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SUBMISSION BY FAIRFAX RADIO NETWORK

REVIEW OF THE COMMERCIAL RADIO STANDARDS

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

14 May 2010

SUBMISSION BY FAIRFAX RADIO NETWORK

Fairfax Radio Network Pty Ltd (**Fairfax Radio**) is pleased that the Australian Communications & Media Authority (**ACMA**) is conducting a review of the commercial radio standards (**Review**). Fairfax Radio welcomes the opportunity to participate in the Review.

Fairfax Radio operates a network of commercial radio stations in metropolitan and regional areas throughout Australia. The Fairfax Radio network comprises 7 stations which broadcast in metropolitan areas (2UE Sydney, 3AW and Magic 1278 Melbourne, 4BC and 4BH Brisbane, 6PR and 96FM Perth), and 9 regional stations in Queensland and South Australia.

Fairfax Radio understands that the following regulation is to be examined in this Review:

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

(collectively, the **Standards**).

Fairfax Radio supports the reasoning behind the Standards. We recognise the need for regulation to ensure that the objects of the *Broadcasting Services Act 1992 (BSA)* are achieved.

However, Fairfax Radio strongly submits that the Standards place unreasonable burdens on commercial radio broadcasters. Fairfax Radio operates a network of talkback stations, and the Disclosure Standard is particularly relevant to – and onerous for – these stations.

As the ACMA is aware, Fairfax Media Limited acquired the above-listed metropolitan stations from Southern Cross Broadcasting (Australia) Limited (**SCB**) on 9 November 2008. Prior to this acquisition, SCB made a number of submissions to the ACMA (and its predecessor the Australian Broadcasting Authority) to review the Standards, without success.

Fairfax Radio now urges the ACMA to examine the Standards critically with a view to implementing a more realistic balance between achieving the spirit of the Standards and imposing minimal administrative burdens on commercial radio stations, both in management and in programming.

Fairfax Radio strongly urges the ACMA to take into account the comments of our industry body Commercial Radio Australia (CRA), which Fairfax Radio wholly supports, when reviewing and amending these legislative provisions. This will ensure that our radio stations can operate as efficiently and competitively as possible.

A. SUMMARY

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

1. The Standards should be repealed.

- (i) The Disclosure Standard is unnecessarily prescriptive and burdensome. It incorporates no flexibility, is almost impossible to implement and does not reflect the practical reality of commercial radio broadcasting. It fails to comply with section 4 of the BSA, which obliges the ACMA to address public interest considerations "*in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services*".
- (ii) The Advertising Standard is not workable or fair. It fails to comply with section 5(b) of the BSA, which obliges the ACMA to use its powers in a manner that will "*produce regulatory arrangements that are stable and predictable*". The lack of detail in the Advertising Standard means that its interpretation by the ACMA will be unnecessarily subjective, leading to inconsistent and unpredictable outcomes.
- (iii) The Compliance Standard is unnecessary. The industry is obliged by the BSA to comply with the Commercial Radio Codes of Practice (**Codes**) and, in the absence of evidence of non-compliance, there is no justification for maintaining a separate Standard. The recent ACMA compliance audit indicated extremely high levels of compliance across the industry.
- (iv) The Standards were introduced to address concerns arising following the "cash for comment" incidents in 2000. The incidents involved a small number of broadcasters yet resulted in prescriptive legislation imposed on the entire industry. The ACMA should also note that there have been no ongoing issues with any of those broadcasters save one, who has now retired from broadcasting. Therefore, continuation of this regime would not reflect an appropriate risk management approach to regulating the industry.
- (v) There is no evidence of continuing breaches of the Standards.
- (vi) The commercial radio industry is the only industry that is subject to such Standards. The obligations imposed on the television industry are far less prescriptive and are contained in the television codes of practice. The requirements relating to radio should be aligned with those applicable to comparable media platforms. The current lack of parity places the commercial radio industry at a significant disadvantage when competing for advertising revenue.

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

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

¹ Section 125, BSA.

- (ii) Accordingly, the BSA contemplates that, before a Standard is unilaterally imposed by the ACMA, an opportunity is available under the co-regulatory codes of practice system for the introduction of industry codes to provide appropriate community safeguards.
- (iii) After 10 years of relying on the Standards with a high level of compliance and few complaints from the public, it is now appropriate for the ACMA to allow the industry (with the co-regulatory oversight of the ACMA) an opportunity to develop appropriate regulation for inclusion into the Codes.
- (iv) The environment in which the regulation is now operating is very different to that into which it was introduced. Any regulation now needs only to ensure continuing compliance in an industry that is already showing high levels of compliance. This task may be best achieved through provisions in the Codes, rather than through Standards.
- (v) Consistent with this suggested approach, the Productivity Commission recommended that the Disclosure Standard should be incorporated into the Codes and revised to become less prescriptive.

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

- (i) The commercial radio industry has never been given the opportunity to develop codes relating to transparency and the impact of commercial arrangements on editorial content. Fairfax Radio would welcome the opportunity to work with the commercial radio industry to develop codes from first principles, having regard to the ACMA's research and matters raised in the Review.
- (ii) Disclosure, advertising and compliance all have great practical impact on the industry, and workable solutions can only come from a comprehensive understanding of the way in which the industry operates. The industry is best placed to provide a first draft of the new provisions, taking into account the results of this public consultation process.
- (iii) The Standards were introduced to address concerns arising following incidents highlighting a lack of transparency in 2000. While the incidents involved only specific and limited presenters and licensees, the Standards were subsequently imposed on the entire industry, with almost no industry consultation. This has resulted in Standards which are, in part, out of date and unworkable from a practical perspective.
- (iv) The development of provisions that may apply to a broad range of stations – from large metropolitan networks to small independent broadcasters in country Australia – is a complex task, which must be informed by first hand practical experience. Only the industry itself has this level of relevant knowledge.

B. PRODUCTIVITY COMMISSION REPORT

1. The Productivity Commission looked at the impact of the Disclosure Standard on the commercial radio industry in its 2009 *Review of the Regulatory Burdens on Business*.²
2. The Government Response to the Productivity Commission's report stated that in its review of the Standards, the ACMA would be "expected to consider the matters raised in this recommendation".
3. The Commission recognised the significant difficulties caused to the commercial radio industry as a result of the legislation. It concluded that the objective of promoting fair and accurate coverage of issues "could be met through more flexible disclosure requirements which could be incorporated into the Commercial Radio Codes".
4. The Commission also noted that the "cash for comment" incident involved a relatively small number of broadcasters and concluded that the fact that "a breach by a relatively small proportion of broadcasters has led to a prescriptive requirement in all commercial broadcasters is not in keeping with an appropriate risk management approach to regulation. That is, the regulatory remedy captured all radio broadcasters, not just those found to have breached the code".
5. The Commission further observed that "another indicator that the disclosure standard for commercial radio may impose an unnecessary regulatory burden on commercial radio broadcasters is the lack of a similar prescriptive arrangement for television broadcasters. The issues with respect to television are generally similar to those for radio broadcasting, yet disclosure requirements in the case of commercial television broadcasting are far less prescriptive and are dealt with through an industry code of practice".
6. The Commission suggested that the following elements should form part of a more flexible approach:
 - allowing licensees to broadcast disclosure announcements at set times, rather than having to do so at the exact moment of a potential conflict of interest;
 - examination of the extent to which commercially sensitive information must be divulged to achieve the objectives – disclosure of the existence of an agreement may be sufficient;
 - consideration should be given to moving the disclosure requirements back into the industry code; and
 - the provisions relating to radio should be aligned as far as possible with requirements in other media platforms.

² Government Response dated 22 December 2009.

7. Accordingly, the Commission made the following recommendation:

Recommendation 4.7 – Disclosure

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

C. NATURE OF THE COMMERCIAL RADIO INDUSTRY

8. Fairfax Radio urges the ACMA to take into account the nature of the commercial radio industry, and the compliance burden under which it operates. Section 4 of the BSA obliges the ACMA to regulate in a manner “*that does not impose unnecessary financial and administrative burdens on providers of broadcasting services*”.
9. Fairfax Radio owns several regional radio stations, which have few staff and are ill-equipped to deal with excessive regulatory requirements. There are 260 commercial radio stations in Australia. The majority of commercial radio stations are in regional markets, with only 40 in the metropolitan areas of Adelaide, Brisbane, Melbourne, Perth and Sydney.
10. The commercial radio industry is already highly regulated. Industry specific regulations cover a wide range of areas, including disclosure, compliance, program content, advertising, cross media mergers and technical issues.
11. Fairfax Radio accepts that some regulation is necessary. However, such regulation must not be allowed to reach a level where it has an overwhelmingly negative effect on the ability of the industry to carry out its core service of radio broadcasting across Australia.
12. Excessive level of regulation makes it difficult for the commercial radio industry to remain commercially viable. This is a particular problem in regional areas, where the compliance burden is highest and the revenue base is smallest.
13. Regulatory requirements have a disproportionate effect on the viability of small licensees. Such licensees have few staff and limited infrastructure. Many staff within such organisations fulfil a number of different roles. These stations struggle to meet their compliance obligations while maintaining focus on their core business of radio broadcasting.
14. Fairfax Radio stations in both regional and metropolitan areas serve their local communities well, by providing listeners with programs that are relevant, informative and entertaining. Further regulation would threaten these services, as the already high compliance costs may escalate to unmanageable proportions.

D. COMPARISON TO THE COMMERCIAL TELEVISION INDUSTRY

15. The excessive regulation surrounding disclosure, advertising and compliance places Fairfax Radio at a significant disadvantage when compared with other media platforms. This affects our ability to compete effectively with other media.
16. Fairfax Radio strongly urges the ACMA to strive for parity between the advertising and disclosure regulations applicable to commercial radio and television. This would ensure fairness and provide the free to air media with equal opportunity to compete for the advertising dollar.
17. The key differences in the regimes applicable to commercial radio and television are set out below.

Disclosure

18. As noted by the Productivity Commission, there are no comparable disclosure requirements imposed on the television industry, despite the similarity of the issues under discussion.
19. The only commercial arrangement disclosure obligation imposed on commercial television obliges licensees to disclose any agreement under which the licensee, presenter or independent producer endorses or features a third party's products or services in a factual program in exchange for consideration.³
20. There are a number of significant differences between the disclosure regime applicable to commercial television and that applicable to commercial radio:
 - *Television*: the disclosure obligation is contained in a Code of Practice.
 - *Radio*: the disclosure obligation is contained in a Standard.
 - *Television*: the disclosure may be made during or in the credits of the program. There are no prescriptive requirements other than that the disclosure announcement must be "readily understandable to a reasonable person".⁴
 - *Radio*: on-air disclosure announcements must be broadcast "at the time of and as part of" the broadcast of material caught by the Disclosure Standard. The ACMA has changed its interpretation of this over the years, to the detriment of radio broadcasters. The ACMA informed SCB years ago that disclosure within a short period of time before or after a mention was sufficient. However, the most recent interpretation applied to Fairfax Radio is that disclosure is required virtually "in the same breath" (which Fairfax Radio strongly disagrees with). This changed view (which was not conveyed to Fairfax Radio) has led to confusion and injustice for Fairfax Radio and resulted in the imposition of significant fines.

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

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

- *Television*: disclosure relates only to agreements to feature or endorse products in a specific program.
- *Radio*: a much wider range of agreements are caught, including any agreement where a presenter performs promotional or public relations services for a third party or any agreement under which a presenter earns more than \$25,000 per year.⁵
- *Television*: disclosure relates only to the endorsement or feature of products or services.
- *Radio*: disclosure relates to a much broader range of material, including: any mention of the name, product or service of the sponsor; any material that directly promotes an issue directly favourable to the sponsor; and any material in which an agent or employee of the sponsor is interviewed in relation to a matter concerning the sponsor.

Advertising

21. The regulations applicable to the television industry are more flexible than those applicable to the commercial radio industry.
22. The Commercial Television Industry Code of Practice provides that commercials in between programs, during commercial breaks or superimposed over a program, must be distinguishable by viewers from program material.⁶
23. The television codes also allow for advertising within programs, provided that the material is “*distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation*”.⁷
24. Radio is the subject of much more stringent regulation:
 - The requirement to differentiate advertising from other program content is contained in a Code for television and in a Standard for radio.
 - There is no equivalent to television’s Code 1.18, allowing advertising within programs (known as “integrated advertising”), provided that the advertisement is distinguishable from other program material.
25. The inability to broadcast advertising integrated into programming, similar to television, places the commercial radio industry at an unfair commercial disadvantage compared with commercial television. There is no obvious reason for this lack of parity.
26. The Issues Paper states that “*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 back end of a program can indicate sponsorship arrangements to viewers*”.

⁵ Section 6, Disclosure Standard.

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

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

Fairfax Radio does not currently have the option under the Standard to place a credit (written or spoken) at the end of a program. Fairfax Radio strongly disagrees with this.

27. There is no reason why disclosure taking place by text is more effective than oral disclosure. Spoken announcements at the end of radio programs would have exactly the same impact as text displays (if not better).
28. In any event, there is no obligation on the commercial television industry to provide text disclosure. Code 1.23 of the Commercial Television Codes of Practice allows television licensees to disclose the existence of commercial arrangements in any way that is “*readily understandable to a reasonable person*”. This includes both spoken and written statements.
29. Fairfax Radio submits that disclosure of commercial arrangements and integrated advertising should be allowed at the beginning and/or end of programs, thus reflecting the risk management approach taken in relation to the commercial television industry.

Compliance

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

E. DISCLOSURE STANDARD

31. Fairfax Radio supports the objective of ensuring fair and accurate coverage of matters of public interest, including the disclosure of commercial agreements that affect the content of current affairs programs. However, the Disclosure Standard is heavy-handed, outdated and unnecessarily burdensome.
32. This section sets out the practical difficulties regarding specific parts of the current legislation, together with recommendations for change.

Timing of on-air disclosure announcements

33. On-air disclosure announcements must be broadcast “at the time of and as part of” the broadcast of material caught by the Disclosure Standard.⁸
34. The ACMA interprets this provision as meaning that the on-air disclosure must be made “in the same breath” as the mention of the sponsor (or other material caught by the Standard).
35. The ACMA’s approach causes significant difficulties for licensees in ensuring compliance with the Disclosure Standard. For example, a 2UE presenter who made the on-air announcement within 90 seconds of the relevant material was found by the ACMA to have “breached” the Disclosure Standard.

⁸Disclosure announcements must be made in relation to (a) material in which the name, products or services of a sponsor are mentioned; (b) material in which an agent, employee or officer of a sponsor is interviewed in relation to any matter concerning the sponsor, its products, services or interests; (c) any broadcast requested by a sponsor based on or similar to material provided by a sponsor; or (d) a broadcast of material that directly promotes any issue directly favourable to the sponsor – section 7(1), *Disclosure Standard*.

36. This approach – which is disruptive for the listener and difficult for the presenter – ignores the practical reality of the circumstances in which talk radio presenters operate, using unscripted, listener reactive and spontaneous material.
37. A more reasonable alternative would be to place disclosure announcements on the station website. If this is not acceptable to the ACMA, an alternative would be to allow presenters to broadcast regular announcements listing all of the relevant commercial agreements.

Difficulty in ensuring compliance

38. The highly prescriptive nature of the Disclosure Standard make it almost impossible to achieve compliance, no matter how vigilant management and presenters may be.
39. When talk radio presenters are on-air, there are many demands on their time and concentration. They are live-to-air and almost always unscripted. They cannot plan what callers or interviewees might say – but in the interests of a free-flowing, informative and entertaining program must react, comment and move on. All the while they are receiving instructions and information from their producers and panel operators and have to control discussion to meet strict time limits to ensure that advertisements and other segments, such as news bulletins, run as scheduled.
40. The prescriptive detail of the Disclosure Standard results in a largely unworkable regime. In particular, the prescriptive wording in section 7(3) is almost impossible to implement without making occasional mistakes.
41. For example, 2UE was found to have breached the Disclosure Standard when the presenter referred to his sponsor as “sponsors of ours” or “sponsors” rather than “sponsors of mine”. The ACMA’s view was that only “sponsors of mine” was acceptable.
42. This overzealous approach ignored the fact that the purpose of the Disclosure Standard was being achieved: disclosure was made and was very likely understood by listeners. A far better approach would be to allow presenters to make a disclosure of their choosing, without the added pressure of a script prescribed by regulation, in the interests of free-flowing and clear discussion. For example, if a presenter has a board appointment, it would in fact be more relevant for the presenter to disclose that he or she is on the board of such company, rather than use prescribed wording referring to a “sponsor” or a “commercial agreement”, which in this example is somewhat misleading.

Excessively broad scope

43. The wording in the Disclosure Standard is excessively broad. This makes it difficult to interpret and results in seemingly unintended consequences.
44. In particular, section 7(1)(a) requires disclosure announcements during broadcasts “*in which the name, products or services of a sponsor are mentioned*”. Section 7(1)(d) requires disclosure announcements during broadcasts “*of any material that directly promotes any issue which is directly favourable to a sponsor*”.
45. Radio 2UE’s experience shows that compliance with the Disclosure Standard can result in some unusual and seemingly unintended outcomes. Examples include:

- a presenter who has an agreement with a record company is required to make a disclosure announcement when mention is made of any artist or song signed to that record company;
- a presenter interviewing the Prime Minister is required to make a disclosure announcement as part of the interview if the Prime Minister mentions the name of the presenter's sponsor; and
- a presenter updating listeners on an important news event is required to declare a commercial relationship as part of the broadcast. For instance, if a presenter has a commercial agreement with Qantas and a Qantas plane crashes killing everyone on board, the presenter would need to declare as part of the broadcast that "Qantas is a sponsor of mine".

46. Section 7(2)(c) provides an exception for on-air disclosure with respect to other media roles. This exception is very narrow and can lead to a requirement for constant unnecessary disclosure.⁹ For example, if a presenter had ancillary editing duties in addition to his or her primary duty of writing a regular column for a newspaper, this exception for on-air disclosure would be lost. Current affairs presenters often discuss articles in newspapers, television programs and other media performers. Therefore, the requirement for disclosure would regularly arise in circumstances where they are not called for.

Register of commercial agreements imposes an unreasonable burden

47. The Disclosure Standard requires commercial radio stations to keep a register of current commercial agreements between sponsors and presenters of current affairs programs. This register must be made publicly available on the licensee's website and also must be made available for public inspection at the station.¹⁰

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

- \$10,000 or less per annum;
- more than \$10,000 but not more than \$100,000 per annum; or
- more than \$100,000 per annum.

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

50. The requirement places radio at a disadvantage compared with other media when recruiting presenters. It is common for talented performers to have roles in a variety of media. These performers are sometimes reluctant to accept radio roles, as they wish to avoid (quite reasonably) to disclose their remuneration from other employers. This is not the intention of

⁹ Section 7(2)(c), Disclosure Standard

¹⁰ Section 9, Disclosure Standard.

the Standard. The original and primary purpose of the Disclosure Standard was to identify arrangements where presenters were engaged specifically to make favourable comments.

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

- discussions with the sponsor are usually required, particularly as the agreements commonly include a confidentiality clause;
- the register must be available both on the station's website and at the station's offices. This creates unnecessary duplication – disclosure of the register on the station website should be sufficient; and
- the level of detail required on the register is excessive.¹¹

Provision of copies of commercial agreements

52. Presenters are further required to provide the radio station with a physical copy of all existing commercial agreements within 7 days of each agreement being entered into.¹²

53. The ACMA insists that this provision is only satisfied where the agreement contains no redactions. Accordingly, presenters are not entitled to redact sensitive information, such as the consideration payable.

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

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

Disclosure Standard - Costs of compliance

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

57. The additional internal costs associated with compliance are extremely high. Substantial amounts of time are devoted by presenters, producers, station managers, executive assistants and legal teams.

58. In addition, Fairfax Radio seeks external legal advice from time to time, which in itself is very expensive.

¹¹ Section 10, Disclosure Standard.

¹² Section 12, Disclosure Standard.

F. QUESTIONS FOR COMMENT - DISCLOSURE STANDARD

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

59. The generally accepted practices of commercial radio broadcasters have moved a long way since the introduction of the Disclosure Standard.
60. The Disclosure Standard originally addressed problems relating to the way in which commercial arrangements were influencing content in some current affairs programs. The legislators believed that there was a “systemic” problem in some commercial radio talk back programs, and, accordingly, introduced a regime that was prescriptive and designed quickly to rectify specific problems.
61. There is now a culture of compliance across the commercial radio industry, as evidenced by the low level of Standards related complaints and breaches.
62. The low number of complaints reflects a low level of public concern. The even lower number of breaches found by the ACMA indicates that the Standards have worked effectively to remedy the problems that previously existed.
63. The recent ACMA industry wide compliance audit also indicated an extremely high level of compliance relating to the Disclosure Standard. There was a **100% compliance rate** – in terms of developing, implementing and maintaining compliance programs – among stations whose presenters had entered into “commercial agreements” and were therefore covered by the Disclosure Standard.¹³
64. There is no longer any need to impose prescriptive legislation designed to rectify so called systemic problems in radio broadcasting. Any ongoing regulation should now be focused on maintaining the current culture of compliance, and providing a mechanism for addressing any isolated breaches that might occur in the future.
65. Fairfax Radio submits that this will be best achieved by repealing the Disclosure Standard, making the provisions relating to disclosure more flexible, and by incorporating the new provisions into the Codes.
66. The heavy-handed approach of the Disclosure Standard is no longer required; the principles reflected in the Disclosure Standard should be reviewed to reflect contemporary practices and reflected in the Codes.
67. The Disclosure Standard should be generally simplified so that radio stations are able to make disclosure in the most appropriate way, knowing that they are required to do so, but

¹³ Page 52, Issues Paper.

without having to get so caught up in form filling, short deadlines, designated phraseology and compliance with other detailed prescriptive requirements.

68. The Codes are mandatory for all commercial radio licensees and repeated breach of the Codes can lead to loss of licence. The sanctions for breach of the Codes have been increased since the Standards were introduced. The ACMA investigates breaches of the Codes, and would have the ability to reimpose a Standard if it felt that the Codes were not providing adequate protection.
69. The new regime should be aligned with the disclosure regime applicable to the commercial television industry.
70. These proposals accord with the recommendations made by the Productivity Commission.

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

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

71. Fairfax Radio strongly submits that any regulation should be limited to current affairs programs.
72. The Disclosure Standard was introduced to address concerns relating to current affairs programs, which were seen as key opinion influencers. Non-current affairs programs are not perceived as providing serious analysis of current affairs and hence are not as capable of influencing opinion on such matters.
73. There is little public concern over the issue of non-current affairs programs. This is reflected in the findings of the ACMA’s research:
 - The Issues Paper acknowledges that “*commercial radio listeners seem to be more sensitive to advertising in current affairs programs than in non-current affairs programs*”.¹⁴
 - The ACMA also notes that “*while recognising that program content of non-current affairs programs may be affected by commercial arrangements, there has not been a high number of complaints to the ACMA or its predecessor regarding this particular issue*”.¹⁵
74. Given the original intention of the legislators when drafting the Disclosure Standard, together with the lack of current public concern over the issue of non-current affairs programs, it would not be appropriate to extend the provisions of the Disclosure Standard to other program formats.

¹⁴ Page 21, Issues Paper.

¹⁵ Page 22, Issues Paper.

75. The problems encountered by Fairfax Radio's four metropolitan talk stations in complying with the Disclosure Standard are highlighted in Section E above. To extend this regime to all programming would be logistically impossible, extremely costly and could threaten the survival of the commercial radio industry in its current form.
76. While the current definition of "current affairs program" has been relatively uncontroversial in its application (perhaps in part due to the very small number of investigations conducted by the ACMA into the application of the Disclosure Standard), Fairfax Radio would like the opportunity to participate in any future review of the definition, with the objective of improving precision.
77. Specifically, Fairfax Radio submits that the suggestion to substitute "substantial purpose" with "focus" would create a definition that is overly broad and very difficult to apply. Licensees would find it hard to judge whether or not a format is subject to the disclosure regulations. This would create uncertainty and would be a confusing and complex way of regulating the industry.
78. There would be a huge detrimental economic and structural impact on the industry if the Disclosure Standard were broadened. Fairfax Radio would be less attractive to advertisers and to presenters and would be less able to compete with the television industry for the advertising dollar.

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

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

79. Fairfax Radio strongly opposes any suggestion that disclosure requirements be extended to all program content or all employees.
80. The immense difficulties caused by the prescriptive nature of the current disclosure arrangements are set out in **section E** above. Any widening of the requirements would simply be unworkable.
81. Extension of the current requirements to "all commercial arrangements" with "the potential to affect program content", or to "all employees associated with the licensee or its program content" would be impossibly vague and onerous. There is no equivalent obligation for the commercial television industry or the print media industry.
82. Fairfax Radio is of the view that any such regulation would be in clear breach of the ACMA's obligations under section 4 of the BSA.

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

83. It is not appropriate to impose an obligation to make on-air announcements whenever there is a connection between the matter broadcast and a relevant commercial agreement. On-air disclosure announcements are burdensome for stations, cause interruptions for listeners, and have not been shown to be particularly effective.
84. The ACMA recognises in its Issues Paper that “*there are mixed views about the usefulness and importance of on-air disclosure announcements that inform listeners about commercial arrangements*”.¹⁶
85. Fairfax Radio submits that a better way of disclosing arrangements would be through publication on the station website. This would enable listeners to check whether arrangements exist at all times and would address the concern that listeners might miss announcements.
86. While the effectiveness of disclosure announcements might not be clear, the impact that imposing a prescriptive disclosure regime has on licensees is clearly extremely costly and burdensome. Fairfax Radio questions the logic of maintaining this burden, particularly in the face of limited evidence regarding its effectiveness.

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

87. The ACMA research shows that 63% of listeners would not be concerned if they were made aware of a commercial arrangement at some point during the program.¹⁷ Disclosure at the beginning or end of a program would also accord with the approach taken in the television industry.
88. The ACMA points out that the length of radio programs differs from that of television programs.¹⁸ While this may be true in some instances, it does not justify the imposition of “same breath” disclosure. The practical difficulties of “same breath” disclosure are outlined in **Section E** above.
89. Disclosure could be made a permanent feature of station websites, which would enable listeners to check sponsorship arrangements at all times. Fairfax Radio would also consider making disclosure announcements at prescribed intervals within a program.

¹⁶ Page 28, Issues Paper.

¹⁷ Page 29, Issues Paper.

¹⁸ Page 31, Issues Paper.

90. Such an approach would enable the *licensee* to control the making of required disclosures, rather than relying on the presenter to make them. It would also remove the difficulties of identifying relevant material, particularly the interpretation of section 7 of the Disclosure Standard.
91. The approach of regular disclosure is used in comparable situations. The Broadcasting Services Amendment (Media Ownership) Act 1996 (**Media Ownership Act**) gives commercial radio licensees the option of adopting a ‘regular disclosure method’, requiring a radio outlet regularly to disclose a cross-media relationship in such a way and with such frequency that the prime-time audience of the commercial radio broadcaster would be reasonably likely to be aware of the cross-media relationship.
92. The explanatory memorandum to the Media Ownership Bill notes that the regular disclosure method is provided as an option in the case of radio, because commentary on radio is generally unscripted.
93. Clearly, the legislature has recognized that the unscripted nature of radio makes a requirement for ‘spontaneous’ disclosure too onerous for radio licensees. It is difficult to see why current affairs disclosure should be treated differently from cross media ownership disclosure.

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

94. Fairfax Radio strongly opposes the current requirement that announcers must use prescribed words. Fairfax Radio is not aware of any other media that must comply with such an obligation; nor is it aware of any other jurisdiction in which such an obligation is imposed.
95. The ACMA has found that licensees have breached the Disclosure Standard in instances where a presenter has missed one word of the prescribed wording. The expectation that presenters are able to use correct words and recite exact phrases at all times during a talk-back program indicates a lack of understanding of the spontaneous and unscripted nature of talk-back radio. It is almost impossible for presenters to comply with such an obligation without making mistakes.
96. The Issues Paper raises the possibility of using pre-recorded disclosure announcements inserted into the program at the time of a mention, as necessary.¹⁹ Again, this would be practically unworkable. Talk-back radio is unscripted and fast-flowing; therefore, the insertion of a pre-recorded announcement “in the same breath” as the mention of the sponsor would be very hard to manage. It would also create an unacceptable level of interruption to the programming.
97. Fairfax Radio urges the ACMA to remove the requirement for prescribed words. Licensees should be able to make the disclosure in any form they like, provided that it is clear to the reasonable listener. Such an approach would be aligned with that taken in relation to the television industry.

¹⁹ Page 33, Issues Paper.

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?

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

99. The following changes should be made to the existing regulations:

- The obligation to specify the amount or value received by the presenter in the register of commercial agreements should be removed.
- The requirement for the register of current commercial agreements to specify the amount or value of the benefit received by the presenter should be removed.²⁰
- The register should include agreements where the benefits received by presenters exceed a material threshold (e.g. more than \$1,000). Whether the benefit received only just exceeds this material level, or greatly exceeds it, is irrelevant – it is the fact that a benefit is received that should be disclosed.
- The requirement for presenters to provide radio stations with a copy of existing commercial agreements within 7 days is onerous and unnecessary and should be removed.
- The key objective is to record the existence of commercial agreements. The precise terms of those agreements are irrelevant.

²⁰ Section 10(5), Disclosure Standard.

G. QUESTIONS FOR COMMENT - ADVERTISING STANDARD

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

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

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

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

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

101. Accordingly, the Advertising Standard should be repealed, and its provisions placed in the Codes.

102. The Commercial Television Industry Code of Practice provides that commercials in between programs, during commercial breaks or superimposed over a program, must be distinguishable by viewers from program material.²¹

103. The television codes also allow advertising within programs, provided that the material is "*distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation*".²²

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

105. There should be flexibility as to the means by which the material may be made distinguishable from other program material – by disclosure announcement, labelling or some other form of differentiation as the licensee sees fit. This also would reflect the position in the television industry.

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

²¹ Code 1.16, Commercial Television Industry Codes of Practice, January 2010.

²² Code 1.18, Commercial Television Industry Codes of Practice, January 2010.

107. Further, the ACMA should not underestimate the sophistication of the listening audience. Listeners are familiar with advertising integrated into content on television, cinema and in print. Fairfax Radio urges the ACMA to take this into account when assessing the appropriate level of regulation.
108. Fairfax Radio is of the view that the approach suggested above should be taken in relation to all formats. Advertising is common to all formats and there is no need to create a more complex system of different frameworks for different formats, particularly when the Disclosure Standard already imposes an additional burden on broadcasters of current affairs programs.
109. The general principles of distinguishing advertisements from other content apply equally across the various formats and, as in television, the licensees are best placed to decide what type of differentiation will be most effective.

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

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

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

110. Fairfax Radio strongly urges the ACMA to avoid imposing further prescriptive requirements on the industry relating to specific advertising practices. The over-arching rule that advertising must be distinguishable from program content covers all practices and leaves the ACMA with the discretion to decide on a case by case basis whether the advertisement is distinguishable or not.
111. The Issues Paper identifies certain practices which it considers hard to identify.²³ Its conclusions are based on a sample of 6 clips containing different types of advertisements – live commercials, talkback discussion and commentary/interviews.
112. As a preliminary comment, Fairfax Radio would be concerned if any substantive changes to the existing regulation were made on the basis of such a small sample and inconclusive findings.
113. Fairfax Radio would strongly oppose any detailed transparency and separation rules, prescribing how such advertisements might be produced and broadcast. This would have an overwhelmingly negative impact on the industry in terms of its ability to compete with other media and hence on its advertising revenue.
114. The ACMA has the freedom to address any lack of transparency or failure to separate advertising from other content under the current regime. If a member of the public does not believe that advertisements are distinguishable from other content – whatever advertising practice is employed – then the ACMA can investigate the licensee under the current

²³ Issues Paper, pages 42 to 43.

regulatory structure. Further detail would be unnecessary, confusing and unduly prescriptive.

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?

115. Fairfax Radio considers that the current definition of “advertisement” under the Advertising Standard is appropriate.

116. The Issues Paper raises the issue of whether the provision of “consideration” should continue to be part of the definition of an advertisement.²⁴ Fairfax Radio’s view is that it should.

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

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

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

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

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

121. The effect on news broadcasts would be equally unreasonable. If a licensee had an arrangement with Qantas, and Qantas featured in a news story, then that story could

²⁴ Issues Paper, page 47.

conceivably be classed as an advertisement. If so, the newsreader would then need to “distinguish” that story from the other stories in the bulletin. This would create an unacceptable level of interference with journalistic freedom to broadcast topical news, and it would become difficult to broadcast genuine news stories about station advertisers that happen to be positive.

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

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

H. QUESTIONS FOR COMMENT – COMPLIANCE STANDARD

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

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

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

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

124.The ACMA research indicates extremely high levels of compliance among commercial radio stations. It showed 100% compliance with the requirement to develop, maintain and implement compliance programs among stations with current affairs programming and 96% compliance across the rest of the industry.²⁵

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

- The ACMA should emphasise the importance of a formal written policy and of conducting internal audits as a part of a compliance program.
- The ACMA should give positive feedback to those with Commercial Agreements in areas where they are complying with the *Compliance Program Standard* to encourage continued compliance.
- The ACMA should work particularly with Section 40 and Independent licensees to improve compliance with the *Compliance Program Standard*.²⁶

²⁵ Issues Paper, page 52.

²⁶ DBM Consultants – *Compliance with Compliance Program Standard* 2009

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

127. Since 2005, there have been only 19 breach findings under the Codes, 3 breach findings under the Standards and 2 breach findings relating to other licence conditions under the BSA.²⁷ This indicates a high level of compliance within the industry. The systemic problems that the Compliance Standard was introduced to address have been resolved.

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

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

130. Again, it is worth noting that the television industry has no equivalent to the Compliance Standard. Fairfax Radio urges the ACMA to strive for parity between comparable industries.

If you would like to discuss any aspect of this submission, please contact Fairfax Radio's General Manager Graham Mott on 03 8667 3610 or Corporate Counsel Michelle Davies on 03 8667 3612.

²⁷ Issues Paper, page 55.