

2 December 2025

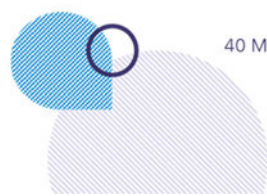
Nerida O'Loughlin PSM
Chair & Agency Head
Australian Communications and Media Authority

By email: OfficeoftheChair@acma.gov.au; autumn.field@acma.gov.au;

Dear Delegate

Response to the Notices of Intention to impose additional licence conditions

- 1 We refer to your letter dated 11 November 2025 enclosing the Notices of Intention to Impose an Additional Condition on Commercial Radio Broadcasting Licence No. 4103 and No. 4142 (**Notices**) pursuant to section 43(2)(a) of the Broadcasting Services Act 1992 (**BSA**) in respect of the broadcast of the Kyle and Jackie O show (the **Kyle and Jackie-O show**).
- 2 On behalf of Australian Radio Network Pty Limited (**ARN**) and its subsidiary licensees, Double T Radio Pty Ltd (**the Melbourne Licensee**) and Commonwealth Broadcasting Corporation Pty Ltd (**the Sydney Licensee**), we thank the ACMA for the opportunity to provide a submission in response to the Notices.
- 3 ARN acknowledges the importance of maintaining community standards and ensuring that professional content aligns with audience expectations. The ACMA's research identifies that contemporary audiences expect to exercise choice and agency in the content they consume, and that safeguards should reflect the context, platform and intended audience of the material. ACMA's position paper, "*What audiences want – audience expectations for content safeguards. A position paper for professional content providers*" dated June 2022 (**ACMA's Position Paper**) emphasises that audience expectations are diverse, dynamic and shaped by changing consumption patterns, including acceptance of more direct and unfiltered content among younger demographics.
- 4 Further, the ACMA's paper titled "*Investigation Concepts: Decency, classification and harm and offence*" from July 2018 (**ACMA's Investigation Guidance**) confirms that community standards are not hard and fast, that they vary across audiences, and that the relevant audience for the purposes of clause 2.2 is the targeted audience of the Program. It also recognises that the Code seeks to balance freedom of expression with the need to respect prevailing standards, and that contextual considerations—including demographic characteristics and audience expectations—are central to decency assessments.
- 5 ARN notes the ACMA's statement in its letter dated 9 September 2025 that its Investigation Guidance is no longer published on its website and was withdrawn in July 2025. It is not clear from the 9 September 2025 letter what the ACMA considers to be



the consequence of it having withdrawn the Investigation Guidance. The ACMA adopted and republished the Investigation Guidance in 2018 and continued to publish it into July 2025. It comprised the operative guidance available to broadcasters at the time of the conduct that is the basis for the conditions identified in the Notices.

- 6 ARN considers that it is entitled to rely on the ACMA's published guidance when assessing compliance with clause 2.2 of the Code at least with respect to conduct that occurred at the time that the Investigation Guidance continued to be published by the ACMA. The subsequent removal of that document does not retrospectively alter the standards communicated to industry at the relevant time.
- 7 Nor has the ACMA issued any replacement guidance addressing decency. It would be inconsistent with principles of regulatory certainty and procedural fairness for the ACMA to withdraw its published guidance without replacement and then rely on the absence of that guidance to narrow or recast the standards applicable to broadcasters, particularly retrospectively. In these circumstances, the ACMA Investigation Guidance remains the most recent expression of the ACMA's expectations as to the interpretation and application of clause 2.2 and continues to be a relevant indicator of the regulatory approach to be taken.
- 8 Against this background, while ARN accepts the proposal identified in Conditions 1 and 3 of the Notices, ARN submits that Conditions 2 and 4 should not be imposed in the proposed form. ARN's submissions and proposal on Conditions 2 and 4 are addressed in the paragraphs below.

Condition 2 – content that is “highly offensive” or contains Sexual References

- 9 There are three reasons why Condition 2 as proposed should not be imposed. First, it is unreasonable. Secondly, insofar as it proscribes the broadcast of content that complies with the Code, it is inconsistent with the co-regulatory framework underpinning the Code and the legislative objective of the BSA and is beyond the ACMA's power. Thirdly, it is uncertain in its scope.

Condition 2 is unreasonable

- 10 As drafted, proposed Condition 2 applies a standard that differs from and exceeds the requirements of clause 2.2 of the Code, with which proposed Condition 1 will already compel compliance. The Notices propose that the Program must not broadcast content “which contains strong and explicit Sexual References”, and that a single reference may constitute a breach. This approach imposes a stricter standard than that set out in the Code, which proscribes content that offends generally accepted standards of decency, not the mere presence of an explicit sexual reference. The result is that Condition 2 will capture and proscribe content that does not breach the Code, in addition to capturing and proscribing content that does.
- 11 In ARN's submission, proposed Condition 2 unreasonably exceeds the scope of clause 2.2 because it reframes the applicable test from whether content “offends generally accepted standards of decency” to whether the Program “contains strong and explicit Sexual References”, including a single such reference. Clause 2.2 of the Code does not operate by reference to the mere presence of sexual references; rather, it requires an evaluative judgment as to whether content is inconsistent with prevailing standards of decency, having regard to audience context. By contrast, Condition 2 of the Notices would operate as a bright-line prohibition triggered by a single explicit reference,

irrespective of whether the reference breached the requirements of clause 2.2 of the Code.

- 12 This approach is inconsistent with the ACMA Investigation Guidance, which recognises that decency standards are inherently subjective, fluid, and dependent upon audience characteristics. The ACMA's Investigation Guidance paper confirms that the relevant assessment involves considering the "ordinary reasonable listener" in the context of the targeted audience of the program, and that community standards vary between audiences and evolve over time. It expressly recognises that contextual factors, including program format, tone, humour, and audience expectations, are central to determining whether content is indecent.
- 13 Furthermore, the ACMA's Position Paper emphasises that audience expectations are not homogeneous, and that contemporary audiences actively choose content that aligns with their preferences — including content that may be provocative, irreverent or confronting. [REDACTED]
[REDACTED]
The ACMA's Position Paper makes clear that regulatory safeguards must account for audience agency and program context, rather than impose uniform standards across divergent audiences. That view expressed in the Position Paper is consistent with the text of the Code and human experience; different audiences will have different expectations.
- 14 By removing the contextual assessment required under clause 2.2 and replacing it with a categorical prohibition on "strong and explicit Sexual References", proposed Condition 2 introduces a new and materially different standard to that contained in clause 2.2 of the Code. It would capture content that the Code permits when contextually appropriate and not forming a core explicit sexual theme. As a result, the Melbourne Licensee and Sydney Licensee could be exposed to breach findings for material that does not offend the Program's audience, does not contravene generally accepted standards of decency for that audience, does not breach clause 2.2 of the Code and has previously been found permissible under the ACMA's own decision-making approach.

Condition 2 is inconsistent with the co-regulatory framework and the legislative objective and its imposition beyond power

- 15 In the ways described above, Proposed Condition 2 seeks to modify the standard contained in the Code. By redefining the applicable standard to prohibit content that the Code expressly permits when contextually appropriate and not forming a core explicit sexual theme, proposed Condition 2 is inconsistent with the co-regulatory framework underpinning the Code, which is grounded in the following provisions of the BSA:
 - (a) Commercial Radio Australia is to develop a code of practice for commercial broadcasting licensees in consultation with the ACMA (under s 123(1) of the BSA);
 - (b) if the ACMA is satisfied that, among other matters, the code of practice so developed provides appropriate community safeguards for the matters covered by the code, the ACMA includes that code in the Register of codes of practice (under s 123(4) of the BSA);

- (c) the ACMA may review whether the registered code of practice is appropriate and, if it considers it appropriate, request that Commercial Radio Australia develop another code of practice (under s 123B of the BSA);
 - (d) the ACMA may investigate complaints under the registered code of practice (s 149 of the BSA);
 - (e) the ACMA may impose additional licence conditions on a commercial radio broadcasting licensee (s 43(1) of the BSA) and such a conditions may require a commercial radio broadcasting licensee to comply with a code of practice that applies to it (s 44(2)(a)).
- 16 Further, proposed Condition 2 removes the essential contextual element that the Code expressly requires: whether the material *“offends generally accepted standards of decency, having regard to the demographic characteristics of the audience of the relevant program”*. The ACMA Investigation Guidance expressly recognises that an “ordinary reasonable listener” may accept that material they personally find indecent would not be so judged by some sections of the community, and may accept the right of those other groups to have such material broadcast.
- 17 The ACMA’s own guidance therefore adopts a standard tied to the ordinary reasonable listener of the program, not an abstract “average person” in the broader community. By instead applying a universalised community decency benchmark and disregarding the specific expectations of the Program’s audience — [REDACTED] proposed Condition 2 impermissibly substitutes a general community standard for the program-specific standard mandated by the Code.
- 18 This substitution has significant compliance consequences. [REDACTED] As the ACMA itself recognises, the requirement to consider “the demographic characteristics of the audience” allows broadcasters to direct content to audiences that choose to listen with an awareness and expectation of the likely content.
- 19 If proposed Condition 2 were imposed, the Licensee would be required to comply with a standard detached from the expectations of its actual audience and grounded instead in the sensibilities of a hypothetical “average moderate person”. This exceeds the scope of clause 2.2 and undermines the legislative objective in the BSA to promote a diverse range of broadcasting services.
- 20 The result is that the imposition of Condition 2 is beyond power.

Condition 2 is uncertain in its scope

- 21 Finally, proposed Condition 2 is ambiguous and lacks the clarity required of a binding licence condition. The phrase “strong and explicit Sexual References” is unclear. “Explicit” is capable of definition and is commonly understood to mean “leaving nothing merely implied; clearly expressed; unequivocal”. However, the addition of the word “strong” introduces a second and undefined threshold, without any connection to decency. It is unclear what differentiates an explicit reference that is “strong” from one that is not. On its face, the condition could capture a very wide range of content, including (a) a reporting (eg, during a news segment) of the nature of a sexual assault; or (b) a passing reference by a caller to their preferred sexual position, without any

further elaboration, delivered in a tone and manner consistent with audience expectations and without being obscene or indecent. The result is uncertainty not only as to what the condition prohibits, but why.

- 22 The internal drafting of the condition compounds this problem. The definition of “Sexual References” includes innuendo and material that is intimated or implied, which cannot be reconciled with the requirement that the reference be “explicit”, meaning expressed clearly and leaving nothing implied. It is also unclear what is meant by “sexual descriptions”, a term that has no established meaning in the Code or in the ACMA’s published guidance. A licence condition must be clear, precise and unambiguous so that the Licensee can determine, in advance and with confidence, whether content may contravene it, and so that compliance can be assessed consistently. Proposed Condition 2 falls short of this standard, creating material uncertainty for both broadcasters and the regulator in circumstances where breach carries serious statutory consequences.
- 23 ARN recognises that the ACMA likely intended by Condition 2 to specify content that, if broadcast, would be taken as breaching clause 2.2 of the Code, to simplify compliance and assessment of compliance with clause 2.2 of the Code. For the reasons outlined above, ARN considers that Condition 2 impermissibly proscribes content some of which will not breach the Code. However, ARN is prepared to work in good faith in consultation with the ACMA to seek to agree content that, if broadcast, will be taken as breaching clause 2.2 of the Code. Alternatively, and as such a list might affect and concern all commercial broadcasting licensees, such a consultation could occur between the ACMA and the CRA.
- 24 For the preceding reasons, ARN submits that Condition 2 should not be imposed, the definition of Sexual Reference should be deleted from any condition imposed on the Licensees and the definition of “Governance Framework” should be updated so as not to refer to Condition 2.

Condition 4 – implementation Independent Auditor recommendations

- 25 ARN is willing to obtain the independent auditor’s report pursuant to Condition 3 in the Notices, and to cooperate fully with the audit process, and engage constructively with the ACMA following receipt of the report. ARN is committed to ensuring that any appropriate and reasonable recommendations arising from the audit are carefully considered and, where feasible, implemented in a manner that delivers meaningful and lasting improvements to governance and compliance.
- 26 However, in ARN’s submission, proposed Condition 4 is unreasonable because:
 - (a) it pre-judges both the reasonableness and appropriateness of any findings or recommendations made by the independent auditor; and
 - (b) it predetermines the capacity of the Licensees to implement those recommendations within a fixed period of three months, irrespective of their scope, complexity, or operational implications.
- 27 By mandating implementation of all recommendations within three months, the proposed condition 4 assumes in advance that those recommendations will be reasonable, proportionate, operationally feasible and appropriate for the Licensees particular broadcasting environment. This approach removes the evaluative stage that the co-regulatory framework requires, in which the ARN, on behalf of the Melbourne

and Sydney Licensees, and the ACMA assess whether identified measures are suitable and capable of being implemented in a sustainable and effective manner.

- 28 The ACMA, as a statutory regulator operating within a co-regulatory model, is required to act reasonably and proportionately when exercising its powers, including when imposing licence conditions. That framework contemplates consultation, collaborative compliance, and the development of targeted and context-specific safeguards rather than the automatic imposition of obligations whose scope and complexity are unknown. The ACMA's own guidance recognises that regulatory responses must be proportionate and responsive to operational realities, and that safeguards should be designed with regard to the context in which content is produced and consumed.
- 29 The ACMA Position Paper reinforces this approach, noting that audiences expect safeguards that are meaningful and effective, and that professional content providers require systems and processes that are appropriately tailored to their production environment. Pre-emptively requiring implementation of all recommendations, without knowing their nature or feasibility, is inconsistent with that guidance and risks creating obligations that are either impractical or ineffective in practice.
- 30 By predetermining that any recommendations made by the auditor will necessarily be appropriate, proportionate and capable of implementation within three months, the proposed condition removes the necessary evaluative function from both the Licensee and the ACMA. It also creates a risk that ARN will be compelled to implement recommendations that may require extensive structural, contractual, behavioural or technical change without adequate time for assessment, planning or consultation. This is an unreasonable regulatory position and inconsistent with the ACMA's statutory role within a co-regulatory framework.
- 31 As to the second matter, the terms of proposed Condition 4 are also unreasonable because the recommendations are unknown and so their scope, complexity, or operational implications cannot be assessed. It is thus unknown whether the Licensee would, even with best endeavours, have the capacity to implement those recommendations within a fixed period of three months. The requirement to implement all recommendations within three months seems to assume that any recommendations will be capable of rapid adoption, and operationally feasible within existing structures, systems and contractual arrangements.
- 32 Depending on the auditor's findings, there is a strong likelihood that any recommendations directed toward governance improvement may involve significant and interdependent changes to systems, processes, policies and personnel responsible for producing and broadcasting the Program. Such changes cannot be assumed to be implementable within a three-month period without compromising effectiveness, continuity of operations, or contractual and workplace obligations.
- 33 Further, any recommendations relating to on-air conduct would necessarily require changes to the way the Program's hosts conduct themselves on the air. The ACMA Position Paper recognises that audience expectations are tied to program identity and presenter style, which means behavioural change in this context is both complex and sensitive. Achieving sustainable adjustment to on-air practices will require time for consultation, development of guidance, training, rehearsal, and integration into the natural cadence of a long-running live broadcast format. It is unreasonable to expect that such behavioural and cultural adjustments could be designed, implemented and embedded within three months.

- 34 The ACMA's own Investigation Guidance highlights that regulatory responses must be proportionate and contextually informed, acknowledging the operational and editorial realities of broadcast environments. Imposing a compulsory implementation deadline without regard to the scale or nature of the auditor's recommendations is inconsistent with this principle. The guidance recognises that compliance measures must balance community expectations with freedom of expression and program format, and that rigid measures risk undermining the effectiveness of safeguards.
- 35 A more appropriate and effective approach is a staged, evidence-based implementation process. ARN proposes that, following receipt of the independent auditor's report:
- (a) ARN undertakes a detailed internal review of the recommendations, including assessment of operational feasibility, contractual implications, staffing impacts, and technical requirements.
 - (b) ARN consults with the ACMA in relation to the proposed prioritisation and sequencing of recommendations.
 - (c) A jointly agreed implementation plan is developed, including realistic timelines, milestones, and resource allocation.
 - (d) Implementation commences in accordance with the agreed plan, with appropriate oversight, with periodic reporting to the ACMA on progress and any emerging issues.
- 36 ARN's position is that the staged process proposed above would ensure that governance improvements are carefully planned, adequately resourced, and operationally sustainable. It also allows the ACMA to maintain appropriate oversight while ensuring that implementation activity is meaningful and effective, rather than superficial or rushed. ARN is willing to meet with the ACMA as soon as reasonably practicable to discuss the implementation of Conditions 3 and 4.

Conclusion

- 37 For the preceding reasons, ARN respectfully submits that:
- (a) Proposed Condition 2, as drafted, is unreasonable, beyond power and uncertain and should not be imposed;
 - (b) Proposed Condition 4 is unreasonable in prejudging the recommendations of any independent auditor, and requiring the implementation of unknown recommendations within three months, irrespective of their scope or complexity, so it should not be imposed;
 - (c) The implementation of Condition 4, or something like it, would be better achieved through a staged, evidence-based implementation process following receipt of the independent auditor's report in response to Condition 3 in order to ensure that any governance improvements are properly designed, operationally feasible, and sustainable over time.
- 38 For completeness, ARN notes that Condition 3 is expressed to apply in the Notices "For a period of 5 years". ARN understands that that is not intended and that the Licensees will be taken to have complied with Condition 3 by commissioning an

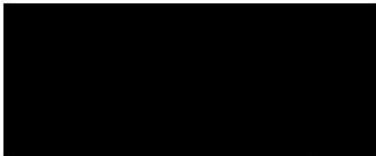
independent audit of the Governance Framework by a compliance expert, on the terms specified in Condition 3, including because Condition 3 requires the Licensees to commission the completion of the audit within 6 months of the imposition of Condition 3. If ARN's understanding is incorrect, please let us know.

- 39 ARN remains committed to working collaboratively with the ACMA to ensure compliance with the Code, to strengthen governance in a practical and sustainable manner, and to maintain audience trust in the co-regulatory framework.
- 40 This submission has been prepared with the assistance of [REDACTED] and [REDACTED] of Counsel and Gilbert + Tobin.

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Please feel free to contact me on [REDACTED] or CEO Michael Stephenson on [REDACTED] to discuss further.

Yours sincerely



Jeremy Child
Chief Legal Officer & Company Secretary