be made 'in the same breath' is overly onerous and difficult to comply with and has posited that such requirement should be relaxed and aligned with requirements under the Commercial Television Code of Practice or the cross-media ownership disclosure regime.⁴³

In the case of the cross-media ownership regime, licensees have the option to adopt a 'regular disclosure method', requiring a radio outlet to regularly 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. A relevant consideration in aligning the frequency of any disclosure announcement with the cross-media ownership regime is whether such regime is 'fit for purpose'. An ownership link which has the potential to influence content (as per the cross-media provisions), may well be different in nature to a specific arrangement for the remuneration of a presenter/licensee by a sponsor in relation to editorial comment.

Under the Commercial Television Code of Practice, television licensees are required to disclose commercial arrangements 'either during the program or in the credits of the program and should adequately bring the existence of any such commercial arrangement to the attention of the viewers in a way that is readily understandable to a reasonable person'.⁴⁴ A relevant consideration in aligning any disclosure requirement for radio with the Commercial Television Code of Practice relates to the audience experience of commercial television programs, which differs from that of radio, both in relation to the availability of visual cues and program length.

The ACMA notes that the Payment of Production Costs provision of the Disclosure Standard requires hourly disclosure announcements, rather than disclosure at the time of, and as part of, the broadcast of sponsor-related material. The ACMA notes that the appropriateness of such hourly disclosure announcements relates to the involvement of the program sponsor, such as in outside broadcasts, rather than the involvement of presenter sponsors.

⁴¹ The requirement to make hourly disclosure of the payment of productions costs is discussed further below.

⁴² *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754, 11.

⁴³ CRA, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009.

⁴⁴ Free TV, Commercial Television industry Code of Practice January 2010, Clauses 1.19 – 1.23.

The relative strengths and weaknesses of relaxing the required frequency of disclosure announcements relates to whether the probability that a listener will hear the disclosure announcement is lessened, and whether the disclosure approach responds appropriately to the key challenge that commercial radio listeners cannot be expected to know, without being told, that a particular presenter has a direct commercial interest in a subject being commented on or discussed. Whilst relaxing the on-air disclosure requirement may lessen listeners' ability to make a connection between the disclosure announcement and the content that has been influenced by a sponsor, such approach may go some way to disclosing relevant agreements whilst alleviating operational and compliance burdens on industry.

-
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?**
 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 a regular interval during the program?**
-

Form of on-air disclosure of commercial agreements

The current Disclosure Standard contains prescribed alternative forms of words for disclosure announcements by presenters of current affairs programs. A disclosure announcement must include at least one of the following phrases:

- A. [name of sponsor] is a sponsor of mine;
- B. I have a commercial agreement with [name of sponsor];
- C. [name of sponsor] is a sponsor of my company, [name of company];
- D. [name of sponsor] has a commercial agreement with my company, [name of company];
- E. [name of sponsor] is a sponsor of a company of which I am a director, [name of company];
- F. [name of sponsor] has a commercial agreement with a company of which I am a director, [name of company].

The prescribed disclosure announcements are designed to ensure that the presenter makes a first-person, individual attribution, recognising that an agreement with a presenter may have a greater influence on the material presented by that individual, than if the agreement is with the licensee.

The necessity of individual attribution of commercial agreements was considered by the ABA and the ACMA in relation to a number of announcements made by Mr Laws purportedly to satisfy the Disclosure Standard. In those cases, the licensee was found to have breached the Disclosure Standard despite a variety of disclosure-type statements having been made, including that 'Telstra are sponsors of ours' and 'Telstra are major sponsors of ours' [emphasis added].⁴⁵

CRA has argued that prescriptive measures such as the phrasing of disclosure announcements are difficult to comply with, especially in the context of unscripted programming. The definition of 'disclosure announcement' set out in section 5 of the Disclosure Standard is as follows:

Disclosure announcement means a statement broadcast by a presenter or part-time presenter that a relevant commercial agreement exists.

⁴⁵ ABA (2003) *Investigation into Radio 2UE Sydney Pty Ltd – Sponsorship of Mr Laws by Telstra Corporation Ltd and NRMA Insurance Ltd*, 8-9.

This definition may benefit from clarification as licensees (as well as one presenter) have raised with the ACMA the proposition that the policy objective could be achieved by means of either:

- > a pre-recorded disclosure announcement made by the presenter and inserted into the program as necessary by the licensee; or
- > a pre-recorded disclosure announcement made by someone other than the presenter and inserted into the program as necessary by the licensee.

The strengths and weaknesses of personal attribution in disclosure announcements relate to making listeners aware that the presenter is directly benefiting, financially, from promoting the sponsor (thereby making the listener more aware that the material may not be disinterested), and imposing requirements on licensees that may be onerous or difficult to comply with.

10. Should the form of words to be used in a disclosure announcement be prescribed by regulation? If yes, what is the appropriate form of words?

2.7.2 Register of commercial agreements

Under the Disclosure Standard, licensees are required to keep a register of current commercial agreements between sponsors and presenters, to make this information available to the public, and to notify the ACMA of presenters' commercial agreements. Notifications to the ACMA must include information including the date of the commercial agreement, the parties to the agreement, a brief description of the obligations of the presenter under the agreement and an indication of the amount or value of the benefit or consideration to be provided under the agreement.

Declaration of value of consideration

Licensees are required to provide the value of consideration within certain ranges, rather than as a specific amount. The ranges are: \$10,000 or less; between \$10,000 and \$100,000; and more than \$100,000. These ranges distinguish between relatively minor agreements (which may comprise only in-kind benefits such as the supply of a product or service free of charge) and substantial agreements that bring with them more onerous obligations (such as the promotion of a sponsor through positioning statements or comments during editorial content).

The rationale for declaring the value of consideration within a range is that it provides the listener and the regulator with greater transparency concerning the presenter's financial benefits able to be derived from increasing the profitability of their sponsor.⁴⁶ However industry submits that the requirement to disclose the value of the benefit or consideration disadvantages radio stations compared with other media, such as television, in terms of attracting presenters, because of reluctance by presenters to divulge the value of their agreements with sponsors.⁴⁷

Notification to the licensee

Similarly, CRA submits that the requirements relating to provision of copies of commercial agreements to the licensee creates a substantial administrative burden as it

⁴⁶ Following the Commercial Radio Inquiry, a licence condition imposed on 2UE on 3 April 2000 included an additional provision under which sponsors whose payments exceeded \$100,000 per annum were regarded as 'major sponsors'. The highest bracket required to be recorded under that licence condition was amounts of \$500,000 or more per annum: ABA, NR 7/2000, 'ABA decides to impose licence conditions on 2UE Sydney', 7 February 2000 available at http://www.acma.gov.au/WEB/STANDARD/pc=PC_91098.

⁴⁷ CRA, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009.

can be difficult to obtain copies of agreements within the requisite seven days because of confidentiality conditions.⁴⁸

The ACMA notes that the Disclosure Standard regulates licensees, and that the ACMA requires information about presenter commercial agreements in order to conduct investigations under the Disclosure Standard. The ACMA further notes that presenter commercial agreements have implications for gross earnings of licensees and a consequent reduction in the licence fees collected by the ACMA for usage of spectrum, a valuable public resource.⁴⁹

Notification to the public and the ACMA

Currently, licensees are required to keep a register of current commercial agreements between sponsors and presenters (or part-time presenters) of current affairs programs or associates of such presenters or part-time presenters. Licensees must make the register available at the station premises during business hours for inspection free of charge upon request by any member of the public and must publish the register on any website operated by or on behalf of the licensee (and must link the register directly to the home page of that website). Industry submits that this dual station premises/website requirement is unduly burdensome.⁵⁰

Further, licensees must provide to the ACMA in writing, in a form approved by the ACMA, the particulars set out in the register (including any changes) within 14 days after the licensee is notified of those particulars.

The ACMA considers it appropriate to review the requirement for licensees to make this information available as part of their public registers as well as to inform the ACMA of this information. The ACMA will also consider the appropriateness of requiring disclosure of the value ranges of commercial agreements.

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?

2.7.3 Payment of production costs

In addition to disclosure of presenter-sponsor commercial agreements, the Disclosure Standard requires disclosure of payment of production costs. This recognises that, alternatively to sponsoring a current affairs presenter, an advertiser or sponsor may pay for, or contribute to, the production costs associated with a current affairs program. If so, the licensee must ensure that the fact of payment is disclosed, on-air to listeners, at least once per hour throughout the program.

Clause 8 of the Disclosure Standard (requiring hourly disclosure announcements) was intended to apply to situations where an advertiser contributed to the costs of outside broadcasts of particular programs, and to sponsorships of particular programs.

In the 2004 investigation into 2GB, it was found that the agreement between MRN and Telstra included the requirement that four sponsorship announcements be made during the program to the effect that the Alan Jones program 'is brought to you by Telstra'. Thus the ABA was not required to rule on the application of clause 8, but suggested that

⁴⁸ CRA, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009.

⁴⁹ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 69

⁵⁰ CRA, Submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, *Social and Economic Infrastructure Services*, February 2009.

for clause 8 to apply there would probably have to be 'a sufficiently direct relationship between the Telstra sponsorship and the program production costs' (ABA 2004, p 27).

The scope of this provision is of course limited by the reference to production 'costs'. It is unclear what aspects of contemporary radio production costs would be covered by this term (other than obvious applications such as the costs of broadcasting from another location). Further, the provision does not cover general sponsorship arrangements which usually comprise a fee paid to the licensee or network, unconnected to the cost of producing the program

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?

14. The ACMA invites comment on any operational or drafting issues or matters requiring clarification, or enhancement in the Disclosure Standard

3. Issues relating to the Advertising Standard

3.1 Objective

The object of the Broadcasting Services (Commercial Radio Advertising) Standard 2000 (the Advertising Standard) is to encourage commercial radio broadcasting licensees to respect community standards by ensuring advertising is clearly distinguishable from all other programs.

3.2 Current requirements

The Advertising Standard provides that licensees must present advertisements in such a manner that the reasonable listener is able to distinguish them from other program material.

3.3 Background to current requirements

At the time of the Commercial Radio Inquiry in 1999, an industry code for advertising was in force. The Commercial Radio Inquiry found breaches of this code and that practices of the commercial radio industry in relation to the codes established convincing evidence that the advertising code was not operating to provide appropriate community safeguards.

The ABA's response to the revelations of undisclosed commercial agreements and associated on-air conduct was to take remedial action to promote transparency. This was done by determining the Advertising Standard to require disclosure of certain commercial agreements and to require that advertising be distinguishable from other program content.

The distinguishing of advertisements from other program matter is particularly important in the context of current affairs radio programs with talkback formats where material may be presented as opinion on a matter of community interest. If a listener cannot discern whether certain broadcast material is in fact advertising, then they are not in a position to know who is seeking to persuade them.⁵¹

3.4 Issues for review

This is the first substantive review of the Advertising Standard since it was introduced. The ACMA has identified the following issues as appropriate for consideration:

- > Need for any regulation – Whether regulation designed to distinguish advertising from other program material remains necessary, and if so, which regulatory model is most appropriate.
- > Scope of any regulation – If there remains a need for regulation, the type of program formats that should be addressed.
- > Operational issues – If there remains a need for regulation, how any regulation should be put into operation, including the form of any transparency requirements for advertising practices and/or presenters and any other operational or drafting improvements.

Each issue is considered in turn below. Depending on the model for regulation adopted, if any, there is a range of further subsidiary issues concerning implementation detail, and

⁵¹ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 96-97.

whether buttressing requirements might be necessary or desirable. For example, the appropriate form of any general transparency, identification or separation requirements; the appropriate form of any specific requirements applying to particular advertising practices or presenters; and any other operational or drafting improvements.

The sections entitled 'operational issues' are in many cases framed in terms of the way those matters are addressed, and have worked, under the current Advertising Standard. However, this should not be taken as a preference by the ACMA that the review is looking to amend the current standard. Rather, this approach towards the operational issues has been adopted for convenience, and because the ACMA is assuming that many submitters will be familiar with, or want to comment on, the issues in that way. Submitters should, however, feel free to address underlying issues in a more general way consistent with their views on any alternate models of regulation.

3.5 Need for regulation

The Advertising Standard requires licensees to present advertisements in such a manner that the reasonable listener is able to distinguish them from other program material.

Regulation requiring that advertising be distinguishable responds to the key challenge that unless commercial radio listeners can discern whether certain broadcast material is in fact advertising, then they are not in a position to know who is seeking to persuade them. It recognises that it may not be clear to listeners whether on-air promotion of organisations, their products, services or issues has been motivated by the existence of a commercial arrangement with the organisation concerned.

This challenge is different from other aspects of content regulation, where listeners are more readily able to identify potential concerns based on the content itself. In the case of vilification or factual accuracy, for example, listeners may be more readily able to identify potential breaches of regulation without being made aware of the nature of the program material.

Research and data

Community attitudes

One of the strongest attitudes identified in ACMA's community research is that 80 per cent of regular radio listeners agree that advertising content on radio *should be clearly distinguishable from other radio content*. A similarly high proportion of regular commercial radio listeners agree with this statement (79 per cent).⁵²

Further, when the survey research examined a range of different advertising practices, commercial radio listeners were most concerned about *advertising that is integrated with the content of a program in a way that is not distinguishable from the other content* — 38 per cent indicate they are 'very' concerned and 38 per cent are 'moderately' concerned (a total of 76 per cent who expressed concern).

At the same time, 55 per cent of commercial radio listeners agree that *integrating advertising with other program content on commercial radio is acceptable so long as advertisers are identified at least once during the program*.⁵³

Transparency in advertising was also important to radio listeners who participated in focus groups. Overall, these participants indicated that where paid material is clearly recognisable as advertising (where listeners hear no ambiguity), advertising or

⁵² ACMA (2010) *Community Attitudes to Radio Content*.

⁵³ ACMA (2010) *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*.

sponsorships of various types are more acceptable. Conversely, advertising that is less clear to listeners was considered to be less acceptable.⁵⁴

International approaches

The international survey of regulation found that most countries adopt the principle of transparency when considering advertising and sponsorship issues. However, some jurisdictions seek an enhanced form of transparency by imposing detailed rules to ensure the separation of advertising and programming content.⁵⁵ Further, a key element of the approach towards regulation of advertising and sponsorship in some jurisdictions is the principle that, whilst advertising and sponsorship are recognised as acceptable revenue-raising activities, influence on, or interference with, the content of other programming is not tolerated.

In the UK, Canada, and Ireland, general rules impose an obligation on licensees to ensure that advertising and other content is readily distinguishable. The UK and Ireland also provide more detailed rules on what might be required to ensure that advertising and other content are able to be distinguished. Thus, these jurisdictions require an enhanced form of transparency by imposing rules to ensure separation (in addition to rules relating to editorial independence).

In the UK for example, the guidance to the general rules that there be transparency and clear separation of advertising emphasises that particular care must be taken with any expressions or sound effects normally associated with news bulletins, and that station presenters/newsreaders may voice advertising messages provided that a proper distinction is made between the programming material and the advertising material they deliver. However they may not be used to advertise products which may be seen to compromise the impartiality of their programming role.

Similar general rules in Ireland require clear identification of any commercial arrangements as well as the separation of commercial content from other content. More detailed rules prohibit presenter and other on-air personnel advertising or endorsing any products or services during their program, and there is a prohibition on persons who regularly present news featuring in any commercial communications (however this prohibition does not extend to those presenting current affairs programming). In Canada, broadcasters are to ensure that advertising material within a newscast is clearly distinguishable from the news information adjacent to it and, to this end, any commercial message should not be read by the newsreader. Further, broadcasters shall ensure that there is no influence by advertisers, or the perception of such influence, on the reporting of news or public affairs.

In the UK, in addition to general requirements that broadcasters must ensure that advertising and program elements of a service are kept separate and maintain the independence of editorial control over programme content, there is a series of rules for particular situations which prohibit the promotion of products and services within a program,⁵⁶ any undue prominence being given to a product or service in a program⁵⁷

⁵⁴ ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio

⁵⁵ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

⁵⁶ A promotion will occur "...where there is a clear 'sell'". The rule does not prohibit program-related material, which can be promoted provided it is editorially justified. Program-related material is products and services which are directly derived from a program and are intended to allow the audience to benefit from or interact with the program.

⁵⁷ Undue prominence is likely to occur when there is no editorial justification for a reference to a product or service (company names, brand names, logos) within a program or because of the manner in which the same appears within a program. It is accepted that reference to branded products and so forth will be inevitable, but there must be no negotiation or agreement as to that appearance with the supplier.

and product placement.⁵⁸ These prohibitions indicate a strong commitment to the separation of program content (including current affairs programs) from advertising, and the unacceptability of commercial interference with program content. In this sense there is a clear contrast with Australia and the USA, which rely on identification, without guarantees of editorial independence.

In the USA, transparency is achieved by announcing the source of any paid-for content under the sponsorship-identification rules. These rules, which are all-encompassing and apply equally to typical spot-type advertisements and practices such as product placement, are concerned primarily with making the fact of sponsorship known rather than with any influence the sponsorship relationship may have over programming content. They are intended to ensure that audiences are aware that the programming they hear has been paid for, and to know by whom. A disclosure announcement, broadcast at the time of airing matter for which valuable consideration is paid, will be regarded as sufficient to inform the audience and to ensure that there is a distinction between content which is paid-for and content which is not.

In October 2009 the USA Federal Trade Commission issued revised Guides concerning the use of endorsements and testimonials in advertising. The revised Guides add new examples to illustrate the long standing principle that 'material connections' (sometimes payments or free products) between advertisers and endorsers – connections that consumers would not expect – must be disclosed.⁵⁹

Discussion

The principle that advertising should be clearly distinguishable from other programming is one of the fundamental cornerstones of broadcasting regulation.⁶⁰ In Australia, the issue of advertising has long been explicitly covered by regulation. Prior to the Advertising Standard, this issue was covered in an industry code of practice and prior to that a standard determined by the ABT.

The Advertising Standard was determined in the absence of specific community attitudes research; rather it was determined on the basis of evidence that licensees were promoting sponsors' and advertisers' products and services in a manner that was not clearly distinguishable as advertising. It recognises that it is possible to surreptitiously promote an organisation, product, service, belief or course of action – that is, in a manner that is not clearly distinguishable as advertising.

Over the life of the Advertising Standard, the ACMA and its predecessor (the ABA) have investigated a number of matters relating to the separation of advertising from other program content. Matters concerning the separation of advertising from other program content continue to arise, albeit in small numbers.

The threshold issue for consideration as part of this review is the extent to which some form of regulation continues to be necessary in order to ensure that commercial radio licensees are responsive to community concerns about advertising.

A further issue for consideration is whether the requirement to distinguish advertising from other program content, as provided by the Advertising Standard is the most appropriate, effective and efficient way of encouraging commercial radio licensees to respect community standards. In January 2009 CRA released Draft Codes of Practice

⁵⁸ Product placement is the inclusion of, or a reference to, a product or service within a program in return for payment or other valuable consideration to the program maker or broadcaster (or any representative or associate of either). Prohibition of product placement has been a longstanding policy, recently under review.

⁵⁹ FTC, 16 CFR Part 255, *Guides Concerning the Use of Endorsements and Testimonials in Advertising* available at <http://www.ftc.gov/opa/2009/10/endortest.shtml>.

⁶⁰ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 96.

and Guidelines for public consultation, which proposed to regulate for integrated advertising as follows:

a licensee may broadcast an advertisement that is integrated within the content of a program (in-program advertisement) and in a manner which is not clearly distinguishable from other program content of the relevant program, if the licensee ensures that a general disclosure announcement is made at the beginning or the end of the relevant program.⁶¹

The relative strengths and weaknesses of relaxing the requirement that advertisements be distinguishable relate to whether commercial radio listeners are able to know who is seeking to persuade them. Whilst relaxing the requirement to a general disclosure approach may reduce listeners' ability to distinguish between advertisements and other program material, such an approach may enable industry to explore new and innovative ways of advertising whilst providing listeners with a degree of transparency.

Should it be considered that regulation is necessary, the review will consider the extent to which the current mechanism continues to be the most appropriate response. Three types of regulatory mechanism are available under the Act:

- > codes of practice developed by groups representing commercial radio licensees;
- > program standards developed by the ACMA; and
- > licence conditions imposed by the ACMA.

Details of each of these regulatory mechanisms and their respective enforcement provisions are set out in Attachment A.

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)?

3.6 Scope of regulation

3.6.1 Program formats

Research and data

Community attitudes

As noted in Chapter 2, radio listeners place considerable importance on being able to make a clear distinction between advertising and other program material, especially within the context of current affairs programs. Two-thirds of commercial radio listeners believe that a clear distinction between advertising and other content is 'extremely' or 'very' important in current affairs programs, while a significantly lower 47 per cent said this about non-current affairs programs.⁶²

There is also substantial awareness around the issue of commercial influence on current affairs programs, with 43 per cent of commercial radio listeners believing that *advertisers*

⁶¹ CRA, Draft Code of Practice 3: *Advertising, Review of the Commercial Radio Codes of Practice – Public Consultation*, January 2009. The revised Codes of Practice (registered February 2010) do not contain this proposal, which is being considered in the review of the commercial radio standards.

⁶² ACMA (2010) *Community Attitudes to Radio Content*.

or sponsors influence the content of current affairs commentary, discussion or talkback on commercial radio.⁶³

International approaches

The international survey of regulation found that in the USA, the practice of 'payola' (the unreported payment to, or acceptance by, employees of broadcast stations, program producers and program suppliers of any money, services or valuable consideration to achieve airplay for any programming) has often arisen with regard to the promotion of music. In 2005 a major investigation into payola practices was carried out by the FCC, leading to four of the largest radio groups in the USA consenting to make payments to the US Treasury totalling \$US12,500,000. The companies were also required to institute detailed compliance measures.⁶⁴

Discussion

Unlike the Disclosure Standard, which applies only to licensees who broadcast current affairs programs, the Advertising Standard applies to all commercial radio broadcasting licensees, irrespective of program format. As such, it applies to a diverse range of news and current affairs programs (including talkback), as well as formats including breakfast, music or sports programs.

On this basis, where the presenter of a music program receives valuable consideration from a record label to promote a particular artist, for example, the promotion must be presented in such a manner that the reasonable listener is able to distinguish the advertising from other program material.

Further, the Advertising Standard makes no distinction between presenter and licensee advertising arrangements – it includes all advertisements where there is a causal link between payment of consideration and the advertisement being broadcast. Advertisements must be distinguishable whether consideration for the material broadcast has been provided to a licensee or to a presenter.

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

3.6.2 Distinguishing advertisements

The Advertising Standard does not include any detailed requirements to ensure separation of advertising and programming content, or prescribe the manner in which licensees are to ensure that advertisements are distinguishable from other program material. There is a range of cues by which advertising may be made distinguishable as such, however, if there is any possibility of a listener confusing the advertising and program material, currently the licensee should err on the side of explicit on-air identification of advertising matter.

Research and data

Community attitudes

Survey research conducted by the ACMA⁶⁵ presented respondents with six audio clips of different advertising practices that could be broadcast on commercial radio. The results indicate that certain practices may limit listeners' ability to distinguish advertising from other program material.

⁶³ ACMA (2010) *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*.

⁶⁴ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

⁶⁵ ACMA (2010) *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio*.

Advertising practices that are most difficult to distinguish

Survey respondents found that some advertising practices that might be broadcast on commercial radio are more difficult to identify than others.

In response to hearing audio examples of different advertising practices, a substantial proportion of the commercial radio listeners surveyed had difficulty identifying advertising material in three out of the six clips presented.

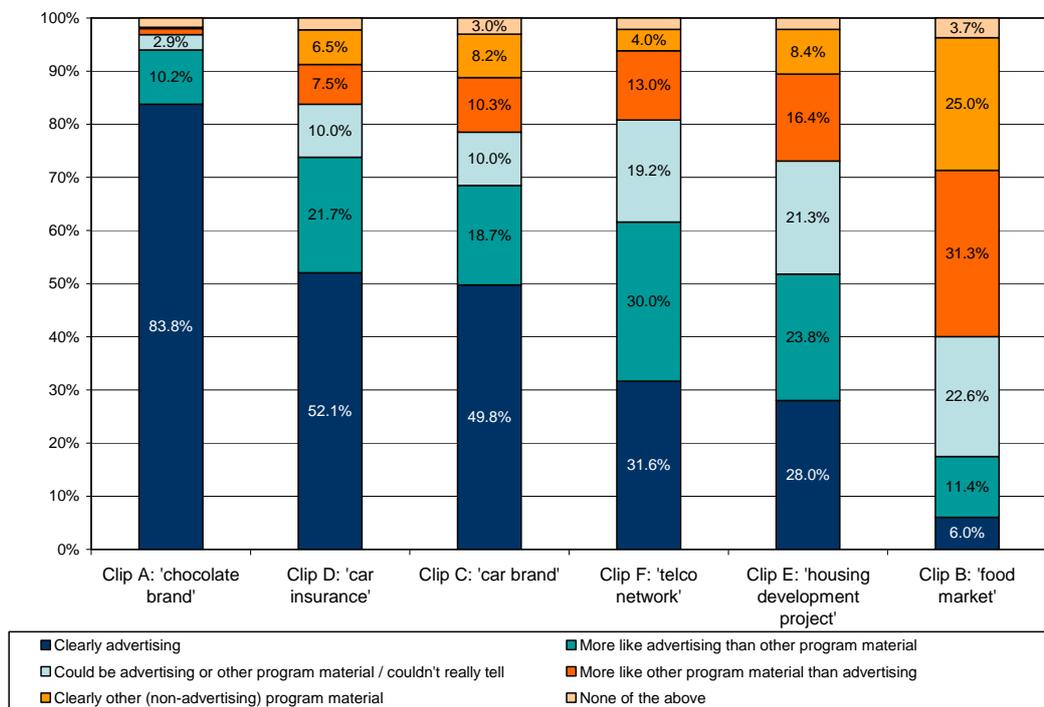
1. Greatest uncertainty was evident for a talkback segment where a caller and the presenter discussed, and gave favourable information about, a particular food market—79 per cent of commercial radio listeners were either uncertain or regarded this example as other program material (17 per cent identified it as ‘clearly’ or ‘more like’ advertising).
2. Views were almost equally polarized for a clip with commentary and an interview between the presenter and a representative of a housing development project. In this clip, the representative responds favourably to questions about the development and gives details of a promotional open day at the end of the clip—46 per cent were either uncertain or saw it as other program material (52 per cent identified it as advertising).
3. The third example was a commentary and interview between the presenter and a senior representative of a telecommunications company. They discuss features of a new mobile phone network and describe how coverage is superior to the older network—36 per cent were either uncertain or thought it was other program material (62 per cent identified it as advertising).

Compared with the other examples that were easier to identify as advertising, the above three examples were less structured (without signals such as contact details and a scripted ‘feel’), and more interactive and multi-faceted—in their use of talkback, expert interviews, presenter commentary and discussion.

The advertising practices that were easiest to identify were ‘live reads’ where a presenter or presenters promote products or services themselves, possibly reading from a pre-prepared script. Between 69 per cent and 94 per cent of respondents considered these examples as either ‘clearly’ or ‘more like’ advertising.

Figure 9 shows that almost all of the surveyed commercial radio listeners (94 per cent) were able to distinguish as advertising a live read for a brand of chocolates that was broadcast between two advertisements during a commercial FM breakfast program (clip A). Least distinguishable as advertising (17 per cent) was a clip involving a discussion with a talkback caller about a particular food market where the caller provides favourable information about the food market with the presenter’s encouragement (clip B).

Figure 9 Comparison of listeners' ability to distinguish advertising from other program material from audio clips, 2009



Base: All commercial radio listeners aged 18+ years N=1,214

Source: ACMA (2010) Listener attitudes to advertising, sponsorship and influence on commercial radio.

Clip A: live read by two presenters who promote a particular brand of chocolate between two advertisements.

Clip B: talkback caller discussion where caller gives favourable information about a particular food market with the presenter's encouragement.

Clip C: live read by a traffic news presenter who promotes a sale for a particular brand of car at end of traffic report.

Clip D: live read by talkback presenter about car insurance discounts, presented directly after editorial commentary on national economic issues, where the benefits of a particular brand and contacts are provided.

Clip E: commentary and interview between a presenter and housing development representative, where the representative responds favourably to questions about the development and gives details of an open-day.

Clip F: commentary and interview between a presenter and a senior representative of a telecommunications company, discussing the features of a new mobile phone network and how coverage is better than the older network.

In general, the less structured (without signals that cue listeners to advertising), more interactive and multi-faceted clips—that included presenter commentary, discussion, interviews and talkback—were more difficult for listeners to discern as advertising.

Common signals and cues that were used to distinguish advertising included the use of brand or product names, repetition of those names, provision of company contact details, overly detailed, positive or unbalanced discussions or descriptions, and having a scripted or artificial feed (including a presenter's tone of voice).

The advertising practices that were easiest to distinguish were live reads, possibly read by a presenter from a pre-prepared script, where between 69 per cent and 94 per cent of respondents considered these examples as either 'clearly' or 'more like' advertising.

Focus group participants were also generally confident that they could recognise advertising in live reads. However some said that it was often initially hard to tell when a presenter moved from editorial commentary directly into a 'live read', especially if the product or service brand and contact details were mentioned toward the end of a live

read. Transparency in advertising was considered important. Overall, participants thought that it was acceptable for advertising or sponsored material to be presented in a variety of different forms on commercial radio, as long as it was clearly identified as such.⁶⁶

International approaches

The review of international regulation indicates that some jurisdictions seek an enhanced form of transparency by imposing detailed rules to ensure the separation of advertising and programming content.⁶⁷ In the UK, Canada and Ireland, general rules impose an obligation on licensees to ensure that advertising and other content is readily distinguishable. The UK and Ireland also provide more detailed rules on what might be required to ensure that advertising and other content are able to be distinguished. Thus, these jurisdictions require an enhanced form of transparency by imposing rules to ensure separation.

The UK, in particular, has a suite of rules that address a number of radio-specific issues in relation to advertising. Specific rules cover presenter-read advertisements, whether read live or pre-recorded. Presenters and newsreaders may voice advertisements provided that a proper distinction is made between programming and advertising. However, they must not advertise products that may be seen to compromise the impartiality of their programming role.

In Ireland a prohibition on any advertiser or sponsor exercising any editorial influence over other programming content protects editorial independence. These rules are reinforced by a further layer of more detailed rules:

- > A prohibition on presenters and other on-air personnel advertising or endorsing any products or services during their program.
- > A prohibition on persons who regularly present news featuring in any commercial communications (this applies to advertising and sponsorship). While this prohibition does not extend to those presenting current affairs programming, the first rule would prevent presenters of all types of programming engaging in any advertising or endorsement of products and services.

Discussion

The Advertising Standard contains a general requirement but no specific provisions for distinguishing advertising. In practice, several factors influence what makes advertisements more or less distinguishable and in determining complaints made under the Advertising Standard, the ACMA considers a range of factors such as tone, style, length, content and context. Factors which may influence the ability of the reasonable listener to distinguish advertising from program material include the practice of presenters voicing advertisements, placement of advertisements within advertising blocks and the use of interview as an advertising vehicle.

Presenter voicing advertisements and placement

A 'live read' is a practice whereby a presenter voices scripted promotional material during a live-to-air broadcast. In such a situation, the listener may mistakenly believe that the material expresses the personal opinion of the presenter. As an industry publication recognises: 'On-air personalities can add a special kind of sales appeal to your store information. People trust the announcers they hear on radio'.⁶⁸

⁶⁶ ACMA (2006) unpublished research on community attitudes to sponsorship of news and current affairs programs on commercial radio.

⁶⁷ ACMA (2010) *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, prepared by Professor Lesley Hitchens, University of Technology, Sydney.

⁶⁸ *Building Your Business With Radio*, obtained in February 2010 from CRA website at http://www.commercialradio.com.au/index.cfm?page_id=1023.

Some programs make a clear distinction between sponsored content and host commentary by use of a brief music theme which allows listeners to recognise the end of a block of advertisements and the start of the host's discussion. Other cues that may be employed in a variety of ways to cue listeners to the commercial nature of content include the use of advertising jingles or the mention of a phone number, web address or store location for example. Other cues that might also suggest an advertisement are mentions of slogans, use of music, and a use of language particular to advertising.

Live reads may be more likely to be recognised as a form of sponsored content where they are broadcast within the context of a block of advertisements and are read with a tone and pitch that might be typical of a person reading aloud. Live reads may be less likely to be distinguished where they are placed within current affairs discussion rather than in blocks of advertisements; they use scripts that include phrases used in host commentary; or they make no distinguishable change in the tone or style relative to the host commentary.

Interviews

The 'paid interview' is a practice where an advertiser pays a licensee or presenter in order for an on-air interview for the purpose of promoting the advertiser's products or services. The interview also often includes scripted segments similar to live reads. The paid interview is potentially more deceptive than the standard live read because of the interaction between the presenter and the interviewee and the length of this type of material can contribute to it seeming like program material as opposed to advertising. A paid interview also lends itself to being aired during 'program time' as opposed to being aired within an advertising block.

In a recent ACMA investigation into a paid interview about an 'Open Day' for a housing development conducted between the presenter of a talkback program and the Managing Director of the housing development, the ACMA considered the content, format and placement of the interview, as well as matters of context – that is, the material broadcast before and after the material in question.⁶⁹ In finding that the paid interview was an advertisement that was not distinguishable, and in breach of the Advertising Standard, the ACMA noted a range of elements that marked the content as commercial in nature as well as other factors that, in the ACMA view, would suggest to the reasonable listener that the content was program material rather than paid advertising.

Elements that marked the content as commercial in nature included detailed information about the time and location of the 'Open Day'. Elements making it difficult to distinguish the advertising content included the placement of the advertisement in relation to other program material; the live-to-air nature of the interview and its duration (five minutes); the current affairs style and tone of the advertisement which framed the advertisement as an issue related to recent local government elections; and the lead-in to the interview where the presenter referred listeners back to a previous interview (which was not paid advertising) about the same issue. Weighing up the facts, the ACMA was of the view that, as a result of the mix of production elements – placement, style, tone, format and content – the advertisement for the housing development, comprising and interview between the presenter and the Managing Director, was presented in such a manner that the reasonable listener would not have been able to distinguish it from other program material.

⁶⁹ ACMA (2009) *Investigation Report No. 2180 into Prime Radio (Cairns-AM) Pty Ltd (4EL – Easy Mix 846) and The John MacKenzie Show*.

-
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)?
-

3.7 Operational issues

3.7.1 Definition of ‘advertisement’

The Advertising Standard contains defined terms which give rise to issues for consideration in the review. The ACMA will consider the appropriateness, effectiveness and efficiency of defined terms such as ‘advertising’ and ‘consideration’, taking into account contemporary advertising and sponsorship practices.

Research and data

Recent broadcasts demonstrate that certain promotional material may be unregulated (and so not required to be distinguishable under the Advertising Standard). Certain practices raise questions about what constitutes advertising on commercial radio in the contemporary environment.

As illustrated by the ACMA’s recent investigation into 4EL Easy Mix 846 and the John MacKenzie Show, whether similar material broadcast on consecutive days is advertising or not may depend on whether consideration for the broadcast of the material has been provided. This investigation demonstrates the limitation that may be imposed by defined terms in the Advertising Standard, and practical issues associated with establishing whether there is consideration for the broadcast of particular material.⁷⁰

Recently, the ACMA considered the application of the Advertising Standard to an arrangement between the Austereo network and an advertiser, the Advanced Medical Institute (AMI), after the ABC Television program, *Media Watch*, raised questions about commercial arrangements that might have influenced the content of an interview that dealt with the services offered by AMI, broadcast on the Kyle and Jackie O program.⁷¹ In response to the ACMA’s inquiries, the licensee indicated that while there was an advertising agreement between Austereo and AMI, there was no payment for the particular interview broadcast on that program at that time.

Similarly, the ACMA inquired into arrangements concerning 2GB and David Jones in relation to the David Jones American Express card.⁷² In response to the ACMA’s inquiries, the licensee indicated that the material did not fall within the definition of ‘advertisement’ because consideration had not been provided at the time the promotional material was broadcast, and the standard refers to consideration ‘that has been provided’.

⁷⁰ ACMA (2009) *Investigation Report No. 2180 into Prime Radio (Cairns-AM) Pty Ltd (4EL – Easy Mix 846) and The John MacKenzie Show*.

⁷¹ Media Watch (2009) *Want Longer Lasting... Interview? Call Kyle and Jackie O* – available at <http://www.abc.net.au/mediawatch/transcripts/s2586347.htm>

⁷² Media Watch (2008) *Plastic Too Fantastic* – available at <http://www.abc.net.au/mediawatch/transcripts/s2383465.htm> and Media Watch (2009) *Plastic Too Fantastic (Part two)* – available at <http://www.abc.net.au/mediawatch/transcripts/s2486629.htm>.

Discussion

‘Advertisement’

The definition of ‘advertisement’ under the Advertising Standard is comprised of two limbs: (a) drawing public attention to, or promoting; and (b) consideration for the broadcast of that material. The first limb is the promotional element of the definition. The second limb contains two additional concepts – consideration, and a causal link to the advertising material broadcast.

Advertisement means

- A. material broadcast a substantial purpose of which is to draw public attention to, or promote, directly or indirectly, an organisation, a product, service, belief or course of action; and
- B. consideration has been provided by or on behalf of an organisation or a supplier of the product or service to the licensee, or to a presenter or part-time presenter, or an associate or a presenter or part-time presenter for the broadcast of that material.

Thus, the second limb confines application of the Advertising Standard to instances where consideration has been provided for the broadcast of the particular advertising material. ‘Consideration’ is defined in the standard as follows:

Consideration means any valuable consideration other than the provision, at no charge, of a product or service solely for review.

‘Consideration’

The term ‘advertisement’ is not defined in the Act or the Codes of Practice. At common law, the word ‘advertisement’ has been interpreted as encompassing any material...designed or calculated to draw public attention regardless of whether the broadcast... serves a purpose other than advertising’.⁷³ Furthermore, it is not necessary that the broadcaster has received payment or other consideration for the broadcast of material for it to constitute an advertisement.⁷⁴

At the time of the Commercial Radio Inquiry, the Panel encountered a difficulty with the breadth of the common law definition of advertisement when interpreting Code 3 – Advertising. The absence of a requirement for valuable consideration at common law meant that merely drawing attention to or promoting a product or service would constitute advertising. The Panel found that:

Were the Authority to apply the common law definition of an advertisement, any material that merely ‘drew public attention to...a product’ would breach the Code, unless it were part of a program that was clearly an advertisement. Application of the common law approach to Code 3 would appear to proscribe a great deal of legitimate promotion of, or publicity for, goods and services provided as part of magazine programs, interviews, reviews, opinion pieces or in other ways. This does not appear to be the intention of Code 3.

The Panel believes that Code 3 is meant to apply only to paid advertisements and has read the term accordingly.⁷⁵

⁷³ Deane and Toohey JJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR, 106 at 171 as extracted in *ABA (2000) Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney Pty Limited*, 28.

⁷⁴ McLachlan and Mallam, *Media Law and Practice* as extracted in *ABA (2000) Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney Pty Limited*, 28.

⁷⁵ *ABA (2000) Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney Pty Limited*, 28.

With the introduction of the Advertising Standard, the ABA applied a new definition of ‘advertisement’ to commercial radio broadcasting. The ABA’s definition is based on the common law meaning of the term to ‘draw public attention to, or promote’ however, it was considered that regulation for appropriate community safeguards only needed to cover instances where consideration was provided for the broadcast of particular advertising material. Thus, the second limb of the definition of ‘advertisement’ operates to confine the application of the Advertising Standard to such instances. Under common law, the concept of consideration is broad, extending to rights, interests, profits or benefits owed to one party; or detriment, loss or responsibility, given, suffered or undertaken by the other.⁷⁶

Material broadcast

The second limb of the definition of ‘advertisement’ may limit the application of the Advertising Standard to instances where consideration was provided for the particular advertising material broadcast. The ACMA is aware of issues which indicate that the definition may not sufficiently take account of contemporary advertising and sponsorship practices – where it is not clear whether there is a causal link between the payment of consideration and the advertisement being broadcast.

The requirement that consideration has been provided for the broadcast of particular advertising material may afford scope for certain licensee and advertiser/sponsor commercial arrangements to fall outside the application of the Advertising Standard.

For example, the potential is created for a broad arrangement whereby a presenter agrees to provide a package of ‘live reads’ and positive mentions. In such a situation, it may be difficult to connect the consideration provided to any particular piece of program material, and may, depending on the particular arrangement, result in some instances falling within the definition of as advertisement and some instances being characterised (perhaps for want of sufficient evidence) as unpaid (and therefore unregulated) promotion.

In particular, in relation to advertiser/licensee package agreements, one issue is how the concept of ‘advertisement’ should apply in a commercial environment where, to attract and retain advertisers, licensees or presenters may supply additional promotional material not expressly enumerated in the advertising agreement (for example ‘freebies’). The commercial environment may not fully align with community safeguards with respect to promotional and commercially-related material.

Finally, the ACMA is also aware of the practice of advertisers supplying program content by way of representatives appearing as guest presenters; for example, a segment in an evening talkback program in which a representative from a travel agency appears as a studio guest for an extended period. In an example examined by the ACMA, the guest provided general information on travel destinations, crossed to an employee on location overseas, advertised deals that the agency was offering customers, and encouraged listeners to call the agency on a telephone number provided. In another example, a finance expert provided finance information and the segment concluded with the mention of a series of seminars that the expert was providing.

-
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?
 24. The ACMA invites comment on any operational or drafting issues or matters requiring clarification or improvement in the Advertising Standard.
-

⁷⁶ *Currie v Misa* (1875) L.R. 10 Ex 162, per Lush.

4. Issues relating to the Compliance Program Standard

4.1 Objective

The object of the Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 (the Compliance Program Standard) is to ensure community safeguards operate effectively by promoting compliance with the requirements of the Act, standards and the codes.

The standard applies to all commercial radio broadcasting licensees.

4.2 Current requirements

The Compliance Program Standard requires licensees to formulate, implement and maintain a compliance program to ensure their compliance with the requirements of the Act, the standards and the codes.

The Compliance Program Standard also sets out the elements which a licensee's compliance program must contain.

4.3 Background to current requirements

During the Commercial Radio Inquiry the ABA examined four licensees' compliance with their regulatory responsibilities. As a result, the ABA found:

- > a large number of serious Code breaches;
- > a high degree of ignorance about the Codes on the part of presenters and producers; and
- > a low degree of commitment on the part of licensees and the industry in general to implementing and enforcing the Codes in any thorough manner.

The ABA found that basic elements of code implementation, including education, practice and regular reinforcement, were either absent or minimally addressed by the licensees under consideration.⁷⁷ The ABA found that reference to the codes was not a regular occurrence in the day to day operations, and that the codes were not understood by those persons expected to implement them, such as presenters or program producers.⁷⁸ The Inquiry found that instead, in most cases, steps towards implementation of licensees' obligations were taken only 'in response to actual or threatened regulatory intervention'.⁷⁹

It is clear that the community cannot be confident that presenters will comply with the requirements of the Codes in the absence of knowledge and understanding of them. ... the Codes appear to have failed as codes per se, as they are not providing any meaningful framework for the day to day conduct of the commercial broadcasting industry.

This issue goes to the fundamental question of the value of the experience of self-regulation in the commercial radio industry and the adequacy of the existing codes of practice as an effective regulatory system. The Authority is concerned that there appears to be a complete lack of a formal system within the industry to make staff aware of the

⁷⁷ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 75.

⁷⁸ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 77.

⁷⁹ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 75.

regulatory framework within which they operate and to maintain and reinforce that system.⁸⁰

In response to these findings, the ABA determined the Compliance Program Standard, citing research that showed that, where it is possible to entrench a code and have it operate as a guide to behaviour, regulatory costs and burdens are reduced rather than increased, and the industry is more accountable to the community.⁸¹

4.4 Issues for review

This is the first substantive review of the Compliance Program Standard since it was introduced. The ACMA has identified the following issues as appropriate for consideration:

- > Need for any regulation – Whether regulation designed to ensure industry compliance with regulatory obligations remains necessary and, if so, which regulatory model is most appropriate.
- > Scope of any regulation – If there remains a need for regulation, the type of regulatory obligations that should be addressed.
- > Operational issues – If there remains a need for regulation, how any regulation should be put into operation, including the appropriate elements for a compliance program and any other operational or drafting improvements.

Each issue is considered in turn below. Depending on the model for regulation adopted (if any) there is a range of further subsidiary issues concerning implementation detail. For example, the appropriate regulatory obligations to address, the appropriate elements for a compliance program and any other operational or drafting improvements.

The sections entitled 'operational issues' are in many cases framed in terms of the way those matters are addressed, and have worked, under the current Compliance Program Standard. However, this should not be taken as a preference by the ACMA that the review is looking to amend the current Standard. Rather, this approach towards the 'operational issues' has been adopted for convenience, and because the ACMA is assuming that many submitters will be familiar with, or want to comment on, the issues in that way. Submitters should, however, feel free to address underlying issues in a more general way consistent with their views on any alternate models of regulation.

4.5 Need for regulation

The Compliance Program Standard requires the licensees to develop, implement and maintain a compliance program inclusive of a written compliance policy, staff training, monitoring and an annual audit.

Formal compliance regulation is one possible response to the key necessity for industry to understand, respect, implement and enforce codes of practice if there is to be successful co-regulation of commercial radio programming. Distinct from compliance with ad hoc regulatory obligations, general compliance-focused regulation goes to the effective operation of the system of co-regulation in broadcasting.

⁸⁰ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 99-100.

⁸¹ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 75-78 and 100.

Research and data

Industry survey

In 2009 the ACMA commissioned a survey of the commercial radio industry to consider the appropriateness, effectiveness and efficiency of the Compliance Program Standard. The survey informs the ACMA about matters relating to industry compliance practices as well as the experience and performance of the commercial radio sector in meeting requirements under the Compliance Program Standard.

The survey indicates generally high rates of compliance with the requirement to develop, implement and maintain a compliance program. Table 2 shows that, of the commercial radio licensees that participated in the survey (n=250), almost all have developed and implemented a compliance program (96 per cent) and almost all have maintained a compliance program (95 per cent).

Table 2 Developed, Implemented and Maintained a Compliance Program

	%										
	Total (n=250)	Commercial agreement (n=20!)	Non-Commercial agreement (n=230)	S40 (n=7!)	Non-S40 (n=243)	Independent (n=24!)	Networked (n=226)	Metropolitan (n=50)	Regional (n=192)	Remote (n=5!)	Australia Wide (n=3!)
Developed a Compliance Program	96.0 (n=240)	100 (n=20)	95.7 (n=220)	71.4 (n=5)	96.7 (n=235)	79.2 (n=19)	97.8 (n=221)	96.0 (n=48)	96.9 (n=186)	80.0 (n=4)	66.7 (n=2)
Implemented a Compliance Program	96.0 (n=240)	100 (n=20)	95.7 (n=220)	71.4 (n=5)	96.7 (n=235)	79.2 (n=19)	97.8 (n=221)	96.0 (n=48)	96.9 (n=186)	80.0 (n=4)	66.7 (n=2)
Maintained a Compliance Program	95.2 (n=238)	100 (n=20)	94.8 (n=218)	71.4 (n=5)	95.9 (n=233)	79.2 (n=19)	96.9 (n=219)	94.0 (n=47)	96.4 (n=185)	80.0 (n=4)	66.7 (n=2)

Source: ACMA (2010) *Industry Compliance with the Compliance Program Standard*.

Total: Commercial radio licensees represented in survey (n=250)

Commercial agreement: licensee with presenter/s with commercial agreement/s for the purpose of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000.

Non-Commercial agreement: licensee without presenter/s with a 'commercial agreement', as defined above.

S40: licensee of commercial radio broadcasting licence allocated under section 40 of the Broadcasting Services Act 1992. Section 40 licences are restricted licences which operate outside of the broadcasting services bands.

Non-S40: licensee of commercial radio broadcasting licence allocated under section 36 or 39 of the Broadcasting Services Act 1992. Section 36 (and supplementary section 39 licences) operate on AM or FM bands within the broadcasting services bands.

Independent: licensee that is not 'networked', as defined below. This includes two or more licences owned by the same entity in one licence area.

Networked: licensee that is one of two or more licensees owned by the same entity across two or more licence areas (there is a control cap of two licences in any one licence area).

Metropolitan: licensee in metropolitan area

Regional: licensee in regional area

Remote: licensee in remote area

Australia Wide: licensee in Australia wide s40 licence area as defined by the ACMA (Area-ID:802) in terms of areas defined by the Australia Bureau of Statistics for the purposes of the Australian Census. Section 40 licences are restricted licences which operate on the AM band outside of the Broadcast Services Bands (BSB).

Table 3 shows that compliance with the six requisite elements of the Compliance Program Standard varies:

Table 3 Six Elements of the Compliance Program Standard

	%										
	Total (n=250)	Commercial agreement (n=20!)	Non- Commercial agreement (n=230)	S40 (n=7!) #	Non-S40 (n=243)	Independent (n=24!) #	Networked (n=226)	Metropolitan (n=50)	Regional (n=192)	Remote (n=5!)	Australia Wide (n=3!) #
Have a Formal Written Compliance Policy	69.2 (n=173)	90.0 (n=18)	67.4 (n=155)	57.1 (n=4)	69.6 (n=169)	70.8 (n=17)	69.0 (n=156)	62.0 (n=31)	70.8 (n=136)	80.0 (n=4)	66.7 (n=2)
Appointed a Senior Compliance Manager or Officer	78.0 (n=195)	95.0 (n=19)	76.5 (n=176)	71.4 (n=5)	78.2 (n=190)	79.2 (n=19)	77.9 (n=176)	64.0 (n=32)	81.8 (n=157)	80.0 (n=4)	66.7 (n=2)
Copy of Written Policy Provided to All Staff	82.8 (n=207)	95.0 (n=19)	81.7 (n=188)	57.1 (n=4)	83.5 (n=203)	62.5 (n=15)	85.0 (n=192)	94.0 (n=47)	81.3 (n=156)	40.0 (n=2)	66.7 (n=2)
Developed a Formal Training Program	86.0 (n=215)	95.0 (n=19)	85.2 (n=196)	28.6 (n=2)	87.7 (n=213)	58.3 (n=14)	88.9 (n=201)	96.0 (n=48)	85.9 (n=165)	40.0 (n=2)	0.0 (n=0)
Have a Monitoring Strategy for the Compliance Program	78.8 (n=197)	90.0 (n=18)	77.8 (n=179)	71.4 (n=5)	79.0 (n=192)	79.2 (n=19)	78.8 (n=178)	84.0 (n=42)	77.6 (n=149)	80.0 (n=4)	66.7 (n=2)
Conducted an Annual Audit of Compliance	70.4 (n=176)	80.0 (n=16)	69.6 (n=160)	28.6 (n=2)	71.6 (n=174)	45.8 (n=11)	73.0 (n=165)	92.0 (n=46)	64.6 (n=124)	80.0 (n=4)	66.7 (n=2)

Source: ACMA (2010) *Industry Compliance with the Compliance Program Standard*.

Total: Commercial radio licensees represented in survey (n=250)

Commercial agreement: licensee with presenter/s with commercial agreement/s for the purpose of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000.

Non-Commercial agreement: licensee without presenter/s with a 'commercial agreement', as defined above.

S40: licensee of commercial radio broadcasting licence allocated under section 40 of the Broadcasting Services Act 1992. Section 40 licences are restricted licences which operate outside of the broadcasting services bands.

Non-S40: licensee of commercial radio broadcasting licence allocated under section 36 or 39 of the Broadcasting Services Act 1992. Section 36 (and supplementary section 39 licences) operate on AM or FM bands within the broadcasting services bands.

Independent: licensee that is not 'networked', as defined below. This includes two or more licences owned by the same entity in one licence area.

Networked: licensee that is one of two or more licensees owned by the same entity across two or more licence areas (there is a control cap of two licences in any one licence area).

Metropolitan: licensee in metropolitan area

Regional: licensee in regional area

Remote: licensee in remote area

Australia Wide: licensee in Australia wide s40 licence area as defined by the ACMA (Area-ID:802) in terms of areas defined by the Australia Bureau of Statistics for the purposes of the Australian Census. Section 40 licences are restricted licences which operate on the AM band outside of the Broadcast Services Bands (BSB).

Many licensees were unable to identify any benefits from the Compliance Program Standard. For those that did, the benefits identified were mainly that it improves staff awareness of their obligations, particularly through training; and assists with compliance with the codes. The main drawback of the Compliance Program Standard was identified as the time and resources required to comply with the standard.⁸²

⁸² ACMA (2010) *Industry Compliance with the Compliance Program Standard*, prepared by DBM Consultants.

Licensees who were not compliant with the Compliance Program Standard felt that it was unnecessary or irrelevant to their particular station or network. In many cases, this was largely because they felt they were compliant with aspects of the standard through ad-hoc dealings with issues that arise, rather than having a formal policy in place. Other reasons given for non-compliance were a lack of awareness of what is required, being too busy or a lack of available resources.⁸³

Discussion

As noted above, the industry survey indicates generally high rates of compliance with the requirement to develop, implement and maintain a compliance program and varying rates of compliance with the requisite elements of the compliance program.

The ACMA is aware, however, that compliance with the Compliance Program Standard does not ensure a licensee's compliance with its other regulatory obligations. The ACMA's 2007 investigation into 2UE found breaches of the Disclosure Standard despite the licensee fulfilling its obligation under the Compliance Program Standard.⁸⁴ As the Federal Court of Australia subsequently noted, during the period in which Radio 2UE repeatedly contravened the Disclosure Standard, the licensee had a compliance policy and had provided training to the presenter and all staff working on his program, in addition to the annual training they received.⁸⁵

The threshold issue for consideration as part of this review is the extent to which some form of regulation designed to ensure that commercial radio licensees comply with their obligations under the codes, standards and the Act remains necessary.

A further key issue is whether industry-wide regulation of compliance continues to be necessary. An alternative approach, for example, would be to limit the application of the Compliance Program Standard to only those licensees who are found to have breached the Act, standards or codes. This could be achieved, for example, by the imposition of an additional licence condition on those licensees.

It is instructive to consider that, although the Commercial Radio Inquiry investigated a small number of licensees, an industry-wide standard was determined to be the most appropriate regulatory response. The ABA highlighted its risk-management approach to regulation as follows:

As the Key Centre for Ethics, Law, Justice and Governance pointed out in its submission to the Productivity Commission, it is appropriate and preferable to regulate in response to perceived risk, rather than merely reacting to particular wrongdoing. There is a clear and real risk identified here that the Codes are not being properly implemented or supported, and that they are therefore not providing appropriate safeguards for the community.⁸⁶

The benefits of regulating for compliance relate to entrenchment of the appropriate function of codes of practice across the commercial radio industry, particularly where an industry culture that respects and enforces codes has, in the past, found to be lacking. Such approach may be considered as relating to prevention, rather than cure. In addition

⁸³ ACMA (2010) *Industry Compliance with the Compliance Program Standard*, prepared by DBM Consultants.

⁸⁴ ACMA (2007) *Investigation Report No. 1790 into Radio 2UE Sydney Pty Ltd and The John Laws Morning Show*, 2.

⁸⁵ *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754, 39.

⁸⁶ ABA (2000) *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority*, 100. In the context of the Disclosure Standard the ABA's view was that a sufficiently large sector of the industry (taking ratings and program syndication into account) and a sufficiently large number of breaches (in excess of 100) allowed it to draw the conclusion that there was convincing evidence of the failure of the industry code of practice to provide appropriate community safeguards (at 88).

to raising awareness of regulatory obligations and guiding industry on practical steps required to reinforce activities that encourage effective compliance, a formal requirement for compliance provides the ACMA with a useful monitoring, investigation and compliance tool. For example, if the ACMA makes preliminary enquiries about a matter of concern which do not amount to a breach of a regulatory obligation, a licensee may volunteer to revise their compliance policy to address the matter of concern. In the event of breach of regulatory obligations, the ACMA may utilise the compliance policy in any ensuing enforcement action.

A drawback of regulating for compliance is that may increase the regulatory burden on licensees, particularly those with limited resources, even though effective compliance in practice may require steps similar to those contained in the Compliance Program Standard.

Should it be considered that regulation is necessary; the review will consider the extent to which the current mechanism continues to be the most appropriate response. Three types of regulatory mechanism are available under the Act:

- > codes of practice developed by groups representing commercial radio licensees;
- > program standards developed by the ACMA; and
- > licence conditions imposed by the ACMA.

Details of each of these regulatory mechanisms and their respective enforcement provisions are set out in Attachment A.

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)? If not, what approach may be applied?

4.6 Scope of regulation

4.6.1 Regulatory obligations

Although it is commonly associated with the disclosure and advertising obligations of the Disclosure Standard and the Advertising Standard, the Compliance Program Standard deals with compliance with all the regulatory obligations with which commercial radio licensees must comply.

Research and data

During the period 1 July 2005 and 31 December 2009, the ACMA received approximately 400 complaints about commercial radio licensees in relation to codes, standards and licence conditions under the Act.⁸⁷ During the same period, the ACMA completed approximately 90 investigations, the majority of which relate to the codes. These investigations resulted in 19 breach findings under the codes, three breach findings under the standards and two breach findings relating to other licence conditions under the Act.⁸⁸

Discussion

As evident from the ACMA's investigations, the majority of compliance matters relate to matters covered by the codes of practice. When investigating matters under the codes, the ACMA may request a licensee to provide the ACMA with operational policies and procedures, such as a formal written compliance policy or details of a formal training

⁸⁷ Figure excludes general enquiries and complaints not relevant to the ACMA's functions.

⁸⁸ Note that investigations under the commercial radio standards conducted prior to 2005 resulted in two breach findings.

program for all members of staff. On review of those policies and procedures, the ACMA may request the licensee to modify its policies and procedures as part of the remedy and to deter further breaches.

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?

4.7 Operational issues

4.7.1 Elements of compliance program

The Compliance Program Standard also sets out the elements which a licensee's compliance program must contain:

- > a formal written compliance policy
- > designation of a senior officer to take responsibility for compliance
- > distribution of copies of the policy, standards and codes
- > a formal training program
- > a monitoring strategy
- > an annual audit of compliance.

Several operational issues have been noted over the life of the Compliance Program Standard, some of which may be addressed via drafting improvements.

Research and data

Industry survey

The formal written compliance policies of the licensees surveyed tended to include staff training manuals, copies of the codes, standards and relevant sections of the Act, monitoring strategies (such as audits and reviews), designated officers with responsibility for compliance, and the responsibilities and obligations of individual staff members.

Responsibility for organisational compliance was often allocated to a senior manager who had been at the business for a number of years and had experience in production or operational roles. In some cases the allocation of responsibility had been delayed or left absent due to resignation of the nominated person or organisational restructure.

The majority of licensees surveyed had developed a formal training program, conducted training during induction of new staff members and conducted training with all members of staff at least once a year to inform them about compliance. Training programs tended to be facilitated by a senior staff member. The majority of licensees have also provided copies of the compliance policy as well as relevant codes, standards and the Act to staff at induction or made copies available for staff at the office or electronically on an intranet.

The majority of licensees surveyed had a monitoring strategy for their compliance program which included monitoring of complaints and reports from on-air monitoring by senior staff such as station managers.

Licensees that conducted an annual audit focussed on staff awareness of the issues and, in a few cases, any commercial agreements made, staff awareness and the appropriateness of on-air content. Those licensees that did not conduct an annual audit cited business structure and availability of resources as reasons.

Discussion

The review will consider any operational issues that have arisen in relation to the Compliance Program Standard. Issues of particular interest to the ACMA include the extent to which each element of the standard continues to be appropriate; whether the

obligations attached to each element continue to be appropriate; and whether the introduction of formal regulatory reporting requirements would be appropriate.

Compliance with the Compliance Program Standard is a condition of a commercial radio broadcasting licence. However, there is no requirement that licensees formally report to the ACMA on compliance with any aspect of the Compliance Program Standard despite the compliance program having to contain a formal written compliance policy and an annual audit of compliance. Further, certain elements of the compliance program are not expressly required be in writing or formally signed-off (though this may be an implied requirement).

The ACMA will consider whether the Compliance Program Standard should include the kind of formal reporting requirements found in similar broadcast regulations (for example, the B55 form for the Disclosure Standard; compliance returns for Australian content quotas; children's television standards, local content quotas and annual returns and change notifications under the media control rules).

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

29. The ACMA invites comment on any operational or drafting issues or matters requiring clarification and improvements in the Compliance Program Standard.

Attachment A: Regulatory mechanisms

Community Standards

It is Parliament's intent that 'respect for community standards' by commercial radio licensees is to be encouraged by way of three main regulatory mechanisms so as to meet the objects of the Act. These are:

- > codes of practice developed by groups representing commercial radio licensees;
- > program standards determined by the ACMA; and
- > licence conditions imposed by the ACMA for some licence categories.

Further, it is intended that these standards, codes and licence conditions will be underpinned by robust research on widespread community views as to program content. The ACMA has a range of powers to enable it to deal effectively with breaches of these mechanisms (in particular, the program standards and licence conditions) established by the Act, in a manner commensurate with the seriousness of the breach.

Codes of practice

The Act allows a degree of regulation through industry-developed codes of practice, which allow broadcasters to more directly manage the processes and costs associated with regulating program content.⁸⁹ The Act acknowledges the importance of co-regulation and the responsibilities it directly places on the industry. In this regard, it is expected that relevant broadcasting service industry groups will seek an effective balance between the public interest in meeting prevailing community standards and licensees' desire to provide competitive services.

Commercial radio licensees have the primary responsibility for ensuring that the material they broadcast reflects community standards. Most aspects of program content are governed by codes of practice developed by industry groups representing the various broadcasting sectors. The ACMA registers codes once it is satisfied that broadcasters have undertaken public consultation and the codes contain appropriate community safeguards. Under section 123 of the Act, industry groups have developed codes of practice in consultation with ACMA. The ACMA monitors these codes and deals with unresolved complaints made under them.

The ACMA includes a code in the register of codes of practice only if:

- > it is satisfied that it provides appropriate community safeguards for the matters covered
- > it was endorsed by a majority of providers of broadcasting services in that section of the industry
- > members of the public have been given an adequate opportunity to comment.

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

The ACMA may also accept an enforceable undertaking proffered by a licensee for the purpose of securing future compliance with the code or may impose an additional licence condition under section 43 of the Act requiring a licensee to comply with the codes (for

⁸⁹ Explanatory Memorandum, *Broadcasting Services Bill 1992*, 68.

example, if there is a breach by a number of licensees relating to the same obligation). If a licensee fails to comply with an enforceable undertaking, that undertaking becomes enforceable by the Federal Court. If a licensee fails to comply with a remedial direction civil or criminal penalties may apply.

Program standards

The Act requires the ACMA to develop program standards where codes of practice fail to provide appropriate community safeguards, or where no code has been developed.⁹⁰ If the ACMA is satisfied a code of practice is not operating to provide appropriate community safeguards in relation to a matter, it may determine a new program standard to apply to a particular section of the broadcasting industry. Before determining, varying or revoking a standard, the ACMA must seek public comment on the proposed standard or the variation or revocation.⁹¹

A program standard operates as a licence condition on the whole of a particular section of the broadcasting industry. Unlike codes of practice, compliance with program standards is a licence condition which may attract a civil penalty order if breached.

The following formal enforcement options are available to the ACMA in responding to a breach of a program standard (or licence condition):

- > acceptance of an enforceable undertaking;
- > imposition of an additional licence condition;
- > application to the Federal Court for a civil penalty order;
- > remedial directions;
- > referral to the Director of Public Prosecutions; and
- > suspension or cancellation of licence (s143).

Licence conditions

Alternatively to industry-wide program standards, the ACMA may determine licence conditions specific to one or more licensees. Licence conditions allow the ACMA to impose a higher level of compliance on licensees.

For a licence condition to be imposed under section 43 of the Act, the ACMA first needs to give the licensee written notice of its intention to impose the licence condition; the licensee must be given a reasonable opportunity to make representations to the ACMA in relation to the proposed license condition and the proposed licence condition must be published in the Commonwealth Gazette. The licensee can apply for the ACMA's decision to be reviewed by the Administrative Appeals Tribunal.

The enforcement options available to the ACMA in the event of a breach of a licence condition are as set out in the discussion on program standards above.

If a licence condition is imposed and a licensee breaches it, then as alternatives to suspending or cancelling the licence, the ACMA has power to issue a remedial direction requiring compliance. In the event that the licensee does not comply with a remedial direction, the ACMA may have recourse to the other options outlined above.

⁹⁰ Section 125, *Broadcasting Services Act 1992*.

⁹¹ Section 126, *Broadcasting Services Act 1992*.

Attachment B: Questions for comment

Issues relating to the Disclosure Standard

Need for any regulation

1. What are the issues that regulation in this area should be seeking to address? (In commenting on this, it would be helpful if submitters also had regard to the objects of the Act and the attitudinal research.)
2. Is regulation appropriate, or the best way of addressing the problem(s)? If so, what is the most appropriate regulatory model (please describe key features) for addressing the problem (disclosure, editorial independence, or other approach)? Are there other models or alternatives to regulation that could be considered?
3. If regulation is necessary under any of the models, which of the regulatory mechanisms under the Act (codes, standards, licence conditions) is best deployed?

Scope of any regulation

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?
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 program?
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?
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 a regular interval during the program?
10. Should the form of words to be used in a disclosure announcement be prescribed by regulation? If yes, what is the appropriate form of words?

Operational issues

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?
14. The ACMA invites comment on any operational or drafting issues or matters requiring clarification, or enhancement in the Disclosure Standard.

Issues relating to the Advertising Standard

Need for any regulation

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)?

Scope of any regulation

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

Operational issues

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)?
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?
24. The ACMA invites comment on any operational or drafting issues or matters requiring clarification or improvement in the Advertising Standard.

Issues relating to the Compliance Program Standard

Need for any regulation

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)? If not, what approach may be applied?

Scope of any regulation

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?

Operational issues

28. If any compliance program requirements apply, what elements and reporting requirements would be appropriate?
29. The ACMA invites comment on any operational or drafting issues or matters requiring clarification and improvements in the Compliance Program Standard.