COMMERCIAL RADIO INQUIRY

Final report of the Australian Broadcasting Authority

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Sydney

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Terms Of Reference

TERMS OF REFERENCE FOR INVESTIGATION BY THE AUSTRALIAN BROADCASTING AUTHORITY UNDER DIVISION 2 OF PART 13 OF THE BROADCASTING SERVICES ACT 1992

WHEREAS the Broadcasting Services Act 1992 ("the Act"):

- includes within its objects
  - (i) to encourage providers of commercial broadcasting services to be responsive to the need for fair and accurate coverage of matters of public interest; and
  - (ii) to encourage providers of broadcasting services to respect community standards in the provision of program material;
- charges the Australian Broadcasting Authority with the responsibility for monitoring the broadcasting industry; and

- confers on the Australian Broadcasting Authority a range of functions and powers that are to be used by the Australian Broadcasting Authority in a manner that, in its opinion, will produce regulatory arrangements that are stable and predictable and deal effectively with breaches of the rules established by the Act;

TAKE NOTICE that for the purposes of the performance of its functions:

(a) to suspend and cancel licences and to take other enforcement action under the Act;

(b) to collect fees payable in respect of licences;

(c) to monitor compliance with codes of practice;

(d) to develop program standards relating to broadcasting in Australia; and

(e) to monitor, and report to the Minister on, the operation of the Act;

the Australian Broadcasting Authority will conduct an investigation under Division 2 of Part 13 of the Act into the following matters:

(f) the terms and circumstances of any arrangements, agreements or understandings entered into by or on behalf of;

(i) Radio 2UE Sydney Pty Limited

(ii) Mr John Laws; or

(iii) any other presenter on radio 2UE;

or a corporation associated with any of the above persons, with any third party or parties concerning the content of any program, comment or discussion to be broadcast on radio 2UE pursuant to the commercial broadcasting licence granted to Radio 2UE Sydney Pty Limited last renewed by the ABA on 23 August 1996;

(g) the effect of any such agreement, arrangement or understanding on the content of programs, comments or discussions broadcast on radio 2UE from 5 October 1992 to the date of commencement of this investigation;

(h) whether any consideration paid to or for the benefit of Radio 2UE Sydney Pty Limited pursuant to any such agreement, arrangement or understanding has been included in the gross earnings of Radio 2UE Sydney Pty Limited in:

(i) the financial accounts of Radio 2UE Sydney Pty Limited; and

(ii) the statutory declarations made by or on behalf of Radio 2UE Sydney Pty Limited;

pursuant to section 205B of the Act; and

(i) whether Radio 2UE Sydney Pty Limited remains a suitable licensee within the meaning of section 41 of the Act.

Radio 5AD (5ADD) and Radio 5DN

(j) the terms and circumstances of any arrangements, agreements or understandings entered into by or on behalf of;

(i) 5AD Broadcasting Company Pty Ltd;

(ii) Southern State Broadcasters Pty Ltd; or

(iii) Mr Jeremy Cordeaux;

or a corporation associated with any of the above persons, with any third party or parties concerning the content of any program, comment or discussion to be broadcast on

- Radio 5AD (also known as 5ADD) pursuant to the commercial broadcasting licence granted to 5AD Broadcasting Company Pty Ltd last renewed by the ABA on 4 October 1997; or
- Radio 5DN pursuant to the commercial broadcasting licence granted to Southern State Broadcasters Pty Ltd last renewed by the ABA on 31 July 1997.

(k) the effect of any such agreement, arrangement or understanding on the content of programs, comments or discussions broadcast on Radio 5DN or Radio 5AD (also known as 5ADD) from 5 October 1992 to the date of commencement of this investigation;

(l) whether any consideration paid to or for the benefit of 5AD Broadcasting Company Pty Ltd pursuant to any such agreement, arrangement or

understanding has been included in the gross earnings of 5AD Broadcasting Company Pty Ltd in:

(i) the financial accounts of 5AD Broadcasting Company Pty Ltd; and

(ii) the statutory declarations made by or on behalf of 5AD Broadcasting Company Pty Ltd;

pursuant to section 205B of the Act; and

(m) whether 5AD Broadcasting Company Pty Ltd remains a suitable licensee within the meaning of section 41 of the Act.

(n) whether any consideration paid to or for the benefit of Southern State Broadcasters Pty Ltd pursuant to any such agreement, arrangement or understanding has been included in the gross earnings of Southern State Broadcasters Pty Ltd in:

(i) the financial accounts of Southern State Broadcasters Pty Ltd ; and

(ii) the statutory declarations made by or on behalf of Southern State Broadcasters Pty Ltd;

pursuant to section 205B of the Act; and

(o) whether Southern State Broadcasters Pty Ltd remains a suitable licensee within the meaning of section 41 of the Act.

Radio 6PR

(p) the terms and circumstances of any arrangements, agreements or understandings entered into by or on behalf of;

(i) 6PR Southern Cross Radio Pty Limited; or

(ii) Mr Howard Sattler;

or a corporation associated with any of the above persons, with any third party or parties concerning the content of any program, comment or discussion to be broadcast on radio 6PR pursuant to the commercial broadcasting licence granted to 6PR Southern Cross Radio Pty Limited last renewed by the ABA on 6 May 1996;

(q) the effect of any such agreement, arrangement or understanding on the content of programs, comments or discussions broadcast on radio 6PR from 5 October 1992 to the date of commencement of this investigation;

(r) whether any consideration paid to or for the benefit of 6PR Southern Cross Radio Pty Limited pursuant to any such agreement, arrangement or understanding has been included in the gross earnings of 6PR Southern Cross Radio Pty Limited in:

(i) the financial accounts of 6PR Southern Cross Radio Pty Limited; and

(ii) the statutory declarations made by or on behalf of 6PR Southern Cross Radio Pty Limited;

pursuant to section 205B of the Act; and

(s) whether 6PR Southern Cross Radio Pty Limited remains a suitable licensee within the meaning of section 41 of the Act.

Radio 3AW

(t) the terms and circumstances of any arrangements, agreements or understandings entered into by or on behalf of;

(i) 3AW Southern Cross Radio Pty Limited; or

(ii) Mr Steve Price; or

(iii) any other presenter on radio 3AW;

or a corporation associated with any of the above persons, with any third party or parties concerning the content of any program, comment or discussion to be broadcast on radio 3AW pursuant to the commercial broadcasting licence granted to 3AW Southern Cross Radio Pty Limited last renewed by the ABA on 18 February 1998;

(u) the effect of any such agreement, arrangement or understanding on the content of programs, comments or discussions broadcast on radio 3AW from 5 October 1992 to the date of commencement of this investigation;

(v) whether any consideration paid to or for the benefit of 3AW Southern Cross Radio Pty Limited pursuant to any such agreement, arrangement or understanding has been included in the gross earnings of 3AW Southern Cross Radio Pty Limited in:

(i) the financial accounts of 3AW Southern Cross Radio Pty Limited; and

(ii) the statutory declarations made by or on behalf of 3AW Southern Cross Radio Pty Limited;

pursuant to section 205B of the Act; and

(w) whether 3AW Southern Cross Radio Pty Limited remains a suitable licensee within the meaning of section 41 of the Act.

CONTENTS

Glossary

Payola	The unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming. A term used in the United States.
Plugola	The practice of allowing material to be broadcast which promotes a product or service in which a person responsible for program selection or on-air presentation has a commercial interest and fails to declare it. Unlike payola, it need not involve another person or payment of any kind, but like payola, it is only the failure to disclose that makes the practice illegal. A term used in the United States.

Abbreviations

The Authority	Australian Broadcasting Authority
ABA	Australian Bankers' Association
ABT	Australian Broadcasting Tribunal
ACCC	Australian Competition and Consumer Commission
ACA	Australian Consumer Association
The Act	Broadcasting Services Act 1992
ALM	*Arbeitsgemeinschaft der Landesmedienanstalten*
AMPCOM	Australian Music Performance Committee
ASC	Advertising Standards Canada
BSC	Broadcasting Standards Commission
CAB	Canadian Association of Broadcasters
CBSC	Canadian Broadcasting Standards Council
CLC	Communications Law Centre
CLR	Commonwealth Law Report
CRTC	Canadian Radio-television and Telecommunications Commission
CSA	Conseil superieur de l'Audiovisuel
DPP	Director of Public Prosecutions
FARB	Federation of Australian Radio Broadcasters
FCC	Federal Communications Commission
IAE	Industry Authority Agreements
ICAC	NSW Independent Commission Against Corruption
MEAA	Media Entertainment and Arts Alliance
PRIA	Public Relations Institute of Australia
RAC	Radio Advertising Condition
RLFA	Radio Licence Fees Act 1964
RPS	Radio Program Standard
RTNDAC	Radio Television News Directors Association of Canada
RTS	Road Transport Forum
SCB	Southern Cross Broadcasting
UK	United Kingdom
US	United States of America
USC	United States Code
VPRT	Association of Private Radio Broadcasters (Germany)

Executive Summary

THE BROADCASTING SERVICES ACT 1992 (THE ACT)

Section 4(1) of the *Broadcasting Services Act 1992* (the Act) provides:

> 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.

Object 3(g) of the Act states:

> 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 records:

> ... 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.

CURRENT AFFAIRS ON RADIO

Radio is an influential medium. In particular, the treatment of current affairs (including talkback programming) has the ability to shape the course of political and social debate in Australia. Talkback announcers carry considerable weight with many listeners, and talkback is a significant source of information and opinions for the entire community.

THE INQUIRY

On 12 July 1999 the ABC program 'Media Watch' broadcast a story concerning an alleged financial agreement between 2UE presenter Mr John Laws and the Australian Bankers' Association (an organisation representing the major Australian banks). On 15 July 1999, the Authority announced that it would be using its formal powers under the *Broadcasting Services Act 1992* (the Act) to conduct an investigation into the issues raised by the 'Media Watch' program.

After further allegations appeared in the media concerning financial arrangements between 2UE's breakfast program presenter Mr Alan Jones and commercial interests, the Authority announced that it would be widening the scope its inquiry to include 2UE broadcasters other than Mr Laws.

Soon after the commencement of the 2UE investigation, the Authority received information relating to commercial arrangements entered into by an announcer at commercial radio station 6PR Perth, Mr Howard Sattler. In addition, further allegations

were raised on the 'Media Watch' program of 26 July concerning Mr Jeremy Cordeaux and radio station 5DN. As a result, on 30 July 1999 the Authority decided to expand the terms of reference of its commercial radio inquiry.

In November 1999, the Authority expanded the terms of reference of its inquiry again to include allegations raised involving radio station 3AW. In the course of the investigation, evidence was obtained about understandings between other 3AW presenters and third parties and in March 2000, the Authority decided to amend the terms of reference to ensure such issues were covered.

THE AUTHORITY'S INFORMATION GATHERING POWERS AND PROCESSES

In deciding to gather information about a matter in relation to the commercial radio inquiry, the Authority is empowered by Part 13 of the Act to conduct investigations and to hold hearings. In relation to 2UE, the Authority decided that it would conduct a hearing pursuant to Division 3 of Part 13 of the Act.

In relation to the other commercial radio licensees 3AW, 5DN and 6PR, the Authority decided to gather information under Division 2 of Part 13 of the Act as the allegations and information received in relation to these licensees were not as extensive as those concerning 2UE.

AGREEMENTS MADE BY MESSRS CORDEAUX, JONES, LAWS, MANSFIELD, PRICE AND SATTLER

The Authority sought documents from relevant persons and companies in relation to the agreements made by Messrs Cordeaux, Jones, Laws, Mansfield, Price and Sattler with a range of commercial entities.

The Authority is concerned about a number of practices in the commercial radio broadcasting industry evidenced by its investigation. These include:

- 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 Authority has concluded that these practices have influenced the content of programs – in some cases, directly. In relation to the licensees investigated by the Authority, these practices have, in some instances, breached the Codes (and in the case of 2UE, the licence conditions imposed under the Act as well).

The Authority has also concluded that there has been a significant failure in the system of co-regulation in these matters. The evidence before the Authority indicates that the effort made by the licensees examined to ensure compliance with the Codes has been inadequate.

The Authority is of the view that:

- relevant commercial agreements between key station personnel and sponsors of current affairs programs must always be disclosed;
- relevant commercial agreements between key station personnel and sponsors in other programs should be disclosed;
- presenters of current affairs programs must (and presenters of other programs should) provide a full copy of all their relevant commercial agreements to the licensee;
- advertisements must not be presented as other programs; and
- licensees must comply with the requirements of Clause 4 of Schedule 2 of the Act in relation to the broadcast of political matter and must ensure, that the identity of third parties at whose request political matter is broadcast, is disclosed.

THE COMMERCIAL RADIO CODES OF PRACTICE (THE CODES) AND THE ACT

Neither the Codes nor the conditions imposed on licensees under the Act specifically address commercial arrangements entered into by presenters.

The stated purpose of Code 2 is 'to promote accuracy and fairness in news and current affairs programs'. Clause 2.2(d) of the Codes provides:

> In the preparation and presentation of current affairs programs, a licensee must ensure that:
>
> ...
>
> (d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts ...

Clause 3.1(a) of the Codes provides:

> Advertisements broadcast by a licensee must:
>
> (a) not be presented as news programs or other programs.

Under sub-section 42 (2) (together with Clause 4 of Schedule 2) of the Act, it is a condition of all commercial radio licences that:

> If a broadcaster broadcasts political matter at the request of another person, the broadcaster must, immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved in writing by the Authority.

In the Authority's view, it is an essential element of fairness in the presentation of programs that, in the absence of any explicit disclosure, a listener can assume there to be no commercial agreements between presenters and persons referred to in those programs. Such agreements can give rise to suggestions that an announcer is obliged to a third party, and to perceptions that the content of broadcasts may be dictated by the commercial imperatives of third parties.

In the Authority's view, a commercial arrangement between a presenter and a person whose commercial interests are directly affected by the broadcast is a fact of sufficient relevance to render misleading any broadcast from which it is withheld.

It is the Authority's view that licensees should note in particular the importance placed by the Parliament on the influence broadcasting services may have in political debate. The Authority will continue to view seriously any breaches of the Act in relation to political matter.

FINDINGS

1. The commercial agreements examined by the ABA have led to a substantial failure by licensees to comply with the standards of conduct required by Codes 2 and 3 and in the case of 2UE with the 'political matter' licence condition.

2. There appears 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 of their implications.

3. Within a significant proportion of current affairs programs, the Codes are not operating to provide appropriate community safeguards.

The Authority has formed the view that remedial action is necessary to ensure the commercial radio industry's compliance with the Act and the Codes and, in particular, to ensure the effective disclosure of the commercial agreements between presenters and sponsors.

It has been suggested, including by 2UE's counsel, that the appropriate course would be to a return to the situation which existed prior to 5 October 1992 where the predecessor to the Authority enforced "black letter law" program standards rather than industry codes.

The Authority believes that, while there has been a substantial failure in the current co-regulatory arrangements, it remains possible to achieve Parliament's intention of effective co-regulation by the imposition of standards in areas where the Codes have failed, as well as by future amendments to the Codes and more effective Code compliance by the commercial radio industry.

FUTURE ACTION

The Authority has reached a preliminary view that it should determine three standards applicable to commercial radio broadcasting licensees. It is suggested that these commence operation on 1 November 2000 and end on the same date as the expiry of the conditions placed on the licence of Radio 2UE Sydney Pty Ltd, 2 April 2003.

The Authority expects that by the cessation of the proposed standards the commercial radio industry will have developed, and submitted to the Authority for registration, codes of practice to operate from 3 April 2003 that will provide at least the same level of community safeguards as are contained in the proposed standards.

Attached to this report are three proposed standards as follows.

Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000.

This proposed standard requires:

- the 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
- licensees to keep a register of commercial agreements between sponsors and presenters of current affairs programs and make it available to the ABA and the public; and
- licensees to 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 this standard.

Broadcasting Services (Commercial Radio Compliance Program) Standard 2000.

This proposed standard requires commercial radio broadcasting licensees to formulate, implement and maintain a compliance program to ensure compliance with the requirements of the Act, standards and the codes.

- The proposed standard prescribes minimum elements of such a program.

Broadcasting Services (Commercial Radio Advertising) Standard 2000.

This proposed standard requires licensees to ensure that advertisements are distinguishable from other programs.

The Need for Legislative Change

The Authority considers that its existing powers lack the flexibility and force to properly respond to serious Code breaches and that it lacks sanctions that have immediate effect.

Options to remedy this situation include:

- the power to direct advertising free periods;

- the power to designate a period of time a presenter is prohibited from broadcasting;
- the power to require on-air corrections or the findings of Authority investigations to be broadcast;
- the power to impose a civil penalty; and
- the power to approach the Federal Court for injunction orders.

These options would require legislative change.

During the course of the investigation there has been some discussion of what sanctions can or should be exercised against presenters involved in breaches of the codes, conditions or the Act. It is fundamental to the regulatory scheme of the Act that it is concerned with the regulation of licensees, and not directly of their employees or presenters. In the proposed 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.

If Parliament wishes to legislate for sanctions against presenters, however, the Authority has identified two options, including an approach similar to the "payola" laws of the United States.

The Authority also considers that the legislation should be amended to require licensees to keep a copy of all material broadcast for a period of 6 months rather than the present 60 days.

Comment Sought on Proposed Determination of Standards

The Authority invites comment on the proposed standards presented in this report:

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

The Authority also seeks comment on its preliminary view that the determination of standards, to operate for the same period as the two conditions on the licence of commercial radio broadcaster 2UE, is the appropriate regulatory action to ensure community safeguards for the matters covered by the proposed standards.

How to make a submission

ABA web site

This report, and other public documents associated with the investigation are available on the Authority's web site at:

www.aba.gov.au/what/investigate/commercial_radio/index.htm

Submissions

Submissions will be public documents and should be provided to the Authority in hard copy and in electronic form to facilitate their posting on the Authority's web site. This will allow access to submissions for all parties unless the Authority, in its discretion, grants restricted access to the whole or part of a submitted document. There will be an online index of submissions that are only provided in hard copy.

Restricted access

Please indicate if you do not wish to have all or part of your submission made publicly available and include reasons why the Authority should grant restricted access to the material.

Where to send your submission

Submissions can be sent as follows:

email	info@aba.gov.au
post	Manager Program Standards Australian Broadcasting Authority PO Box Q500 Queen Victoria Building NSW 1230
courier	Level 15, Darling Park 201 Sussex Street SYDNEY NSW 2000

Closing date for submissions

Submissions must be received by the Authority's Sydney office no later than:

5.00 p.m. Friday 15 September 2000.

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1 Background to the Commercial Radio Inquiry

INITIATION OF THE INQUIRY

On 12 July 1999 the ABC program 'Media Watch' broadcast a story concerning an alleged financial agreement between 2UE presenter Mr John Laws and the Australian Bankers' Association (an organisation representing the major Australian banks). On 15 July 1999, the Authority announced that it would use its formal powers under the *Broadcasting Services Act 1992* (the Act) to conduct an investigation into the issues raised by the 'Media Watch' program.

After further allegations appeared in the media concerning financial arrangements between 2UE's breakfast program presenter Mr Alan Jones and commercial interests, the Authority announced that it would widen the scope its inquiry to include 2UE broadcasters other than Mr Laws.

The 2UE investigation was commenced under Division 2 Part 13 of the Act. The aim of the investigation was to determine whether the allegations, if substantiated, involved breaches of the Act, the licence conditions of 2UE or the *Commercial Radio Codes of Practice and Guidelines* (the Codes).

Soon after the commencement of the 2UE investigation, the Authority received information relating to commercial arrangements entered into by an announcer at commercial radio station 6PR Perth, Mr Howard Sattler. This information suggested to the Authority that the matters being investigated in relation to Messrs Jones and Laws and 2UE might also be relevant to Mr Sattler and 6PR. In addition, further allegations were raised on the 'Media Watch' program of 26 July concerning Mr Jeremy Cordeaux and radio station 5DN.

As a result, on 30 July 1999 the Authority decided to expand the terms of reference of its commercial radio inquiry to include the allegations raised involving radio station 6PR and Mr Sattler and radio stations 5ADD and 5DN and Mr Cordeaux. Revised terms of reference were issued on 6 August 1999.

In November 1999, the Authority expanded the terms of reference of its commercial radio inquiry further to include the allegations raised involving radio station 3AW. Revised terms of reference were issued on 23 November 1999. In the course of the investigation evidence was obtained about understandings between other 3AW presenters and third parties. On 30 March 2000 the Authority decided to amend the terms of reference to ensure such issues were covered.

THE AUTHORITY'S INFORMATION GATHERING POWERS AND PROCESSES

In deciding to gather information about a matter in relation to the commercial radio inquiry, the Authority is empowered by Part 13 of the Act to conduct investigations and to hold hearings. In relation to 2UE, the Authority decided that it would conduct a hearing pursuant to Division 3 of Part 13 of the Act.

In relation to the other commercial radio licensees 3AW, 5DN and 6PR, the Authority decided to gather information under Division 2 of Part 13 of the Act. While the examinations of witnesses conducted by the Authority under Division 2 of Part 13 of the Act are required to be private, the Authority can publish a report of its investigation into these matters.

The 2UE Hearing

Between July and November 1999, the Authority issued notices under section 173 of the Act requiring various persons to produce relevant documents to the Authority.

As part of the inquiry process, the Authority decided that a Panel (comprised of members of the Authority) would conduct a public hearing into certain of the allegations as they related to Mr Laws, Mr Jones and 2UE. The hearing commenced on 19 October 1999 and concluded on 3 December 1999. The manner in which the Authority may conduct hearings is set out at ss184–198 of the Act.

On 7 February 2000, the Panel produced a report containing the findings of the hearing into the various allegations relating to radio station 2UE, Mr Jones and Mr Laws (see *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney*, February 2000). The report examined:

- the relevant Codes and the principles which underpin them;
- the contractual arrangements entered into by Mr Jones and Mr Laws, the effect of those contractual arrangements on the on-air conduct of Mr Jones and Mr Laws, and whether there was any breach of the Codes and/or 2UE's licence conditions as a result; and
- the extent of the licensee's knowledge of the existence and effect of these contractual arrangements, and whether there was any breach of the Codes and/or 2UE's licence conditions as a result.

The report concluded with a brief summary of findings and with recommendations for further action by the Authority, including the imposition of two new conditions on 2UE's licence. The Authority noted the findings of the Panel, adopted its recommendations and, on 21 March 2000 imposed two conditions on 2UE's licence.

The 3AW Investigation

In December 1999 and March 2000, the Authority issued notices under s.173 of the Act requiring relevant persons and companies to provide to the Authority documents and other information in their possession relevant to the terms of reference of the Authority's investigation.

In March and April 2000, the Authority issued notices under s.173 of the Act to relevant persons and companies requiring them to appear before delegates of the Authority for examination. The purpose of the examinations was to gather further information relevant to the Authority's investigation. Examinations were conducted on 9 and 10 March 2000

and 11 April 2000 in Melbourne. The manner in which the Authority may conduct examinations is set out at ss174–176 of the Act.

On 13 June 2000, the Authority provided a report containing the draft findings of the investigations into the various allegations relating to radio station 3AW to those persons whose interests may have been adversely affected by publication of the report. By 5 July 2000, those persons whose interests may have been adversely affected by publication of the report provided comments on the draft report to the Authority. Those comments were taken into account in producing a final report of the investigations into radio station 3AW.

The investigation into 3AW (see Report of the Australian Broadcasting Authority investigations into 3AW Melbourne, 5DN Adelaide and 6PR Perth) examined:

- the contractual arrangements entered into by Mr Bruce Mansfield, the effect of those contractual arrangements on Mr Mansfield's on-air conduct, and whether there was any breach of the Codes of Practice and/or 3AW's licence conditions as a result;

- the contractual arrangements entered into by 3AW with a number of advertisers, and whether there was any breach of the Codes of Practice and/or 3AW's licence conditions as a result; and

- the extent of the licensee's knowledge of the existence and effect of these contractual arrangements, the systems put in place by the licensee to ensure the effective operation of the Codes of Practice, and whether there was any breach of the Codes of Practice and/or 5DN's licence conditions as a result.

The 5DN Investigation

In August and September 1999, the Authority issued notices under s.173 of the Act requiring relevant persons and companies to provide to the Authority documents and other information in their possession relevant to the terms of reference of the Authority's investigation.

In January and February 2000, the Authority issued notices under s.173 of the Act to relevant persons and companies requiring them to appear before delegates of the Authority for examination. The purpose of the examinations was to gather further information relevant to the Authority's investigation.

Examinations were conducted on 2 and 3 February 2000 in Sydney, 8, 9 and 10 February 2000 in Adelaide, 10 March 2000 in Melbourne and 21 March 2000 in Sydney.

On 13 June 2000, the Authority provided a report containing the draft findings of the investigations into the various allegations relating to radio station 5DN to those persons whose interests may have been adversely affected by publication of the report. By 5 July 2000, those persons whose interests may have been adversely affected by publication of the report provided comments on the draft report to the Authority. Those comments were taken into account in producing a final report of the investigations into radio station 5DN.

The investigation into 5DN Adelaide (see Report of the Australian Broadcasting Authority investigations into 3AW Melbourne, 5DN Adelaide and 6PR Perth) examined:

- the contractual arrangements entered into by Mr Cordeaux, the effect of those contractual arrangements on Mr Cordeaux's on-air conduct, and whether there was any breach of the Codes of Practice and/or 5DN's licence conditions as a result; and

- the extent of the licensee's knowledge of the existence and effect of these contractual arrangements, the systems put in place by the licensee to ensure the effective operation of the Codes of Practice, and whether there was any breach of the Codes of Practice and/or 5DN's licence conditions as a result.

The 6PR Investigation

In August and September 1999, the Authority issued notices under s.173 of the Act requiring relevant persons and companies to provide to the Authority documents and other information in their possession relevant to the terms of reference of the Authority's investigation.

On 27 January 2000, the Authority issued notices under s.173 of the Act to relevant persons and companies requiring them to appear before delegates of the Authority for examination. The purpose of the examinations was to gather further information relevant to the Authority's investigation. Examinations were conducted on 2 and 3 February 2000 in Sydney, 14 February 2000 in Perth and 11 April 2000 in Melbourne.

On 13 June 2000, the Authority provided a report containing the draft findings of the investigations into the various allegations relating to radio station 6PR to those persons whose interests may have been adversely affected by publication of the report. By 5 July 2000, those persons whose interests may have been adversely affected by publication of the report provided comments on the draft report to the Authority. Those comments were taken into account in producing a final report of the investigations into radio station 6PR.

The investigation into 6PR Perth (see Report of the Australian Broadcasting Authority investigations into 3AW Melbourne, 5DN Adelaide and 6PR Perth) examined:

- the contractual arrangements entered into by Mr Sattler, the effect of those contractual arrangements on Mr Sattler's on-air conduct, and whether there was any breach of the Codes of Practice and/or 6PR's licence conditions as a result; and

- the extent of the licensee's knowledge of the existence and effect of these contractual arrangements, the systems put in place by the licensee to ensure the effective operation of the Codes of Practice, and whether there was any breach of the Codes of Practice and/or 6PR's licence conditions as a result.

2 The Commercial Radio Industry in Australia

THE EXTENT OF NEWS/CURRENT AFFAIRS/TALKBACK PROGRAM FORMATS

There are 232 commercial radio broadcasting services operating on the AM and FM bands in Australia, represented at an industry level by the Federation of Australian Radio Broadcasters Limited (FARB). In 1998-99, 226 commercial radio licensees generated $635.5 million in revenue (a 6.3 per cent increase over the revenue generated by 212 licensees in 1997-98) and $107.5 million in profit (a 13.4 per cent increase over 1997-98).

There is a range of commercial radio program formats, including music, news, current affairs and talkback. An Authority survey of commercial radio program formats for the year 1998-99 indicated that, of the 217 stations surveyed, all stations surveyed broadcast music to some degree. For 80 per cent of stations surveyed, music formed between 60 and 80 per cent of their weekly programming. All stations surveyed also broadcast news programs, varying between less than 1 per cent to 14 per cent of weekly programming. In addition, 27 per cent of stations surveyed also broadcast current affairs programs, varying between less than 1 per cent to almost 50 per cent of weekly programming.

The Authority survey also revealed that talkback is a significant element within the broader current affairs format. For example, 47 per cent of stations surveyed broadcast talkback programs, varying between less than 1 per cent to almost 70 per cent of weekly programming. Talkback is also a predominantly AM radio phenomenon: 74 per cent of AM stations broadcast talkback programs, whereas only 21 per cent of FM stations broadcast some form of talkback.

Talkback is also a national phenomenon: 50 per cent of metropolitan capital city stations, 38 per cent of large regional stations, 48 per cent of medium regional stations and 52 per cent of small regional stations broadcast talkback programs. Music is by far the dominant format, however, as the talkback component for 88 per cent of stations surveyed comprises less than 20 per cent of total weekly programming. There are only a small number of stations (6 per cent) that have a large proportion of talkback content (more than 30 per cent of total weekly programming), and these stations are located in metropolitan or large regional cities in New South Wales, Queensland, South Australia or the Australian Capital Territory.

TALKBACK RADIO IN AUSTRALIA

The Macquarie Dictionary defines talkback as 'a radio program in which members of the public participate by telephone'. Talkback radio, also known as open-line, generally 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.

All of the mainland state capital cities in Australia have commercial AM radio stations which feature talkback as an important part of their formats. These include 2UE and 2GB in Sydney, 3AW in Melbourne, 4BC in Brisbane, 5DN in Adelaide and 6PR in Perth.

While one of the primary purposes of talkback-oriented programs is to entertain, this does not preclude such programs from also being informative. The Authority has always taken the view that talkback programs can properly be regarded as current affairs programs, that is, programs focussing on social, economic or political issues of current relevance to the community.

The personalities and opinions of talkback presenters tend to dominate the programs they host. Their success depends largely on their ability to talk easily on a wide range of issues and topics (including those of a social, political and economic nature), to engage their audiences and to elicit responses from on-line callers and other people who appear on their programs.

Other factors that may contribute to the success of talkback radio format include:

- the opportunity provided by talkback radio for people directly and (usually) anonymously to express themselves to a large audience;
- the perception that talkback radio is spontaneous and unpredictable; and
- talkback radio's ability to provide a sense of companionship and keep people in touch with the views of others on topical issues and events.

The opinions of talkback announcers carry considerable weight with many listeners, particularly regular ones. Generally speaking, advertisements read live-to-air by these announcers (especially if the advertisement includes an explicit personal endorsement from the announcer) are worth more to advertisers than pre-recorded advertisements, because of the perceived authority of the presenter when talking about the product being advertised. For example, during the 2UE hearing, one witness testified that 'I don't think you can underrate the importance of the live reads'.[1]

As indicated above, talkback is a significant element within the current affairs program format across commercial radio in Australia. Taken as a whole, current affairs programming (including talkback) is broadcast daily across metropolitan, regional and rural Australia and is a significant source of information and opinions for the entire community. It is for this reason that the Authority takes particular interest in breaches of Codes in the areas of news and current affairs or advertising.

COMMERCIAL RADIO CODES OF PRACTICE AND GUIDELINES

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

The Codes developed under the Act, work within the framework of other Federal and State laws, for example, the various State laws relating to the use of listening devices, the

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1 2UE Hearing Transcript, Mr Max Suich (Director, Marketing Division, Optus), p. 424.

law relating to defamation, and so on. Also, radio journalists who are members of the Media Entertainment and Arts Alliance pledge to stand by its code of ethics in their professional activities.

Introduction of the Codes

During 1992, before the commencement of the *Broadcasting Services Act 1992*, FARB developed draft codes of practice in consultation with the ABT. FARB member stations in October of that year unanimously endorsed the draft codes.

In March 1993 FARB submitted the draft codes to the Authority for registration (the Authority having replaced the ABT in October 1992). The Authority registered Codes 1 to 5 on 17 May 1993, with Code 6 being registered on 22 June 1993. The Codes came into force on these dates. The six Codes covered the following areas:

- programs unsuitable for broadcast (Code 1);
- news and current affairs programs (Code 2);
- advertising (Code 3);
- Australian music (Code 4, developed by the Australian Music Performance Committee comprising radio, music industry and craft union representatives);
- complaints handling (Code 5); and
- interviews and talkback programs (Code 6, relates only to the prevention of the unauthorised broadcast of statements by identifiable persons).

COMMERCIAL RADIO GUIDELINES

In addition to the Codes, FARB developed supporting guidelines on the portrayal of indigenous Australians and of women. The purpose of the guidelines is to assist broadcasters in understanding and meeting the requirements of Code 1. Clause 1.3(e) of this Code prohibits programs likely to incite or perpetuate hatred against or vilify any person or group on the basis of, among other things, race or gender.

The guidelines on the portrayal of indigenous Australians and of women were adopted in May and June 1993 respectively. As guidelines, rather than codes, they did not need to be registered by the Authority. While compliance with the guidelines is not required under the Code, with their introduction FARB demonstrated initiative on these important issues. At the time the Authority commended FARB on the guidelines and also on the way they had been developed in consultation with relevant groups.

1999 REGISTRATION OF REVISED CODES (EXCLUDING CODES 2, 3 AND 6)

In 1998 FARB began the process of reviewing the Codes for the first time. After the commencement of its investigation into 2UE and other talkback stations, the Authority advised FARB that at that time it did not intend to consider revised codes dealing with

news and current affairs (Code 2), advertising (Code 3) and interviews and talkback programs (Code 6). The Authority informed FARB that until the end of its investigation, it would be difficult for the Authority to be satisfied that revised codes on these matters provided adequate community safeguards for all matters that might arise out of the investigation.

FARB therefore submitted to the Authority for registration only those codes not affected by the Authority's investigation. The Authority registered these revised codes on 21 October 1999. As a result, the original Codes 2, 3 and 6 remain in force.

Changes introduced under the revised Codes include:

- a new code on compliance with the Codes;
- an introduction outlining the purpose of the Codes and requiring their formal review every three years;
- a proscription on the way suicide may be presented;
- restrictions on the broadcast of sexual content, including the introduction of a time zone for explicit sexual themes (9.30pm – 5am) and a requirement for appropriate warnings;
- minimum requirements for 'new' Australian music; and
- 30-day time limits for broadcasters to respond to complaints and for complaints to be lodged in response to a program.

CODE OF PRACTICE 2 – NEWS AND CURRENT AFFAIRS PROGRAMS

Code 2 of the Codes of Practice states:

> Purpose:
> The purpose of this code is to promote accuracy and fairness in news and current affairs programs.
>
> 2.1 News programs (including news flashes) broadcast by a licensee must:
>
> (a) present news accurately;
>
> (b) not present news in such a way as to create public panic, or unnecessary distress to listeners;
>
> (c) distinguish news from comment.
>
> 2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:
>
> (a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity;
>
> (b) the reporting of factual material is clearly distinguishable from commentary and analysis;

(c) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community;

(d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts; and

(e) respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy.

Definition of 'Current Affairs Program'

The Code does not include a definition of current affairs programs, as FARB believed such a definition was unnecessary. FARB indicated at the time the Codes were being finalised, however, that it would be open to the idea of including such a definition in the context of guidelines. The superseded ABT standard RPS 8 defined a 'current affairs program' as:

> a program focussing on social, economic or political issues of immediate relevance to the community, including interviews and commentaries dealing in depth with news items.

Regarding this definition, the ABT's December 1991 decision and reasons report on the public inquiry[2] that resulted in the determination of RPS 8 stated:

> The standard, as it is now presented, includes a definition of the meaning of 'current affairs programs'. Apart from mainstream current affairs programs, this may include, but is not limited to, programs such as news and current affairs specials, **talkback radio**, documentaries and magazine-style programs. However, the standard will only apply to these programs when they focus on social, economic or political issues of immediate relevance to the community. [emphasis added]

The Authority has adopted this meaning of 'current affairs program' in all matters concerning compliance with the Codes. The Authority has conducted a number of investigations into talkback programs and assessed these programs against the clause of Code 2 that deals with current affairs programs.[3] The licensees of the programs under investigation have accepted this method of assessment, as has FARB.

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2 Inquiry into Accuracy, Fairness and Impartiality in Current Affairs Programs on Television and Radio; Decisions and Reasons; IP/89/48

3 For example, Authority Investigations: 265 (96/0149 – 2MW – Steve Schumanski); 553 (98/0207 – 2UE – Alan Jones); 559 (97/0677 – 2UE – John Laws); 561 (98/0268 – 2UE – Stan Zemanek); 567 (98/0300 – 2GB – Mike Gibson); 619 (98/0486 – 3AW – Steve Price); and 651 (98/0923 – 5AA – Bob Francis).

Relevant Available Facts

The 2UE, 3AW, 5DN and 6PR investigations were concerned (in part) with whether there had been a breach of clause 2.2(d) of the Codes. In the broadcasts examined in these investigations, the Authority is of the view that:

- the existence of each commercial agreement between a presenter and a third party is an 'available fact' as the term is used in Clause 2.2(d) of the Codes.

- if available facts such as these are withheld in circumstances where their disclosure might affect the listeners assessment of the material broadcast, the presentation of the relevant program material is misleading

The Authority is of the view that the existence of a commercial agreement becomes relevant where the subject matter of the broadcast concerns, or is favourable to, the person with whom a presenter has a commercial agreement.

The Authority is of the view that the disclosure of relevant available facts must be sufficiently linked to the broadcast to ensure the disclosure forms part of the broadcast. The disclosure and the broadcast must be linked to avoid the broadcast being misleading.

CODE OF PRACTICE 3 – ADVERTISING

Code 3 of the Codes of Practice states:

> Purpose:
>
> The purposes of this Code are to ensure that advertisements comply with others Codes where applicable, and to limit the time devoted to advertisements.
>
> 3.1 Advertisements broadcast by a licensee must:
>
> (a) not be presented as news programs or other programs;
>
> (b) comply with all other Codes of Practice so far as they are applicable.
>
> 3.2 Where a commercial radio station is the only commercial station in a licence area in which 30% or less of the licence is attributed to overlap, the licensee of that station must not broadcast more than 18 minutes of advertisements in a period of an hour.

Meaning of 'Advertisement'

'Advertisement' is not defined in the Act or in the Codes. As a result, when investigating complaints relating to advertisements, the Authority has to date relied on the common law meaning as determined through judicial interpretation.[4]

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[4] For a discussion of the common law meaning of 'advertisements', see the *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney*, February 2000, pp 27-28.

Code 3 prohibits advertisements from being presented as news or as any other kind of programming, other than as advertisements. In effect Code 3 requires that advertisements must be clearly distinguished as such and not able to be confused with any other type of programming. Code 3 recognises that the promotional purpose of an advertisement may be concealed, for example, by disguising it as news or comment. Also program material may be designed or calculated to have a number of purposes, one of which may be to draw attention to or to promote an organisation, product or service.

In interpreting Code 3 in the 2UE hearing, however, the Authority encountered a difficulty with the width of the common law definition of advertisement. If the Authority were to apply the common law definition, the effect would be that 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 intention of Code 3.

The Authority accepts that Code 3 is meant to apply only to paid advertisements, and it has read the term accordingly. Thus, the proper meaning of Code 3.1 is to prohibit the presentation as news programs or other programs any material that fits within the common law definition of an advertisement, in circumstances where that material is broadcast for payment or other valuable consideration.

Paid advertisements include all advertisements where there is a causal link between payment of consideration and the advertisement being broadcast. Thus consideration passing to a presenter, producer or program maker does not stop the matter being an advertisement.

Whether program matter may be classified as an advertisement that draws public attention to a product or service is determined by objective reference to the nature of the broadcast. Further, matter which is, in truth, advertising may be presented as other program matter despite being placed within a broader context of unambiguously advertising programs. The broadcast matter itself is sufficient context to determine whether the matter, 'advertising' in content, has assumed the form of 'other program' matter.

3 The Legislative and Policy Framework for Regulation of Commercial Radio Content

INTRODUCTION

Objects of the Act

The objects of the *Broadcasting Services Act 1992* (the Act) specify the outcomes Parliament intended from the regulation of broadcasting in Australia. They are also designed to facilitate decision making consistent with the regulatory policy of the Act and to guide its administration.

The objects relevant to this investigation are:

- 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 (subsection 3(g)); and

- to encourage providers of broadcasting services to respect community standards in the provision of program material (subsection 3(h)).

Regulatory Policy

The regulatory policy of the Act is 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 (subsection 4(1)); and

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

Role of the Authority

In order to achieve the objects of the Act in a way that is consistent with the regulatory policy in subsection 4, the Authority has:

- responsibility for monitoring the broadcasting industry; and

- a range of functions and powers to be used in a manner that, in the opinion of the Authority, will produce stable and predictable regulatory arrangements and deal effectively with breaches of the rules established by the Act. (subsection 5(1))

Where necessary to deal with a breach of the Act or the regulations, the Authority should use its powers, or a combination of its powers, in a manner that, in the opinion of the Authority, is commensurate with the seriousness of the breach concerned (subsection 5(2)).

Primary Functions of the Authority

The primary functions of the Authority include to:

- conduct or commission research into community attitudes on issues relating to programs (subsection 158(g));
- assist broadcasting service providers to develop Codes of Practice that, as far as possible, are in accordance with community standards (subsection 158(h));
- monitor compliance with those Codes of Practice (subsection 158(i));
- develop programs standards relating to broadcasting in Australia (subsection 158(j));
- monitor and investigate complaints concerning broadcasting services (subsection 158(j)); and
- monitor, and report to the Minister on, the operation of the Act (subsection 158(n)).

INDUSTRY CODES AND THEIR REGISTRATION BY THE AUTHORITY

Under the Act primary responsibility for industry rules that ensure programs reflect community standards, and for handling complaints about program content, rests with broadcasters. Only in the case of commercial television, and only then in the areas of Australian content and children's television, has the Act required the Authority to determine mandatory program standards.

The Explanatory Memorandum to the *Broadcasting Services Bill 1992* sets out the underlying policy intent for program content regulation. While the fundamental focus of the regulatory framework is on broadcasters taking responsibility for their own rules, the Explanatory Memorandum recognises that conflict is likely between the public interest and broadcasters' commercial imperatives. It states that:

> Areas such as Australian content, children's programs, taste and decency, and advertising, are matters of community concern which could conflict with a service provider's responsibility to its shareholders to maximise profits. This Part [9] aims to balance the costs and benefits of the community's regulatory needs with the profit-based nature of a commercial service provider...

Section 123 of the Act requires industry groups representing commercial, community and narrowcasting services to develop, in consultation with the Authority, Codes of Practice that are applicable to the broadcasting operations of each of those sections of the industry. The Act lists the matters that the codes may relate to, including:

- promoting accuracy and fairness in news and current affairs programs (subsection 123(2)(d);
- broadcasting time devoted to advertising (subsection 123(2)(f); and
- any other matters relating to program content that are specifically listed but which are of concern to the community (subsection 123(2)(l).

The Authority must include a code of practice in the Register of Codes of Practice if it is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code; and
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code (subsection 123(4)(b)).

LICENSEE COMPLIANCE WITH CODES

The Authority must monitor compliance with codes of practice and their effectiveness in operating to provide appropriate community safeguards for matters of concern. The Authority investigates unresolved complaints from the public that relate to codes of practice, as well as complaints from the public that relate to a potential breach of a licence condition or the Act.

Unlike programs standards determined by the Authority, industry codes of practice are not rules that must be complied with as a condition of licence. A breach of a code of practice, therefore, is not a breach either of a licence condition or of the Act.

In relation to breaches of licence conditions or of the Act, the Authority has various powers including, in certain circumstances, the power to:

- issue a notice requiring the offending broadcaster to take action to ensure compliance (subsection 141(1)); or
- refer the matter to the Director of Public Prosecutions (section 139 and section 142); or
- suspend or cancel a licence (section 143); or
- impose an additional condition on the licence (section 43), including a condition designed to ensure a breach of a condition does not recur (section 44).

Schedule 2 of the Act sets out a number of mandatory licence conditions relating to program content, including rules governing election advertising and the broadcasting of political matter. While the Authority cannot alter these mandatory conditions, it does have the power under the Act to impose, vary or revoke additional conditions of licence.

In relation to a breach of a code of practice, the Authority is not able to issue a notice requiring the broadcaster to comply with the code. The Authority has the power to impose

an additional condition on the licence (section 43), including a condition that makes compliance with a code of practice a condition of the licence (section 44). If code compliance is made a condition of licence, any further breach of the code by the licensee is a breach of a licence condition.

THE RESPONSE TO CODE FAILURE OR TO SITUATIONS WHERE NO CODE HAS BEEN DEVELOPED BY INDUSTRY

The Act sets out a framework of industry codes of practice that is underpinned by the power of the Authority to determine standards in two circumstances. These are where codes fail or where an industry group does not develop codes.

Section 125 provides that:

> (1) If:
>
> (a) the Authority is satisfied that there is convincing evidence that a code of practice registered under section 123 is not operating to provide appropriate community safeguards for a matter referred to in subsection 123(2) in a particular section of the broadcasting industry; and
>
> (b) the Authority is satisfied that it should determine a standard in relation to that matter;
>
> the Authority must, in writing, determine a standard in relation to that matter.
>
> (2) If:
>
> (a) no code of practice has been registered under section 123 for a matter referred to in subsection 123(2) in a particular section of the broadcasting industry; and
>
> (b) the Authority is satisfied that it should determine a standard in relation to that matter;
>
> the Authority must, by notice in writing, determine a standard in relation to that matter.

Therefore, if the Authority is satisfied under 1(a) and (b) or 2(a) and (b), it *must* determine a standard in relation to that particular matter (which then becomes a condition of licence for all licensees within the relevant section of the broadcasting industry). Before determining a standard, however, the Authority *must* seek public comment on the proposed standard (s.126).

THE AUTHORITY'S APPROACH TO CODE ENFORCEMENT TO DATE

The Authority has only ever placed additional licence conditions on one commercial radio licensee. These are the recent conditions placed on the licensee of 2UE as a result of the hearing that formed part of this inquiry.

Excluding the investigations undertaken as part of this inquiry, since the introduction of the Codes in 1993 and as at 30 June 2000, the Authority has conducted 98 investigations

into matters of code compliance. These have resulted in the Authority finding a total of 36 breaches of the Codes by commercial radio licensees. There have been:

- four breaches of Code 1, covering programs unsuitable for broadcast;
- eight breaches of Code 2, covering news and current affairs programs;
- no breaches of Code 3, covering advertising;
- one breach of Code 4, covering Australian music;
- 18 breaches of Code 5, covering complaints handling; and
- five breaches of Code 6, covering interviews and talk back programs.

Generally, the Authority has sought to ensure that broadcasters take action to remedy Code breaches and to put in place procedures to ensure they do not recur, rather than move directly to the imposition of licence conditions. The Authority will seek assurances from the licensee that findings will be communicated to relevant station staff, and that relevant systems are improved at the station.

In addition, Authority investigations into compliance with industry codes of practice are matters of public interest and as such receive appropriate public exposure. The Authority publishes findings of investigations into matters of licensee compliance with codes. Summaries of investigations are included in the journal *ABA Update* and a full copy of the report is placed on the Authority's website. In appropriate cases, those that are of particular public interest, newsworthy or involve broader issues on which the Authority wants to communicate, the Authority will issue a media release.

In making any decision as to the appropriate course of action in the case of a breach of a code of practice, the Authority takes into account matters such as:

- the part of the Code that has been breached;
- the seriousness of the breach and its consequences;
- whether the breach was deliberate, inadvertent, due to recklessness or because of carelessness;
- the steps taken by the broadcaster before or after the breach to minimise the likelihood of such breaches or remedy the breach that occurred;
- whether, if appropriate, an apology has been given to anyone adversely affected by the breach;
- the number of breaches of the same or similar clauses of the Code found by the Authority;
- the number of breaches of the same or similar clauses of the Code admitted by the broadcaster; and
- any undertaking given by the broadcaster.

4 Key Findings of the Investigations into Radio Stations 2UE, 3AW, 5DN and 6PR

RADIO STATION 2UE

The Authority sought documents from relevant persons and companies for the period between 5 October 1992 (the date of commencement of the Act) and 20 July 1999. During that period, Mr Alan Jones and Mr John Laws had agreements with a range of commercial entities, some of which were not examined in the hearing.

Mr Jones' Agreements

The following agreements of Mr Jones (all of which included terms relating to on-air conduct) were examined in some detail during the hearing:

- Optus Administration Pty Limited (Optus);
- QANTAS Airways Limited (QANTAS);
- State Bank of New South Wales (State Bank);
- Walsh Bay Finance Pty Limited (Walsh Bay); and
- Walker Corporation Limited (Walker Corporation).

The agreements examined in detail in the hearing report are those which Mr Jones held with Optus and Walsh Bay, which most clearly illustrate a causal link between the existence of an agreement and the on-air conduct of Mr Jones.

Mr Jones and Optus

Mr Jones entered into agreements with Optus in 1993, 1995 and 1998. The primary obligations of Mr Jones' Optus agreements included the promotion and enhancement of Optus long distance communication services by:

- personal recommendation and endorsement;
- reading and embellishing live radio commercials; and
- making pre-recorded radio commercials.

Mr Jones was also required not to promote products that competed with those of Optus, although the agreements stated that Mr Jones was not required to breach any of his obligations to 2UE.

Mr Jones made frequent mention of Optus on-air in circumstances where there is evidence that Optus supplied talking points or scripts to him (either directly, or through his secretary, or through his agent Mr Harry Miller and Mr Miller's staff). These items appeared as if Mr Jones was offering disinterested editorial comment in support of Optus.

The Panel found that Mr Jones used the key phrases of the talking points supplied by Optus in his broadcast, and the totality of evidence showed a relationship of influence between Optus and Mr Jones. The Panel also found that Mr Jones was aware of his obligations under the Optus contract, and that his agreement with Optus affected his on-air behaviour.

Mr Jones and Walsh Bay

In May 1998 discussions were held between Walsh Bay Finance and Mr Miller concerning the Walsh Bay Finance partnership's use of Mr Jones' consultancy services. Mr Jones' services were retained in order to assist 'with the development of key media relationships and the general promotion of Walsh Bay and its scheme for redevelopment'. Regular briefing sessions of Mr Jones were to be arranged by Mr Miller.

The day after signing the contract with Walsh Bay Mr Jones made a lengthy comment on-air in which he expressed agreement with statements in an article in the *Daily Telegraph* rejecting criticism of the Walsh Bay development. In evidence, Mr Jones indicated that his on-air comments were not prompted by the contractual agreement signed the previous day but, rather, were prompted by Mr Miller bringing the detailed models and conceptual plans developed in relation to Walsh Bay to his attention. Mr Jones gave evidence that it was by chance that he had been given a briefing from Walsh Bay Finance, arranged by Mr Miller.

The Panel found that the information used in Mr Jones' broadcast was provided to him in order for him to fulfil his obligations pursuant to his contract with Walsh Bay Finance. The Panel also found that Mr Jones made the broadcast as a consequence of his contract with Walsh Bay Finance, and the previous day's meeting between Messrs Jones and Miller and representatives of Walsh Bay Finance.

Mr Laws' Agreements

The following agreements of Mr Laws (all of which included terms relating to on-air conduct) were examined in some detail in the hearing:

- the Australian Bankers' Association (Bankers' Association);
- the Australian Trucking Association (formerly the Road Transport Forum);
- Foxtel Management Pty Limited (Foxtel);
- NRMA Limited (NRMA);
- Optus Administration Pty Limited (Optus);
- QANTAS Airways Limited (QANTAS);
- RAMS Home Loans Pty Limited (RAMS);
- the Registered Clubs Association of NSW (Registered Clubs); and
- Star City Entertainment Pty Limited (Star City).

The agreements examined in detail in the hearing report are those which Mr Laws held with the Bankers' Association, the Road Transport Forum, Registered Clubs, and Star City, all of which clearly illustrate a causal link between the existence of an agreement and the on-air conduct of Mr Laws.

Mr Laws and the Bankers Association

In May 1998, Mr Christopher Stewart (who had recently commenced working for the Bankers' Association), wrote to Mr Laws suggesting that he may have a potential sponsor for a series of short radio scripts on Australian historical topics which Mr Stewart had written. Mr Tony Aveling, Chief Executive of the Bankers' Association subsequently proceeded to promote to the Bankers' Association Council the idea of sponsoring key media opinion leaders to assist in the improvement of the banks' image and also of sponsoring a John Laws radio project for the next year.

Independently, Mr Bob Miller (Managing Director of the advertising agency Australia Street Consulting Pty Limited; 'Australia Street Consulting') had initiated negotiations with Mr Stewart in September 1998 to determine whether the banks might wish to do some advertising using Mr Laws. Mr Miller was seeking to become the agent for the Bankers' Association in an advertising arrangement on 2UE. Negotiations between the Bankers' Association, Australia Street Consulting and 2UE continued throughout October, November and December 1998.

In February 1999, Mr Aveling wrote to the Bankers' Association Council and to non-member retail banks, reporting that negotiations had been completed for a package (split between Mr Laws and 2UE) costing $1.35 million. The Bankers' Association Council subsequently met and approved the deal. The agreement between Australia Street Consulting and Radio 2UE included a total of 150 live reads by Mr Laws over 40 weeks, to be broadcast over the 74 stations in the network, for a total fee of $707,550.

The final written agreement between the Bankers' Association and Australia Street Consulting included:

- Mr Laws recording of 150 advertising spots under the name 'The Whole Story'; and
- The granting to very senior bank and Bankers' Association executives the opportunity to discuss 'their side of the story' on particular issues with Mr Laws on-air.

Mr Laws was not, during the course of the agreement, to broadcast any advertisement that denigrated Australian banks or the Australian banking industry. Nor was there any obligation to pay Australia Street Consulting if the Bankers' Association considered that Mr Laws had brought the reputation of its members into disrepute during 1999.

It appears that the terms of the agreements between Australia Street Consulting and the Bankers' Association, and Australia Street Consulting and Mr Laws may have been wider than those expressed in the written documents. It appears that the agreements also included a regular practice of referring listener complaints to the Bankers' Association or individual banks for their response, and Mr Laws, on at least some occasions, putting those responses to air.

In mid-February 1999, Mr Aveling made a pre-arranged (and scripted) telephone call to Mr Laws on-air, referring to Mr Laws' comments on Australian history the previous day, and offering the banks as a sponsor for a history series. Between March and July 1999, Mr Laws performed live reads for the Bankers' Association four times per week as part of the 'Whole Story' campaign. The segment involved Mr Laws reading a script about a historical event or character, written by Mr Stewart. Part way through the script, Mr Laws would break from the story and read a script provided by the Bankers' Association, usually concerning a topical issue in banking.

On 19 July 1999 the Bankers' Association Council decided to terminate its agreement with Mr Laws through its contractual agreements with Australia Street Consulting. The termination of the agreement resulted from the pressure of negative publicity resulting from the allegations raised on the ABC program 'Media Watch' on 12 July 1999.

Mr Laws and the Road Transport Forum

An advertising strategy ('The Laws Campaign') was developed in May 1996 for the Road Transport Forum (RTF). An important component of the proposal involved informing the community of industry problems and influencing the government, and the proposal addressed (among other things) 'key political events', 'key political and environmental messages' and 'crisis management'.

In October 1996 the RTF entered into a three-year endorsement agreement with Mr Laws. The agreement included Mr Laws:

- reading and embellishing radio commercials from scripts provided by the RTF;
- use of best endeavours to provide favourable publicity and informed commentary (including editorial coverage and personal support) about the RTF, the Australian road transport industry and issues identified by the RTF;
- updates on subjects relevant to the RTF through on-air talks with media personality Michael Whitney;
- support for RTF promotional campaigns and competitions; and
- encouragement of truck drivers to contribute to the Today's Truckies campaign and to buy the products of companies who actively supported the RTF.

Mr Laws was also required to use his best endeavours to ensure that 2UE placed any advertisements inconsistent with RTF objectives in other programs. The RTF undertook to provide Mr Laws with information that was both current and of public interest capable of being used by Mr Laws on the program.

Mr Laws was provided with extensive and detailed briefs by the RTF either to read or upon which to base his own editorial comment. These were sent to him pursuant to the agreement both before and after paid advertising was taken up with 2UE by the RTF. These briefs continued to be sent after the RTF began paying 2UE for advertising (from approximately February 1998). The agreement was terminated by consent in July 1999, following the 'Media Watch' program.

Mr Laws used a number of on-air opportunities to support the position of the RTF and that, in doing so, Mr Laws used the talking points and 'questions' provided by the RTF as a basis for interviews he conducted on his program.

Mr Laws and Star City

Discussions between Star City and Mr John Fordham (Mr Laws' agent) about Mr Laws' promotion of Star City commenced in October 1997. A formal, three year, endorsement agreement was executed in December 1997, and Mr Laws' obligations included:

- reading and embellishing advertisements;
- providing editorial comment from information supplied by Star City, subject to Mr Laws' satisfaction that the information was newsworthy/entertaining;
- promoting and interviewing performers billed to appear at Star City; and
- interviewing representatives of Star City.

Star City appointed a public relations manager to give daily and weekly information to Mr Laws 'to enable him to defend or to clarify the position of Star City'. Mr Laws warranted that he would not publicly or in private 'disparage Star City', or make statements which may either adversely affect its image, or 'denigrate or detract from casino gambling'. Star City understood that Mr Laws had promised to avoid making comments discouraging gambling. During the period of the Star City Agreement Mr Laws' critical on-air comment in relation to gambling was limited to the proliferation of poker machines in hotels and a proposal for a new 'super club' at Liverpool. The agreement was terminated on 19 August 1999.

In early November 1998 Mr Laws played on-air a tape of an interview he had conducted in Melbourne with Victorian Premier (The Hon. Jeff Kennett) in which Mr Kennett criticised Star City. On the same day, Mr Neil Gamble, CEO of Star City, wrote to Mr Laws expressing concern about Mr Laws' 'failure to take a strong stance in support of Star City' and questioning the value of the Star City agreement. The letter complained that Mr Laws 'made no attempt to defend Star City despite the fact that we are paying a substantial fee for your endorsement'. Mr Laws understood these remarks as 'accusing me of a breach of contract'.

Three days after playing the taped interview, Mr Laws referred on-air to Mr Kennett's comments and expressed his disagreement with them. On the same day Mr Laws wrote to Mr Gamble defending his conduct on the basis that Mr Kennett's comments had been in a jocular vein, but also outlining steps he had taken and planned to take to rebut those comments. He also said:

> I believe that I have displayed my loyalty to Star City constantly and perhaps in a way of which you aren't aware. We get reasonably frequent calls wanting to be critical of Star City, as we do with faxes and e-mails. I either dismiss them totally or defend Star City. At no time did I allow any comment on the unfortunate incident concerning the security guards even though I was strongly encouraged to do so.

On the same day Mr Fordham sent a fax message to Mr Gamble saying that Mr Laws was happy to take a call from Mr Gamble that morning (i.e., on air) about Mr Kennett's

comments. Mr Gamble replied by fax to Mr Laws thanking him for his response and for 'airing the issue in a positive light'.

The 'unfortunate incident' referred to in Mr Laws' letter was an altercation involving security guards at Star City in which a person died. In his letter Mr Laws cited his decision not to comment on the incident as an instance of his support for Star City. In his evidence to the hearing, however, Mr Laws indicated that the Star City agreement was not behind his decision to refrain from comment on the incident. Among his reasons for not mentioning the incident he cited legal advice emphasising that the matter seemed likely to result in litigation. In this regard, it is relevant to observe that the first lawyer to whom Mr Laws spoke was the in-house lawyer at Star City, and that the prospect of litigation did not deter other media organisations from covering the incident. The Panel found that Mr Laws did not mention the incident because of his contractual obligations to Star City.

Radio Station 2UE and the Codes

The Panel concluded that the existence of Messrs Jones' and Laws' agreements, and their conduct in giving them effect, influenced the content of the Jones and Laws programs (in some cases, directly). The Panel also noted that neither the Codes nor the conditions imposed on licensees under the Act specifically address commercial agreements entered into by presenters.

The Panel was of the view that listeners are entitled to assume that there are no significant commercial agreements between presenters and persons who are the subject of broadcasts unless such agreements have been disclosed.

The key findings in relation to 2UE were:

- From at least September 1995, 2UE was aware of the possibility that Mr Jones' agreements with Optus may affect his on-air behaviour.

- 2UE was (or ought reasonably to have been) aware as early as April 1998 that Mr Laws held contracts that obliged him to provide services that were, at the very least, potentially in contravention of the Codes.

- 2UE management also knew of the existence of an agreement between Mr Laws and the Bankers' Association that potentially infringed 2UE's policy concerning such agreements. 2UE preferred, however, not to challenge Mr Laws on this matter.

- The two functions given to the Program Manager at 2UE (of monitoring compliance with the Codes and of maintaining the morale and composure of on-air presenters) would be almost impossible to combine successfully. This clash of roles should have been obvious to 2UE from the outset.

- The management systems at 2UE were not adequate to ensure compliance with 2UE's policy concerning agreements between presenters and advertisers.

- 2UE's management systems were not adequate to prevent breaches of the Codes.

The Panel found that the agreements entered into by Mr Jones and Mr Laws with corporations and associations which obliged them to provide services on-air have

contributed to a substantial failure by the licensee to comply with the conditions of its licence and with the standards of conduct required by Codes 2 and 3.

The Panel found that:

- 2UE breached the Act on five occasions;
- 2UE breached Code 2 on 60 occasions; and
- 2UE breached Code 3 on 30 occasions.

The Panel also formed the view that remedial action was necessary to ensure 2UE's compliance with the Act and the Codes and, in particular, to ensure the effective disclosure of the commercial agreements between presenters, their producers and advertisers.

The Panel recommended that the Authority consider the imposition of two additional conditions on 2UE's licence:

- The first proposed condition required on-air and off-air disclosure of relevant commercial agreements and required the Licensee to develop and implement a compliance training program.
- The second proposed condition required the Licensee to ensure that paid advertisements are readily distinguishable from other program matter. This is to ensure that listeners are able to clearly distinguish paid messages from other messages.

RADIO STATION 3AW

The Authority sought documents from relevant persons and companies for the period between 5 October 1992 (the date of commencement of the Act) and March 2000. The Authority examined the effects of agreements, arrangements and understandings:

- entered into by Mr Bruce Mansfield;
- between 3AW, Mr Steve Price and Bilia Hawthorn;
- between 3AW and Crown Casino; and
- between 3AW and Transurban.

Mr Bruce Mansfield

Mr Bruce Mansfield and Mr Philip Brady hosted the Nightline program (a light entertainment, comedy and talkback program) on 3AW for nine years until December 1999. During this period, Mr Mansfield had agreements, arrangements and understandings with suppliers of goods and services whereby goods and services were supplied to Mr Mansfield on the understanding or condition that the goods or services supplied would be mentioned on Radio 3AW. In particular, Mr Ash Long, acting

for Mr Mansfield, entered into written agreements that obliged Mr Mansfield to mention a supplier of goods or services on 3AW without 3AW's knowledge.

Messrs Mansfield and Brady made mention during the Nightline program (in a conversational manner) of the names of various businesses that had provided goods and services to them free of charge:

- In many cases, there was no explicit obligation on Messrs Mansfield or Brady to make these conversational mentions.

- In the case of those agreements negotiated by Mr Long, however, there was a written obligation on Mr Mansfield to make mentions on 3AW of the names of certain businesses.

- Mr Mansfield gave evidence that he did not think it was clear to a listener whether the on-air conversational mention of the name of the business was an advertisement or a review of the product or service associated with the business.

In July 1999, during an internal investigation initiated by Southern Cross Broadcasting and 3AW management, Mr Graham Mott (General Manager of 3AW) spoke to all on-air presenters about any agreements they might have. Mr Mansfield disclosed to Mr Mott (General Manager, 3AW) that he had taken a complementary trip with Lauda Air flying first class to Europe.

That disclosure should have alerted 3AW management to the need to make further inquiries into the terms of the provision of the trip, and to determine whether Mr Mansfield had any other agreements, arrangements or understandings.

Despite the internal investigation into the matter in July 1999, 3AW were only alerted to such agreements, arrangements and understandings by sources external to 3AW. Mr Mansfield's employment with 3AW was terminated once it became known that Mr Long, acting for Mr Mansfield, had entered into agreements in writing which obliged Mr Mansfield to mention a supplier of goods or services on 3AW without 3AW's knowledge.

The Authority found that:

- Mr Mansfield failed to disclose fully to 3AW management agreements, arrangements or understandings he had with suppliers of goods and services; and

- 3AW management did not make sufficient inquiries between July and December 1999 to determine whether Mr Mansfield had agreements, arrangements and understandings with suppliers of goods and services.

- The conversational mentions of various businesses on the Nightline program were of promotional and commercial benefit to those businesses. Such mentions are "advertisements" within the meaning of Code 3.

- In some circumstances these conversational mentions were made in return for goods and services rendered free of charge to Messrs Mansfield and Brady.

Bilia Hawthorn

The Authority investigated allegations that Bilia Hawthorn (a Melbourne Volvo dealership) received preferential treatment with regard to interviews on 3AW as a result of the advertising relationship between Bilia Hawthorn and 3AW. The allegations specifically linked Mr Steve Price (a presenter on 3AW) with Bilia Hawthorn as Mr Price drove a vehicle supplied by the dealership.

The Authority investigated:

- the frequency and nature of the interviews with Bilia Hawthorn staff; and
- the newsworthiness of interviews conducted by 3AW with the managing directors of Volvo.

The Authority did not receive any evidence that Mr Price had entered into improper agreements, arrangements or understandings which affected his on-air conduct on 3AW.

In addition, the infrequency of the interviews, the nature of the interviews with Bilia Hawthorn staff and newsworthiness of the interviews of the managing directors of Volvo, indicate that Bilia Hawthorn did not receive any preferential treatment or greater access to interviews as a result of:

- the advertising relationship between Bilia Hawthorn and 3AW, or
- the vehicle provided to Mr Price.

Crown Casino

The Authority also investigated allegations that Crown Casino received preferential treatment with regard to interviews on 3AW as a result of the advertising relationship between Crown Casino and 3AW. The Authority did not receive any evidence that suggested Crown Casino received preferential treatment or greater access to interview opportunities on 3AW.

Advertising

3AW advertising sales staff made approaches to personnel involved in the preparation or broadcast of programs on behalf of 3AW advertising clients. For example, Mr Justin Thompson (the 3AW sales person responsible for the relationship between Transurban and 3AW) conveyed the impression (to Transurban) that interviews requested by Transurban were likely to be accommodated as part of the advertising package. Letters sent by 3AW to Transurban served to confirm Transurban's impression that 3AW would accommodate interviews requested by Transurban as part of the advertising package.

Outside Broadcasts

The Authority found that:

- The relationship between advertisers and 3AW is not fully disclosed during outside broadcasts.

- The outside broadcasts examined by the Authority provided advertisers with a better prospect of having persons nominated by them interviewed on Radio 3AW than if the program had been broadcast from the studio.

3AW Management Practices and the Codes

The Authority's investigations indicate that 3AW did not have adequate systems in place to communicate information to staff concerning the Codes. There were no regular meetings or forums, and there was no written policy to provide guidance to staff. The only company policy document available to Southern Cross Broadcasting employees did not include the Codes. The Authority is of the view that 3AW management's reliance on informal procedures was not adequate in ensuring staff were familiar with the Codes.

The Authority does not consider the approach taken by 3AW (that is, verbal communication about Codes matters only on complaint) to be an effective means of educating staff on the Codes. This approach relies on complaints being made in order to communicate information about the Codes. In such a situation specific Codes would be examined in isolation to understand the basis for complaint. This approach is sporadic and it is more likely that discussion would be aimed at the resolution of the specific complaint.

Although the explanation of why specific broadcasts may or may not breach a Code is a necessary component in investigating complaints and correcting on-air behaviour, it is not an adequate preventative measure. The Authority does not consider that this approach results in staff gaining a comprehensive understanding of the Codes.

The primary focus of induction programs conducted by 3AW appears to have been to prevent the broadcast of defamatory material, with training on defamation law being provided by external experts. The Authority is of the view that Codes training was of minimal concern to 3AW management and, as a result, was conducted internally and informally.

In February 2000, Southern Cross Broadcasting and 3AW management distributed to 3AW staff a questionnaire on the Codes developed by a large international accountancy firm. All the questions in the questionnaire relating to the Codes and distributed to 6PR (along with other Southern Cross Broadcasting radio staff) are in the form 'do you understand that ...', and the answer to every question is 'yes'.

The Authority is of the view that the questionnaire is not adequate to test the knowledge of the Codes of those completing it, or to educate them about the Codes. It is not clear what information could be usefully extracted from the results to the questionnaire to assist Southern Cross Broadcasting in developing a policy about the Codes.

Southern Cross Broadcasting Policy

3AW did not have written policies to inform and educate staff regarding station policy until September 1999. Moreover, Southern Cross Broadcasting's policy on the disclosure

of commercial agreements entered into by its employees that do not 'make the station a party to the agreement' is not clear:

- The managing director of Southern Cross Broadcasting gave evidence that Southern Cross Broadcasting would be demanding knowledge of *all* contracts (including the terms of contracts) from its employees.

- The managing director also gave evidence that there are some agreements entered into by employees that are so far removed from Southern Cross Broadcasting that it would not need to see those agreements.

There is no specific requirement, either contractually or otherwise, that Southern Cross Broadcasting employees must disclose:

- the terms of all their commercial agreements with third parties to management; and/or

- their commercial agreements with third parties on-air.

It is not clear whether, or how, Southern Cross Broadcasting employees (including managers) were informed of the amendment to the policy on employee benefits from third parties in the April 2000 edition of the *Southern Cross Broadcasting Company Policy Manual* (which adds the words 'on-air presenters must not disguise commercial content as comment').

There is no evidence in 3AW employment contracts with on-air presenters of a standard approach taken by Southern Cross Broadcasting to the issue of compliance with the Codes and the endorsement of products and services by presenters.

RADIO STATION 5DN

The Authority sought documents from relevant persons and companies for the period between 5 October 1992 (the date of commencement of the Act) and February 2000. During that period, Mr Cordeaux had agreements with a range of commercial entities, some of which were not examined in the investigation.

The following agreements of Mr Cordeaux (all of which included terms relating to on-air conduct) were examined in some detail:

- the Adelaide Casino;

- Channel Ten (Adelaide);

- GIO; and

- Cable & Wireless Optus (Optus).

Mr Cordeaux and the Adelaide Casino

Mr Cordeaux approached the Adelaide Casino in June 1993 to discuss two separate commercial propositions – an advertising package between the Casino and radio station 5DN and a public relations package between the Casino and Mr Cordeaux. Responsibility

for negotiation of the advertising package was handed to staff at radio station 5DN while Mr Cordeaux pursued the negotiation of a separate public relations package with the Adelaide Casino.

The advertising package was not proceeded with, although the Adelaide Casino did advertise irregularly (and on a casual basis) on radio station 5DN. The separate public relations package between the Adelaide Casino and Mr Cordeaux did proceed, however, and primarily involved Mr Cordeaux promoting the Casino on-air, including by means of a five minute interview segment every week.

During the period September 1993 to August 1999 (when the agreement was terminated) Mr Cordeaux's promotional services primarily consisted of a five-minute interview segment on-air every week, as well as some occasional off-air promotional services. This weekly five-minute Adelaide Casino segment constituted an advertisement (for the purposes of Code 3).

As a result, during the period 1993-1999, advertisements for the Adelaide Casino were broadcast on radio station 5DN in circumstances where there was no payment of advertising fees to the Licensee. Had the Licensee been paid for the advertisements, that payment would have comprised part of the gross earnings of the Licensee for the purposes of calculating license fees. Moreover, these advertisements were presented in a manner which suggested that they were discussions of matters of topical interest; there was no disclosure that they were paid advertisements.

The procedures within radio station 5DN regarding the monitoring and management of advertising between 1993 and 1999 were inadequate in that station management did not detect that radio station 5DN was not being paid for the regular five-minute interview segment. Mr Cordeaux, as Managing Director of the Licensee Company (in the period 1993-1996), was in a position to know that radio station 5DN was not being paid for the five-minute interview segment.

Mr Cordeaux and Channel Ten

During the period 1993-1995, Channel Ten was a regular advertiser on radio station 5DN. In 1993-1994, Mr Cordeaux negotiated a separate promotions package with Channel Ten, that primarily involved Mr Cordeaux promoting Channel Ten on-air, by means of an interview segment every day with Channel Ten news presenter Mr George Donikian.

The on-air promotional services provided by Mr Cordeaux, involving interviews with Mr Donikian, constituted an advertisement (for the purposes of Code 3). As a result, during the period 1993-1999, advertisements were broadcast on radio station 5DN in circumstances where there was no payment of advertising fees to the Licensee. Had the Licensee been paid for the advertisements, that payment would have comprised part of the gross earnings of the Licensee for the purposes of calculating license fees.

The procedures within radio station 5DN regarding the monitoring and management of advertising between 1994 and 1995 were inadequate, in that station management did not detect that radio station 5DN was not being paid for the regular interview segment. Mr Cordeaux, as Managing Director of the Licensee Company (in the period 1994-1995), was in a position to know that radio station 5DN was not being paid for the interview segment.

Mr Cordeaux and GIO

Between June 1993 and June 1996, Cordeaux Media Pty Limited entered into a commercial agreement with GIO to supply the services of Mr Cordeaux. The obligations of the agreement included Mr Cordeaux providing media training to GIO staff and attending and/or hosting GIO functions in South Australia.

The primary obligation of the agreement was Mr Cordeaux's 'endorsement' of GIO, which included not only the embellishment of live read scripts but also the provision of pre-arranged interviews with GIO staff on a range of topics, and comment from GIO staff on newsworthy topics for inclusion in news/current affairs programs.

Once Mr Cordeaux's commercial agreement with GIO ceased in 1996, he entered into commercial agreements with other insurance and financial planning institutions. As a result of these subsequent commercial agreements, Mr Cordeaux's on-air favourable treatment of GIO ceased and representatives of GIO were no longer able to secure interviews on the Cordeaux program.

Mr Cordeaux and Optus

Between December 1993 and December 1999, Cordeaux Media Pty Limited entered into a commercial agreement with Optus to supply the services of Mr Cordeaux. The primary obligation of the agreement was that Mr Cordeaux would promote and mention Optus favourably on his program, in particular, by using the talking points on a range of topics provided to him (with varying frequency) by Optus. The primary purpose of the agreement was a guarantee of promotion and favourable mention of Optus by Mr Cordeaux.

Mr Wayne Clouten (Station Manager 1993-1998) was aware of the existence, but not the terms of Mr Cordeaux's Optus agreement. Mr Cordeaux did not tell any other station staff that he had an endorsement agreement with Optus.

Mr Graeme Tucker (Station Manager since 1998) asked to see Mr Cordeaux's Optus contract in June/July 1999, and was shown Mr Cordeaux's 1993 contract with Optus. As a result, Mr Tucker was not aware of the existence (or terms) of Mr Cordeaux's 1999 Optus agreement.

Mr Cordeaux and Industry Authority Endorsements

Industry Authority Endorsements (IAEs) were a concept developed by Mr Cordeaux in early 1993 and involved, in part, the offer of 'special status' to advertisers. IAEs were an agreement between advertisers, Mr Cordeaux and radio station 5DN that offered advertisers the ability to raise their on-air profile by being used in interviews commenting on newsworthy or topical events (both in news as well as other programs).

Mr Clouten (Station Manager 1993-1998) had a series of discussions with senior news and sales staff at radio stations 5ADD and 5DN in the period preceding June 1993 in an attempt to implement the concept of IAEs. During and after those discussions, news and sales staff raised concerns about the integrity and viability of the concept of IAEs with Mr Clouten.

In the period following June 1993, senior sales staff at radio stations 5ADD and 5DN attempted to implement the concept of IAEs as they (and Mr Clouten) understood it. Within weeks, however, the concept of IAEs was abandoned by Mr Clouten and senior sales staff at radio stations 5ADD and 5DN because of the lack of advertising agencies' interest in the concept.

Mr Cordeaux entered into a commercial agreement in 1993 (with GIO) that provided access to on-air interviews by GIO staff, where staff were described as being 'industry experts'. This agreement offered access via Mr Cordeaux that by-passed the normal sales and advertising channels at radio stations 5ADD and 5DN.

Mr Cordeaux's commercial agreement with GIO in 1993 closely resembled the IAE concept (except that it was with Mr Cordeaux exclusively, rather than with Mr Cordeaux and the station). While the original IAE concept seems not to have proceeded, Mr Cordeaux continued to offer representatives of GIO, AAMI and Constant Care opportunities to be interviewed on his program on newsworthy or topical events.

Representatives of GIO were interviewed on Mr Cordeaux's program, and Mr Cordeaux referred to one representative of GIO as 'our superannuation expert'. Moreover, when Mr Cordeaux interviewed representatives of GIO on his program, they were represented as 'experts' on issues of current interest/newsworthiness. As a result, it is the Authority's view that IAEs (in all but name) were sold to GIO.

Mr Cordeaux and the Codes

Mr Cordeaux made partial disclosure of his personal endorsement agreement with the Adelaide Casino to the Board of Directors of Montclair Pty Limited and to ARN management. Mr Cordeaux did not, however, reveal the relevant detail of the obligations of that agreement, nor did he indicate that the agreement contained on-air obligations.

During the period that Montclair Pty Limited was the licensee, senior staff at 5ADD/5DN were aware that Mr Cordeaux had live read endorsement agreements with advertisers and that he had off-air promotional agreements with advertisers. Senior staff were not aware, however, of Mr Cordeaux's personal endorsement agreements involving on-air obligations.

As a result of the investigation, the Authority concluded that the existence of Mr Cordeaux's agreements, and his conduct in giving them effect, influenced the content of programs broadcast by the presenter – in some cases, directly. There was no evidence of disclosure. The Authority is of the view that listeners are entitled to assume that there are no significant commercial agreements between presenters and persons who are the subject of broadcasts unless such agreements have been disclosed.

Radio Station 5DN and the Codes

During the period that Montclair Pty Limited was the licensee of radio stations 5ADD and 5DN (1993-1996), Mr Cordeaux was both a presenter on radio station 5DN as well as the Managing Director of the licensee company. As a result, unlike other presenters at the station, Mr Cordeaux was in a position to influence the Board of Directors of the licensee company as well as station policy on endorsements.

During this period, very little was done in the way of informing staff of the Codes (or of their responsibilities under the Codes), or in establishing any system aimed at ensuring station staff complied with the Codes. Mr Clouten (General Manager 1993-1998) did, however, institute a policy to manage live read endorsements by presenters (formalised by his memo to all presenters of 8 August 1995).

Under this policy, live read agreements were negotiated within the framework of the stations' broader advertising policy. In addition, a system was put in place to ensure that live read endorsement agreements were known to senior station staff (particularly to himself and the Sales Director). There was, however, no enforcement or compliance regime in place to address the policy on personal endorsements in a systematic way.

There was a general assumption that the off-air endorsement agreements entered into by presenters had no implications for or effect on the content of programs on 5ADD or 5DN. As a result, there was no policy covering these agreements and no system to oversee or to check to ensure that these agreements did not, in fact, have an effect on program content.

Mr Cordeaux's personal endorsement agreements with the Adelaide Casino, Channel Ten, GIO and Optus fell outside the scope of Mr Clouten's endorsement policy, in that they did not encompass live read advertisements but did relate to on-air obligations affecting program content.

After Mr Cordeaux ceased to be the Managing Director of the licensee (with the acquisition of radio stations 5ADD and 5DN by ARN in August 1996), he still enjoyed a special status at the stations. As there were no significant changes in staff after the sale to ARN, Mr Cordeaux remained in a different position vis a vis station management than any other presenter, in that he was not asked to disclose the terms of his endorsement agreements to station management.

During the period August 1996 until August 1999, station policy at 5ADD and 5DN on personal endorsement agreements remained as it was under the previous licensee (Montclair). The policy instituted by Mr Clouten (and formalised in his memo of August 1995) remained unchanged.

Mr Cordeaux was not included in this policy regime, and his endorsement agreements were not subject to the same (limited) level of scrutiny that the agreements of other presenters were.

Until late 1999 there does not appear to have been any written ARN policy on personal endorsements; rather, ARN policy on endorsements appears to have been communicated orally to senior network staff at meetings held three to four times a year. There does not appear to have been any program(s) in place within the ARN network to ensure that station managers communicated ARN's unwritten policy on endorsements to their respective workplaces.

ARN policy was first clearly articulated immediately following the announcement of the Authority's investigations into radio station 2UE. This policy was a much stronger version of ARN's previously unwritten policy on endorsements. This new policy was not implemented with regards to Mr Cordeaux until December 1999. Between December 1999 and March 2000, station management failed to ensure that Mr Cordeaux's personal endorsement agreements complied with ARN policy, in that there was no attempt to obtain copies of the terms of all Mr Cordeaux's current agreements .

The Authority found that the agreements entered into by Mr Cordeaux with corporations and associations which obliged him to provide services on-air contributed to a substantial failure by the licensee to comply with the standards of conduct required by Codes 2 and 3.

The Authority found that:

- 5DN breached Code 2 on 8 occasions (see Report of the Investigations into Radio Stations 3AW, 5DN and 6PR); and
- 5DN breached Code 3 on 4 occasions (see Report of the Investigations into Radio Stations 3AW, 5DN and 6PR).

RADIO STATION 6PR

The Authority sought documents from relevant persons and companies for the period between 5 October 1992 (the date of commencement of the Act) and September 1999. During that period, Mr Sattler had agreements with Optus and Qantas (which were examined in some detail).

Mr Sattler and Optus

During the period 1994 to end 1999, Mr Sattler entered into agreements with Optus to promote Optus products and services.

Mr Healy (General Manager at 6PR) had been advised of the existence of Mr Sattler's agreement with Optus (but not the terms and conditions of the agreements) since 1996 when Mr Sattler's contract with 6PR was renewed and a clause relating to the Optus agreement was included in the contract. 6PR management considered that the agreements between Mr Sattler and Optus did not have any impact on 6PR and, Mr Healy did not ask to see the terms of Mr Sattler's agreement with Optus until after July/August 1999.

As a result of its agreements with Mr Sattler, Optus expected to receive positive mentions on-air from Mr Sattler from time to time about Optus products. Optus provided a range of materials to Mr Sattler for his on-air use, including advertising and promotional material, advertising scripts, media releases and talking points about issues of interest to Optus.

Mr Sattler used some of the material provided to him by Optus on-air and conducted interviews during his program from time to time with Optus personnel.

Mr Sattler and Qantas

In 1997 Mr Sattler entered into an agreement with Qantas (renewed in 1998 and 1999) whereby he was paid to generally promote Qantas in Western Australia. 6PR management was not aware of the existence of Mr Sattler's agreement with Qantas until about July/August 1999.

Mr Healy (General Manager of 6PR) was not aware of Mr Sattler's agreements with Qantas. Mr Healy (and the promotions department at 6PR) were aware, however, that Mr Sattler was receiving significant and valuable give-away prizes from Qantas. The

provision of these give-way prizes ought reasonably to have raised the issue of the relationship between Mr Sattler and Qantas in the minds of Mr Healy and the Promotions Department at 6PR.

Qantas provided a range of materials to Mr Sattler for his on-air use, including promotional material on specific events and media releases and, during the term of his agreement with Qantas, Mr Sattler used some of that material on-air. Mr Sattler conducted interviews during his program from time to time with Qantas personnel.

Mr Sattler and RAMS

Mr Sattler was paid a total of about $30,000 by RAMS over a three to four year period in recognition of his role in promoting RAMS' business in Western Australia through live reads.

Mr Sattler and John Hughes Skipper Mitsubishi

John Hughes Skipper Mitsubishi was a long-term sponsor of Mr Sattler's program. John Hughes Skipper Mitsubishi paid the repayments for a new car that Mr Sattler bought from that company in 1997. The repayments amounted to about $625 per month.

Radio Station 6PR and the Codes

Before August 1999, Southern Cross Broadcasting did not have a written company policy about employees receiving benefits from third parties with whom the employee had a commercial agreement. Again, before August 1999, there were no procedures in place to provide guidance and advice to 6PR managers or to educate staff about Southern Cross Broadcasting's policy on employees receiving benefits from third parties with whom the employee had a commercial agreement.

Southern Cross Broadcasting provided no guidance or direction to managers of 6PR about distribution to staff of the policy on employee benefits from third parties when it was formally written down in August 1999. Nor did Southern Cross Broadcasting give any clear direction about the meaning or application of the policy on employee benefits from third parties when the policy was distributed to 6PR managers.

As with radio station 3AW, Southern Cross Broadcasting's policy on the disclosure of commercial agreements entered into by its employees at 6PR that do not 'make the station a party to the agreement' is not clear. Nor is it clear whether, or how:

- Southern Cross Broadcasting's 6PR employees (including managers) were informed of the amendment to the policy on employee benefits from third parties in the April 2000 edition of the *Southern Cross Broadcasting Company Policy Manual* (which adds the words 'on-air presenters must not disguise commercial content as comment').

- the Southern Cross Broadcasting policy in relation to the words 'on-air presenters must not disguise commercial content as comment' has been explained to managers and on-air presenters since they were added to the policy.

As discussed in relation to radio station 3AW, before about July/August 1999 there were no policies, written procedures or formal training programs in place at 6PR to educate managers and staff about the Codes of Practice. In late November 1999, staff at 6PR completed a questionnaire about the Codes of Practice (the questionnaire was developed by a large international accountancy firm). The Authority is of the view that the questionnaire is not adequate to test the knowledge of the Codes of Practice of those completing it, or to educate them about the Codes of Practice.

The Authority found that:

- 6PR breached Code 2 on 6 occasions (see *Report of the Investigations into Radio Stations 3AW, 5DN and 6PR*); and

- 6PR breached Code 3 on 11 occasions (see *Report of the Investigations into Radio Stations 3AW, 5DN and 6PR*).

5 Issues Arising from the Commercial Radio Inquiry

The 2UE hearing and the investigations into radio stations 3AW, 5DN and 6PR raise a number of significant issues for the Authority, the industry, and the community. The implications for the commercial radio broadcasting industry are profound. These issues include:

- the principle of an assumption of disinterestedness and the need for the disclosure of commercial arrangements that have the potential to affect program content;
- the manner in which advertising matter is presented on commercial radio;
- the manner in which political matter is presented on commercial radio;
- the relationship between licensees and presenters;
- the relationship between the commercial agreements of presenters and the payment of licence fees by licensees; and
- whether or not, as a result of the Authority's inquiries, 2UE, 3AW, 5DN and 6PR remain "suitable" licensees (as defined in section 41 of the Act).

DISINTERESTEDNESS AND DISCLOSURE

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[5]), 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. The public is entitled to assume that the information content of commercial radio is disinterested except when an interest is disclosed.

The investigations conducted into radio stations 2UE, 3AW, 5DN and 6PR have disclosed a number of practices in the commercial radio broadcasting industry of concern to the Authority, 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).

In relation to the licensees investigated by the Authority, these practices have affected the content of programs broadcast and, in some instances, have breached the Codes.

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5 'The objects of this Act are:...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'

Agreements Between Presenters and Advertisers

Code of Practice 2.2(d) states that:

> 2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:
>
> (d) viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts;

In the 2UE hearing and in the investigations into radio stations 5DN and 6PR, the Authority examined numerous broadcasts where relevant available facts (namely the existence of a commercial arrangement between a presenter and a commercial entity) were withheld in circumstances where their disclosure might affect the listener's assessment of the material broadcast.

For example, in the 2UE hearing the Panel found that Mr Jones and Mr Laws made favourable comments about their sponsors in the context of providing comment on social, political and economic issues. Many of those comments were derived from material supplied to Messrs Jones and Laws by their sponsors, including press releases, talking points and pre-prepared scripts. Neither Mr Jones nor Mr Laws disclosed to their listeners that they had commercial agreements with those companies at the time they made those comments, nor that the source of that material was those sponsors.

Similar examples can be found in the investigations into radio stations 3AW, 5DN and 6PR. Mr Mansfield made favourable mention on 3AW of companies which had supplied him with goods and services for free (with the expectation that they would be mentioned on his program) without disclosing his arrangements. Mr Cordeaux made favourable mentions of GIO and Optus on 5DN, without disclosing his agreements with those companies, and Mr Sattler made favourable mentions on 6PR of Optus and Qantas, again without disclosing his agreements with those companies.

The Authority also found that Mr Cordeaux entered into agreements with sponsors that offered them 'industry authority' status; that is, those sponsors were represented as being 'authorities' in their particular industry sector and were used by Mr Cordeaux as sources of comment in matters of news and current affairs. In all these cases, the Authority is of the view that the presentation of the material was misleading.

In addition, the Authority notes that presenters may make mentions of companies with which they have agreements in relation to stock market reports and discussions regarding the share price and/or value of companies. The Authority is of the view that non-disclosure in these circumstances is particularly serious and may also place presenters in breach of the Corporations Law.

The Authority has heard evidence from many of the witnesses in the inquiry about the need to provide disclosure. For example, in the investigation into radio station 3AW, Mr Steve Price (Program Director and presenter) was asked about his attitude to the on-air

disclosure of presenters' agreements (as required by the licence condition on radio station 2UE). Mr Price testified that:[6]

> From our point of view we don't think it is necessary but [we] would not have a difficulty complying with that, we would have no problem with the disclosure clauses. I think it is a little invasive.

In the investigation into radio station 6PR, Mr Sattler testified that he would have no objection to being required to disclose the existence of his agreements on-air: [7]

> I have only ever treated the material in a - in a newsworthy, honest way. If I we're required to disclose [agreements on-air], that's fine with me, I don't have a problem with that, it's just that as far as I'm concerned, we weren't required to do that. But there's no argument from me that that - if that makes for even more honest broadcasting, that's fine. I know it's all very well to say it now, but I don't have a problem with it.

In the 2UE hearing, advertisers were questioned about their attitudes to the on-air disclosure of a commercial agreement between an advertiser and a presenter. For example, Mr Max Suich (Optus) testified that Optus' only concern was with the disclosure of the value of the commercial arrangement between a presenter and an advertiser.[8]

> Q. Would you have regarded the public disclosure of the existence of the agreement as detracting from its value to Optus?
>
> A. Not in 1998. It had been disclosed....There was no secrecy of a commercial arrangement between Optus and Jones or Laws. So to the extent that it had already been revealed, I saw no harm to it in affecting the arrangement. My feeling that the confidentiality always was it was probably about the dollar number, and there would be some commercial advantage to us in keeping that dollar number confidential in terms of talking to other talent....In hindsight, I rather wish we'd put a press statement out when we renewed the contract out - we could have quite easily - saying, "Our arrangements with Alan Jones for public endorsement and public support of Optus's competitive position and product is being renewed." If there had been a thing at the end of the program that said this program is that would have undermined or underwritten the relationship we had.

Similarly, Mr Neil Gamble (Chief Executive Officer, Star City Casino) indicated that his only concern was with the disclosure of the value of the commercial arrangement between a presenter and an advertiser[9]

> Q. Would the desirability of an endorsement agreement be affected in any way, from your point of view, if the existence of the agreement was a matter of public knowledge?

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6 3AW Investigation Transcript, Mr Price, pp. 36-37.

7 6PR Investigation Transcript, Mr Sattler, p. 68.

8 2UE Hearing Transcript, Mr Suich, pp. 425-426.

9 2UE Hearing Transcript, Mr Gamble, p. 624.

A. I would think that the financial details are probably like anyone's remuneration, should not be not public knowledge, but we were not trying to hide anything in our agreement. Our reservations number was used regularly for the promotion of our products, and, as far as we were concerned, there was nothing clandestine about this.

Having regard to the evidence it has heard, the Authority is of the view that:

- The existence of a commercial agreement between an on-air presenter and a third party becomes a 'relevant available fact' when the subject matter of a broadcast concerns, or is favourable to, the party with whom the presenter has a commercial agreement.

- There has to be some connection between the matter broadcast and the particular commercial agreement before the existence of the agreement becomes relevant, although the Authority is of the view that the threshold at which the connection becomes relevant is quite low.

- The disclosure of relevant available facts must be sufficiently linked to the broadcast to ensure the disclosure forms part of the broadcast.

- The accuracy of the facts stated and the genuineness of any opinion expressed is not relevant to whether there has been a breach of clause 2.2(d). Rather, the only consideration is that a relevant available fact has been withheld.

- Disclosure during a program of a commercial agreement between a sponsor and radio station does not carry with it any indication that there may also exist a commercial agreement between a sponsor and the presenter of that program. In fact, the Authority is of the opinion that such a disclosure may in fact suggest the reverse.

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. Listeners are entitled to be told of the existence of such a direct commercial interest and, if they are not so told, they are entitled to assume that no direct commercial interest exists. In other words, they are entitled to assume presenters are disinterested.

4. There must, at all times, be disclosure of relevant commercial agreements between presenters and sponsors in current affairs programs.

Agreements with Other Station Personnel/Licensees

The Authority is also concerned about the potential for commercial agreements between other station personnel and sponsors to raise issues similar to those already examined in the context of the commercial agreements between presenters and sponsors. The Authority did not find any examples of agreements, arrangements or understandings between other station personnel (such as program producers or sales staff) with sponsors. Nevertheless, the Authority is of the view that there is the potential for such agreements to affect the content of programs broadcast and that, therefore, they should be disclosed.

In the case of advertising agreements between licensees and sponsors, the Authority found evidence in its investigation into radio station 3AW that advertising sales staff made approaches to personnel involved in the preparation or broadcast of programs on behalf of 3AW advertising clients. For example, Mr Justin Thompson (the 3AW sales person responsible for the relationship between Transurban and 3AW), conveyed the impression to Transurban that interviews requested by Transurban were likely to be accommodated as part of an advertising package with 3AW.

In responding to a an advertising proposal on behalf of Transurban, Mr Thompson wrote:[10]

> 3AW will endeavour to place interviews wherever possible. All programs are wholly responsible for their editorial and interview content and usually select program matter depending on its newsworthiness...

Mr Thompson gave evidence that he was not accommodating Transurban's requests for interviews but was subtly informing the advertiser in 'gentle words' that interviews are the responsibility of the program department.[11] Mr Thompson stated that he is 'absolutely certain' the advertiser understood from what he had written that interviews were not 'part of the equation'.[12]

The Authority does not accept that the words written by Mr Thompson ('3AW will endeavour to place interviews wherever possible. All programs are wholly responsible for their editorial and interview content and usually select program matter depending on its newsworthiness') dispel the expectation that interviews would form part of the advertising package he was selling to Transurban. The Authority is of the view that neither statement refutes the proposal that interviews with key Transurban personnel would or might occur as had been requested by the advertiser in the context of negotiating an advertising package with 3AW.

The Authority is of the view that the interviews with Transurban personnel broadcast by 3AW[13] may mislead listeners if the commercial nature of the relationship between the licensee and the advertiser is not disclosed. The Authority is of the view that disclosure in these cases is essential.

The Authority also found that agreements between licensees and sponsors for the conduct of outside broadcasts provided advertisers with a better prospect of having persons nominated by them interviewed than if the program had been broadcast from the studio.

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10 Letter, Mr Thompson (3AW) to Messrs Guhl and Nolan (for Transurban) dated 25 June 1998.

11 3AW Investigation Transcript, Mr Thompson, p. 9.

12 3AW Investigation Transcript, Mr Thompson, p. 12.

13 For example, 3AW Investigation Transcript, Mr Edwards, p. 5.

> Q. How many times have you been interviewed on 3AW?
>
> A. ... I would say 100 times, I suppose. I have been on radio just about every week for the last three years; 3AW, 3LO or Fox, or something like that, or television.

In the 3AW investigation, Ms Sarah Baston (former Media Relations Manager for Transurban) testified that advertisers seek outside broadcast opportunities as a means of building relationships between senior company executives and presenters or journalists:[14]

> Every time you put your managing director or your principal in front of a compere it's an opportunity for them to relationship build and the opportunities are as hard to create as the relationships, so what you try to do is build relationships so that the information can exchange easily and freely and if some sort of trust develops between a compere and an MD or a principal where that information can flow easily then the ultimate outcome is a more educated journalist which is more useful nine times out of ten...

Ms Baston also testified that prior to an outside broadcast, site inspections occurred which provided opportunities to deal directly with a compere and attempt to highlight the benefits of projects and educate and excite a compere.[15] In Ms Baston's view, direct contact with comperes increased the likelihood that material would be broadcast. [16]

The Authority also heard evidence that interviews or guest appearances occurred more frequently in outside broadcasts than in regular studio programming.[17] Mr Tony Bell (Managing Director, Southern Cross Broadcasting) testified that:

> Q. As distinct from the program emanating from the studio as part of normal programming, let's say a talkback show, is it more likely in outside broadcast based around an event that it will have a higher interview component in it?
>
> A. Absolutely, I would think it would because the event is normally of such significance that you can't miss the opportunity. If it is the opening of the City Link or the opening of the casino - which I know are two issues that you are looking at - they are significant billion-dollar-plus events that such an opportunity couldn't be missed. A talk radio station has to fill 100 per cent of the time with talk. They have a producer, and in some cases two producers, yet they have got to fill that time. They must find content and that content must be relevant, and they must take advantage of any circumstance they are in to fill the content

Mr Nigel Brennan (Account Manager 3AW) testified to the same effect, and stated that there were more interviews conducted in an outside broadcast 'because the fact that 3AW is broadcasting from there makes the event topical. If it is topical, you get someone to come on air and say why it is such a great idea that 3AW is down there - cut and dried.'[18]

The Authority is of the view that the material broadcast during the conduct of an outside broadcast may mislead listeners as to the commercial nature of the relationship between the 'event' that is the subject of the outside broadcast and the advertiser with whom it has been arranged. Without disclosure of an advertising agreement between advertiser and

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14 3AW Investigation Transcript, Ms Baston, p. 34.

15 3AW Investigation Transcript, Ms Baston, p. 18.

16 3AW Investigation Transcript, Ms Baston, p. 43.

17 3AW Investigation Transcript, Mr Bell p. 58.

18 3AW Investigation Transcript, Mr Brennan p. 8.

licensee, the 'event' may be perceived by listeners as 'current affairs'. The Authority is of the view that disclosure in these cases is essential.

> ***5.*** There must, at all times, be disclosure of relevant commercial agreements between all key station personnel and sponsors, and between licensees and sponsors in current affairs programs.

Disclosure in Other Programming

It is the Authority's view that the principle of the assumption of disinterestedness is not confined to news and current affairs programs. As with talkback programs, listeners cannot be expected to know, without being told, that a presenter has a direct commercial interest in a subject being commented on or discussed, or in the music being played. The Authority is of the view that listeners are entitled to be told of the existence of all commercial interests and, if they are not so told, they are entitled to assume that no direct commercial interest exists. In other words, they are entitled to assume all presenters are disinterested.

Similarly, the Authority is also concerned about the potential for commercial agreements between other station personnel and sponsors or between licensees and sponsors to raise similar issues in other program formats. The Authority is of the view that there is the potential for such agreements to affect the content of programs broadcast and that, therefore, they should also be disclosed.

> ***6.*** There should be disclosure of relevant commercial agreements between presenters and sponsors in other programs.
>
> ***7.*** There should be disclosure of relevant commercial agreements between all key station personnel and sponsors, and between licensees and sponsors in other programs.

THE PRESENTATION OF RADIO ADVERTISING MATTER

Code of Practice 3.1(a) states that:

> 3.1 Advertisements broadcast by a licensee must:
>
> (a) not be presented as news programs or other programs;

One of the key issues in interpreting Code 3 is the meaning to be attributed to the word 'advertisements'. 'Advertisement' is not defined in the Act or in the Codes. As a result, when investigating complaints relating to advertisements, the Authority has to date relied on the common law meaning as determined through judicial interpretation. For the

purposes of interpretation of Code 3, the Authority takes, as its starting point, this common law meaning.

McLachlan and Mallam summarise the common law definition of 'advertisement (in *Media Law and Practice*) thus:

> So, an 'advertisement' is something designed or calculated to draw public attention to, or promote the use or sale of, a product. As a matter of ordinary construction and, in any event, as implied by Sch 2 cl 2(1) and 9(6) of the Act and s 31 of the *Australian Broadcasting Corporation Act 1983*, it is not necessary, to constitute an advertisement, that the broadcaster have received payment or other consideration for the broadcast of material.

While the Authority understands that the use of the word 'product' includes a service, person or organisation, in interpreting Code 3, the Authority has encountered a difficulty with the width of the common law definition of advertisement. The effect of the Code is to prohibit advertisements from being presented as news or as any other kind of programming, other than as advertisements. It recognises that the promotional purpose of an advertisement may be concealed, for example by disguising it as news or comment. Also program material may be designed or calculated to have a number of purposes, one of which may be to draw attention to or to promote an organisation, product or service.

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 Authority believes that Code 3 is meant to apply only to paid advertisements and has read the term accordingly. Thus, the proper meaning of Code 3.1 is to prohibit the presentation as news programs or other programs any material that fits within the common law definition of an advertisement, in circumstances where that material is broadcast for payment or other valuable consideration.

In the 2UE hearing and in the investigations into radio stations 3AW, 5DN and 6PR, the Authority examined numerous broadcasts where advertisements were disguised as other program material. For example, in the 2UE hearing, the Panel found that Mr Jones and Mr Laws used the opportunity of a discussion of an item of current affairs to make favourable mentions of their sponsors. Many of those favourable mentions were derived from material supplied to Messrs Jones and Laws by their sponsors, including talking points and pre-prepared scripts. Similar examples can also be found in the investigations into radio stations 3AW, 5DN and 6PR.

In its investigation into radio station 3AW, the Authority heard evidence from Mr Price that he strongly supported the Code prohibition on advertising being presented as other matter:[19]

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[19] 3AW Investigation Transcript, Mr Price, p. 37.

> As to the Codes of Practice being adhered to, we already do that and we feel confident that we do do that. As to advertising being absolutely clear-cut that it is advertising, that is what we do and we think that it is wrong that anyone wouldn't do that. I think the practice of meshing commercials in with other content is wrong. I think the listener deserves to know when you are speaking as the program presenter as opposed to reading a live commercial for a client who is paying the station for that commercial; I don't think the two should ever cross over, and that is what we endeavour to do if we can.

The Authority agrees with Mr Price.

8.	Advertisements must not be presented as news programs or other programs.

The Authority's investigations revealed a number of practices that contributed to these breaches of Code 3, including:

- the practice of first and third person 'live reads' by presenters;
- the practice of on-air and off-air personal endorsement by presenters;
- the practice of making gratuitous mentions of advertisers and/or their products and services; and
- the practice of goods and services given for review.

First and Third Person 'Live Reads'

During the 2UE hearing, Mr Max Suich (Director, Marketing Division, Optus) testified to the value of live read advertisements for advertisers: [20]

> ...I would put the category of importance in order of live read commercials, then public endorsement in the program and elsewhere, then the use of him [Mr Laws] in paid television, and then his appearances with customers and staff. But I don't think you can underrate the importance of the live reads'.

Live read advertisements capitalise on the popularity of (and the credibility ascribed to) radio announcers. Generally speaking, advertisements read live-to-air by these announcers (especially if the advertisement includes an explicit personal endorsement from the announcer) are worth more to advertisers than pre-recorded advertisements because of the perceived authority of the presenter when talking about the product being advertised.

Live read advertisements can be presented in two ways – as a third-person narrative ('XYZ is a great product') or as a first-person endorsement ('I think XYZ is a great product'). Either way, there is a strong association between a product and the presenter who 'voices' live read (and/or pre-recorded) advertisements. The Authority's

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[20] 2UE Hearing Transcript, Mr Suich, p. 424.

investigations have revealed that breaches of the Codes have occurred in circumstances where presenters have both live read agreements with advertisers (which are known to station management) and personal endorsement agreements with those advertisers (not disclosed to station management).

During the 2UE hearing and the investigation into 5DN, for example, the Authority heard evidence that even experienced radio station staff were unable to detect that presenters had a personal endorsement agreement with an advertiser. For example, during the 2UE hearing, Mr John Brennan (Program Manager, 2UE) testified that he had heard Messrs Jones and Laws refer to Qantas from time to time, but that these mentions had not alerted him to the fact that Messrs Jones and Laws had personal endorsement agreements with Qantas.[21] Similarly Mr Brennan had heard Mr Laws mention the Road Transport Forum from time to time, but had not associated those mentions with a personal endorsement agreement.[22]

In relation to the 5DN investigation, both Mr Wayne Clouten (Station Manager, 5DN, 1992-1998) and Mr Graeme Tucker (Station Manager, 5DN, 1998-2000) were questioned regarding their knowledge of Mr Cordeaux's personal endorsement agreements. Both Mr Clouten[23] and Mr Tucker[24] testified that they were aware of Mr Cordeaux's live read endorsement agreements and knew that Mr Cordeaux had personal endorsement agreements with advertisers, but neither knew the details of those agreements (and both presumed that they related to off-air obligations).[25] Neither Mr Clouten nor Mr Tucker associated Mr Cordeaux's mentions of companies with which he had a personal endorsement agreement with any on-air obligations.

The practice of live read advertisements may mislead listeners as to who it is that is persuading them. The Authority is of the view that, at the very least, the disclosure of all agreements (including those with only off-air obligations) between presenters and advertisers, to both station management and to listeners, is required.

On-air and Off-air Personal Endorsement

Another issue, closely aligned to that of live reads, is that of the personal endorsement agreements of presenters. During the 2UE hearing and the investigations into 3AW, 5DN and 6PR, the Authority heard evidence that Messrs Jones, Laws, Mansfield, Cordeaux and Sattler all had personal endorsement agreements with a range of advertisers. The agreements included a number of obligations, both on-air as well as off-air.

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21 2UE Hearing Transcript, Mr Brennan, pp. 1225, 1226.

22 2UE Hearing Transcript, Mr Brennan, p. 1227.

23 5DN Investigation Transcript, Mr Clouten, pp. 60-63.

24 5DN Investigation Transcript, Mr Tucker, pp. 14, 21.

25 5DN Investigation Transcript, Mr Clouten pp. 60-63; Mr Tucker, pp. 17-19.

In their evidence, Messrs Jones,[26] Cordeaux[27] and Sattler[28] all testified that their on-air behaviour was not influenced by the existence of an endorsement agreement. In all cases, the Authority is satisfied that the existence of a personal endorsement agreement between a presenter and an advertiser has the potential to influence on air behaviour (even if that agreement relates solely to off-air activities).

Gratuitous Mentions of Advertisers and their Products and Services

During the 2UE hearing and the investigations into 3AW, 5DN and 6PR, the Authority heard evidence that all licensees are aware that, from time to time, presenters will make gratuitous mentions of advertisers and their products and/or services. Station staff gave evidence that they were attuned to this, as it diminished the advertising revenue that might otherwise have been obtained by the station.

In the hearing and examinations, senior station staff were questioned on how they detected these gratuitous mentions and how they determined what was an unacceptable level of mentions. Those senior staff indicated that they had no objective means of detecting or determining what is an acceptable level of gratuitous mention. Rather, they indicated they relied on their listening skills and judgement (and the listening skills and judgement of other station staff) to alert them to whether or not a presenter had 'gone too far' in giving gratuitous mention to advertisers.

For example, in the 3AW investigation, Mr Bell testified that 'We have got enough people listening to the radio to pick that [gratuitous mentions] up, within the station'.[29] In relation to the Nightline program and Mr Mansfield's on-air behaviour, however, Mr Graham Mott (General Manager, 3AW) testified that he was not aware that the Nightline credits (in which Mr Mansfield made numerous gratuitous mentions) were a regular feature of the program. Mr Mott testified that he understood that some of the businesses mentioned on the Nightline program were advertisers on 3AW, and that Mr Mansfield and Mr Brady were servicing a client by mentioning them on air in this manner.[30] Mr Price (Program Manager, 3AW) testified that he had not recognised the significance of the credits either.[31]

Again, in the 5DN investigation, Mr Clouten's evidence was that he expected the program director and sales department to alert him to any 'free commercials':[32]

> Q. How did you police that? How did you enforce that?

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26 2UE Hearing Transcript, Mr Jones, pp. 1060, 1062, 1494-1498.

27 5DN Investigation Transcript, Mr Cordeaux, pp. 15, 43-44, 53-54,

28 6PR Investigation Transcript, Mr Sattler, pp. 17-18.

29 3AW Investigation Transcript, Mr Bell, p. 62.

30 3AW Investigation Transcript, Mr Mott, p. 11.

31 3AW Investigation Transcript, Mr Price, p. 8.

32 5DN Investigation Transcript, Mr Clouten, p. 62.

> A. Well, number one, we had a policy which the program director was aware of. I mean, program directors keep a pretty close listen on the radio station. Obviously the sales department was the best watchdog you could ever possibly have. I mean, if they heard one freebie go to air that wasn't being paid for they would want to know about it. So I had 24 salespeople who effectively kept them pretty honest. But, to be frank, our announcers never abused it. I mean, I don't think I can ever recall in the time I was there having to pull up one of our announcers for doing anything untoward or doing more than what was proposed or recommended.

The Authority is of the view that the 'systems' relied upon by senior station staff are inadequate. Not only do they appear to have failed to detect a significant level of gratuitous mentions, they also appear to have failed to detect serious breaches of the Codes.

Goods and Services Given for Review

In its investigation into 3AW the Authority heard evidence of goods and services being provided by advertisers to presenters 'for review'. Mr Mansfield gave evidence that he had received free goods and services for the entire time he has been employed in the radio industry.[33] Mr Mott stated that 3AW management '...don't have a problem with presenters receiving gifts, as long as it never means that they have to use our airtime to say thank you or to promote those gifts; in other words pay those gifts off, if you like'.[34]

Mr Price also gave evidence regarding 3AW's policy on presenters receiving goods and services for review:[35]

> A. We wouldn't consider any of them minor. Anyone who accepts goods in exchange for plugs shouldn't do it and we would not be happy about it happening. The acceptance of free movie tickets or a meal is common practice and I don't have a problem with it as long as it doesn't stray into program content.
>
> ... Everybody who works at 3AW and who comes to work at 3AW is aware of the culture of the radio station and the culture of the radio station is you do not give away the air time.
>
> Q. And your view is the plug is doing that?
>
> A. Of course it is. We only have air time, that is all we have as a product, air time, and if you are giving it to somebody for nothing, then you are stealing from the company is my view.

The Authority also heard evidence from Mr Price that 3AW management relies on the understanding of on-air presenters as to what is, and is not acceptable: [36]

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33 3AW Investigation Transcript, Mr Mansfield, p. 6.

34 3AW Investigation Transcript, Mr Mott, p. 31.

35 3AW Investigation Transcript, Mr Price, p. 8.

36 3AW Investigation Transcript, Mr Price, p. 10.

> We try and make sure the culture is so well known that anyone consciously taking something and promoting it in return for that would know that they are doing the wrong thing. It is a very open policy. ... As long as people who are on the air understand that when they are on the air they have got to be absolutely aware that they can't give away air time because somebody gave them something.

The Authority found, however, that there are no written policies or guidelines available to 3AW presenters or other staff regarding gifts and the provision of goods and services for review. Nor did the Authority receive any evidence of meetings or training programs in which these issues were discussed.

The Authority is of the view that the practice of providing goods and services for review is problematic in circumstances where there are no clear guidelines on the acceptance and disclosure of those goods and services. In addition, as the evidence from 3AW indicates, breaches of the Codes can arise in circumstances where there are no systems in place to monitor and regulate this practice.

The Authority is of the view that, at the very least, all licensees should have guidelines and monitoring/compliance systems to manage the practice of goods and services being provided 'for review', and that presenters should disclose all such goods and services provided to them to station management.

THE PRESENTATION OF POLITICAL MATTER

Broadcasting services play an influential role in the course of Australian political debate, and Parliament recognised this in a number of places within the Act. It is reflected in the Objects of the Act, particularly 3(c) and 3(d), where greater regulation is placed on the 'more influential broadcasting services', and it is recognised in the requirement to 'tag' political broadcasts (see clause 4 of Schedule 2 to the Act).[37]

Whereas other matters were left to the Authority and industry to develop guidelines for regulation, Parliament regarded the disclosure of the sponsor of political advertisements as a matter of such singular importance that detailed guidance was included in the Act. In accordance with the regulatory policy set down for it by Parliament, the Authority regards it as a matter of the highest importance that, in the course of political debate, listeners and viewers clearly know who it is that is trying to persuade them.

In the 2UE hearing, the Panel heard evidence of five breaches of the Act in relation to political matter. Those five broadcasts (all made by Mr Laws) related to:

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[37] Clause 4 of Schedule 2 concerns the broadcasting by the licensee of political matter at the request of another person. Where this occurs, the licensee must 'immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved by the ABA'. The required particulars are the name of the person who authorised the broadcast, the place where the person lives or, if the person is a corporation or association, in which the principal office of the person is situated, and the name of every speaker. For the purposes of clause 4, a person authorises the broadcasting of political matter – or political matter is broadcast at the request of a person – only if the person is responsible for approval of the content of the political matter and the decision to present it for broadcasting. The expression 'political matter' is broadly defined for the purpose of the clause to mean 'any political matter, including the policy launch of a political party'.

- a broadcast on behalf of the Bankers' Association in relation to the effect of the implementation of the (then proposed) Goods and Services Tax on Financial Institutions Duty and Bank Accounts Debit tax;

- three broadcasts on behalf of the Road Transport Forum (in relation to the levels of government expenditure on roads, the level of tax paid by the road transport industry, the announcement of politically-focussed public meetings, and the effect of the (then proposed) Goods and Services Tax on the road transport industry); and

- a broadcast on behalf of Foxtel (in relation to a decision by the Federal Government to prevent the retransmission by subscription broadcasting television licensees of the commercial and national broadcasting services).

The Panel took the view (which the Authority accepted) that these breaches represented a failure by the senior management of 2UE to comply with the conditions of its licence. However, it considered that the explicit requirement for disclosure imposed by the new condition on 2UE's licence would operate to ensure the transparency of arrangements between presenters and third parties in cases where political as well as commercial content was involved.

In the 2UE hearing, the Panel found that material had been broadcast without the necessary disclosure 'tags'. The Panel (and the Authority) were of the view that the condition to be imposed on 2UE's licence requiring an education and compliance regime would address the failure of station management to disclose instances where political matter was broadcast at the request of a third party.

The evidence from the 2UE hearing and the 3AW, 5DN and 6PR investigations indicates that most of the broadcasts examined were concerned with propounding commercial or marketing messages. Some, however, have been concerned with matters of public policy and decisions by governments that have had commercial consequences for affected companies. These broadcasts, while couched in terms of a broader public policy debate, advocated particular political positions advantageous to those affected companies or organisations.

The Authority is strongly of the view that it is an essential element of fairness and accuracy that presenters advise their audience of the existence of commercial arrangements which may influence opinions broadcast on political matters. The Authority considers that the measures it proposes (taken together with the existing licence conditions of Clause 4 of Schedule 2) should ensure the transparency of arrangements affecting political as well as commercial matters. As a result, it does not propose to take any action specifically directed at the disclosure of political matter.

The Authority recognises the complexity of the relationship between the broadcasting industry (licensees, journalists and presenters), their audiences, and public relations firms and their clients. The Authority also recognises that there are real commercial and political advantages in securing coverage of people or issues in news stories or interviews. The Authority expects, however, that in the implementation of their Codes compliance programs, licensees will note the importance placed by Parliament on the disclosure of the identity of third parties requesting the broadcast of political matter.

Licensees should also note the gravity with which the Authority will continue to view breaches of the Act in relation to political matter.

9.	Licensees must comply with the requirements of Clause 4 of Schedule 2 of the Act in relation to the broadcast of political matter and must ensure, that the identity of third parties at whose request political matter is broadcast, is disclosed.

THE RELATIONSHIP BETWEEN LICENSEES AND PRESENTERS

During the 2UE hearing and the investigations into 5DN and 6PR, the Authority heard evidence that some presenters were considered to be in powerful positions vis a vis their respective licensees. In the case of Messrs Jones and Laws, this was as a result of their ratings success (and the revenue they generated); in the case of Mr Cordeaux, it was a result of his position as former managing director of the licensee company.

In the 2UE hearing, for example, Mr Brennan (Program Manager at 2UE and responsible for ensuring Code compliance) testified that Mr Jones and Mr Laws were 'megastars', and that this placed them in a special position at 2UE.[38]

> A. Well, Mr Burnside, we're dealing with probably two of the highest profile personalities in the land --
>
> Q. What difference does that make?
>
> A. Megastars.
>
> ...
>
> Q. Megastars, fine; what difference does that make to your job of supervision compliance with the codes?
>
> A. Well, I don't - no, I'm trying to explain to you that what is their financial situation between the station and themselves is between them and the chief executive.

In relation to the 5DN investigation, prior to August 1996 Mr Cordeaux was both the Managing Director of Montclair Pty Limited (the licensee) as well as a presenter on radio station 5DN. In the period prior to August 1996, responsibility for developing and implementing 5ADD and 5DN policy rested largely with Mr Clouten, an employee of the licensee. Mr Clouten gave evidence that, at times, this placed him in a 'difficult position' vis a vis Mr Cordeaux.[39] Despite this situation, it was Mr Clouten's evidence that if he had ever had to question Mr Cordeaux on his compliance with station policy, he felt that he would have been supported by the Board of Directors of Montclair. Mr Clouten testified, however, that the situation never arose.[40] Mr Clouten also testified that after the

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38 2UE Hearing Transcript, Mr Brennan, p. 1236.

39 5DN Investigation Transcript, Mr Clouten, pp. 17, 29.

40 5DN Investigation Transcript, Mr Clouten, pp. 36-37.

sale of 5ADD and 5DN to ARN, Mr Cordeaux still enjoyed a special position at the station.[41]

The Authority also heard evidence that, in the case of 2UE, station management were reluctant to approach Messrs Jones and Laws about (let alone seek and obtain copies of) their personal endorsement agreements. For example, in the 2UE hearing, Mr Brennan was asked whether he had asked to see Mr Jones' agreement with Optus. Mr Brennan testified that he hadn't and went on to agree with the proposition that, if he had asked to see the contract 'all hell would break loose'.[42]

In addition, the Authority also heard evidence that, even after station management had sought full disclosure of all agreements held by presenters, there were delays and equivocations on the part of some presenters.

Mr John Conde (Executive Chairman of 2UE) testified that on 19 July 1999, 2UE management issued a formal direction to Mr Laws and Mr Jones to provide a list all endorsement agreements to which they were party. It took some time for Mr Conde to gain access to the list of Mr Jones' endorsement agreements:[43]

> Q. You also wrote through your solicitors to Mr Jones' solicitors requesting a list of all endorsement agreements he had?
>
> A. We did.
>
> Q. And his response, I suggest through his solicitors, was to say your request was invalid?
>
> A. I think this detailed exchange of correspondence is set out in my statement.
>
> Q. ... Do you accept that his response through his solicitors was that your request was invalid?
>
> A. Yes, I believe that's correct.
>
> Q. And did your solicitors write back to him on 3 August insisting on compliance with the direction?
>
> A. I think that's correct.
>
> Q. Is it the case that it was not until 16 August 1999 that a list of Mr Jones's endorsement agreements was provided to your solicitors?
>
> A. I think that's correct, Mr Burnside. I'm not sure of all the dates.
>
> Q. Paragraph 15.19 of your statement gives that date; okay? Now, it's also the case, isn't it, that when that list of endorsement agreements was provided by Mr Jones' solicitors, it was on terms that you should not be shown the list. Do you agree with that?

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41 5DN Investigation Transcript, Mr Clouten, p. 63.

42 2UE Hearing Transcript, Mr Brennan, p. 1235.

43 2UE Hearing Transcript Mr Conde, pp. 1406-1407.

A. I believe so, yes.

Q. And you were aware that the list was being provided on that condition?

A. I was informed of that.

Q. Did it occur to you that was a striking thing that Mr Jones was saying that you were not allowed to see a list of his sponsors?

A. That was an unsatisfactory position which subsequent discussions resolved.

Q. It took a couple of weeks, didn't it?

A. I believe so.

Mr Conde also testified about delays in Mr Laws' compliance with the 19 July 1999 direction:[44]

> ... And the response from Hunt & Hunt made it plain, citing reasons of confidentiality with third parties, and drawing an analogy to the 2UE/John Laws contract, which we wouldn't want disclosed lightly, that those contract details were not going to be supplied. So we persisted, as you would have heard.

In the case of Mr Cordeaux, Mr Tucker testified that in May-June 1999 the Sales Department of 5DN made him aware that Mr Cordeaux had an agreement with Optus (and other companies) for live reads.[45] Mr Tucker then approached Mr Cordeaux in June/July 1999, and asked Mr Cordeaux to show him his Optus contract.[46] Mr Tucker testified that he was shown Mr Cordeaux's 1993 Optus contract. Mr Tucker was not made aware of Mr Cordeaux's 1999 endorsement agreement with Optus until provided with a copy of that agreement by the Authority.[47]

Q. So you are certain you've seen the 1993 contract?

A. Yes.

...

Q. Whereas these are, as you can see obviously, just letters of agreement that take matters forward and provide for the current arrangements for Mr Cordeaux. Would you have expected to have received documents like that, having asked for - well, put it this way. Did you ask for Mr Cordeaux's current contractual arrangements with - - -

A. Well, I guess it comes to your phraseology, doesn't it. I mean, I asked for the Optus contract and he's given me the Optus contract. I can only say I would be

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44 2UE Hearing Transcript Mr Conde, p. 1349.

45 5DN Investigation Transcript, Mr Tucker, pp. 22-23.

46 5DN Investigation Transcript, Mr Tucker, p. 43.

47 5DN Investigation Transcript, Mr Tucker, pp. 46-47.

surprised if these were attached to it, because I think I would have remembered them.

Q. Certainly. So you're obviously not aware of the current obligations on Mr Cordeaux as in the latest Optus document, which is the one from Harry M. Miller and Co?

A. It seems not.

In the case of Mr Sattler, on 7 September 1999 Mr Healy wrote to Mr Sattler requiring him to terminate his contract with Optus, to notify any other company with which he had a commercial arrangement that he would not be influenced editorially by the arrangement, and to cancel any arrangement with a company that would not accept this position. By 3 November 1999, Mr Sattler had not complied with the directions in Mr Healy's letter and Mr Healy again wrote to Mr Sattler. By 26 November 1999, Mr Sattler still had not complied with Mr Healy's directives, so Mr Healy again wrote to him restating his concerns and asking him to 'discuss this with me at your earliest convenience on Monday, or if you prefer, feel free to call me over the weekend.' Mr Sattler continued to disregard Mr Healy's directives and resigned from 6PR in December 1999.

From the evidence presented to the Authority, it is clear that it is not sufficient to seek to understand the obligations of a presenter's personal endorsement agreements by means of questioning presenters on the detail of their agreements. The Authority is of the view that, not only should the existence of an agreement be disclosed, but that the full text of the agreement should also be disclosed to the licensee.

The Authority is also of the view that the principle of disinterestedness is not confined to current affairs programs. Listeners are entitled to be told of the existence of all commercial interests and, if they are not so told, they are entitled to assume that no direct commercial interest exists. In other words, they are entitled to assume all presenters are disinterested. As a result, the Authority is of the view that licensees should be aware of the full text of the agreements entered into by all presenters (not just presenters of news and current affairs programs).

10. Presenters of news and current affairs programs must provide a full copy of all their relevant commercial agreements to the licensee.

11. Presenters of other programs should provide a full copy of all their relevant commercial agreements to the licensee.

The Authority also heard evidence indicating that licensees had failed to ensure that there were adequate systems in place to ensure that the obligations and responsibilities of the Codes were understood and put into operation.

At the 2UE hearing, Mr Conde gave evidence that it was 2UE policy that an announcer should be entitled to enter into a personal endorsement arrangement or promotional contract provided that:[48]

- the editorial independence of the announcer is not compromised, and
- the announcer does not receive recompense from a third party for doing something on 2UE that 2UE is already paying for.

Mr Conde said that prior to March 1998, when the 'Media Watch' program on ABC television broadcast allegations of improper editorial conduct by Mr Laws, he was aware that Messrs Jones and Laws had commercial relationships with various entities. Mr Conde also gave evidence, however, that he thought that these arrangements did not infringe 2UE's policy.

On 27 July 1998, Mr Conde issued a memorandum to all on-air broadcasters. The memorandum expressed concern with certain types of arrangements between presenters and other entities and spelt out 2UE's policy. 2UE appointed Mr Brennan to monitor compliance with the Codes. At the same time, however, he was responsible for ensuring that presenters on 2UE were kept 'psychologically number one when they do their program'.[49]

Mr Brennan gave evidence that one of the management systems employed at 2UE designed to ensure compliance with the Codes, was the conduct of 'spot tests'.[50] Mr Brennan was unable to properly carry out 'spot tests' of Mr Laws' program, however, as he had not been given the names of any of Mr Laws' sponsors known to 2UE.[51] Nor had 2UE sought the names of any other sponsors of Mr Laws.[52]

The Authority is of the view that the two functions given to Mr Brennan (monitoring compliance with the Codes of Practice and maintaining the morale and composure of on-air presenters) would be almost impossible to combine successfully. The Authority is also of the view that 2UE took no effective action to address the problem with Mr Laws' contracts exposed by 'Media Watch' on 16 March 1998. In the Authority's view, the management systems at 2UE were not adequate to ensure compliance with 2UE's policy concerning sponsorship agreements.

In the case of Mr Jones, the existence of Mr Jones' contract and the potential difficulties it posed for 2UE were certainly known to 2UE as early as February 1995, when Mr Conde sought to clarify Mr Jones' position on live read advertisements for Telecom. Again, in September 1995, Foxtel wrote to Mr Conde complaining about the treatment

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48 Submission, Mr Conde, paras 1.24, 12.6.

49 Transcript, Mr Brennan, p. 1235.

50 Transcript, Mr Brennan, p. 1222.

51 Transcript, Mr Brennan, p. 1238-1242.

52 Transcript, Mr Brennan, p. 1238-1242; Transcript, Mr Conde, p. 1350-1352.

given to Foxtel by Mr Jones in an interview with Mr Geoffrey Cousins (CEO of Optus Vision).[53]

In the Authority's view, as early as September 1995 2UE was aware that the relationship between Mr Jones and Optus was (potentially at least) not what it was thought to be. 2UE did not ask to see the detail of Mr Jones' contracts nor did it seek to satisfy itself that Mr Jones had no other contracts or agreements that might breach station policy or the Codes. In the Authority's view, 2UE's management systems again were not adequate to prevent breaches of the Codes.

In its investigation of 3AW, the Authority has found that 3AW management did not have adequate systems in place to communicate information to staff concerning the Codes. 3AW Codes training was conducted internally and informally. Mr Bell gave evidence that, prior to July 1999 (when the Authority commenced its investigations into radio station 2UE), Southern Cross Broadcasting had no formal policies, procedures or training programs in place to ensure that its employees were aware of or complied with the Codes.[54]

Mr Bell testified that, although there was no written policy until about August/September 1999, the policy itself pre-dated that time and, in his view, there was a general awareness of the policy amongst Southern Cross Broadcasting managers and employees.[55] When a written policy was circulated, Mr Bell also testified, however, that he did not include any guidance, information or instructions to managers about what was expected of them in relation to the policy, or how to interpret or implement the policy.[56]

The Authority received evidence that 3AW Management relied on informal methods such as 'culture' to ensure staff were familiar with the Codes. Mr Mott, who was responsible for ensuring compliance with the Codes at 3AW, held the understanding that '... the Codes of Practice are something that is part of the culture of the organisation...'[57] This understanding cannot be sustained in the light of the evidence of Mr Mansfield (who had been part of the 3AW culture since the introduction of the Codes in 1993). Mr Mansfield testified that he had never seen a copy of the Codes during his employment with 3AW.[58]

3AW Management also relied on discussions of complaints to ensure information about the Codes was communicated to staff. This approach, relying as it did on complaints being made in order to communicate information about the Codes, was sporadic and focussed on the resolution of the specific complaint. The Authority does not consider that such an approach results in staff gaining a comprehensive understanding of the Codes.

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53 Transcript, Mr Conde, p. 1339-1340; 2UE.0025.0247.

54 3AW Investigation Transcript, Mr Bell, p. 8.

55 Transcript, Mr Bell, pp. 13, 15.

56 Transcript, Mr Bell, pp. 14-15.

57 3AW Investigation Transcript, Mr Mott, p. 35.

58 3AW Investigation Transcript, Mr Mansfield, p. 24.

Mr Mott gave evidence that he believed the station was in need of a training program, [59] and as part of this training program, 3AW distributed a Codes questionnaire in February 2000 to all staff. It is the Authority's view, however, that the questionnaire is inadequate to test the knowledge of the Codes of those completing it, or to educate them about the Codes.

In addition, the Authority found that Southern Cross Broadcasting's policy on the disclosure to the licensee of commercial agreements (entered into by its employees) that do not 'make the station a party to the agreement' is not clear. Moreover, examination of 3AW employees indicates that 3AW staff were not aware of the existence of this policy after it had been distributed to 3AW management. This, in the Authority's view, indicates a significant failure in management systems.

In its investigation into radio station 5DN, the Authority was not provided with any evidence that suggested that a compliance regime was put in place to monitor personal endorsements during the period that Montclair Pty Limited was licensee (1993-1996). For example, Mr Clouten's evidence was that he expected the sales department to alert him to any "free commercials", and that he did not ask to see any of Mr Cordeaux's contracts.[60] The evidence of Mr Dane Hansen (Sales Director 5ADD/5DN from October 1990 to November 1996) also suggests that there was no effective oversight of the endorsement policy or of the detail of Mr Cordeaux's endorsement contracts.[61]

Similarly, once ARN became the licensee of 5DN in August 1996, there is scant evidence of any system being put in place to ensure that staff at 5DN were aware of and abided by, the Codes.[62] Mr Tucker's evidence was that, under his management of the station, a copy of the Codes was available to staff, and new staff were asked to read the Codes (though this was not enforced or checked in any systematic way). Apart from this, however, there was no system in place to inform staff of their obligations under the Codes or to ensure staff complied with the Codes. [63]

The evidence of Mr Neil Mount (Chief Executive Officer of ARN since April 1998)[64] and Ms Cameron (Director Corporate and Workplace Relations, ARN)[65] was that, from a corporate perspective, ARN regularly raised issues concerning the Codes among station managers, with the expectation that they would then do the same among their respective station staff. Mr Mount also testified that, as a result of the Authority's investigations, a policy of spot checks has subsequently been instituted to ensure that station managers and senior station staff are making staff aware of their responsibilities under the Codes.[66] In

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59 3AW Investigation Transcript, Mr Mott, p. 31.

60 5DN Investigation Transcript, Mr Clouten, p. 62.

61 5DN Investigation Transcript, Mr Hansen, pp. 34-35.

62 5DN Investigation Transcript, Mr Clouten, pp. 12-13.

63 5DN Investigation Transcript, Mr Tucker, pp. 52-53.

64 5DN Investigation Transcript, Mr Mount, p. 8.

65 5DN Investigation Transcript, Ms Cameron, pp. 12-13.

66 5DN Investigation Transcript, Mr Mount, p. 8.

the Authority's view, there has been a significant failure in management systems at radio station 5DN during the period 1993-2000.

As with radio station 3AW, Mr Bell gave evidence that, prior to July 1999, Southern Cross Broadcasting had no formal policies, procedures or training programs in place at radio station 6PR to ensure that its employees were aware of or complied with the Codes. Mr Healy (General Manager, 6PR) gave evidence that he was aware of Southern Cross Broadcasting's policy before the written policy was circulated, and that he had discussed it with staff.[67] Mr Sattler testified, however, that before the written policy was distributed around September 1999 he was not aware of the policy being available in any other form accessible by staff.[68] Mr Healy gave evidence that when he received the policy document, he distributed it to all programs presenters and producers and attached it to the 6PR notice board for the general information of staff. Mr Sattler testified that the policy was 'put on everybody's desk'.[69]

> Q. Was there discussion by station management about the document at any time?
>
> A. No.

Before the commencement of the Authority's 2UE inquiry in July 1999, Southern Cross Broadcasting did not have any formal policies, practices or training programs in place to ensure that its employees were aware of the Codes of Practice. Mr Healy gave evidence that, prior to July 1999, there was discussion about the Codes in Southern Cross Broadcasting and at 6PR from time to time; he was not able, however, to provide any specific examples.[70] Mr Sattler gave evidence that in his recollection, the only time that 6PR management discussed the Codes was after the commencement of the Authority's 2UE inquiry.

Mr Healy's evidence was that the Codes were kept by 'program directors and [the] general manager. There may be one in the news room as well. I'll have to check on that.'[71] Mr Sattler testified that he was not aware of the Codes being easily accessible by staff in the station.[72] Mr Healy also testified that he distributed a Codes questionnaire in February 2000 to about half of the Southern Cross Broadcasting staff in Perth (including 6PR's sister station 96FM).[73] This was the same questionnaire that was distributed to staff at radio station 3AW, and the Authority makes the same criticisms of this questionnaire in the case of 6PR as it does with 3AW.

In relation to the evidence concerning the operation of the Codes, the Authority is of the view that:

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67 6PR Investigation Transcript, Mr Healy, pp. 17-18, 20-21.

68 6PR Investigation Transcript, Mr Sattler, pp. 53-54.

69 6PR Investigation Transcript, Mr Sattler, pp. 53-54.

70 6PR Investigation Transcript, Mr Healy, pp. 6-7, 8-9.

71 6PR Investigation Transcript, Mr Healy, p. 13.

72 6PR Investigation Transcript, Mr Sattler, pp. 4-6.

73 6PR Investigation Transcript, Mr Healy, pp. 12-13.

- There has been inadequate commitment by licensees to embracing and implementing the principles underpinning and the practices enjoined by the Codes.

- There has been inadequate commitment by licensees to putting any system in place to ensure staff understand and comply with the Codes.

- There is a significant lack of awareness by staff of the Codes and their responsibilities under them.

The Authority is of the view that within a significant proportion of the talkback radio industry (that is, 2UE, 3AW, 5DN and 6PR), the Codes are not operating to provide adequate community safeguards.

12. There appears to be a lack of any system(s) to ensure the effective operation of self-regulation within current affairs segment of the commercial radio industry, including a lack of staff awareness of the Codes and their implications.

13. Within a significant proportion of news and current affairs programs, the Codes are not operating to provide appropriate community safeguards.

THE RELATIONSHIP BETWEEN THE COMMERCIAL AGREEMENTS OF PRESENTERS AND THE PAYMENT OF LICENCE FEES BY LICENSEES

Legislative Framework

Commercial radio licensees are required as a condition of the licence under Clause 8(1)(ha) Part 4 Schedule 2 of the Act to comply with the requirements set out in section 205B of the Act. Under section 205B(1) of the Act, a commercial radio licensee must:

(a) keep and maintain, in a recognised business or commercial form, financial accounts in relation to the service provided under the licence; and

(b) make those accounts available for inspection by the ABA or an authorised officer when requested to do so; and

(c) within 6 months after 30 June in each year, give the ABA:

(i) an audited balance-sheet and an audited profit and loss account, in a form approved by the ABA, in relation to the service provided under the licence for the year ending on that 30 June; and

(ii) a statutory declaration stating the gross earnings in relation to the licence during that year; and

(d) keep such records in respect of the service provided under the licence as the ABA directs and give copies of those records to the ABA when requested to do so.

Under section 5 of the *Radio Licence Fees Act 1964* (RLFA), a commercial radio licensee must pay a licence fee calculated in accordance with section 6 or section 6A of that Act. Section 6 requires a commercial radio licensee to pay a licence fee on each 31 December, and the licence fee is to be 'an amount equal to the relevant percentage of the gross earnings in respect of the licence during the period of one year ending on the 30 June last preceding the 31 December.'

Under section 4(1) of the RLFA, 'gross earnings' is defined as:

> **'gross earnings'**, in respect of a licence in respect of a period, means the gross earnings of the licensee during that period from the broadcasting, pursuant to the licence, of advertisements or other material.

What constitutes 'advertisements or other material' is not defined in the RLFA or the Act. The common law meaning of an 'advertisement' is material which is designed or calculated to draw public attention to a product or service or to promote its use.[74]

Section 7 of the RLFA allows the Authority to take anti-avoidance action to take account of all amounts earned that are properly attributable to broadcasting on a service, including amounts that might not have been paid directly to a licensee. Section 7 of the RLFA states:

> Where the ABA is of the opinion that:
>
> (a) an amount, or part of an amount, earned during any period by a person other than a licensee would, if the licensee and that person were the same person, form part of the gross earnings in respect of the licence of that period for the purposes of this Act; and
>
> (b) a relationship exists between the licensee and the other person (whether by reason of any shareholding or of any agreement or arrangement, or for any other reason) of such a kind that the amount or part of the amount, as the case may be, should, for the purposes of this Act, be treated as part of the gross earnings of the licence in respect of that period;
>
> the ABA may direct that the amount or the part of the amount, as the case may be, shall be so treated.

To date the Authority has not made any directions under section 7 of the RLFA.

Agreements Between Presenters and Advertisers

The Authority heard evidence at the 2UE hearing and during the investigations into radio stations 3AW, 5DN and 6PR of a number of commercial agreements between presenters and advertisers. In the main, those agreements involved presenters 'advertising' their sponsors' goods and services by embellishing live read advertisements, providing favourable editorial comment, providing interviews to representatives of sponsors or disguising advertisements as other program content. These 'advertisements' were

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[74] *Rothmans of Pall Mall v Australian Broadcasting Tribunal* (1985) 58ALR675 at 683 per Bowen, Toohey and Wilcox JJ

broadcast pursuant to the agreements between presenters and advertisers. Licensees, however, received no payment for these advertisements. A sample of these agreements and their effect is outlined below.

Mr Jones' Agreements with Optus

Mr Jones entered into agreements with Optus in 1993, 1995 and 1998 (the fee for the 1995 and 1998 agreements was $500,000 per annum). The primary obligations of Mr Jones' Optus agreements included the promotion and enhancement of Optus long distance communication services by:

- personal recommendation and endorsement;
- reading and embellishing live radio commercials; and
- making pre-recorded radio commercials.

Mr Jones made frequent mention of Optus on-air in circumstances where there is evidence that Optus supplied talking points or scripts to him. In making use of these talking points or scripts, it appeared as if Mr Jones was offering disinterested editorial comment in support of Optus. The Panel found that, as a result of the agreement between Mr Jones and Optus, 2UE (as licensee) had breached Code 3 on seven occasions.

Mr Laws' Agreement with the Australian Bankers' Association

In February 1999, Mr Laws entered into an agreement with Australia Street Consulting and the Bankers' Association for a fee of $500,000 per annum. The agreement included:

- Mr Laws recording of 150 advertising spots under the name 'The Whole Story'.
- The granting to very senior bank and Bankers' Association executives the opportunity to discuss 'their side of the story' on particular issues with Mr Laws on-air.

Mr Laws was not, during the course of the agreement, to broadcast any advertisement that denigrated Australian banks or the Australian banking industry, and there was no obligation to pay Australia Street Consulting if the Bankers' Association considered that Mr Laws had brought the reputation of its members into disrepute during 1999.

In addition, it appears that the terms of the agreements between Australia Street Consulting and the Bankers' Association, and Australia Street Consulting and Mr Laws may have been wider than those expressed in the written documents. It appears that the agreements also included a regular practice of referring listener complaints to the Bankers' Association or individual banks for their response, and Mr Laws, on at least some occasions, putting those responses to air. The Panel found that, as a result of the agreement between Mr Laws and the Bankers Association, 2UE (as licensee) had breached Code 3 on three occasions.

Mr Sattler's Agreements with Optus

During the period 1994 to end 1999, Mr Sattler entered into agreements with Optus to promote Optus products and services for a fee ranging between $20,000 and $40,000 per annum. It appears that Optus entered into an agreement with Mr Sattler with the expectation of receiving positive mentions on-air from Mr Sattler from time to time about Optus products. To that end, Optus provided a range of materials to Mr Sattler for his on-air use, including advertising and promotional material, advertising scripts, media releases and talking points about issues of interest to Optus.

Optus provided material to Mr Sattler with a view to promoting Optus and Optus products and services, and Mr Sattler used some of the material provided to him by Optus on-air and conducted interviews during his program from time to time with Optus personnel. The Authority found that, as a result of the agreement between Mr Sattler and Optus, 6PR (as licensee) had breached Code 3 on two occasions.

Mr Cordeaux's Agreements with Optus

Mr Cordeaux also had agreements with Optus between December 1993 and December 1999 for a fee of $30,000 per annum (rising to $50,000 per annum in 1999). The primary obligation of the agreements was that Mr Cordeaux would promote and mention Optus favourably on his program, in particular, by using the talking points on a range of topics provided to him (with varying frequency) by Optus. The primary purpose of the agreement was a guarantee of promotion and favourable mention of Optus by Mr Cordeaux. The Authority found that, as a result of the agreement between Mr Cordeaux and Optus, 5DN (as licensee) had breached Code 3 on three occasions.

Mr Cordeaux's Agreements with the Adelaide Casino and Channel Ten

The Authority also heard evidence in regard to radio station 5DN that the Adelaide Casino and Channel Ten were paying Mr Cordeaux for regular advertisements involving interview segments.

During the period September 1993 to August 1999 (when the agreement was terminated), Mr Cordeaux entered into an agreement with the Adelaide Casino to provide a public relations package. This package primarily involved Mr Cordeaux promoting the Casino on-air, including by means of a five-minute interview segment every week, for a fee of $30,000 per annum (reduced in 1996 to $25,000 per annum), as well as some occasional off-air promotional services.

This weekly five-minute Adelaide Casino segment constituted an advertisement (for the purposes of Code 3). As a result, during the period 1993-1999, advertisements for the Adelaide Casino were broadcast on radio station 5DN in circumstances where there was no payment of advertising fees to the licensee.

During the period 1993-1995, Channel Ten was a regular advertiser on radio station 5DN. In 1993-1994, Mr Cordeaux negotiated a separate promotions package with Channel Ten, that primarily involved Mr Cordeaux promoting Channel Ten on-air. The promotion entailed an interview segment every day with Channel Ten news presenter Mr George Donikian for a fee of $25,000 per annum. The on-air promotional services provided by Mr Cordeaux, involving interviews with Mr Donikian, constituted an advertisement (for

the purposes of Code 3). As a result, during the period 1993-1995, advertisements were broadcast on radio station 5DN in circumstances where there was no payment of advertising fees to the licensee.

Implications of the Agreements

The Panel did not make any finding on the question of what proportion of Mr Jones' $500,000 annual fee might be directly linked to his advertisements for Optus on 2UE (and not any other obligations of his agreements). Nor did the Panel make any finding on the question of what proportion of Mr Laws' $500,000 annual fee might be directly linked to his advertisements for the Bankers' Association on 2UE (and not any other obligations of his agreement).

The Authority is of the view, however, that an undetermined portion of that annual fee was paid to Mr Jones by Optus and to Mr Laws by the Bankers Association for the 'promotion' of Optus and the Association on 2UE and for the 'embellishment' of Optus' and the Association's live read advertisements. That undetermined portion of the annual fee was paid to Mr Jones and to Mr Laws (and not the licensee) for their services in 'advertising' Optus and the Bankers Association on 2UE.

Again, in its investigation into radio stations 5DN and 6PR, the Authority did not make any finding on the question of what proportion of Messrs Cordeaux's or Sattler's Optus' fees might be directly linked to their advertisements for Optus on 5DN and 6PR respectively (and not any other obligations of their Optus agreements). The Authority is of the view, however, that an undetermined portion of that annual fee was paid to Messrs Cordeaux and Sattler by Optus for the 'promotion' of Optus on 5DN and 6PR and for the 'embellishment' of Optus' live read advertisements.

That undetermined portion of the annual fee was paid to Messrs Cordeaux and Sattler (and not the respective licensees) for their services in 'advertising' Optus on 5DN and 6PR. Further, it is clear that Mr Cordeaux and not the licensee received a $30,000 annual fee from the Adelaide Casino (later reduced to $25,000 per annum) and a $25,000 annual fee from Channel Ten for regular advertising segments on his program.

The Authority's investigations indicate that each of the presenters received payment from advertisers for the advertisements they broadcast without the knowledge of their respective licensees. Had the licensees (rather than the presenters) received payment for broadcasting the advertisements, those amounts would have formed part of their gross earnings. As a result of the presenters' agreements, the gross earnings of all these licensees have been reduced, and there has been a consequent reduction in the licence fees collected by the Authority.

A direction made by the Authority under section 7 of the RLFA could extend the meaning of 'gross earnings' to include amounts paid to presenters for advertisements using the broadcasting service. Such a direction is unlikely to have retrospective effect, however, in respect of previous financial years. Thus, without the ability to make a section 7 direction retrospectively, it is not now open to the Authority to recover the licence fees that may have been payable had the payments to Messrs Laws, Jones, Cordeaux and Sattler been assessable as 'gross earnings' in respect of the licence.

Future Action

There are three actions open to the Authority to ensure that payments to third persons, such as presenters, be included in gross earnings for licence fee purposes:

- to direct that the amounts be treated as part of the gross earnings of the licence under section 7 of the RLFA;
- to direct that licensees keep records of such payments under paragraph 205B(1)(d) of the Act and give copies to the Authority upon request; and
- to conduct audits of licensees.

Direction under Section 7 of RLFA

As stated earlier, section 7 of the RLFA allows the Authority to take anti-avoidance action to take account of all amounts earned that are properly attributable to broadcasting on a service, including amounts that might not have been paid directly to a licensee. This power enables the Authority to direct that an amount or part of an amount paid to a presenter (or to a company associated with a presenter) be treated as gross earnings of the licensee.

Under section 205B(1)(c)(ii) of the Act, a commercial radio broadcasting licensee must give the Authority a statutory declaration stating gross earnings in relation to the licence during each financial year. If the Authority makes a direction under section 7 of the RLFA that amounts paid to a presenter are to be treated as part of the gross earnings of the licence, such amounts will need to be included in the statutory declaration.

In considering whether to give a direction under section 7 of the RLFA, the Authority must be satisfied that:

- an amount earned by another person would form part of the gross earnings of the licensee if the person and the licensee were the same; and
- such an amount should be treated as part of the gross earnings of the licensee because of the relationship between the licensee and the other person.

One complication is that an agreement between a sponsor and presenter may require the presenter to engage in both on-air and off-air conduct. Only the proportion of the amount attributable to on-air conduct can be included in the gross earnings in respect of the licence. It may therefore be difficult to determine what proportion of the total payment is related to on-air conduct. The Authority would, therefore, need to make a direction under paragraph 205B(1)(d) of the Act.

Direction under Paragraph 205B(1)(d) of the Act

Section 205B of the Act requires licensees to declare 'gross earnings' and to maintain financial accounts 'in relation to the service provided under the licence' as well as to 'keep such records in respect of the service provided under the licence as the ABA directs'.

Currently, licensees are not required to maintain accounts or provide information that would disclose the earnings of persons other than the licensee from the broadcasting of advertisements or other material. Under section 205B(1)(d) of the Act, however, the Authority can direct licensees to keep and provide such records. The Authority intends, therefore, to direct licensees to keep records about the earnings of other persons who might potentially fall within the scope of section 7 of the RLFA.

The Authority is of the view that licensees must provide an annual report of presenters' contractual agreements that involve the use of airtime for advertisements and affect gross earnings. The information thus provided will enable the Authority to apply an objective method for determining that an amount or part of an amount was earned from broadcasting advertisements or other material on a licensee's service. Licensees will be given an opportunity to provide the Authority with other relevant information or material that they believe the Authority should take into account. After considering such information, the Authority will determine how to apportion amounts earned using airtime and will provide the licensee with reasons for its decision.

Currently, licensees provide financial information in ABA Form 10 and ABA Form 17 to the Authority by 31 December each year. Licensees are advised, usually in about October or November each year, that financial documents and licence fees should be received by the Authority by that date. If the Authority is to have time to process the additional information required (and communicate with licensees on any anomalies, as appropriate), the Authority is of the view that financial documents (not licence fees) should be received by the Authority by 31 October.

As a result, the Authority intends to advise licensees in August or September each year, that financial documents and licence fees should be received by the Authority by 31 October. It is the Authority's view that this would not be burdensome for licensees (if records have been kept and monthly monitoring has taken place), and licensees could factor regulatory compliance into their preparation of the end of financial year accounts happening at that time.

Licensee Audits

A primary function of the Authority is to monitor the operation of the Act. One way to monitor compliance with the account keeping provisions is to conduct regular licensee audits. The Authority has commenced a 10-year program of licensee audits from 2000. As part of this program, the Authority is of the view that risk assessment and the selection of licensees for audit will take into account (among other factors) compliance with licence fee payment and the provision of financial documentation.

14. The Authority intends to make a direction under section 7 of the RLFA that amounts paid to a presenter are to be treated as part of the gross earnings of the licence.

15. The Authority intends to make a direction under section 205B(1)(d) of the Act that licensees are to maintain accounts or provide information that would disclose the earnings of persons other than the licensee from the broadcasting of advertisements or other material.

16. The Authority is of the view that risk assessment and the selection of licensees for audit will take into account (among other factors) compliance with licence fee payment and the provision of financial documentation.

SUITABILITY

Under the Terms of Reference for the Investigation, the Authority is to consider whether Radio 2UE Sydney Pty Limited, Southern State Broadcasters Pty Limited, 6PR Southern Cross Radio Pty Limited and 3AW Southern Cross Radio Pty Limited remain suitable licensees within the meaning of section 41 of the Act.

Section 41 of the Act provides that:

(1) For the purposes of this Part, a company is a suitable licensee or a suitable applicant for a licence if the ABA has not decided that subsection (2) applies to the company.

(2) The ABA may, if it is satisfied that allowing a particular company to provide or continue to provide commercial broadcasting services under a licence would lead to a significant risk of:

(a) an offence against this Act or the regulations being committed; or

(b) a breach of the conditions of the licence occurring;

decide that this subsection applies to the company.

(3) In deciding whether such a risk exists, the ABA is to take into account:

(a) the business record of the company; and

(b) the company's record in situations requiring trust and candour; and

(c) the business record of each person who is, or would be, if a licence were allocated to the applicant, in a position to control the licence; and

(d) the record in situations requiring trust and candour of each such person; and

(e) whether the company, or a person referred to in paragraph (c) or (d), has been convicted of an offence against this Act or the regulations.

Each commercial radio broadcasting licence is subject to the condition that the licensee remains a suitable licensee (clause 8(2)(b) of Schedule 2 of the Act). It is also a condition of the licence that the licensee complies with the requirements of clause 4 of Schedule 2 of the Act regarding the identification of political matter (clause 8(1)(i) of Schedule 2). Failure to comply with the latter licence condition is an offence under section 139(3) of the Act.

In February 2000 the Authority found that Radio 2UE Sydney Pty Limited, the licensee of 2UE, had contravened clause 4(2) of Schedule 2 of the Act on five occasions by not causing the required particulars to be announced after the broadcast of political matter. As a result there had been five breaches of the licence condition in clause 8(1)(i) of Schedule 2. The Authority also found that there had been numerous breaches of clauses 2.2(d) and 3.1(a) of the Codes of practice by 2UE.

On 23 March 2000 the Authority imposed two additional conditions on 2UE's licence. The first licence condition included a requirement that the licensee of 2UE ensure that all staff involved in the production or presentation of material broadcast on 2UE (including all presenters) undertake a training program concerning the obligations placed on the broadcaster by the Act, the Codes of Practice and the new condition.

Under the condition, training is to take place at least twice in the first year of the condition and at least once in each of the following two years. The training must be conducted by a firm of lawyers with expertise in broadcasting law or compliance programs and a report on the training must be provided to the Authority. The Authority considers that compliance with this condition should reduce the risk of both a breach of the licence condition in clause 8(1)(i) recurring and an offence being committed against the Act.

The Authority has considered the circumstances surrounding 2UE's breaches of the licence condition in clause 8(2) of Schedule 2. On the available information, the Authority does not consider that there is a significant risk of a breach of this licence condition in allowing the licensee of 2UE to continue to provide the relevant commercial radio broadcasting services.

The test of suitability under section 41 of the Act does not involve any consideration of the risk of breaches of the Codes. Thus, while the Authority has found that the Codes were breached on 90 specific occasions by 2UE, 12 specific occasions by 5DN and 17 specific occasions by 6PR, these findings are not relevant to the issue of suitability under the Act. Accordingly, the Authority makes no adverse suitability finding against the licensees of 2UE, 3AW, 5DN and 6PR.

17. The Authority makes no adverse suitability finding against the licensees of radio stations 2UE, 3AW, 5DN and 6PR.

6 Code Failure – Possible Causes and Potential Alternative Remedies

The right to exclusive use of a section of the radiofrequency spectrum for the purpose of commercial broadcasting is an extremely valuable public asset, and the community has certain expectations of those who are entrusted with the use of such assets. This includes the expectation that community standards with respect to content and conduct are respected, and that complaints from members of the public will be addressed courteously, effectively and expeditiously.

Prior to the introduction of the *Broadcasting Services Act 1992* (the Act), the regulatory system imposed by the *Broadcasting Act 1942* depended on the holding of multiple formal public hearings, and was complex, cumbersome and imposed significant burdens of cost and time on the industry. Upon review of that system, Parliament thought it appropriate and desirable to recognise the industry's principal responsibility, at least in the first instance, for meeting the community's expectations of commercial broadcasting licensees. The Act removed the requirement for licence renewal hearings to occur in respect of licences to use the broadcasting spectrum.

The philosophy underlying the Act is essentially one of co-regulation, which provides for industry administration of Codes of Practice, subject to Authority oversight. It recognises that ethical behaviour is behaviour which should be undertaken for its own sake, for the sake of the principles which underpin it (in this case the expectations a community rightfully places on holders of major public assets), although it also provides a regulatory safety net.

In short, it is an essential part of such an approach that those promulgating and seeking to rely on self regulatory codes (as a defence against formal government intervention) are bound to ensure that the codes are living, working and workable guides to behaviour and conduct in the industry. The removal of the requirement for licence renewal hearings and the entrusting of significant self-regulatory responsibility to industry, indicates that a very high standard of compliance is expected of industry in the fulfilment of its self-regulatory responsibilities.

The 2UE hearing and the investigations into radio stations 3AW, 5DN and 6PR have indicated significant problems with the Codes. The Authority has sought to examine whether the failure of the Codes can be ascribed to any underlying causes, and whether there are other regulatory responses (from similar regulatory agencies overseas) that may provide some insight into more effective regulation of these issues.

CODE FAILURE

Licensee Code Implementation

Codes of practice deal with ethical issues. Their principal function is to provide a framework within which day to day operations are conducted in an appropriate and ethical fashion. Dealing with ethical issues is, by definition, a matter of dealing with shades of grey rather than black and white. All codes of conduct or practice require

interpretation, and facility with their impact on day to day activities is achievable only through education, practice and regular reinforcement. The proper and successful implementation of any code of practice requires that each of these elements be present.[75]

The Authority's investigations into the commercial radio industry show that these basic elements of code implementation have been either absent or minimally addressed in each licensee under examination. In most cases, the steps that have been taken have been implemented only in response to actual or threatened regulatory intervention, and are of such superficiality as to have been unlikely to succeed.

Education

This is the most basic element of any code of practice. Put bluntly, no one can be reasonably expected to comply with requirements of which they are unaware, or of which their understanding is deficient.

None of the licensees examined during the course of this investigation provided any formal training or discussion of the Codes. Upon examination, while senior managers asserted that Codes were discussed occasionally, none was able to provide specific instances.[76] For example, Mr Stephen Price of 3AW, testified that information about the Codes was communicated 'not in a formal forum. It would come up on an irregular basis'.[77] It appears that this occurred principally when a complaint had been received..

Some evidence was given that, at the time of commencing employment, licensees informed staff of the Codes, and the expectation that they would read and abide by them.[78] This might or might not involve their having to 'sign off' on a document to the effect that they had been informed about the Codes. However, it is by no means clear that this practice was common prior to the commencement of the Authority's recent inquiries. In any event, the mere provision of information as part of an induction process is completely inadequate as an educative process. Peter Gifford, Director of Corruption Prevention and Education at the NSW Independent Commission Against Corruption, describes this approach as 'a trap', pointing out that induction is a time when people are swamped with information.[79]

Generally speaking, there appears to have been an assumption in operation that the relevant individuals would somehow absorb an understanding of the Codes and their requirements from merely being referred to them and from length of service in the industry (most of which would no doubt relate to times before there were Codes at all). For example, Mr Clouten of 5DN testified the staff at 5DN were given copies of the Codes and 'anything that might have come from FARB', and that he understood that

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75 See, for example, *How Codes of Conduct Can Work For Your Organisation;* paper prepared by Peter G. Gifford, Director, Corruption Prevention and Education, NSW Independent Commission Against Corruption.

76 6PR Investigation Transcript, Mr Healy, pp. 6-9.

77 3AW Investigation Transcript, Mr Price, p. 35.

78 For example, 5DN Investigation Transcript, Mr Tucker, pp. 52-53.

79 Gifford, op cit.

presenters would be asked to 'sign off' on them. There was no evidence of any further education or compliance regime at the station during Montclair Pty Ltd's ownership.[80] Mr Bell of Southern Cross testified that Mr Healy, general manager of 6PR, 'understood them back to front and understood how to pass the essence of what was in them on to ensure that there were no breaches' because 'he had been in the broadcasting industry since the early '70's. He had been a program manager and a consultant' and consequently that Mr Bell 'absolutely' assumed that he had historical knowledge. [81]

Practice

Particularly in the absence of formal education programmes, the only way in which a staff member could be expected to gain facility in the use and application of the Codes would be through regular reference to them in the course of his or her work.

The evidence before the authority is that reference to the Codes was not a regular occurrence in the day to day operations of the licensees examined. Some announcers, notably Mr Sattler of 6PR[82] and Mr Mansfield of 3AW, [83] claimed never to have had a discussion of the Codes during their employment with those licensees until after the commencement of the Authority's 2UE inquiry. Indeed, Mr Mansfield claimed never even to have seen them in 20 years with 3AW. [84]

Clearly the Codes were not 'ready reference' in the licensees examined. When asked about copies of the Codes in their radio stations, senior managers could identify the location of only two or three copies, and then without precision. Mr Tucker testified that copies of the Codes were 'available' in 'the news and program area and I believe there's a copy in the 5AD programming area and there's one in the admin. area'.[85] Mr Healy of 6PR testified that copies were held by the program managers and the general manager and 'there may have been one in the news room as well'.[86] If the Codes were truly alive and well, and in day to day operation, one would expect that every member of the programming staff and management would have a copy: that there would be one in every office.

Peter Gifford of the NSW ICAC observes that one of the most significant elements in entrenching Codes of Conduct and Practice is the example of senior management. [87] Dr Simon Longstaff of The St James Ethics Centre points out that when the legitimacy of a

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80 5DN Investigation Transcript, Mr Clouten, pp. 63-65.

81 3AW Investigation Transcript, Mr Bell, p. 9.

82 6PR Investigation Transcript, Mr Sattler, pp. 4-6.

83 3AW Investigation Transcript, Mr Mansfield, p. 24.

84 3AW Investigation Transcript, Mr Mansfield, p. 24.

85 5DN Investigation Transcript, Mr Tucker, pp. 52-53.

86 6PR Investigation Transcript, Mr Healy, p. 13.

87 Gifford, op cit

rule is perceived as being weak, respect for it is consequently lowered. [88] In the licensees examined, little reference was made to the Codes in the day to day operations of the broadcasters, by staff or management. Few copies of the documents were in evidence. Staff rarely discussed them and senior management referred to them only to fend off actual or threatened regulatory intervention.

Reinforcement

For a Code to work, it must be regularly and effectively reinforced. The kinds of mechanisms appropriate for this include: ongoing training, inclusion of regular Code discussions in team meetings, the establishment of internal checking and reporting systems. All of these things were absent in the licensees examined, the last one to the extent that station managements were (in some cases) completely unaware of the existence, let alone the terms of, agreements between presenters and third parties with the potential to give rise to significant conflicts of interest and actual breaches of the Code.

Since the commencement of the Authority's inquiries into the commercial radio industry, a number of licensees have commenced reinforcement and education programmes. As none of these programmes demonstrates an approach to Code compliance grounded in the ownership of the Codes by station staff, they are unlikely to succeed.

Southern Cross issued a questionnaire to its staff that, it is claimed, was designed to evaluate staff understanding of the Codes and to educate them about the Codes' requirements. The questionnaire took the form of repeating the provisions of relevant Codes, with the prefatory question 'do you understand that...?'. The answer options were 'yes', 'no' and 'don't know'. Since the correct answer to each question is 'yes', the Authority is of the view that the questionnaire is not well-suited to measuring the understanding or knowledge of staff.

Moreover, given that all the answers are 'yes' (and the pattern of answers obvious), the Authority is of the view that the questionnaire makes little contribution to the education of staff (as staff could simply to tick the 'yes' box without even reading the questions). Given this, the analytical value of the instrument in identifying areas of weakness is rendered nugatory.

Mr Mount and Ms Cameron of ARN testified that Codes issues are now regularly raised at management level, with the expectation that this will be then taken up by the managers with the staff. Ms Cameron now asks managers to tell her what they have done in the area of Code compliance.[89] Apart from these 'spot checks', however, there is no system for checking that this material is in fact passed down the line, or for evaluating the effectiveness or appropriateness of the manner in which this is done.

For a code of practice to become entrenched and fully operationalised, it needs to be owned and understood by those expected to implement it. In the case of commercial radio, this is in the first instance, the presenters and producers whose daily conduct is meant to embody the principles set out in the Codes. Initiatives and discussions at a

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[88] *Why Codes Fail: and Some Thoughts About How to Make Them Work* paper by Dr Simon Longstaff, The St James Ethics Centre Sydney

[89] 5DN Investigation Transcript, Mr Mount, p. 8; 5DN Investigation Transcript, Ms Cameron pp. 12-13.

purely management level, with no detailed follow through or involvement of those whose behaviour is most critically affected are unlikely to achieve more than superficial and short-term responses.

Southern Cross has also issued memoranda to its staff informing them that they are expected to read and comply with the Codes. Staff have been provided with copies and asked to 'sign off' on their receipt and their obligations. [90] This process is at most a bare beginning and without further appropriate follow up in the areas of ongoing education, practice and reinforcement is more likely to instil cynicism than commitment to the Codes. It is an approach of the kind that has been described by the St James Ethics Centre as 'superficially efficient – but almost totally ineffective'.[91]

FARB announced in June 2000 that an internal committee is drafting recommended changes to the Codes.[92] The changes appear to be focussed on the principles of disinterestedness and disclosure (highlighted by the Authority in the *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney* (February 2000). In addition, FARB announced that it intends to develop an education and training program covering the Codes (and other issues).

It is worth noting that it is important that this response directly involve those directly affected by the Codes – the producers and presenters themselves. Trust and ownership are fundamental to the operation of a Code, and are best built by direct and on-going involvement. To this extent, the process for Code registration provided by the Act may flawed and in need of revision. Part 9 of the Act requires the Authority to register a Code if it is satisfied that it:

- provides adequate community safeguards;
- is endorsed by the majority of relevant service providers; and
- the public has been given an adequate opportunity to comment.

The community at large, the licence holders and individual audience members are recognised and involved as stakeholders, but the process ignores the practitioners. Since they are the ones who have to ensure that their daily conduct accords with the Codes, their participation and acquiescence is essential to ensure the successful entrenchment of the Codes in their work culture. The Authority is of the view that any approach to a code of practice that is not based on the ownership and understanding of those expected to implement it will not succeed.

Other Ethical Issues

In the course of conducting the inquiries into commercial radio, a number of important ethical issues also came to the Authority's attention. As they are outside the scope of the

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90 See *Report of the Investigations into Radio Stations 3AW, 5DN and 6PR.*

91 Longstaff, op. cit.

92 Media Week: 1990-2000, dated 11 June 2000.

inquiries and the Authority's formal responsibilities, it is not appropriate to consider them in any detail here, or to offer views on them. They are significant issues, however, that deserve acknowledgment and further discussion, so for this reason we note them here:

- Is it appropriate in a democracy for a corporation to seek to purchase covert rather than overt dissemination of its opinions?
- Is it appropriate for corporations to solicit behaviour that would breach publicly available Codes?
- What is the role of managers, agents and other personal representatives in negotiating agreements?
- Is it appropriate for corporations to dispense large amounts of money to individuals for conduct that is not then monitored and in exchange for vague and unenforceable obligations?

These are matters that invite fuller public discussion.

INTERNATIONAL APPROACHES TO THESE ISSUES

The Authority has surveyed broadcasting regulatory authorities in various countries in relation to the issues raised in its inquiry into commercial radio, to see what regulations they have in place to deal with similar situations and what their experience has been. This section of the report examines the different approaches taken in the United States, the United Kingdom, Canada, Germany, France and Sweden to these issues (see Schedule 4 for a full description of the range of international regulatory approaches to these issues).

The Authority contacted the relevant government authorities in each country and sought to determine the regulatory approaches taken regarding advertising and sponsorship on commercial radio, including requirements in relation to disclosure of commercial interests and ensuring impartiality in news and current affairs programs.

Of those countries examined, the Authority found that, at one end of the spectrum, there are regimes where government bodies enforce specific and comprehensive legislation and rules prohibiting the practices the Authority is investigating. At the other end of the spectrum, there are environments where no specific relevant regulation exists and where regulators have had no experience in dealing with these issues. In between, there are largely self-regulatory environments where industry representative bodies develop and monitor the observance of industry codes of practice in co-operation with the government regulatory authority.

One thing all regulatory regimes held in common, however, is the principle that advertising should be clearly distinguishable from other program matter.

In all cases except for the United States, the regulations allow only for action against the licence holder and not individual presenters, program producers or other employees of a station. Regulation of advertising and sponsorship practices in the United States involves a vigorous enforcement of legislation and rules which are comprehensive and specific, and allow for criminal penalties against individuals (including fines and possible imprisonment), and the potential loss of licence for stations found in breach.

The United States

The regulatory position in the US requires full on-air disclosure of payments to broadcasters, presenters and other employees, program makers and suppliers. Failure to disclose payment or acceptance of anything of value in return for airtime for any programming (including on-air promotion of a product or service) is a serious offence. The Federal Communications Commission (FCC) refers to this practice as 'payola' and defines it thus:

> the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming.

While the term payola was originally, and is still largely, associated with the music industry, it is clear from the legislation that it has a much wider application and can relate to any program matter involving secret payments. Payola is not only a violation of the United States Criminal Code, but may also subject broadcasters to sanctions under the *Communications Act 1934* and rules drawn up by the FCC.

Also prohibited under the American regulations is the practice referred to as 'plugola', which involves a person responsible for program selection or presentation of a program, allowing a matter to be broadcast which promotes a product or service in which that person has a financial interest. Unlike payola, it need not involve another person or payment of any kind but like payola, it is only the failure to disclose that makes the practice illegal.

Section 507 of the Communications Act requires those persons who have paid, accepted, or agreed to pay or accept payment in relation to matter to be broadcast, report that fact to the licensee before the related matter goes to air. Failure to make the relevant disclosures, as required by the Communications Act, can result in criminal penalties of a fine of up to $10,000 or imprisonment of up to one year, or both.

Section 317 of the Communications Act requires the licensee to announce that the matter contained in the program is paid for, and to disclose the identity of the person furnishing the money or other valuable consideration at the same time the related matter is broadcast. Whenever a payment in any form is made with the intention of influencing what goes to air, that matter is considered to be sponsored, and listeners have a right to be informed of the arrangement.

Both section 317(c) of the Communications Act and section 73.1212(b) of the FCC's rules require that each licensee 'exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals' information to enable the licensee to comply with the sponsorship identification requirements of section 317 of the Communications Act. The 'reasonable diligence' standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola.

To assist in the compliance process, the National Association of Broadcasters, the body representing the interests of broadcasters before Congress, the FCC, other federal agencies and the courts, recommends that they require employees to provide on a periodic basis, details of any relevant personal agreements or arrangements which might have an influence on matters broadcast. Employees are also asked to provide affidavits stating that they have read the relevant regulations and understand the legal requirements. To meet

the reasonable diligence standards expected by the FCC, broadcasters are encouraged to educate employees about their responsibilities in relation to payola and plugola and are advised to insulate those with outside business interests from program selection that may promote those interests.

To comply with the requirements under section 73.1212 (1)(b) of the FCC's rules, the licensee is expected to be aware of outside business interests of everyone involved with the station including the owners, directors, employees, agents and anyone who regularly appears on air and to be diligent in ensuring that the program selection process is not compromised. This expectation of the exercise of reasonable diligence extends to the providers or producers of programs sourced from outside the station.

The Department of Justice has primary jurisdiction for enforcement of the law. The FCC co-operates with the Department of Justice by passing on any relevant evidence that comes to its attention. In addition to the criminal sanctions that may be imposed by the Department of Justice, the FCC may impose administrative sanctions. These include the imposition of fines or the initiation of licence revocation proceedings where a broadcaster fails to comply with section 317 of the Communications Act or section 73.1212(b) of the FCC's rules.

There have been a number of recent indictments for alleged cases of 'payola', and the FCC regulations have received significant exposure over the years in the United States.[93] As a result, it would be reasonable to assume that broadcasters are well aware of the need to make the relevant disclosures in relation to advertising and sponsorship. Despite the publicity and the serious consequences that flow from breaching the rules, however, there still appear to be cases of contravention requiring enforcement action. This suggests that the commercial pressures at play in the area of undisclosed paid-for programming are considerable and likely to remain so.

The United Kingdom

In the United Kingdom, broadcasting is also highly regulated. The commercial radio industry is regulated by the Radio Authority operating under the provisions of the *Broadcasting Act 1990*. One method by which the Authority performs its regulatory functions is through the application of four codes of practice: *Advertising and Sponsorship Code* (currently under review), *News and Current Affairs Code, Programme Code* and *Engineering Code*. Observance of these codes is a licence condition.

The Advertising and Sponsorship Code's General Rule states:

> Advertising must be clearly distinguishable from programming. Licensees must ensure that the distinction between advertising and programming is not blurred and that listeners are not confused between the two. Legitimate objective coverage of a commercial product or service in editorial is acceptable...
>
> Advertisements that have a similar style and format to program editorial must be separated from programming by other material such as a jingle or station identification or by being scheduled in the middle of a break.

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[93] Including by way of the reminders the government regulator periodically provides to broadcasters through public notices.

The Radio Authority informed the Authority that it would be likely to treat payment to a presenter as product placement, which falls under Rule 2 of the *Advertising and Sponsorship Code.* This Rule states:

> Product placement or undue prominence in programs of commercial products or services is prohibited unless they comply with the sponsorship rules. Legitimate objective coverage of a commercial product or service in program editorial is acceptable, but, where it is in return for payment or other valuable consideration, the rules of this code apply.
>
> The rules require public disclosure of any associated commercial interest and scripts to be copy cleared in advance.
>
> The gratuitous mentioning of brand names in programs constitutes a form of indirect advertising. No undue prominence should be given in programming to commercial products or services unless the appropriate disclosures are made. Any reference to such products or services must be limited to what can clearly be justified by the editorial requirements of the program itself.

Rules 16 and 22 of the *Advertising and Sponsorship Code* prohibits presenter-read advertisements and testimonials. Rules 16 and 22 respectively state:

> Station presenters may not testify on their own station about products or services they use; and
>
> 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. They should not make references to any specific advertisement (whether presenter-read or not) when in their presenter role, except within the Rules of this Code.

Personal-view programs are covered by the *News and Current Affairs Code.* Rules 1.5 and 1.6 of this code require presenters to avoid discussion of issues where their connection or involvement away from the program may call into question their fairness or impartiality. When such programs are broadcast, listeners must be clear that a personal view program or feature is the expression of one person's view on matters about which other views exist. Licensees must ensure that statements of fact in the program or feature are accurate, and that opinions expressed, however partial, do not rest upon false evidence. A licence holder offering personal view programs must be able to demonstrate that an appropriate range of views on any relevant topic has been aired so that alternative views are exposed over a period of time.

In addition to adhering to the codes, another licence condition requires all licensees to abide by their individual Promise of Performance. These charters summarise the nature, style and balance of programming output the licensee undertook to provide when it applied for its licence. A radio service must not deviate from commitments in its charter, which may only be modified by the Authority if the proposed changes do not substantially alter the character of the service or reduce programming diversity in station's licence area.

There are a number of sanctions the Radio Authority can impose if a station is found to be in breach of the codes including notices requiring the submission of scripts and particulars, and/or recordings of a program considered in potential breach; admonishment of the station concerned; requirements to broadcast an apology or correction; financial

penalties not exceeding £50,000; or shortening or withdrawing a station's licence to broadcast.

Canada, Sweden, France and Germany, the other regulatory regimes the Authority studied, have little or no regulation in the way of specific prohibitions on failure to disclose commercial sponsorship arrangements.

Canada

The Canadian approach to broadcasting regulation is essentially self-regulatory. Canada has a well-developed system of industry codes related to aspects of broadcasting content which are administered by bodies set up by broadcasters to represent the interests of their particular category of service (as in Australia). While all generally applied codes in Canada are voluntary, two codes act as conditions on all licences: the *Advertising to Children Code* and the *Sex-Role Portrayal Code.*

Investigations of complaints against open-line (talkback) programs on radio prompted Canadian Radio, Television and Telecommunications Commission (CRTC), the independent public authority responsible for regulating Canada's broadcasting and telecommunication systems, to publish for public and industry comment, a set of policy guidelines on open-line programming. Members of the public and elected representatives generally supported the proposed industry code. However the broadcasting industry uniformly opposed imposition of an industry-wide code. The CRTC decided against implementing the guidelines and to continue to deal with concerns regarding open-line programs on a case by case basis. Licensees were advised to develop their own individual guidelines in accordance with the principles underpinning the CRTC's open-line guidelines.

The CRTC requires licensees who have been found in breach of the Act or the Radio Regulations in relation to open-line programming, to develop their own codes of conduct and control mechanisms in line with CRTC open-line policy. Such licensees must submit their individual open-line code of conduct to the CRTC for approval. The effectiveness of the licensee-developed codes of conduct and control mechanisms is reviewed at time of licence renewal and in some cases the CRTC imposes adherence to the licensee's code as a condition of licence. After assessing the level of compliance by a licensee, the CRTC may, if appropriate, renew its licence for a shorter than usual term.

The major representative body for the broadcasting industry, responsible for monitoring adherence to a code, is the Canadian Broadcasting Standards Council (CBSC). One of its functions is to assist in the application of specific broadcast standards developed by the Canadian Association of Broadcasters (CAB) through voluntary self-regulation. The CBSB accepts complaints from the public about a wide cross section of issues covered by the *Code of Ethics*, a code for broadcasters developed in cooperation with the CAB.

Where a decision in relation to a complaint to the CBSC goes against the broadcaster, the CBSC requires it to announce full details of the complaint and findings during peak listening times, within 30 days of the decision, on television or radio as relevant. Apart from possibly expelling the licensee found in breach of the CAB's code from membership of the CAB, this is as far as the CBSC's powers go in terms of sanctions.

Apart from the CBSC, there are a number of other industry representative bodies which administer voluntary self-regulated codes which may involve broadcasters. Such relevant

codes include Article 5 of the Radio Television News Directors Association of Canada's (RTNDA) Code of Ethics and the *Canadian Code of Advertising Standards,* which is administered by Advertising Standards Canada (ASC).

If the ASC concludes an advertisement violates the code, the advertiser is notified of the decision in writing and requested to appropriately amend the advertising in question or withdraw it. If an advertiser fails to voluntarily comply with the decision of the ASC the media is advised of the advertiser's failure to cooperate and media support is requested in no longer exhibiting the advertising in question; and may publicly declare, in such manner as the ASC deems appropriate, that the advertising in question, and the advertiser who will be identified, have been found to violate the code.

Germany

In Germany, commercial broadcasting regulation is the responsibility of the 15 individual state regulatory authorities (*Landesmedienanstalten*). These state authorities co-operate on matters of principle and on national issues in an association of regulatory authorities for broadcasting known as the *Arbeitsgemeinschaft der Landesmedienanstalten* (ALM). Public broadcasters are self-regulated.

The ALM's functions include the development of national guidelines on issues including advertising and sponsorship. The ALM advised the Authority that it was aware of only one case in recent years of radio stations providing airplay for particular records as a result of a secret agreement with an agency acting on behalf of a record company. In Germany this practice is referred to as 'bartering'. The matter was dealt with by the Association of Private Radio Broadcasters (VPRT) which resolved the matter without recourse to sanctions although there are quite specific regulations in place prohibiting such practices. Administrative sanctions apply which allow the relevant state regulatory authority to impose a fine of up to DM500,000 on a licensee found to be in breach of provisions of the *German State Broadcasting Treaty.*

Sweden

Broadcasting content in Sweden is regulated by the Swedish Broadcasting Commission. There are no specific regulations in Sweden relating to undisclosed sponsorship agreements. However, there is a general prohibition stating that, 'Programmes that are not advertisements may not favour commercial interests in an improper manner'. The licensee is subject to fines if commercial interests have been unduly favoured in programs.

France

Broadcasting regulation in France is the responsibility of the independent administrative authority, Conseil Superieur de l'Audiovisuel (CSA). There are no codes of practice or guidelines however, before being granted a licence each licensee must negotiate an agreement with the CSA which sets out the way the service will operate. The CSDA has a number of administrative sanctions available to it if broadcasters do not meet their commitments and obligations as set out in the agreement. Sanctions available to the CSA

include the suspension of licence, or a part of the programming of a service, for a period of up to one month; broadcasting on-air announcements, the terms and conditions of which are fixed by the CSA; reduced term of a licence; financial penalties (calculated as a percentage of a licensee's turnover before tax) and the revocation of a licence.

7 Regulatory Options for Appropriate Community Safeguards

INTRODUCTION

The inquiry has raised a number of matters of concern to the Authority arising from the conduct of presenters and licensees in that part of the commercial radio industry that broadcasts talkback current affairs programs. These matters of concern have been identified in previous chapters. Some of these matters are covered by the existing Codes. Others are not.

This chapter identifies eight issues arising from these matters of concern, and indicates which of the issues are covered by an existing Code. In these cases, the Authority reaches a view as to whether the Code in question adequately addresses the scope of the relevant issue of concern and whether it is operating to provide appropriate community safeguards.

The chapter also explores the regulatory options for providing appropriate community safeguards in the future for issues of concern that are inadequately covered by Codes, covered by Codes that have failed or not currently addressed by a Code.

The regulatory options for dealing with the identified issues are founded on the legal framework for program content regulation, in particular, as it relates to section 125 of the Act. The options discussed in this chapter represent those that are currently available under the Act. Chapter 8 of this report discusses possible additional options that would require legislative amendment.

While they will be considered separately, the eight issues fall broadly into three categories:

- disclosure of commercial agreements;
- clearly distinguishing advertising from other program matter; and,
- the operation of self-regulation in terms of code implementation and administration.

The principles concerning disclosure of relevant commercial agreements relate to all types of radio programming, not just current affairs programs. The disclosure of commercial arrangements to listeners and the disclosure to licensees are both issues. These issues are separately presented for current affairs programs, the area that has been the focus of the Authority's investigations, and for other programming where they also apply.

The eight issues for consideration are:

Disclosure of commercial agreements – current affairs programs

1. the need for disclosure to listeners of relevant commercial agreements between presenters of current affairs programs and their sponsors;

2. the provision, to the licensee by the presenter, of full copies of any relevant commercial agreements between presenters of current affairs programs and their sponsors;

3. the need for disclosure to listeners of relevant commercial agreements between licensees, program producers or other radio station personnel on the one hand, and sponsors of current affairs programs on the other;

Disclosure of commercial agreements – other programs

4. the need for disclosure to listeners of relevant commercial agreements between presenters of other programs and their sponsors;

5. the provision, to the licensee by the presenter, of copies of any relevant commercial agreements between presenters of other programs and their sponsors;

6. the need for disclosure to listeners of relevant commercial agreements between licensees, program producers or other radio station personnel on the one hand, and sponsors of other programs on the other;

Advertisements clearly distinguished from other programs

7. advertisements not to be presented as news programs or other programs; and,

Operation of self-regulation by licensees

lack of systems to ensure effective operation of self-regulation, including, informing staff of codes and their implications and ensuring compliance.

These are discussed below.

ISSUE 1

The need for disclosure to listeners of relevant commercial agreements between presenters of current affairs programs and their sponsors.

This issue is covered by Code 2, the Commercial Radio Code of Practice on News and Current Affairs Programs.

It has been the central issue of this inquiry. The Authority found 60 breaches of Code 2 by 2UE, with 8 breaches by 5DN and 6 breaches by 6PR. These breaches were based on the failure of licensees to disclose relevant available facts, namely the existence of relevant commercial agreements between certain presenters and their sponsors.

The purpose of Code 2 is 'to promote accuracy and fairness in news and current affairs programs'. Code 2.2 (b) requires that '...material is not presented in a misleading manner...by withholding relevant available facts'. 2UE submitted that the Code was not meant to cover such commercial agreements as 'relevant available facts'. The Authority rejected this argument but accepted that this could have been made clearer in the text of Code 2. While the Code requires disclosure of these agreements, the precise mechanism

for disclosure is not covered, and the requirement for disclosure could be made more directly.

The way in which this Code was operating at 2UE, 6PR and 5DN was not such that adequate disclosure of these agreements was being made. In the Authority's view, this was a serious shortcoming of the Code and the way in which the relevant licensees administered it.

Listeners are entitled to know who is seeking to persuade them. This principle is fundamental to full and open public discourse on matters of current relevance to the community. Disclosure of these agreements to listeners was important in letting listeners form their own views in this vital area of current affairs. Given the seriousness of this issue, the Authority is of the view that Code 2 was clearly not operating to provide appropriate community safeguards in relation to this matter.

Currently nine commercial radio stations have identified their format as being 'talk' or 'news/talk'.[94] As part of this inquiry the Authority has investigated four of the six of these stations that are located in metropolitan markets. In three of the four stations that the Authority investigated, the Code was not providing appropriate community safeguards for this issue. The John Laws and Alan Jones shows rate highly in the Sydney market and are syndicated by Sky Radio Pty Ltd throughout Australia to both commercial and community radio stations. As at 3 May 2000, 67 commercial radio stations broadcast the John Laws show, with seven of those also broadcasting the Alan Jones show. This degree of coverage represents 29 per cent of the total number of commercial radio stations in Australia.

In the Authority's view, this is a sufficiently large sector of the industry and a sufficiently large number of breaches to allow the Authority to draw the conclusion that there is convincing evidence of the failure of Code 2 to provide appropriate community safeguards in relation to this matter.

Proposed Regulatory Action

The Authority considers that community safeguards in relation to disclosure of relevant commercial agreements between presenters of current affairs programs and their sponsors should be strengthened. There are two regulatory options for providing the required level of appropriate community safeguards. The first is for FARB to amend industry Code 2. The second is for the Authority to determine a standard requiring the necessary level of disclosure.

The Authority's preliminary view is that it should determine a standard in relation to this matter. The Authority will not reach a final view, however, until after it has considered comment from the industry and the public.

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[94] These are the metropolitan stations 6PR, 2GB, 2UE, 3AW, 4BC and 5DN (format Talk/easy listening), and the regional stations 2HD, 2LM and 4WK. The formats were self-identified in the context of the October 1999 implementation of the 'new' Australian music requirement under the Code of Practice 4. In addition, the Authority notes that the format of 2SM appears to include 'talk'.

The Explanatory Memorandum of the Act acknowledges that conflict is likely between the public interest and broadcasters' commercial imperatives. The serious deficiencies in the operation of self-regulation in current affairs programs as exposed in this investigation, clearly locates the issue of presenters' commercial agreements within such a conflict. These presenters are highly rating and widely syndicated. The value of these presenters to their stations is such that the interests of the licensees and presenters weigh heavily on the side of the commercial, rather than the public, interest.

The Authority's survey of relevant regulation in other countries found that sponsorship, particularly of current affairs programs, is a serious regulatory issue. The UK and US experience is most relevant to this discussion.

The UK Radio Authority regulatory codes on product placement and sponsorship require full disclosure of all payment or other valuable consideration to licensees, program makers, or any of their employees, representatives or associates. The UK code specifically prohibits sponsorship of news and of any program that is required to be presented with due impartiality.

The code also prohibits sponsors from providing programming content for current affairs, soft news features or news magazines, business/financial news or comment, or programs about matters of political or industry controversy or relating to current public policy. Sponsors can only contribute clearly credited financial assistance for these types of programs. In addition, under the proposed revisions to the UK code, such sponsorship is only permitted if the sponsor's business interests do not prejudice, or appear to prejudice, the impartiality of the programming content.

In the United States there are stringent laws carrying serious penalties which, while not prohibiting sponsorship, require full disclosure of all payment or valuable consideration to anyone connected to the radio station and its programming in return for any on-air programming. The fact that enforcement action is still required in the US underscores the fact that, even in a regulatory environment with a long history of criminal sanctions there are significant problems in ensuring compliance with the law in this area.

The findings of the Authority's investigations have clarified the full scope and meaning of the requirements of the current Code. In particular, the Authority has found that the Code requires disclosure of presenters' agreements with sponsors. It is also true that the Code, while requiring disclosure of these agreements as relevant facts, is not an explicit statement of the obligation to disclose. Nevertheless, it is not clear to the Authority that an amended Code would provide appropriate community safeguards.

While the Authority has placed detailed and specific conditions on the licence of 2UE, such conditions are not required for all commercial radio licensees to meet their obligation, under the current Code, to disclose any presenter's commercial agreements with sponsors of current affairs programs. If there are any such agreements in existence, they should have been immediately disclosed after the announcement of the findings of the hearings into 2UE. At that point, the full meaning of the requirement to disclose relevant available facts under the existing Code was made explicit by the Authority. The Authority is not aware of any such disclosures being made.

If the Code were amended by FARB, after an opportunity for public comment, it would be submitted to the Authority for registration. The Authority's key task in assessing the Code for registration would be to determine whether the requirement as worded in the amended Code provided appropriate community safeguards. While the obligation as

expressed in the Code may, of itself, appear to meet this test, the level of community protection afforded to this highly important sphere of public debate on current events, would be less than would be guaranteed by a standard. Breach of a code simply does not allow the Authority to access any of the enforcement remedies in the Act.

The Authority has no direct sanction for breach of a code. It can only commence a process to make the code a licence condition. Breach of a standard, however, is a breach of a licence condition that can be met immediately with an Authority notice to take action to remedy the breach or to suspend or cancel the licence. Breach of an Authority notice is an offence under the Act. In the event of a breach, access to these remedies by the Authority provides greater community safeguards. The Authority is less able to act immediately to restore community safeguards in the case of a licensee breaching a code requirement.

The form in which an obligation in a code is expressed represents only one half of what is needed to provide appropriate community safeguards. The other half is the necessary commitment of licensees to comply fully with both the wording and spirit of the code. An effective industry code (that is, a code that affords appropriate protection to audiences) requires a high level of licensee responsibility, ownership and commitment.

The Authority views with great seriousness the lack of an adequate sense of ownership of, responsibility for, or commitment to the Code by licensees as disclosed by its investigations into four major talk format stations from across the country. Even the most explicit code requirement must be supported in the first instance by the voluntary commitment of licensees. If that commitment is not strong or sufficiently genuine, community safeguards are not provided by the code.

In this case, where strong commercial pressures and the integrity of public discourse are involved, the Authority's view is that it is unreasonable to expect the Australian community to tolerate any possibility of a recurrence of undisclosed 'cash for comment' in current affairs programs on commercial radio.

The Authority invites public comment on whether it should determine a standard and on the terms of a proposed standard that is to be found in Schedule 1 of this report.

ISSUE 2

The provision, by the presenter to the licensee, of copies of any relevant commercial agreements between presenters of current affairs programs and their sponsors

This issue is not currently covered by the Code.

This issue represents an essential part of the process by which a licensee comes into possession of knowledge required to discharge its responsibility of disclosure to its listeners. To meet their obligation to disclose, licensees must know of both the existence and contents of commercial agreements between presenters of current affairs programs and their sponsors. Licensees must be confident that they know the details of all such relevant commercial agreements. Without the full knowledge of relevant agreements, a licensee is unable to guarantee appropriate community safeguards are being provided by the full disclosure of all presenters' agreements.

In the 2UE hearing, evidence was adduced that, despite requests being made by 2UE management for details of presenter's commercial agreements, full disclosure to the licensee was not forthcoming. Confidentiality was cited as the reason for this. In the 3AW, 5DN and 6PR investigations, evidence was adduced that management incorrectly believed that certain presenter's commercial agreements with sponsors did not cause the presenter to 'have to do something' on those radio stations. Management had not sighted the agreements but believe this to be the case because that was what they had been told.

The Authority notes that licensees covered by its inquiry still do not see all presenter agreements that may impact on current affairs programs nor recognise the need to do so. The most recent standard Southern Cross Broadcasting contract contains no specific obligation to disclose the terms of any agreements to either the licensee or Southern Cross Broadcasting, only to obtain the consent of the broadcaster before entering into agreements that specifically refer to on-air obligations. It appears to be left to the discretion of presenters as to whether or not they disclose the existence of an agreement that, in their judgement, does not involve personal endorsements during their program.

The Authority is of the view that without seeing their presenters' contracts a licensee is not in a position to know whether they have the potential to affect programming nor to ensure that the code is not breached.

Proposed Regulatory Action

The Authority's view is that for disclosure to operate as necessary, regulation is required to ensure licensees are provided with full copies of any relevant commercial agreements between presenters of current affairs programs and their sponsors.

There are two options for regulatory action. The first is for FARB to amend industry Code 2. The second is for the Authority to determine a standard requiring licensees to have in their possession, full copies of all relevant commercial agreements between presenters of current affairs programs and their sponsors.

The Authority's preliminary view is that the provision of full copies of any relevant commercial agreements between presenters of current affairs programs and their sponsors, should be covered by a standard. The first level of disclosure necessary for ensuring appropriate community safeguards is that of disclosure of their commercial agreements by the presenter to the licensee. The Authority notes that the US regulation specifies both disclosure to the licensee and disclosure to the public.

At the centre of this issue is the powerful position occupied by some presenters of current affairs programs, in terms of their contribution to the profitable operation of their commercial radio station. The Authority is of the preliminary view that it would be difficult for this issue to be covered effectively by an amendment to the Code. In particular, it would be difficult for such a Code to operate in concert with the proposed standard requiring disclosure of sponsorship arrangements for current affairs programs. Greater certainty would be provided by a standard that fully dealt with all aspects of disclosure in relation to current affairs programs.

Alternatively the issue could be left to licensees to deal with contractually in their agreements with presenters. This would require, however, re-negotiation of all presenters' agreements throughout the industry, with no certainty that negotiations would deliver the

desirable outcome. There would also be no likelihood of consistency of approach or terms.

The Authority is of the preliminary view that including this issue in the proposed standard would assist licensees in circumstance where, as the Authority's inquiry has shown, it may be difficult for them to have full access to presenters' commercial agreements with their sponsors. While assurances may be given, by presenters to their employers, that there is nothing to be concerned about, licensees cannot be certain of this without full knowledge of the agreements in question.

The number and magnitude of the commercial agreements investigated by the Authority suggests that there is a need for a standard clarifying the disclosure of commercial agreements by the presenter to the licensee. A standard will ensure that licensees are alerted to all circumstances and situations where they are required to ensure adequate disclosure has been made to the listening public.

The Authority acknowledges that commercial agreements between presenters of current affairs programs and their sponsors may be confidential in nature. This is one of the reasons why a standard would assist the licensee in gaining full access to any such agreements. Commercial agreements could be provided to licensees on an in-confidence basis and would be provided solely for the purpose of ensuring that a licensee complies with its obligation to ensure disclosure of relevant commercial agreements.

The Authority invites public comment on whether it should determine a standard and on the terms of a proposed standard that is to be found at Schedule 1 of this report.

ISSUE 3

The need for disclosure of relevant commercial agreements between licensees, program producers or other radio station personnel on the one hand, and sponsors of current affairs programs on the other

This issue is covered by Code 2, the Commercial Radio Code of Practice on News and Current Affairs Programs.

The principle that listeners ought to know who is attempting to persuade them, is no less valid when there is a relevant commercial agreement between a licensee and a sponsor than if the agreement is between a presenter and a sponsor.

In the context of current affairs programs, agreements between a licensee and a sponsor are relevant available facts and ought to be disclosed in accordance with clause 2.2(d) of the existing Code. As discussed above under issue 1, however, the Code lacks an explicit reference to disclosure of such agreements.

Disclosure of relevant commercial agreements between licensees, program producers or other radio station personnel on the one hand, and sponsors of current affairs programs on the other, is covered by the current Code.

The Authority found that Mr Cordeaux had sought to establish undisclosed commercial agreements with sponsors of current affairs programs. The sale, and attempted sale, of 'industry authority status' provided advertisers with a privileged position in relation to their competitors and were a mechanism for the sale of interviews, which were presented to the public as expert comment.

The original proposal involved the licensee selling 'industry authority' packages. In the end, the managing director of the licensee company sold an industry authority endorsement to an advertiser and the contractual agreement was with the managing director personally rather than the licensee. It is the Authority's view that, in developing a comprehensive response to the issue of disclosure, it is necessary to cover all personnel associated with the licensee who have the ability to directly affect the content of what is broadcast.

Outside broadcasts are another issue of significance with regard to disclosure by the licensee. Outside broadcasts are paid for by advertisers but that payment is not explicitly disclosed to listeners. In addition to providing positive promotion for the business located at the broadcast site, paid outside broadcasts are mechanisms whereby sponsors may, in effect, purchase on-air interviews.

In its investigation into 3AW, the Authority found evidence that sponsors appeared to expect an increased likelihood of interviews as a result of an outside broadcast. The Authority found that the nature of program material broadcast during an outside broadcast may lead listeners to perceive that the presenter's editorial independence has been compromised.

The Authority considers that this constitutes convincing evidence that Code 2 is not operating to provide appropriate community safeguards in relation to the matter of disclosure of relevant commercial agreements between licensees and other station personnel and sponsors of current affairs programs.

Proposed Regulatory Action

As discussed above under issue 1, adequate disclosure of relevant commercial agreements that may affect the content of current affairs programming is a matter of serious concern to the Authority. Current affairs programming on commercial radio is able to exert considerable influence on the listening public and on important issues of relevance to the Australian community.

Accordingly, in developing a comprehensive response to the issue of proper disclosure of relevant commercial agreements with sponsors of current affairs programs, this issue should be addressed by regulation. As with the issue 1 above, there are two regulatory options, an amended Code 2 or an Authority determined standard.

The Authority's investigations have revealed limited evidence that undisclosed commercial agreements, arrangements and understandings that involve payment or other valuable consideration in return for favourable programming are not confined to presenters and their sponsors. These types of arrangements, whether between sponsors and licensees, presenters or other station personnel, affect, or have the power to affect, the content of current affairs programs. This situation is unacceptable.

The Authority's view is, therefore, that the more appropriate regulatory option is to determine a standard that provides a high level of safeguard for the community. In the area of current affairs programs the Authority is of the view that a standard that comprehensively deals with the issue of disclosure of all relevant commercial agreements is the appropriate regulatory response.

The Authority invites public comment on whether it should determine a standard and on the terms of a proposed standard that is to be found at Schedule 1 of this report.

ISSUE 4

The need for disclosure of relevant commercial agreements between presenters of other programs and their sponsors

This issue is not currently covered by the Code.

This is an issue that has arisen in the inquiry. In addition to current affairs programs involving open-line discussion by callers of current issues in the community, other programs where presenters have been found to have relevant commercial agreements include sports and general entertainment programs.

The Authority has not, however, investigated the existence of agreements and their disclosure in relation to other types of programs in any methodical way.

The Authority is 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.

Proposed Regulatory Action

There are two options for regulation. The first is for FARB to develop a new industry code of practice covering disclosure of relevant commercial agreements between presenters of other programs and their sponsors. The second is for the Authority to determine a standard.

The transparency of political discourse and communication that is sought to be protected by a regulatory response, is particularly important in current affairs programs as these are a primary source of information and influence in relation to such issues. Other programs are unlikely to play such a significant role in fulfilling this function.

Accordingly, the Authority is of the view that, while the Codes presently fail to address this issue, this is a matter that, having been identified, should be left to the industry sector to develop an appropriate regulatory response. Should the commercial radio industry, however, decline to develop a new code that provides appropriate community safeguards, it would be open to the Authority to determine a standard covering this matter. If the industry does not develop such a code within three months of the publication of this report, the Authority will act to determine a standard.

The Authority considers that its proposed standard on the disclosure of all relevant commercial agreements with sponsors of current affairs programs, provides clear benchmarks for what are appropriate community safeguards on disclosure. The Authority considers that the establishment of these benchmarks in the context of current affairs programs, provides industry with clear guidance on the appropriate community safeguards for a new code on disclosure of all relevant commercial agreements with sponsors of other programs.

ISSUE 5

The provision, to the licensee by the presenter, of copies of any relevant commercial agreements between presenters of other programs and their sponsors

and

ISSUE 6

The need for disclosure of relevant commercial agreements between licensees, program producers or other radio station personnel, and sponsors of other programs

These issues are not currently covered by the Code.

As is the case with issue 2 and issue 3 above, these issues relate to the scope and nature of the matters that need to be covered by appropriate regulation for the disclosure of commercial agreements. The Authority considers that for a disclosure regime to operate effectively for commercial radio, all relevant commercial agreements with sponsors, whether with presenters, licensees or other station personnel, should be disclosed.

The Authority therefore identifies these issues relating to programs other than current affairs programs as requiring regulatory action.

Proposed Regulatory Action

The Authority's view is that, while the Codes presently fail to address this issue, this is another matter that, having been identified, should be left to the industry sector to develop an appropriate regulatory response. Should the commercial radio industry, however, decline to develop a new code that provides appropriate community safeguards, it would be open to the Authority to determine a standard covering this matter. If the industry does not develop such a code within three months of the publication of this report, the Authority will act to determine a standard.

ISSUE 7

Advertisements not to be presented as news programs or other programs

This issue is presently dealt with by Code 3.

The principle that advertising should be clearly distinguishable from other programming is one of the fundamental cornerstones of broadcasting regulation. The issue has long been explicitly covered by regulation in Australia, previously as a standard and currently as an industry code of practice.

The Authority's survey of international regulation found this principle to apply to all countries examined and the Authority considers that it is likely to be common to all regulatory systems.

While all the countries researched had a clear and simple rule on this issue, the UK in particular has a suite of rules that flesh out a number of radio-specific issues in relation to advertising. The Radio Authority in the UK has specific rules covering presenter-read advertisements, whether read live or pre-recorded. In the UK presenters and newsreaders may voice advertisements provided that a proper distinction is made between programming and advertising material. Presenters and newsreaders must not advertise products, however, that may be seen to compromise the impartiality of their programming role. The Radio Authority rules also prohibit on-air endorsements of products or service by presenters on their own stations.

In its investigations, the Authority has found breaches of this Code as follows:

- At 2UE, 30 breaches, 21 relating to broadcasts by Mr Laws, 9 relating to broadcasts by Mr Jones;
- At 5DN, four specific breaches relating to broadcasts by Mr Cordeaux; and,
- At 6PR, 11 breaches related to broadcasts by Mr Sattler.

This 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 current debate. Examples of this are:

- the various comments made about the Registered Clubs and their issues by Mr Laws;
- the comments made and interviews conducted by Mr Jones which had the effect of promoting Optus, its services, products and issues;
- the comments made and interviews conducted by Mr Cordeaux which had the effect of promoting Optus, its services, products and issues; and,
- the comments and live read scripts read by Mr Sattler for RAMS Home Loans, all of which breached Code 3.

There is sufficient evidence of breaches of Code 3 for the Authority to be satisfied that there is convincing evidence that Code 3 is not operating to provide appropriate community safeguards.

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. In this way there is a close relationship between compliance with Code 2 and with Code 3 in the circumstances of this investigation.

Mentions of organisations, their products, services or issues on-air in a manner where it is unclear whether such material is advertising may have been motivated by the existence of a commercial agreement with the organisation concerned. This raises not only the issue of disclosure of a relevant understanding, arrangement or agreement but also whether that mention is an advertisement and should be distinguished from other program matter.

Code 3 states that 'advertisements broadcast by the licensee must not be presented as news programs or other programs'. The Authority considers that while Code 3 is explicit, it does not clearly acknowledge the related issue of advertising and programming material needing to be clearly distinguishable by the listener. If there is any possibility of a listener confusing the two, the licensee should err on the side of explicit on-air identification of advertising matter.

The Authority considers therefore that while Code 3 places a clear and unequivocal obligation on commercial radio broadcasters, the breaches and behaviour found by this inquiry are convincing evidence that the Code is not operating to provide appropriate community safeguards.

Proposed Regulatory Action

Having regard to the extent of the breaches of Code 3, the importance of the issue of clearly distinguishing advertising matter from other program matter and that many fact situations identified by the Authority led to findings of breaches of both Code 2 and 3, the Authority is of the view that this matter should also be addressed by way of a standard.

Meaning of the Word 'advertisement'

In the 2UE hearing report, the Panel drew the industry's attention to an apparent deficiency in the drafting of Code 3, being the ambiguity in the meaning of the word 'advertisement'.[95] The Panel concluded (and the Authority agreed) that the proper effect of Code 3.1 is to prohibit the presentation, as news programs or other programs, of any material that comes within the common law definition of an advertisement, in circumstances where that material is broadcast for payment or other valuable consideration.

A variation of this approach is to be found in the second licence condition imposed on 2UE's licence. The word 'advertisement' is defined there as follows:

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[95] *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney* February 2000, p. 28

Advertisement means

- material broadcast a substantial purpose of which is to draw public attention to, or to promote, an organisation, product or service; and

- consideration has been provided by or on behalf of that organisation or a supplier of that product or service to the Licensee, or to a Presenter or an Associate of a Presenter for the broadcast of that material.

Associate of a Presenter means any person including without limitation, a corporation or a trustee of a trust) which has, or purports to have, the right to provide the services of the Presenter to any person.

Consideration means any valuable consideration but does not include consideration which consists of the provision, at no charge, of a product or service solely for review.

Presenter means the on-air presenter or compere of a program broadcast by the Licensee.

The key difference between this definition and the construction of Code 3 adopted by the Panel who reported on the 2UE hearing is in the definition of 'consideration'.

The Authority took the view when imposing the condition that the on-air review of products or services that had been provided, at no charge, solely for the purposes of review, should not be considered advertisements for that product or service.

In preparing the proposed standard for the industry on this matter, the Authority has modified the above definition of advertisement. The proposed definition is a result of the Authority's further consideration of the issue. It makes it clear that, in addition to a product, service or organisation, an advertisement may draw public attention to or promote the interests of an organisation, a belief or a course of action.

In looking at overseas modes of regulation on this issue, the Authority found that the Canadian Code of Advertising Standards takes a different approach to defining an advertisement. The Canadian Code states that:

> An **Advertisement** is defined as any message (the content of which is controlled directly or indirectly by the advertiser) expressed in any language and communicated in any medium [except for foreign media and packaging, wrappers and labels] to Canadians with the intent to influence their choice, opinion or behaviour.

While foreign media that originate outside Canada are excluded, any advertiser in a foreign medium who is a Canadian person or entity is required to comply with the code.

The Canadian code also clearly identifies to whom the code applies, and in doing so supports the view that advertising is not only concerned with promoting products, services or organisations. The code applies specifically to:

- advertisers promoting the use of goods and services;

- corporations, organisations or institutions seeking to improve their public image or advance a point of view; and

- governments, government departments and crown corporations.

The Authority considers that its proposed definition provides a similar level of community safeguard as that in operation in Canada.

The Authority also notes that the Australian Commercial Television Industry Code of Practice, while neglecting to include organisations or their interests, defines 'spot commercial' as:

> any advertising for a product, service, belief or course of action which is scheduled within a program break or between programs, and for which a licensee receives payment or other valuable consideration[96]

The Authority invites public comment on whether it should determine a standard and on the terms of a proposed standard that is to be found in Schedule 3 of this report.

ISSUE 8

Lack of systems to ensure effective operation of self-regulation, including, informing staff of codes and their implications and ensuring compliance

This issue is not currently covered by the Code.

The Authority's investigations into the commercial radio industry have identified:

- a large numbers 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 supporting and implementing the Codes in any thorough manner.

These findings and the evidence on which they are based are discussed in detail in previous chapters, in particular that dealing with ethical issues.

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. It is also clear that the Codes have failed in preventing particular kinds of conduct offensive to community standards. Moreover, 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

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[96] Commercial Television Industry Code of Practice 5.4.1

to be a complete lack of a formal system within the industry to make staff aware of the regulatory framework within which they operate and to maintain and reinforce that system.

As the Key Centre for Ethics, Law, Justice and Governance pointed out in its submission to the Productivity Commission,[97] it is appropriate and preferable to regulate in response to perceived risk, rather then 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.

Proposed Regulatory Action

There are two possible regulatory responses:

- a return to mandatory standards for all program content issues of concern to the community (a more 'heavy handed' intervention of the kind existing before the Act came into effect) or

- regulatory intervention in the form of a standard designed to entrench the appropriate function of the Codes across the commercial radio industry.

The research shows that it is indeed possible to entrench a code, and to have it operate properly as a guide to behaviour.[98] When this occurs regulatory costs and burdens are reduced rather than increased, and the industry is more accountable to the community. For this reason, the Authority is of the view that a standard dealing with Code compliance training and monitoring is at this stage the most appropriate regulatory response.

Given that the Authority has found the lack of an industry culture that respects and enforces the Codes, the Authority does not believe that this issue can simply be addressed by a new Code on training and compliance programs.

The Authority's preliminary view is that it should determine a standard in relation to this matter. The Authority does not intend to reach a final view on this matter, however, until it has sought public comment on the issue.

The Authority invites public comment on whether it should determine a standard and on the terms of a proposed standard that is to be found in Schedule 2 of this report.

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97 Key Centre for Ethics Law Justice and Governance, *Submission to the Productivity Commission,*

98 See Gifford op cit. and Longstaff op .cit

8 The Need for Legislative Change

INTRODUCTION

It is a function of the Authority under s 158(n) to monitor and report to the Minister on the operation of the Act. This includes reporting to Minister on proposals to amend the Act to enhance the remedies and regulatory options available to the Authority.

The Authority finds the words of Mr Tom Hughes QC in his closing address on behalf of 2UE in the Authority's public hearing particularly relevant:

> If there is to be any lasting solution of the problems exposed by this inquiry, it will be achieved only if, as was the case under the Broadcasting Act 1942, the Code of Practice is given some sort of legal effectiveness and only if presenters such as Mr Laws and Mr Jones are brought within the reach of such a code. That was the case under the old Act. In that connection, may I refer you to a case in the CLR where it is all set out: *Laws v the Australian Broadcasting Tribunal (*1990) 170 CLR 70.

This Chapter will examine some proposals that might assist in the prevention and/or enforcement of future breaches of Codes 2 and 3. The analysis refers to the regulatory approaches of other countries where appropriate (see Schedule 4).

PROPOSALS FOR ADDITIONAL REGULATORY POWERS

Powers over Licensees

Sanctions for Breach of a Code of Practice

It is an offence for a commercial radio broadcasting licensee to breach certain provisions of the Act and to breach the licence conditions set out in subclause 8(1) of Schedule 2 (subsection 139(3)). In addition, if a licence condition is breached, the Authority has the power to issue a notice directing a licensee to take action to ensure that the service is provided in a way that conforms with the licence (section 141) and to suspend or cancel the licence (section 143). Failure by the commercial radio broadcaster to comply with a notice is an offence with a maximum penalty of $55,000 (section 142).

By contrast, the Authority has limited powers when a commercial radio broadcasting licensee breaches a code of practice. The Authority can impose an additional condition on the commercial broadcasting licence, including a condition that the licensee comply with the applicable code of practice (section 43) and, if certain preconditions are satisfied, determine an industry-wide standard under section 125 (an industry-wide standard becomes a licence condition, breach of which is an offence).

Furthermore, under section 141(2), if the Authority is satisfied that a person is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services in deliberate disregard of a code of practice it can issue a notice directing the person to ensure that those services are provided in accordance with the code of practice. The Authority has no power to issue such a notice to a commercial radio broadcasting licensee.

In the United Kingdom, compliance with the codes of practice drawn up by the Radio Authority is a statutory licence condition. A broadcaster found to be in breach of a licence condition might face fines of up to £50,000 or suspension or even revocation of its licence, should it fail to comply with notices or directions regarding the breach

The Commercial Radio Inquiry investigation reports indicate that there are strong commercial incentives for a licensee or presenter to engage in conduct that results in breaches of Codes 2.2(d) and 3.1(a). For example, the Authority found that a number of presenters were paid significant amounts of money to promote advertisers on air and that, in many cases, this was not disclosed to either listeners or the licensee of the broadcasting service. There was also evidence that some presenters exercised considerable power in their relationship with their respective employers, causing station management to exhibit reluctance to obtain copies of agreements the presenters had with advertisers.

It is arguable that where strong commercial pressures exist, the regulator needs powers that are realistic and can impose sanctions that have immediate effect. The Authority's existing powers lack the flexibility and force to properly respond to serious Code breaches.

Sanctions for Breach of an Additional Licence Condition

It is not an offence to breach an additional licence condition imposed by the Authority under section 43 of the Act, such as the licence conditions imposed by the Authority on the 2UE licence. If breach of an additional condition occurs, the Authority's powers are limited to suspending or cancelling the licence or issuing a notice directing the licensee to take action to ensure that the service is provided in a way that conforms with requirements of the licence. Failure to conform to the notice is an offence with a maximum penalty of $220,000. Making the breach of a section 43 condition an offence would make the condition enforceable and may deter future breaches.

Additional Administrative Remedies

While it is important for the Authority to have criminal sanctions, these need to be complemented by other more flexible enforcement options. To prosecute a matter the Authority must refer a brief to the Commonwealth Director of Public Prosecutions (DPP). The prosecution process can be lengthy and resource-intensive. Furthermore, breaches of the Act must be proved to the criminal standard of proof. Administrative remedies are often a useful alternative to criminal prosecution in the regulation of commercial behaviour. They usually have the advantage of being a remedy that the Authority can pursue quickly without having to consult another agency.

The Authority already has some administrative remedies under the Act. As mentioned, the Authority has the power to suspend or cancel a licence which, because of the consequences of such an action, is an option that the Authority is unlikely to exercise lightly. On the other hand, issuing a notice to the licensee to rectify the breach may also be an insufficient remedy, as the only sanction for non-compliance with a notice takes the Authority down the prosecution route. Given the limitations of these remedies, it is worth considering whether there are any other options under the Act or alternatively, remedies that could be introduced into the Act by Parliament.

Advertising-free periods

One option may be for the Authority to direct a licensee not to broadcast advertisements for a specified period of time. As one of the main objectives of commercial radio is to maximise revenue from the sale of advertising time this would, in effect, be a monetary penalty. Moreover, this form of monetary penalty is always sensitive to current advertising rates and is more effective than a fixed rate penalty (which can be overtaken by inflation).

Arguably, this remedy could be imposed using the existing power to impose an additional licence condition under section 43. This process, which involves gazettal of both the proposed and final condition, can be slow and thus may not be well designed for the purpose of requiring advertising-free periods. Further, before imposing such a penalty, the Authority would need to have a clear understanding of the commercial implications it will have for the licensee.

A similar sanction exists under the French regulatory system, which permits the CSA to suspend part of the programming of a service for a period of up to one month.

Designating a period of time a presenter is prohibited from broadcasting

This remedy may be appropriate in circumstances where the breach of a Code was caused directly by the behaviour of a presenter and the licensee had not prevented such a breach occurring. Again, arguably, the existing power in section 43 could be used to impose this remedy. There is a limitation on the exercise of this power, however, in that the condition must be 'relevant to the broadcasting service concerned'. Thus, such a condition could not prevent a presenter presenting a program on another station during the time of the prohibition.

In addition, to restrain by an administrative process the liberty of any citizen to speak raises fundamental concerns about freedom of speech in a democratic community and requires further public policy debate.

Power to shorten or revoke a licence

This option is open to regulators in the United Kingdom, France and Canada. However, under section 47 of the Act, the Authority is required to renew a commercial radio licence unless it has found that a licensee has failed the suitability test under section 41 (and, under the Act, licences remain in force for five years).

Requiring on-air corrections or the findings of Authority investigations to be broadcast

This remedy would give the Authority the power to direct a licensee to broadcast any breach findings made by the Authority and to disclose relevant available facts to listeners, where this had not already be done. It may also be an appropriate remedy in respect of other breaches of Codes, for example, where factual material has been presented inaccurately.

The Authority already has a similar power in respect of national broadcasters. If the Authority considers a complaint against the ABC or SBS is justified it has the power to direct the national broadcaster to broadcast an apology or retraction (ss 152(2)). If the national broadcaster does not comply with the direction within 30 days the Authority may give the Minister a written report on the matter which must be laid before each House of Parliament within 7 sitting days.

There appears to be no reason why the power to require the broadcast of an on-air announcement should be limited to investigations conducted after a complaint has been made to the Authority. Under section 170 of the Act the Authority has power to conduct investigations on its own initiative and in fact, did so, in the case of the Commercial Radio Inquiry.

Some foreign regulatory authorities also have similar sanctions. The UK Radio Authority has the power to issue a notice to a licensee requiring that an apology or correction be broadcast. If the notice is not complied with the Radio Authority has the power to impose a financial penalty or suspend or shorten the licence period. In France, the CSA can require a licensee to broadcast on-air announcements, the terms and conditions of which are determined by the CSA. A licensee that refuses to broadcast such an announcement is liable for a financial penalty.

Power to impose a civil penalty

This remedy is similar to the 'advertising-free' period proposal, in that it is another form of monetary penalty. One advantage is that it appears to operate with more precision than the advertising-free period proposal.

Broadcasting regulators in the United States, United Kingdom and Germany exercise this option, with maximum financial penalties in each jurisdiction being $10,000, £50,000 and DM500,000 respectively. In the UK the penalty to be levied is calculated as a percentage of revenue, between 3% and 5%, depending on the circumstances (up to £50,000). Financial penalties can also be imposed in France where they are calculated as a percentage of a licensee's turnover before tax to a maximum of 3% for a first breach and 5% for a second breach.

Retention of Tapes of Matter Broadcast

Schedule 2, clause 5(3)(b) of the Act requires all licensees to keep records of broadcasts relating to a political subject or current affairs matter for 6 weeks from the date of the broadcast or, if a complaint has been made about the matter, 60 days from the date of the broadcast. The Authority can direct the licensee in writing to retain the record of the broadcast for a longer period if special circumstances exist but this does not assist with the retention of records for historical matters that only come to the attention of the Authority in the context of a public hearing or investigation. By the time the matter comes to the attention of the Authority, often the record of the broadcast no longer exists.

A problem arose in the course of this inquiry in that the Authority was unable to obtain records of many broadcasts for which the retention period had expired. Commercial media monitoring companies had some (but not all) audio and transcript records of broadcasts: in the case of Sydney stations, these records covered the previous 18 months; in the case of Melbourne, Adelaide and Perth stations, the period covered (and the range

of records available) was much less. While summaries of broadcasts were also available, these were of little probative value as they did not provide a full transcript of what was broadcast. In addition, there was a substantial cost to the Authority in having to source recordings and transcripts privately.

The inability of the Authority to obtain records relevant to the investigation impacted on the Authority's ability to properly investigate a considerable amount of other information received and complaints made.

Consideration should be given to amending Schedule 2, Part 2, clause 5(3)(b) of the Act to require licensees to retain records of all broadcasts for a period of at least six (6) months.

Judicial Remedies

Injunctive Powers

It is in the public interest that the Authority should be able to act swiftly to prevent breaches of the Act continuing.

In recent amendments to the Act, the Authority has been provided with specific power to approach the Federal Court to seek an injunction in certain circumstances. The Authority can seek an injunction against broadcasters who engage in conduct contrary to an approved Implementation Plan for digital television (see Part 7 of Schedule 4 to the Act) and can apply to the Federal Court for an order that a person cease supplying an Internet carriage service or cease hosting Internet content otherwise than in accordance with an online provider rule (see Part 6 of Schedule 5 to the Act). In addition, it can apply to the Federal Court for an injunction against datacasters who engage in conduct contrary to a condition of their licence (see Part 8 of Schedule 6 to the Act).

There is no general provision at present (although one is being considered separately), that allows the Authority to approach the Federal Court for injunctive relief in the event of a breach of the Act. While an application for an injunction is likely to put the Authority to some expense and could be protracted and time consuming if defended vigorously, it is likely to be speedier than a criminal prosecution and may be a suitable remedy in preventing future breaches of the Act. It is not proposed that this remedy should be available to prevent breaches of the codes of practice.

POWERS OVER PRESENTERS

Criminal Prosecution

As mentioned, it is an offence for a licensee to breach a licence condition set out in subclause 8(1) of Schedule 2. Under the Crimes Act 1914 it is also an offence for a person to aid and abet or be knowingly concerned in the commission of a crime. Thus, a presenter could potentially be criminally liable if he/she aided and abetted a licensee in the breach of a condition set out in subclause 8(1), for instance by failing to properly identify political matter.

Under the current legislation there are no criminal sanctions against licensees for breach of a code of practice or breach of an additional condition imposed by the Authority and hence, there are also no sanctions against a presenter for aiding and abetting such a breach.

If Parliament wished to legislate for sanctions against presenters for on air conduct (such as failure to disclose a commercial agreement) there are two options available. Parliament could make the conduct by the presenter a breach in itself as the United States government has done in respect of 'payola'. The FCC (the broadcasting regulator in the US) has defined payola as 'the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming.'

Alternatively Parliament could make the licensee responsible for the conduct, and the aiding and abetting provisions in the *Crimes Act 1914* would then come into force in respect of presenters.

The first course of action may be preferable as, to establish the offence of aiding and abetting, the commission of the principal offence must first be proved. In particular, a difficulty may arise if proof of the licensee's intention to commit the offence is required as an element of the principal offence. The Commercial Radio Inquiry has demonstrated that licensees may not be aware that the presenter is engaging in conduct that is in breach of the Act.

As with other criminal sanctions, an advantage of making the presenter criminally liable for his/her conduct is that it provides an additional enforcement option and may deter such conduct in future while the disadvantages are that prosecution is time consuming, resource-intensive and carries a high burden of proof. The authority would be required to collect detailed evidence to refer to the DPP, who would evaluate the evidence and independently decide whether to prosecute. The process may not provide a quick outcome.

Administrative Remedies

The Authority currently has no power to impose an administrative remedy on a presenter. One option might be to enact civil penalty provisions imposing monetary fines for certain conduct that leads to the contravention of a provision of the Act or a Code. Another option may be to give the Authority power to direct a presenter whose conduct has contributed to a breach to broadcast Authority's breach finding and/or an on-air correction.

Schedule 1: Disclosure in commercial radio current affairs programs

Part 1 Introductory

1. Name of standard

This standard is the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000.

2. Duration

This standard commences on 1 November 2000 and ends on 2 April 2003.

3. Object of standard

The object of this standard is to encourage commercial radio broadcasting 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.

4. Application of standard

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

5. What this standard does

This standard requires:

the 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

licensees to keep a register of commercial agreements between sponsors and presenters of current affairs programs and make it available to the ABA and the public; and

licensees to 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 this standard.

Part 2 Terms used in this standard

6. Definitions

In this standard:

ABA means the Australian Broadcasting Authority.

Act means the Broadcasting Services Act 1992.

advertisement means

material broadcast a substantial purpose of which is to draw public attention to, or to promote, directly or indirectly, an organisation, a product, service, belief or course of action; and

consideration has been provided by or on behalf of an organisation or a supplier of the product or service to a licensee, or to a presenter, part-time presenter, or an associate of a presenter or part-time presenter for the broadcast of that material.

associate of a presenter means:

(a) any person (including, without limitation, a corporation or a trustee of a trust) who has, or purports to have, the right to provide the services of the presenter or;

(b) any corporation or trust in which the presenter has a greater than 50% company or beneficial interest, as the case may be, or any corporation of which the presenter is a director.

associate of a part-time presenter means:

(a) any person (including, without limitation, a corporation or a trustee of a trust) who has, or purports to have, the right to provide the services of the part-time presenter or;

(b) any corporation or trust in which the presenter has a greater than 50% company or beneficial interest, as the case may be, or any corporation of which the presenter is a director.

code means a code of practice for licensees registered by the ABA under section 123 of the Act.

commercial agreement means an agreement, arrangement or understanding, whether committed to writing or not:

(a) one of the purposes of which is that a presenter or part-time presenter or an associate of a presenter or a part-time presenter:

(b) promotes a third party and/or its products or services or interests, or;

(c) provides consultancy services in respect of publicity, promotion or public relations;

(d) in exchange for any benefit or valuable consideration; or

(e) which imposes obligations on a presenter or part-time presenter to provide services and pursuant to which the presenter or part-time presenter or an associate of a presenter or part-time presenter, receives from a person other than a licensee, any benefit or consideration of $25,000 or more per annum; and

(f) which is not an agreement, arrangement or understanding between only a presenter or part-time presenter and an associate of the presenter or part-time presenter.

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

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.

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

licensee means a holder of a commercial radio broadcasting licence.

part-time presenter means a presenter who presents a program or programs for no more than a total of three (3) hours per week when averaged over any continuous period of four (4) weeks.

presenter means the on-air presenter of a program broadcast by a licensee but does not include a part-time presenter or commentators or guests invited to appear on a program whether or not they appear on the program regularly.

register means the register of current commercial agreements referred to in part 3.

sponsor means:

(a) 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

(b) 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.

Part 3 Disclosure of commercial agreements

7. On-air disclosure

1) Subject to subsection (2), a licensee must cause to be broadcast a disclosure announcement at the time of and as part of:

   (a) a broadcast of any material in which the name, products or services of a sponsor are mentioned; or

   (b) a broadcast of any material in which an agent, employee or officer of a sponsor is interviewed in relation to any matter that concerns the sponsor, its products, services or interests; or

   (c) any broadcast requested by a sponsor or which is based on or similar to any material which is provided by a sponsor; or

   (d) a broadcast of any material that directly promotes any issue which is directly favourable to a sponsor.

2) A disclosure announcement need not be broadcast:

(a) if the material is a news broadcast or bulletin; or

(b) if the material is an advertisement broadcast pursuant to an agreement between a licensee and an advertiser provided that the advertisement is not presented in a manner whereby a reasonable listener would be entitled to assume that the advertisement is:

(i) the reporting of news; or

(ii) the expression of opinion or editorial comment; or

(c) if the relevant commercial agreement is solely an agreement for the presenter or part-time presenter to provide writing services for a magazine or newspaper, to perform or appear in a film, television program or theatrical production, or to provide voice-over services for an advertisement.

3) A disclosure announcement must include at least one of the following phrases:

(a) [name of sponsor] is a sponsor of mine, or

(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]

Part 4 Disclosure of other commercial arrangements

8. Disclosure of payment of production costs

If an advertiser or sponsor pays for or contributes to the production costs associated with any particular current affairs program broadcast by the licensee, the licensee must ensure that the fact of payment is disclosed on-air to listeners at least once per hour throughout the program.

Part 5 Register of current commercial agreements

9. Register available to the public

1) A licensee must 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.

2) A licensee 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.

3) A licensee 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.

10. Contents of register

1) Subject to subsection (2), the register must record the following particulars of each commercial agreement concerning presenters and associates of presenters:

   (a) the date of the commercial agreement; and

   (b) the parties to the commercial agreement; and

   (c) the duration of the commercial agreement; and

   (d) a brief description of the obligations of the presenter under the commercial agreement; and

   (e) the identity of each person providing a benefit or consideration under the commercial agreement; and

   (f) subject to subsection (4), the amount or value of the benefit or consideration to be provided under the agreement.

2) In circumstances where the associate of a presenter is party to a commercial agreement, that does not involve the provision of the services of the presenter (in any capacity whatsoever) to the other party to the agreement, the register need only record:

   (a) the parties to the commercial agreement; and

   (b) a brief description of the obligations of the associate of the presenter under the commercial agreement.

3) The register must record the following particulars of each commercial agreement concerning part-time presenters and associates of part-time presenters:

   (a) the parties to the commercial agreement; and

   (b) a brief description of the obligations of the part-time presenter under the commercial agreement.

4) Subject to subsection (5), the register need only record the amount or value of the benefit or consideration to be provided under a commercial agreement as:

   (a) $10,000 or less per annum;

   (b) more than $10,000 but not more than $100,000 per annum;

   (c) more than $100,000 but not more than $500,000 per annum; or

   (d) $500,000 or more per annum.

5) For the purposes of determining the value of the benefit or consideration, the value of any benefit or consideration to be provided under every agreement, arrangement or understanding with the same sponsor is to be aggregated.

11. Notification to the ABA

The licensee must provide to the ABA in writing, in a form approved by the ABA, the particulars set out in:

(a) subsection 10(1) in relation to each commercial agreement provided to the licensee by each presenter or an associate of a presenter, and

(b) subsection 10(1) or (3), as the case may be, in relation to each commercial agreement provided to the licensee by each part-time presenter or an associate of a part-time presenter,

(c) within 28 days of the commencement of this standard and any changes within 14 days after the licensee is notified of those particulars.

Part 6 Obligations of presenters

12. Presenters to disclose commercial agreements to licensee

1) A licensee must require that each presenter or associate of the presenter provide to the licensee:

(a) a copy of any existing written commercial agreement to which the presenter or an associate of a presenter is a party;

(b) a copy of any further written commercial agreement to which the presenter or an associate of a presenter is a party, within seven (7) days of it being entered into; or

(c) if the commercial agreement is not in writing, the particulars of each commercial agreement set out in subsection 10(1).

2) A licensee must require that each part-time presenter or associate of the part-time presenter provide to the licensee:

(a) the names of the parties to any existing commercial agreement to which the part-time presenter or an associate of a part-time presenter is a party ; and

(b) within seven (7) days of it being entered into, the names of the parties to any further commercial agreement to which the part-time presenter or an associate of a part-time presenter is a party; and

(c) a brief description of the obligations of the part-time presenter pursuant to any such commercial agreement.

13. Licensees to require presenters to comply with certain obligations

A licensee must require that each presenter and part-time presenter comply with relevant obligations imposed on the licensee by the Act, the codes and this standard.

14. Licensee must not engage non-compliant presenters

A licensee must not engage, or continue to engage, the services of any presenter or part-time presenter unless it is a condition of that engagement that the presenter or part-time presenter or associate of the presenter or part-time presenter, as the case may be, complies with section 12.

Schedule 2: Compliance program for commercial radio broadcasters

Part 1 Introductory

1. Name of standard

This standard is the Broadcasting Services (Commercial Radio Compliance Program) Standard 2000.

2. Duration

This standard commences on 1 November 2000 and ends on 2 April 2003.

3. Object of standard

The object of this standard is to ensure community safeguards operate effectively by promoting compliance with the requirements of the Act, standards and the codes.

4. What this standard does

This standard requires commercial radio broadcasting licensees to formulate, implement and maintain a compliance program to ensure compliance with the requirements of the Act, standards and the codes.

Part 2 Terms used in this standard

5. Definitions

In this standard:

ABA means Australian Broadcasting Authority

Act means the Broadcasting Services Act 1992.

code means a code of practice for licensees registered by the Australian Broadcasting Authority under section 123 of the Act.

licensee means a holder of a commercial radio broadcasting licence.

senior officer means an officer who reports directly to the chief executive officer or the board of the licensee company or a managing company, in the case of a radio network.

standard means a program standard determined by the ABA under part 9 of the Act.

Part 3 – Compliance Program

6. Compliance program

A licensee must formulate, implement and maintain a compliance program to ensure its compliance with the requirements of the Act, the standards and the codes.

The compliance program must contain the following elements:

(a) a formal written compliance policy;

(b) designation of a senior officer with primary responsibility for organisational compliance with the policy;

(c) provision of copies of the compliance policy, standards and codes to all members of staff in all operational areas of the licensee;

(d) establishment of a formal training program for all members of staff in all operational areas of the licensee, to be conducted at induction and at least once a year;

(e) a monitoring strategy for the compliance program; and

(f) an annual audit of compliance.

Schedule 3: Advertisements distinguishable from other commercial radio programs

Part 1 Introductory

1. Name of standard

This standard is the Broadcasting Services (Commercial Radio Advertising) Standard 2000.

2. Duration

This standard commences on 1 November 2000 and ends on 2 April 2003.

3. Object of standard

The object of this standard is to encourage commercial radio broadcasting licensees to respect community standards by ensuring advertising is clearly distinguishable from all other programs.

4. What this standard does

This standard requires licensees to ensure that advertisements are distinguishable from other programs.

Part 2 Terms used in this standard

5. Definitions

In this standard:

Act means the Broadcasting Services Act 1992.

advertisement means

material broadcast a substantial purpose of which is to draw public attention to, or to promote, directly or indirectly, an organisation, a product, service, belief or course of action; and

consideration has been provided by or on behalf of an organisation or a supplier of the product or service to a licensee, or to a presenter, or an associate of a presenter for the broadcast of that material.

associate of a presenter means any person including without limitation, a corporation or a trustee of a trust) which has, or purports to have, the right to provide the services of the presenter to any person.

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

licensee means a holder of a commercial radio broadcasting licence.

presenter means the on-air presenter of a program broadcast by the licensee.

Part 3 Advertisements clearly distinguishable by listeners

6. Distinguishing Advertisements

Advertisements broadcast by the licensee must be presented in such a manner that the reasonable listener is able to distinguish them from other program material.

Schedule 4: International Regulatory Approaches

INTRODUCTION

The Authority has surveyed broadcasting regulatory authorities in various other countries in relation to the issues raised in its inquiry into commercial radio, to see what regulations they have in place to deal with similar situations and what their experience has been. This section of the report examines the different approaches taken in the United States, the United Kingdom, Canada, Germany, France and Sweden.

The Authority contacted the relevant government authorities in each country, with particular reference to the regulatory approaches taken regarding advertising and sponsorship on commercial radio, including requirements in relation to disclosure of commercial interests and rules to ensure impartiality in news and current affairs programs.

The Authority found amongst those countries examined, that at one end of the spectrum there are regimes where government bodies enforce specific and comprehensive legislation and rules prohibiting the practices it is investigating, while at the other end there are environments where no specific relevant regulation exists and where regulators have had no experience in dealing with these issues. Some are largely self-regulatory environments where industry representative bodies develop and monitor the observance of industry codes of practice in co-operation with government regulatory authorities whilst others lean more towards statutory control, with less emphasis on self-regulation.

One thing all the regulatory regimes surveyed held in common, however, is the principle that advertising should be clearly distinguishable from other program matter.

In all cases except for the United States, the regulations allow only for action against the licence holder and not individual presenters, program producers or other employees of a station. Regulation of advertising and sponsorship practices in the United States involves a vigorous enforcement of legislation and rules which are comprehensive and specific and allow for criminal penalties against individuals, including fines and possible imprisonment and the potential loss of licence for stations found in breach.

The regulatory position in the US requires full on-air disclosure of payments to broadcasters, presenters and other employees, program makers and suppliers and was developed in the light of many years experience with commercial radio. Due to the number of recent indictments for potential breaches and the amount of exposure the regulations have received over the years in the United States, including by way of the reminders the government regulator periodically provides through public notices, broadcasters should be well aware of the need to make the relevant disclosures in relation to advertising and sponsorship.

Despite the publicity, and the serious consequences for breaching the rules, however, there still appear to be cases of contravention requiring enforcement action. This would indicate that the commercial pressures at play in the area of undisclosed paid-for programming are considerable and likely to remain so.

In the United Kingdom, broadcasting is also highly regulated. There is a comprehensive advertising and sponsorship code of practice in force, observance of which is a condition

of licence. Breaches of the mandatory codes may ultimately lead to suspension or loss of licence for any station involved or fines of up to £50,000.

Canada, Sweden, France and Germany, the other regulatory regimes the Authority studied, have little or no regulation in the way of specific prohibitions on failure to disclose commercial sponsorship arrangements.

Canada does, however, have a well-developed system of industry codes related to other aspects of broadcasting content. The codes are administered by bodies set up by broadcasters to represent the interests of their particular category of service, much like in Australia.

THE UNITED STATES OF AMERICA

Overview

Of the various national broadcasting regulatory regimes examined, the United States has the most comprehensive and specific prohibitions and sanctions in relation to failure to disclose payment or acceptance of anything of value in return for airtime for any programming, including on-air promotion of a product or service. This practice is referred to as payola and is defined by the Federal Communications Commission ('FCC') as the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming.

The FCC is the government body established under the *Communications Act 1934,* as amended, ('the Act (US)'), to regulate the broadcasting industry in all its forms. Payola is viewed as a serious matter in the United States and the Department of Justice and the FCC pursue violations vigorously.

There has been a long history of prosecutions for payola in the United States. The practice dates from at least the 1950s and the term itself arose in 1960 in relation to a court case over a record company's secret payments to disk jockey Alan Freed, to promote particular records. Payola is a contraction of the words 'pay' and 'Victrola', which was a popular brand of record player. While the term was originally and is still largely associated with the music industry, it is clear from the legislation that it has a much wider application and can relate to the broadcast of any program matter involving secret payments.

When Alan Freed was indicted, the practice was seen as commercial bribery and attracted only a small fine. As a response to the public outrage at the time, the *Communications Act 1934* was amended in September 1960 to strengthen provisions in relation to such practices. Section 317 of this act was amended to redefine the situations in which broadcast licensees must make sponsorship identification announcements. Section 507 [47 U.S.C. s.508] was added to the Act (US) requiring disclosure by persons other than broadcast licensees who provide or receive valuable consideration for the inclusion of any matter in a program intended for broadcast. The persons to whom section 507 relates had previously not been directly subject to any provisions of the Act (US).

Also prohibited under the American regulations is the practice referred to as plugola, which involves a person responsible for program selection or presentation of a program,

allowing a matter to be broadcast which promotes a product or service in which that person has a financial interest. Unlike payola, it need not involve another person or payment of any kind, but like payola, it is only the failure to disclose that makes the practice illegal.

The principle that listeners are 'entitled to know by whom they are being persuaded' has been enshrined in legislation in the United States since the enactment of the *Radio Act* in 1927. Payola is not only a violation of the United States Criminal Code, but may also subject broadcasters to sanctions under the *Communications Act 1934*. It is forbidden by sections 317 and 507 of the Act (US), and by section 73.1212 of the rules drawn up by FCC.

Disclosure to Licensee Requirements under section 507 of *Communications Act 1934* [47 U.S.C. 508]

Section 507 requires those persons who have paid, accepted, or agreed to pay or accept payment in relation to matter to be broadcast, report that fact to the licensee before the related matter goes to air. Failure to make the relevant disclosures, as required by section 507 of the Act (US), can result in criminal penalties of a fine of up to $10,000 or imprisonment of up to one year, or both.

Section 507 states:

> **Disclosure of payment to individuals connected with broadcasts - Payments to station employees**
>
> (a) Subject to subsection (d) of this section, any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.
>
> **Production or preparation of programs**
>
> (b) Subject to subsection (d) of this section, any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.
>
> **Supplying of program or program matter**
>
> (c) Subject to subsection (d) of this section, any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

Waiver of announcements under section 317

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d) of this title, an announcement is not required to be made under section 317 of this title.

Announcement under section 317 as sufficient disclosure

(e) The inclusion in the program of the announcement required by section 317 of this title shall constitute the disclosure required by this section.

Definition of "service or other valuable consideration"

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

Penalties

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than $10,000 or imprisoned not more than one year, or both.

The Department of Justice has primary jurisdiction for enforcement of the law. The FCC co-operates with the Department of Justice by passing on any relevant evidence that comes to its attention. In addition to the criminal sanctions which may be imposed by the Department of Justice, the FCC may impose administrative sanctions, including fines or initiate licence revocation proceedings where a broadcaster fails to comply with section 317 of The Act (US) or section 73.1212(b) of the FCC's rules.

Licensee Disclosure Requirements under section 317 of the *Communications Act 1934* [47 U.S.C. 317]

Section 317 of the *Communications Act 1934* requires the licensee to announce that the matter contained in the program is paid for, and to disclose the identity of the person furnishing the money or other valuable consideration at the same time the related matter is broadcast. Whenever a payment in any form is made with the intention of influencing what goes to air, that matter is considered to be sponsored and listeners have a right to be informed of the arrangement.

This section also covers disclosure announcement requirements in relation to the broadcast of political matter or the discussion of issues which are controversial or of public importance, for which talent, program material, payment in the form of money or a service of any kind is provided to the station as an inducement to broadcast particular material. As with other disclosure announcements, the person, group or corporation from whom such payments or considerations are received must be clearly identified in the disclosure announcement accompanying the program.

Section 317 states in part:

> **Announcement of payment for broadcast -- Disclosure of person furnishing**
>
> (a) 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. .....
>
> **Disclosure to station of payments**
>
> (b) In any case where a report has been made to a radio station, as required by section 507 of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.
>
> **Acquiring information from station employees**
>
> (c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.
>
> ...
>
> **Rules and regulations**
>
> (e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Disclosure announcements are not required where any kind of payment, property other valuable consideration is provided without charge or at nominal cost or where there is no expectation from the provider of promotional benefit. Where the programs involve discussion of politics or controversial public issues, however, the appropriate disclosure announcements are required.

Federal Communications Commission Rule 73.1212

As required by section 317(e), the FCC has developed rules in line with the requirements under sections 317 and 507, and appear at section 73.1212 of the FCC's rules, relevant parts of which follow.

> **Sponsorship identification; list retention; related requirements**
>
> (a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied.
>
> (i) For the purposes of this section, the term "sponsored" shall be deemed to have the same meaning as "paid for."

> (b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.
>
> (c) In any case where a report has been made to a broadcast station as required by section 507 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such broadcast station, an appropriate announcement shall be made by such station.

Paragraphs (d)–(h) of section 73.1212 of the FCC's rules cover announcement requirements regarding sponsorship of programs of a political nature, which advertisements are exempt from the usual disclosure requirements, what information must be included in any sponsorship disclosure announcement and what information licensees are required to keep on their public inspection files regarding sponsorship details.

Reasonable Diligence

Both section 317(c) of the *Communications Act 1934* and section 73.1212(b) of the Commission's rules require that each licensee 'exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals' information to enable the licensee to comply with the sponsorship identification requirements of section 317. The 'reasonable diligence' standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola.

To assist in the compliance process, the National Association of Broadcasters, the body representing the interests of broadcasters before Congress, the FCC, other federal agencies and the courts, recommends that they require employees to provide on a periodic basis, details of any relevant personal agreements or arrangements which might have an influence on matters broadcast. Employees are also asked to provide affidavits stating that they have read the relevant regulations and understand the legal requirements. To meet the reasonable diligence standards expected by the FCC, broadcasters are encouraged to educate employees about their responsibilities in relation to payola and plugola and are advised to insulate those with outside business interests from program selection which may promote those interests.

To comply with the requirements under section 73.1212 (1)(b) of the FCC's rules, the licensee is expected to be aware of outside business interests of everyone involved with the station including the owners, directors, employees, agents and anyone who regularly appears on air and to be diligent in ensuring that the program selection process is not compromised. This expectation of the exercise of reasonable diligence extends to the providers or producers of programs sourced from outside the station.

Enforcement

It would appear that in recent times, many cases of payola have taken the form of gifts of cocaine. In a 1988 *Public Notice,* the FCC declared that it would continue to co-operate with the Department of Justice in any payola investigation and would impose sanctions of its own, if warranted. On 30 November 1989 the Chairman of the FCC stated the FCC's position thus:

> The Commission has recently made clear that it will not tolerate drug traffickers among its licensees, and violations of the 'payola' provisions of the Communications Act are criminal violations and serious offences. The combination of drugs and payola, when shown to exist among broadcast licensees, involves a violation of the public trust which cannot be tolerated. The Commission will act with respect to its licensees to assure that our communications system remains free of these totally improper influences. The Commission will be following this matter closely to see if there is licensee involvement.

When necessary, the FCC informs the broadcasting industry of legislative developments and requirements through issuing public notices. In relation to advertising and sponsorship issues, several notices have been issued setting out the relevant sections of legislation and FCC rules including one in 1975 (*FCC 75-418*) which sets out a series of scenarios where sponsorship identification requirements apply.

In 1988, following a number of indictments, *Public Notice FCC 88-175* was issued, defining payola and reminding broadcasters of the seriousness with which it views such undisclosed payments and the implications for those found in breach. Broadcasters were also reminded of their responsibilities in relation to the exercise of reasonable diligence. The Notice stated in part:

> The Commission notes that licensees play a critical role in preventing payola, and the Commission's enforcement staff will investigate substantive allegations of payola that come to its attention. In many situations a station may be a victim of payola practices. Therefore, the Commission is willing to assist concerned stations by informally advising them as to whether a particular situation constitutes a potential rule or statutory violation. The Commission emphasises, however, that a broadcaster's failure to comply with section 317 of the Act (US) and 47 C.F.R. section 73.1212(b) may result in the imposition of administrative sanctions, including monetary forfeiture or initiation of revocation proceedings.

It is understood that under the regulations, many have been fined over the years but no one has yet been jailed. As recently as November 1999, Associated Press reported that federal officials were investigating radio programmers in relation to payola at almost 80 stations.

THE UNITED KINGDOM

Overview

Regulation of commercial radio in the United Kingdom is the responsibility of the Radio Authority, the statutory body operating under provisions of the *Broadcasting Act 1990* and its amendments of 1996 ('the Act (UK)'). In addition to its responsibility for technical planning, it also allocates and renews licences, enforces ownership rules and regulates programming and advertising.

One of the main ways in which the Authority performs these functions is through the application of four codes of practice covering technical performance, advertising and sponsorship, programming and news and current affairs. All commercial radio licensees must observe these codes as a condition on their licences. Section 90(5) of the Act (UK) requires the Authority to draw up these codes, after widely consulting with all interested parties, and to review and enforce them. Apart from complaints about standards and

fairness, which are referred to another statutory authority, the Broadcasting Standards Commission, the Radio Authority deals with all complaints or concerns related to codes matters.

The Authority can apply sanctions to licensees who break the rules, which may include publicly admonishing them, requiring them to broadcast apologies or corrections, fining them or shortening or revoking their licences. Under the Authority's rules no action can be taken against individuals involved, only the licensee of the station concerned - the licensee having full responsibility for what is broadcast.

In addition to adhering to the codes, another licence condition requires all licensees to abide by their individual Promise of Performance. These charters summarise the nature, style and balance of programming output the licensee undertook to provide when it applied for its licence. A radio service must not deviate from commitments in its charter, which may only be modified by the Authority if the proposed changes do not substantially alter the character of the service or reduce programming diversity in station's licence area.

Of the four Radio Authority codes, the *Advertising and Sponsorship Code* and the *News and Current Affairs Code* are especially relevant to this inquiry. A third code, the *Programme Code,* sets out the rules to be observed generally in programs and also summarises the general rules covering sponsorship, but for the purposes of this investigation, the relevant details are covered in the other two codes. The fourth code is the *Engineering Code.*

Code Principles

Underpinning the *Advertising and Sponsorship Code* and the *News and Current Affairs Code* are the principles set out in sections 90, 92 and 93 of the *Broadcasting Act 1990.* The following clauses of this act are relevant to advertising and sponsorship and require the Authority to do all that it can to ensure that:

- any news given (in whatever form) in its programmes is presented with due accuracy and impartiality (s.90(1)(b));

- without prejudice to the generality of subsection (1)(b) or (3)(a) there are excluded from its programmes all expressions of the views and opinions of the person providing the service on matters (other than sound broadcasting) which are of political or industrial controversy or relate to current public policy (90(2 (b));

- where the licensed service is a national service, that due impartiality is preserved on the part of the person providing the service as respects matters of political or industrial controversy or relating to current public policy (s.90(3)(a));

- where the licensed service is local, satellite or licensable sound programme service, that undue prominence is not given in its programmes to the views and opinions of particular persons or bodies on such matters (s.90(3)(b)).

Advertising and Sponsorship Code

The Radio Authority's *Advertising and Sponsorship Code* sets wide-ranging and detailed standards for the presentation and content of advertisements and sponsored programs. This code is currently under review, a process which is required periodically under section 93(1) the Act (UK). Several months of public consultation concluded on 31 May 2000.

Apart from clarifying and better explaining the rules, the proposed changes are intended to strengthen consumer protection by sharpening the current rules on transparency, honesty, taste and decency in relation to advertising and sponsorship. Many of the proposed changes are necessary to conform with recent and imminent changes to relevant legislation in the United Kingdom and the Europe Union.

One of the few proposed changes of relevance to the Authority's research involves relaxing the restrictions on sponsorship of certain programs, to allow more scope for presenter involvement in commercial promotions, so long as the appropriate disclosures are made to the licensee and scripts for the programs and the relevant disclosure announcements are properly copy cleared and broadcast at the appropriate time. In exchange for this relaxation, there is a requirement for much closer scrutiny of scripts in order to avoid exaggerated commercial claims.

Advertising

Stating the underlying principles and scope of the proposed *Advertising and Sponsorship Code,* Rule 1 states:

> 'Advertising' in this Code refers to any items, including both spot advertisements and sponsor credits, which are broadcast in return for payment or other valuable consideration to a licensee or which seek to sell to listeners any products or services.
>
> Radio advertising should be legal, decent, honest and truthful, and these Rules should be applied in spirit as well as in the letter.
>
> Licensees must make it a condition of acceptance that advertising complies fully with all legal requirements.

Of particular relevance to the Authority's investigations is Rule 1 of the Code's General Rules, which states:

> Advertising must be clearly distinguishable from programming. Licensees must ensure that the distinction between advertising and programming is not blurred and that listeners are not confused between the two. Legitimate objective coverage of a commercial product or service in editorial is acceptable (but see also Section 1, Rule 2 Product Placement).

Advertisements that have a similar style and format to program editorial must be separated from programming by other material such as a jingle or station identification or by being scheduled in the middle of a break.

Product Placement

Also of specific interest to this inquiry, is Rule 2 of the code referred to above, which covers the issues of product placement and undue prominence. The Radio Authority informed the Authority that it would be likely to treat payment to a presenter as product placement. The code defines product placement as:

> the gratuitous reference to a product or service within editorial (i.e. not clearly within an advertisement) in return for payment or other valuable consideration to the licensee or program maker (or any of their employees, representatives or associates)

Rule 2 of the code states:

> Product placement or undue prominence in programs of commercial products or services is prohibited unless they comply with the sponsorship rules. Legitimate objective coverage of a commercial product or service in program editorial is acceptable, but, where it is in return for payment or other valuable consideration, the rules of this code apply.

The rules require public disclosure of any associated commercial interest and scripts to be copy cleared in advance.

The gratuitous mentioning of brand names in programs constitutes a form of indirect advertising. No undue prominence should be given in programming to commercial products or services unless the appropriate disclosures are made. Any reference to such products or services must be limited to what can clearly be justified by the editorial requirements of the program itself.

Sponsorship

The prohibitions in the existing code on the sponsorship of certain types of programs have been relaxed in the revised code to allow most programming to be sponsored, with the exception of any programming, including news, which is required to be presented with due impartiality.

Rules 3 of the Code covers sponsorship more directly. It defines sponsorship, sets out the requirement for transparency, the responsibilities of the licensee regarding editorial control, the need for scripting and copy clearance for sponsored programs and what must be included in sponsor credits so that listeners are in no doubt about the nature of the sponsors involvement. It states in part:

> A program or promotion is sponsored if it is broadcast in return for payment or other valuable consideration (which includes the provision of the programme itself) to a Licensee. All sponsorships, must conform to all the Rules in this Advertising and Sponsorship Code.
>
> Listeners must unmistakably be able to recognise sponsored programming. Links between the sponsored programming and the sponsor's commercial activities must be transparent and must be made totally clear to listeners.
>
> Editorial control of, and responsibility for, sponsored programming or promotions must remain with the Licensee. However, sponsors may contribute to the content of

> most sponsored programming or promotions, provided contributions adhere to all the Rules in this Code.
>
> All sponsorships/promotions must be scripted and submitted for copy clearance. They must comply fully with all the requirements of the Advertising Code. All claims must be substantiated and the nature of the sponsor's involvement must be made absolutely clear to listeners.

All promotion of a sponsor's product or service within programming must be scripted and copy must be cleared for broadcast either centrally or locally, in the same way as copy for advertisements. Promotion of a product or service includes presenter involvement with, or endorsement of, that product or service. Presenters may voice a sponsorship promotion or tag during their program, as long as the item is clearly not a part of normal editorial. This separation or distinction can be achieved by voice inflection, pauses or tone, as well as by the use of a jingle. However, listeners must clearly be able to understand that this is a 'sell', and stations and presenters should not attempt surreptitious endorsement within normal programming.

Prohibited Sponsorships

In order not to compromise the requirement under section 90(1)(b) of the *Broadcasting Act 1990*, that 'all news in whatever form is presented with due accuracy and impartiality', sponsorship of any programming, including news, which is required to be presented with due impartiality, is prohibited under the code.

Sponsors may pay for the related types of programs provided they have no input into the programming or editorial commentary. Rule 3.8(b) of the *Advertising and Sponsorship Code* states:

> Sponsors may pay for, but may not contribute to, the programming or editorial content of the following output, provided the chosen sponsor's business interests do not prejudice, or appear to prejudice, the impartiality of the programming content. Central copy clearance is required for:
>
> soft news features, retrospectives or news magazines;
>
> current affairs and/or programming about matters of political or industrial controversy or relating to current public policy;
>
> business/financial news or comment (but not financial advice).

Sponsors can only contribute clearly credited financial assistance for these types of programs. In addition, the positioning of credits must not appear to link the sponsor with the news output.

Sponsor Credits

Rule 3 also explains in detail what is required under the code in terms of acknowledgment of sponsorship through sponsor credits, which are defined as announcements 'primarily designed to be short branding statements'. They must include the name or title of the program or promotion, the sponsor's name, an indication of the nature of the sponsor's

commercial activity, where it is not self-evident and the nature of the sponsor's contribution. Sponsor credits must be broadcast either at the beginning or end of every sponsored item and at least every 15 minutes thereafter during longer sponsored items.

Advance Clearance Of Advertisements And Sponsorships

Rule 4 of the *Advertising and Sponsorship Code* sets out the situations where copy clearance is required prior to advertisements or sponsorships going to air. The general requirement is that:

> Stations must ensure that all advertisements and sponsorships are cleared in advance of broadcast, either by an organisation approved by the Radio Authority (currently, the Radio Advertising Clearance Centre ('RACC')) or by stations themselves.
>
> Scheduling of all advertisements (including sponsorships and promotions) and all other compliance matters (copy clearance, content etc) are the ultimate responsibility of each Licensee. This is the case whether or not an advertisement also requires central clearance.

The term "central clearance" refers to copy clearance by the RACC. The code sets out certain 'special category' advertisements (an extensive list of products and services including alcohol, betting and medical and health products) which require advance central clearance of scripts by the RACC. This organisation also vets national advertising campaigns and advertisements broadcast on more than one station.

Presenter-read Advertisements

The Radio Authority's rules covering presenter-read advertisements and testimonials endorsing products or services are also pertinent to the Authority's investigation. General Rules 16 and 22 respectively, of the revised advertising and sponsorship code, state in part:

> Station presenters may not testify on their own station about products or services they use; and
>
> 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. They should not make references to any specific advertisement (whether presenter-read or not) when in their presenter role, except within the Rules of this Code.

Political And Public Controversy

General rule 13 of the revised code covers the responsibility of the Authority under sections 90 and 92 of the *Broadcasting Act 1990* to ensure that:

> No advertisement is broadcast by, or on behalf of, any body whose objects are wholly or mainly of a political nature, and no advertisement is directed towards any political end.

> No advertisement shows undue partiality in matters of political or industrial controversy or relating to current public policy.
>
> Advertisements which include references to any political, industrial or public controversy must be submitted for central copy clearance.

The term 'political' here is used in a wider sense than 'party political'. The prohibition includes, for example, issue campaigning for the purposes of influencing legislation or executive action by local, national or foreign governments.

News and Current Affairs Code

The Radio Authority's *News and Current Affairs Code,* which was drawn up under the requirements of sections 90 and 107 of the *Broadcasting Act 1990* (UK), is also expected to be revised this year. Draft changes are not yet available and for the time being, the 1994 version remains in force.

Rule 1.3 of the *News and Current Affairs Code* states in part:

> Each current affairs or documentary program or series of programs dealing with matters of political or industrial controversy or relating to current public policy on the same topic/s must be impartial.

Personal View Programs

Rule 1.4 states in part:

> 'Personal view' programs are programs or features on matters of political or industrial controversy or relating to current public policy in which the presenter or central person presents his own view.

When such programs are broadcast, listeners must be clear that a personal view program or feature is the expression of one person's view on matters about which other views exist. Licensees must ensure that statements of fact in the program or feature are accurate, and that opinions expressed, however partial, do not rest upon false evidence. A licence holder offering personal view programs must be able to demonstrate that an appropriate range of views on any relevant topic has been aired so that alternative views are exposed over a period of time.

Phone-in Hosts

Phone-in hosts are expected to avoid discussion of issues where their connection or involvement away from the program is such as to call into question their fairness or impartiality. News and current affairs programs are required to avoid giving misleading emphasis and licensees must ensure that the views and opinions of particular persons or bodies are not given undue prominence. The following rules from the *News and Current Affairs Code* apply.

Rule 1.5 Discussion and 'Phone- In'Programs

The demands of undue prominence and impartiality require Licence Holders to ensure that, in discussions on any matter of political or industrial controversy or current public policy, a wide range of opinions is represented over time – within a series in the case of national Licence Holders and within three months in the case of other relevant Licence Holders.

Rule 1.6 Impartial Chairman, Interviewers and Phone-In Hosts

A chairman, interviewer or phone-in host should avoid discussion of issues where his connection or involvement away from the programme is such as to call into question his fairness or impartiality. He must ensure that the participant(s) or interviewee(s) – some perhaps with less radio experience than others – are able to express their views; and that the discussion moves forward as coherently and logically as possible. .....

A phone-in host or chairman may assume the role of devil's advocate to encourage discussion and represent alternative views to those being expressed by guests or callers. They must not express their own views unless those of opposing views are given the opportunity of expressing them with equivalent force within the program or on another program, at a similar time of day, presented by a phone-in host with opposing views.

Sanctions Available to the Radio Authority

The Radio Authority considers complaints concerning programming, advertising and sponsorship. If the Authority decides to proceed with an investigation, it will request a tape of the item (which stations are required to keep for 42 days) and then decide if the item is in breach the Act (UK), any of its codes or a station's Promise of Performance.

If a station is found to be in breach of the rules, the Authority has a number of sanctions it can impose. It can admonish the station concerned; it can require it to broadcast an apology or correction; it can impose a financial penalty; or it can shorten or revoke a station's licence to broadcast.

Sections 109, 110 and 111 of the *Broadcasting Act 1990* cover the Radio Authority's powers in relation to enforcement of provisions of the Act (UK) or a relevant code of practice, observance of which is required as a condition on licence.

- Under the provisions of section 109 of The Act (UK), the Authority may serve a notice on a licensee considered to have failed to comply with a licence condition, asking it to submit scripts and particulars, and/or recordings of a program considered in potential breach.

- A notice under s.109 may also require an apology or correction be broadcast.

- Section 110 allows the Authority to shorten the period of licence for the service in question or to impose of a financial penalty not exceeding £50,000. The ultimate penalty, revocation of the licence, is allowed for under s.111 of the Act (UK).

To date the Authority has not had reason to investigate issues pertaining to failure to disclose by a presenter or talkback host. Under existing regulations however, any action it could take would have to be against the licence holder, not the offending individual.

Broadcasting Standards Commission

Listeners to commercial radio in the UK are also able to complain to the Broadcasting Standards Commission ('BSC'), the statutory body for standards and fairness in all broadcasting. The BSC has three main tasks under the Act (UK): to produce codes of practice relating to standards and fairness; to consider and adjudicate on complaints; and to monitor, research and report on standards and fairness in broadcasting.

The BSC deals with complaints from individuals alleging that a program has treated them unfairly or unjustly or that their privacy has been infringed. It also considers complaints about violence, sexual conduct and taste and decency in programs and advertisements. The BSC administers a *Code of Guidance* applicable to all broadcasters. Under the heading 'fairness', which relates to questions of unjust or unfair treatment and unwarranted infringement of privacy, the code states:

> Broadcasters should take all reasonable care to satisfy themselves that all material facts have been considered before transmission and so far as possible are fairly presented.

The sanctioning powers of the BSC are limited to directing a broadcaster in breach to publish details of the complaint and findings in the press, and on television or radio as relevant.

CANADA

The Role of the CRTC

The Canadian Radio-television and Telecommunications Commission (CRTC) is the independent public authority responsible for regulating Canada's broadcasting and telecommunication systems. It is governed by the *Broadcasting Act of 1991* (Canada) and the *Telecommunications Act of 1993* (Canada).

The *Broadcasting Act 1991* requires that broadcasts be of a high standard and in line with this, the CRTC administers the *Radio Regulations 1986* ('the Regulations'), which are designed to help prevent, among other things, abusive comment, the broadcast of anything contrary to the law and any false or misleading news.

The Canadian approach to broadcasting regulation is essentially self-regulatory, utilising voluntary codes of practice. While all generally applied codes in Canada are voluntary, two codes act as conditions on all licences. They are the *Code of Advertising to Children Code* and the *Sex-Role Portrayal Code*.

Someone wishing to complain about a program is first directed to the relevant licensee. If the complainant is not satisfied with how the broadcaster has dealt with the complaint and informs the CRTC, he or she is directed to the relevant industry body responsible for the supervision of the voluntary codes for adjudication of the matter.

When the CRTC receives a complaint, it either directs the complainant to the relevant broadcaster, the relevant code administrator, or to one of its own departments, depending on the nature of the complaint. Complaints involving, potential breaches of the Regulations are dealt with by the CRTC.

To address concerns arising out of several investigations it had recently completed regarding complaints about open-line (talkback) programs on radio, in 1988 the CRTC published for public and industry comment, a set of policy guidelines on open-line programming (Public Notice CRTC PB88-213). The Notice states in its introduction:

> A licensee is responsible for the actions of its employees, including open-line hosts, producers and programmers. A licensee is also responsible for comments made by guests or callers during open-line programs.

The policy guidelines outlined the requirements for licensees with respect to the conduct of open-line programs. These relate to abusive comments, balance and high standards in programming and address the requirements under paragraph 3 of the Regulations, which states in part:

> A licensee shall not broadcast any abusive comment that when taken in context tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age, or mental or physical ability ...or broadcast any false or misleading news

Most of the responses to the policy guidelines were from members of the public and elected representatives who generally supported the proposed industry code. However the broadcasting industry uniformly opposed imposition of an industry-wide code. The CRTC decided against implementing the guidelines and to continue to deal with concerns regarding open-line programs on a case by case basis. Licensees were advised to develop their own individual guidelines in line with the principles underpinning the CRTC's open-line guidelines.

In most of the cases where the CRTC has found open-line broadcasters in contravention of the rules, it was in relation to offensive remarks about minorities.

Sanctions Available to the CRTC

The CRTC requires licensees who have shown they are unable to meet the provisions of the *Broadcasting Act 1991* or the *Radio Regulations 1986* in relation to open-line programming, to develop their own codes of conduct and control mechanisms in line with CRTC open-line policy. Such licensees must submit their individual open-line code of conduct to the CRTC for approval. Their effectiveness is reviewed at time of licence renewal and in some cases the CRTC imposes adherence to the licensee's code as a condition of licence. For example, the Radiomutuel network, following a breach by one of its stations, was required to develop an open-line code, compliance with which the CRTC made a condition of licence on that station. The Radiomutuel code includes the following provision:

> Journalists and program hosts must avoid controversial subjects in which they have a personal interest. In every circumstance, the program host or journalist must disclose the interest he has in the topic. His involvement in an issue must not detract from the facts.

After assessing the level of compliance by a licensee, the CRTC may, if appropriate, renew its licence for a shorter than usual term.

While the CRTC has scope for action against licensees in relation to breaches of the Regulations or the *Broadcasting Act of 1991,* it has no authority to take action against individual presenters. In response to a request for information from the Authority, the CRTC advised that it has never had cause to investigate or regulate services in relation to issues associated with undisclosed commercial agreements covering payment for endorsements and favourable commentary by talkback radio presenters. It advised the Authority it has never articulated a position on such matters.

Self-Regulatory Broadcasting Industry Codes

The major representative body for the broadcasting industry, responsible for monitoring adherence to a code, is the Canadian Broadcasting Standards Council ('CBSC'). The CBSC was established by the Canadian Association of Broadcasters ('CAB') and includes 430 private sector radio and television stations in its membership. One of its functions is to assist in the application of specific broadcast standards developed by the CAB through voluntary self-regulation.

The CBSC takes complaints in writing from members of the public about a wide cross-section of issues covered by the *Code of Ethics,* a code of conduct for broadcasters developed in co-operation with the CAB. Clause 10(f) of the Code states:

> Broadcasters should ensure that there is no influence by advertisers, or the perception of such influence, on the reporting of news or public affairs, which must be accurate, balanced, and objective, with fairness and integrity being the paramount considerations governing its reporting.

For the benefit of broadcasters and the general public, the CBSC publishes on its web-site, background commentaries on the application of the *CAB Code of Ethics*, providing information outlining its interpretation of each of the clauses and including discussion in detail of its past adjudications. All of the commentaries sighted, which dealt with complaints about talkback radio presenters, were in relation to abusive or offensive remarks or insults to minority groups.

Sanctions

Where a decision in relation to a complaint to the CBSC goes against the broadcaster, the CBSC requires it to announce full details of the complaint and findings during peak listening times, within 30 days of the decision, on television or radio as relevant. Apart from possibly expelling the licensee found in breach of the CAB's code from membership of the CAB, this is as far as the CBSC's powers go in terms of sanctions.

Other Self-regulated Industry Codes

Apart from the CBSC, there are a number of other industry representative bodies which administer voluntary self-regulated codes which may involve broadcasters. One such

code is relevant to this investigation. Article 5 of the Radio Television News Directors Association of Canada's (RTNDA) Code of Ethics contains the following rule:

> Broadcast journalists will govern themselves on and off the job in such a way as to avoid conflict of interest, real or apparent.

Another self-regulated code of relevance here is the *Canadian Code of Advertising Standards,* which is administered by Advertising Standards Canada. The code applies to:

- advertisers promoting the use of goods and services;
- corporations, organisations or institutions seeking to improve their public image or advance a point of view; and
- governments, government departments and crown corporations.

The code includes the following definitions in relation to advertising:

> 'Advertising' is defined as any message (the content of which is controlled directly or indirectly by the advertiser) expressed in any language and communicated in any medium to Canadians with the intent to influence their choice, opinion or behaviour.
>
> 'Advertising' also includes 'advocacy advertising', 'political advertising', and 'election advertising', as defined below.
>
> 'Advocacy advertising' is defined as 'advertising' which presents information or a point-of-view bearing on a publicly recognised controversial issue.
>
> 'Political advertising' is defined as 'advertising' by any part of local, provincial or federal governments, or concerning policies, practices or programs of such governments, as distinct from election advertising.

Clause 1(b) of the *Canadian Code of Advertising Standards*, which covers accuracy and clarity in advertising, states:

> Advertisements must not omit relevant information in a manner, which, in the result, is deceptive.

Clause 2, which prohibits disguised advertising techniques, states:

> No advertisement shall be presented in a format or style which conceals its commercial intent.

Clause 6 relates specifically to news, which is interpreted by the CBSC to include editorial comment, analysis and opinion in relation to news items. It states in part:

> News shall not be selected for the purpose of furthering or hindering either side of any controversial public issue, nor shall it be designed by the beliefs or opinions or desires of the station management, the editor or others engaged in its preparation or delivery.
>
> ...nothing in the foregoing shall be understood as preventing news broadcasters from analysing and elucidating news so long as such analysis or comment is clearly labelled as such and kept distinct from regular news presentations.

> ...editorial opinion shall be clearly labelled as such and kept entirely distinct from regular broadcasts of news or analysis and opinion.

Sanctions available to Advertising Standards Canada

The ASC accepts written complaints from consumers and if it concludes an advertisement violates the code, the advertiser is notified of the decision in writing and requested to appropriately amend the advertising in question or withdraw it.

Should an advertiser fail to voluntarily comply with the ASC's decision, there are effective sanctions to enforce compliance. The *Code of Advertising Standards* states:

> The ASC will advise exhibiting media of the advertiser's failure to co-operate and request media's support in no longer exhibiting the advertising in question; and may publicly declare, in such manner as the ASC deems appropriate, that the advertising in question, and the advertiser who will be identified, have been found to violate the code.

OTHER EUROPEAN COUNTRIES

GERMANY

In Germany, commercial broadcasting regulation is the responsibility of the 15 individual state regulatory authorities (Landesmedienanstalten). Public broadcasters are self-regulated. The state authorities are responsible for licensing and monitoring compliance with the regulations. They co-operate on matters of principle and on national issues in an association of regulatory authorities for broadcasting known as the Arbeitsgemeinschaft der Landesmedienanstalten ('ALM').

The ALM's functions include representing the interests of the state regulatory authorities, providing a forum for discussion on issues of common interest in broadcasting, commissioning expert reports on those issues, co-ordinating uniform procedures throughout the states, planning spectrum use and developing national guidelines on such things as advertising and sponsorship and the protection of minors.

The ALM advised the Authority that it was aware of only one case in recent years of radio stations providing airplay for particular records as a result of a secret agreement with an agency acting on behalf of a record company. In Germany this practice is referred to as 'bartering'. The matter was dealt with by the Association of Private Radio Broadcasters (VPRT) which resolved the matter without recourse to sanctions, although there are quite specific regulations in place prohibiting such practices. Administrative sanctions apply which allow the relevant state regulatory authority to impose a fine of up to DM500,000 on a licensee under the provisions of the German State Broadcasting Treaty ('the Treaty'). Parts 7 and 8 of the Treaty cover advertising and sponsorship, relevant sections of which are set out below.

> **Advertising**
>
> Advertising or advertisers may not exert an influence upon the content and editorial activities of a program

> Note: In order to guarantee the independence of the content of a respective programme, a radio station may not grant advertisers permission to exert any influence upon the programme organisation. This means, in particular, that individual parts of a respective programme may not be adjusted to suit an advertiser's requirements. The exertion of influence on the part of advertisers upon the placing of programmes in an advertising environment shall also be deemed inadmissible. (Part 7 Section 2)
>
> Advertising must be recognised as such... (Part 7 Section 3)
>
> **Camouflaged Advertising**
>
> Camouflaged advertising is inadmissible. Camouflaged advertising shall be deemed to be the mentioning or portrayal of goods, services, names, brands or activities of a manufacturer of goods or a provider of services in programmes, if same is intended for advertising purposes and can mislead the general public with regard to the actual purpose of such mentioning or portrayal. Such a mention or portrayal shall, in particular, be deemed intended for advertising purposes if carried out without remuneration or other counter performance.

This applies to programs which are produced in-house, those co-produced and those commissioned and purchased.

Part 7 Section 5 of the Treaty, which relates to editorials and sponsorship, states:

> **Editorials**
>
> In the case of the permitted portrayal of products and services, the promotion of advertising interests is, as far as is possible, to be avoided by way of editorial organisation.
>
> **Sponsorship**
>
> Sponsoring shall be deemed to mean the contribution of a natural or legal person or a group of persons, who do not have a participating interest in broadcasting activities or in the production of audio-visual programmes, for the direct or indirect financing of a programme in order to promote the name, the brand, the appearance of a person, his or her activity or her performance.
>
> In the case of programmes which are either wholly or partially sponsored, reference must be clearly made to the financing at the beginning and end in an acceptably brief period of time by the sponsor. The content and programme placing of a sponsored programme may not be influenced by the sponsor to the extent that the responsibility and the editorial independence of the broadcaster is impeded. Sponsored programmes may not encourage the sale, the purchase or the renting or leasing of products or services of the sponsor or of a third party, above all by way of appropriate references.

News programmes and programmes concerning current political affairs may not be sponsored.

SWEDEN

Broadcasting content in Sweden is regulated by the Swedish Broadcasting Commission. The Commission responded to the Authority's request for information about regulation in

Sweden in relation to undisclosed sponsorship agreements by saying that there are no regulations in Sweden specifically covering such situations and few concerns that secret agreements were likely to be a problem.

There is, however, a general prohibition stating that:

> Programmes that are not advertisements may not favour commercial interests in an improper manner.

In applying this provision the Commission only examines what is said or shown in a program in relation to whether it is justified by 'an information or entertainment interest'. If the presenter has been paid to promote the product in question, it is of no relevance in this context. It is the licensee who is legally responsible for everything that is broadcast and is subject to fines if commercial interests have been unduly favoured in programs.

FRANCE

Broadcasting in France is governed by *Law 86-1067 of 30 September 1986* (as amended) and by decrees which are issued from time to time. Since 1989, the regulation of state-owned and private broadcasting has been the responsibility of the Conseil Superieur de l'Audiovisuel ['CSA'], an independent administrative authority.

The CSA is responsible for, amongst other things, ensuring diversity of broadcasting ownership and content, licensing new and existing services, and monitoring programs to ensure that human dignity, the presumption of innocence and the protection of children are respected.

Unlike in Australia, where commercial radio licences are allocated under a priced-based system, in France, the CSA uses a competitive merit-based allocation process. Licences are granted for a period of five years and may be renewed for a maximum of two five-year periods without going through the competitive process.

Because broadcasting is governed by laws and decrees, there are no codes of practice or guidelines in France, however, under article 28 of the *Law of 30 September 1986*, before being granted a licence, each licensee must negotiate an agreement with the CSA which sets out the way the service will operate. Amongst other things, the matters that the agreement may deal with include the general characteristics of the service, the amount of French and non-French content (music and other) and educational and cultural programming, the amount of time to be devoted to advertising and to sponsored programs, and the manner in which advertising will be inserted into programming.

Advertising

Under article 14 of the *Law of 30 September 1986*, the CSA has the power to use appropriate means to regulate advertising on broadcasting services. The general principles under which radio advertising is regulated are set out in decree 87-239 of 6 April 1987, article 8 of which states that advertising must be clearly announced and clearly identified as advertising.

Sponsorship

Under article 9 of decree 87-239 of 6 April 1987, companies may sponsor broadcasts to promote themselves or their activities, on the condition that the broadcaster retains complete control over the content of the broadcast.

Article 9 permits mention of the name and other signs identifying the sponsor during the sponsored program.

Sanctions

Article 42 of the *Law of 30 September 1986* sets out the administrative sanctions that the CSA may apply if broadcasters do not meet their commitments and obligations. The CSA may issue notices to both public and private radio and television stations.

The sanctions that the CSA can impose, according to the seriousness of the matter, are as follows:

- suspend (after a notice) a licence, or a part of the programming of a service, for a period of up to one month;
- reduce the term of a licence;
- impose a financial penalty;
- withdraw a licence.

Financial penalties are calculated as a percentage of a licensee's turnover before tax.

If a licensee fails to meet its commitments or obligations, the CSA may require a licensee to broadcast on-air announcements, the terms and conditions of which are fixed by the CSA. A licensee refusing to broadcast an announcement would be liable for a financial penalty.

Schedule 5: People Mentioned in this Report

Please note, a person's position is the one they held at the time of the event or occurrence mentioned in the report. It is not necessarily their current position.

Ms Sarah Baston, Transurban, Manager Media Relations

Mr Tony Bell, Southern Cross Broadcasting, Managing Director

Mr Phillip Brady, 3AW, Presenter

Mr John Brennan, Radio 2UE Sydney Pty Limited, Program Manager

Mr Nigel Brennan, 3AW, Account Manager

Ms Fiona Cameron, ARN, Director, Corporate and Workplace Relations

Mr Wayne Clouten, 5ADD and 5DN, General Manager

Mr John Conde, Radio 2UE Sydney Pty Limited, Chairman

Mr Jeremy Cordeaux, Managing Director, Montclair Pty Limited, presenter on radio station 5DN

Mr Geoff Cousins, Cable & Wireless Optus Vision, Chief Executive

Mr George Donikian, Channel Ten Presenter

Mr Kim Edwards, Transurban, Managing Director

Mr John Fordham, Fordham Communications, Mr Laws' Manager & Agent

Mr Neil Gamble, Star City, Chief Executive Officer

Mr Dane Hansen, 5ADD and 5DN, Sales Director

Mr Shane Healy, 6PR, General Manager

Mr Alan Jones, 2UE, Presenter

The Hon. Jeffrey Kennett MLA, Premier of Victoria

Mr John Laws, 2UE, Presenter

Mr Bob Mansfield, Optus Communications Pty Ltd

Mr Bruce Mansfield, 3AW, Presenter

Mr Harry M Miller, Harry M Miller & Company Management, Mr Alan Jones' Agent & Manager

Mr Bob Miller, Australia Street Consulting, Managing Director

Mr Graham Mott, 3AW, General Manager

Mr Steve Price, 3AW, Presenter and Program Director

Mr Howard Sattler, 6PR, Presenter

Mr Max Suich, Optus Communications Ltd, Director Marketing Division

Mr Justin Thompson, 3AW, Senior Account Manager

Mr Graeme Tucker, 5ADD/5DN, General Manager

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