Productivity Commission Inquiry into Broadcasting Regulation

Draft Report

Response by Communications Law Centre

1. Codes and Standards

DRAFT Recommendation 10.1

A further objective 'to promote the public interest in freedom of expression' should be added to the objectives in section 3 of the Broadcasting Services Act.

CLC response: SUPPORT

DRAFT Recommendation 10.2

The mechanisms for consultation on the development of codes of practice should be amended so that:

- *a requirement for general support from within the relevant section of the industry replace the requirement that a majority of broadcasters within the relevant section of broadcasting endorse a proposed code of practice; and*
- *the ABA develop guidelines on how it will assess whether a code has 'general support from within the relevant section of the industry'; and*
- *the ABA develop guidelines on 'adequate opportunity to comment' to support community consultation on a proposed code of practice. These guidelines should provide for:*
  - *on-air broadcasts at peak or other appropriate audience times announcing that a code is under development or review and inviting comment;*
  - *public hearings; and*
  - *minimum periods for consultation.*

CLC response: SUPPORT

DRAFT Recommendation 10.3

The co-regulatory scheme should be amended so that:

- *all codes of practice include the requirement for community service type announcements about the complaints mechanism, to be broadcast at peak or other appropriate audience times;*
- *the ABA undertake ongoing monitoring of community awareness of complaints mechanisms;*
- *licensees be required to accept e-mailed complaints as well as written and faxed complaints;*
- *each licensee be required to institute a telephone complaints system which would advise complainants of their rights and on which complainants may record telephone complaints.*

A summary of these complaints along with a summary of written complaints and action by the licensee should be provided to the ABA;

- *licensees found to be in breach of a relevant code of practice be required to broadcast an on-air announcement of the breach finding and subsequent action during the relevant program or time slot;*
- *the ABA be given the power to issue directions for action to broadcasters found in breach of a relevant code of practice; and*
- *the BSA be amended to provide that relevant codes of practice (once registered by the ABA) automatically become conditions of broadcasters' licences, and the ABA be given the power to impose penalties for all breaches of codes of practice.*

CLC response: Broadly, the CLC supports all elements of this recommendation except the last two. It believes the basic regulatory structure of codes and standards remains appropriate, and that the distinctions between the two need to be maintained. It is inappropriate for sanctions to be imposed for one-off breaches of codes of practice in many areas which might be covered by codes of practice, eg. program classification and most aspects of news-gathering.

DRAFT Recommendation 10.4

The ABA should develop standards dealing with fair and accurate coverage and ethical news gathering and reporting practices. These standards should provide that:

- *such complaints may be made to either the ABA or the licensee in the first instance;*
- *licensees must inform the ABA of such complaints and their proposed action as soon as practicable;*
- *the ABA must actively monitor the actions of the licensee in response to the complaint; and*
- *the ABA may exercise its powers to direct licensees to take certain actions (including broadcasting retractions and corrections) in response to complaints about fair and accurate coverage.*

CLC response: The CLC believes this recommendation appears to represent an over-reaction to the legitimate concerns raised in the 2UE inquiry. A draft of the Centre's submission to that inquiry is attached. It proposes legislative change to require a program standard to be made requiring *effective disclosure of relevant interests in the subject matter of programs.* Thge CLC opposes the more far-reaching proposals in this recommendation, preferring to see the necessary firm legislative and regulatory response being integrated into the broad framework of codes and standards.

DRAFT Recommendation 10.5

The regulatory scheme for controlling access to online content should be reviewed after two years of operation. Such a review should encompass:

- *the scheme's success in regulating access to objectionable material;*
- *the scheme's effect on Internet service providers, Internet content hosts and online commerce;*
- *the scheme's effect on freedom of expression and access to educational, artistic and political material; and*
- *the scheme's compliance and administrative costs.*

CLC response: SUPPORT

2. Ownership and Control

Comments on the proposed media-specific public interest test.

See two articles by former CLC staff:

Chadwick, P (1992) "Print media inquiry treads so lightly it makes no impression", *Media Information Australia*, No 65 (August), pp44-52

Hardy, C., Muslan, M. and Madden, J. (1994) "Competition Policy and Communications Convergence", *UNSW Law Journal* Vol 17(1), pp156-89

and

Robinson, B. (1995) "Market Share as a Measure of Media Concentration", in Robinson et al (1995) *The Cross Media Revolution: Ownership and Control*, John Libbery, London, pp 50-72

3. Planning and licensing

DRAFT Recommendation 4.4

The planning criteria for the broadcasting services bands, currently found in s. 23 of the BSA, should, for commercial broadcasting, be restricted to those relevant to the technical planning of the spectrum.

CLC response: Oppose. This recommendation seems to misunderstand the nature of planning decisions. "Non-technical planning criteria" do not simply "complicate what should be a technical planning function". They are an important part of all planning decisions, including those undertaken under the Radioc ommunications Act: eg. setting the timing for the release of particular frequencies to auction.

Selecting community broadcasters

The Commission seeks further comment on methods of allocating community broadcasting licences.

CLC response: The Centre does not believe the Commission has made out an adequate case for changing the current system for allocating community licences. It believes the proposed inclusion of the CBAA in the process of selecting applicants is most inappropriate.

DRAFT Recommendation 5.2

A new licence category for Indigenous broadcasters should be created, with appropriate conditions relating to advertising.

DRAFT Recommendation 5.3

Spectrum should be reserved for Indigenous broadcasters that provide a primary level of service to a specific audience...

CLC response: SUPPORT

4. Program siphoning

Consumer access to sports programs: impact on competition

Noting that parliament's objective is to ensure major sporting events are available on free to air television, the Commission is inclined to recommend that neither free to air nor subscription broadcasters be permitted to negotiate contracts that exclude the other form of broadcasting. The Commission would welcome further discussion of this issue at the draft report hearings.

Broadly, the Centre supports the existence of regulation of this kind. While the Centre has been critical of the number of events included in the list of protected events, the arrangements for removing events from the list appear to have worked reasonably well so as to maximise access to listed events.

The Centre believes this is an area in which trade practices law is likely to have an increasing impact. It questions the Commission's rationale for industry-specific regulation of this matter at this stage.

5. Australian content

The Centre believes the draft recommendations on advertising does not appear to be well-founded in research and analysis. It would support a more detailed investigation of the advertising industry and experience since the liberalisation of the quota by the ABA and the Communications Research Unit in the Department of Communications, Information Technology and the Arts. Advertising is an important industry and advertisements are significant cultural artifacts which deserve less cursory attention in an inquiry of this significance.

The Centre does not support the Commission's preliminary view that content regulation for pay TV is inappropriate, but notes that legislation to make the existing 10% expenditure requirement enforceable is currently before the Parliament and is expected to be supported by all the major parties.

6. Digital broadcasting

The Centre addressed this important issue in some detail in its initial submission and does not seek to make any further comments on the Commission's proposals.

December 1999

ATTACHMENT

COMMUNICATIONS
LAW CENTRE

SUBMISSION TO THE INQUIRY INTO RADIO STATION 2UE

AUSTRALIAN BROADCASTING AUTHORITY

NOVEMBER 1999

About the Communications Law Centre

The Communications Law Centre is an independent, non -profit research, teaching and public education organisation specialising in media and communications law and policy. It was established in Sydney in 1988 and in Melbourne in 1990. It is affiliated with the University of NSW and Victoria University.

Its founding mission was to articulate and advance the public interest in Australian media and communications. We believe the public interest is served by:

a diverse range...
of high quality services...
competitive and diversely controlled...
relevant and accountable to Australians...
widely available...
at affordable prices.

The Centre undertakes activities in four major areas:

research and policy development;
teaching;
public education; and
legal practice.

The establishment of the Centre was an initiative of the Law Foundation of NSW, which continues to be one of the Centre's program funders. Program funds are also received from Victoria University and the Australian Film Commission. The Reichstein and Myer foundations have been consistent supporters of the Melbourne office's activities. Around two-thirds of the Centre's revenue is earned from project-based research and teaching, from the sale of publications including the monthly magazine *Communications Update*, and from the staging of conferences and seminars. Individual project funders are identified in annual reports. In recent years, they have included industry, government and academic sources.

This submission

The Centre believes the matters which are the subject of this inquiry raise serious issues for public policy and law enforcement.

There are several elements to the approach proposed by the CLC to address the public policy concerns raised by this inquiry.

First, there needs to be immediate action in relation to conditions on 2UE's licence to ensure that the objects of the BSA about fairness and

accuracy in the coverage of matters of public interest are upheld, and then a clearer and stronger mechanism under the BSA for ensuring that announcers do not engage in paid-for promotional activity, at the very least, without effective disclosure of the nature of that activity to their audiences.

Second, there needs to be a clearer understanding of the relationship between the TPA and the BSA in this area, resolved through test cases if necessary.

Third, there needs to be more aggressive enforcement of the existing provisions of the Trade Practices Act and its State equivalents in relation to the commercial radio industry, and a structured analysis of common industry practices to assess whether they generally comply with the current law.

Fourth, following the US example, the existing legislative mechanisms should be supplemented to ensure that all categories of person likely to be involved in the kinds of activity which are the subject of this inquiry, including announcers, station employees, independent contractors, suppliers and sponsors are also caught by any sanctions.

What has happened?

Policy

Broad policy concerns

The outcry which followed the allegations on *Media Watch* on 12 July 1999 that a company representing John Laws had entered into an agreement with the Australian Bankers Association under which Laws effectively agreed to soften his on-air criticisms of Australia's banks, raised at least three central public policy concerns:

first, a radio announcer, particularly one with as high a profile as Laws and as big a reputation for expressing strong opinions, had traded those opinions for personal gain;
second, the credibility of all views expressed on talk-back radio by other announcers suddenly seemed questionable;
third, Australian companies, especially "blue chip" companies like the major banks, had been prepared to buy favourable media coverage of their activities which fell outside normal advertising. This was a concern about the very existence of agreements of this kind, particularly in a sector like banking, where public dissatisfaction with the performance of service providers was rife.

Although the specific circumstances of "cash for comment" have been at the centre of the inquiry, this kind of behaviour can be seen as one

example of the broader issue of conflicts of interest in the media, where information, entertainment and opinion presented by media organisations is influenced by factors other than those of which the audiences are or could be expected to be aware.

Reality

It is important to recognise and acknowledge, at the outset, the nature of commercial radio. It is funded by people who are trying to sell things. Its audiences know it is funded by people who are trying to sell things. Commercial radio is very popular with those audiences. It deserves to be. Its survival depends on its ability to attract advertisers and sponsors through the presentation of programs which rate well in the advertiser's target demographic. Advertisers want to get as much as they can for their money. Commercial radio stations want to keep their advertising customers happy and be as profitable as they can for their shareholders. That's business, it's what the Corporations Law requires, and it's fine.

But radio listeners deserve to be looked after as well. We want to suggest a simple proposition: that radio listeners "are entitled to know by whom they are being persuaded". That proposition, borrowed from the Applicability of Sponsorship Identification Rules in the US, is what underpins everything the Communications Law Centre wants to say about this matter. Radio listeners "are entitled to know by whom they are being persuaded". They shouldn't have to fight for it, they shouldn't have to pay for it, they shouldn't have to tune into Media Watch to uncover it. They have a right to know by whom they are being persuaded.

The issue for this inquiry is whether 2UE's listeners have known who it is who's been trying to persuade them, what existing laws say about it, and what they should say about it in the future.

Our conclusion is that we need some more laws about this matter. The Communications Law Centre doesn't come to that conclusion easily - we generally prefer to keep governments out of too much detailed regulation of media content. We have, for example, been consistent opponents of the government's plans for legislation regulating Internet content.

[Anyone who saw a movie called *Wag the Dog*, in which Robert de Niro plays a film producer hired to produce a distraction to keep the media off the trail of a Presidential sex scandal in the last days of an election campaign, will probably remember the conversation when de Niro first explains his plan. He's going to produce a war - not a real war, of course, just TV images of a war, that will run every hour of every day. But they'll find out, protests his colleague. Who'll find out? asks de Niro. The American people, she replies. Who's gonna tell 'em? he smiles.]

Circumstances in which conflicts may arise

During the course of the hearings, the panel heard a number of statements about the "blurry lines" between different types of broadcast material - advertisements, advertorials, editorial and so on.

While the borders may be blurry, licensees must ensure that listeners are not misled about the nature of the content they are receiving. The current regulatory framework provides this with reasonable clarity (although, for reasons discussed later, we are suggesting that certain issues need tightening up). If material is advertising, it is clearly caught by FARB Code 3 and the requirements of the Trade Practices Act. If material contains a promotional element, it may be caught by FARB Code 3, and may fall under section 52 Trade Practices Act (partly because it is excluded from the media exemption under s65A of that Act). News and current affairs program content should not mislead listeners - Code 2 covers this. This means that promotional arrangements and other issues which might be relevant to listener's perceptions about the credibility of the program must be disclosed.

The difficulty may lie in the fact that the current framework is not explicit enough in its intentions and the relationships between the BSA and the TPA insufficiently tested and understood.

The public interest in fair and accurate presentation of news and current events is not well served if commercial radio is dominated by commentators who have commercial ties with organisations who are in the public eye and the subject of public discussion or controversy. The practice of private endorsement agreements between announcers and other organisations which involve on-air obligations should be discouraged. However, commercial realities and the legal unenforceability of restraint of trade provisions mean that licensees may not be in a position to prevent announcers from entering into broader promotional arrangements.

In our view, the existence of undisclosed promotional agreements which contain a range of broadly expressed obligations can be similarly, if not equally misleading to listeners. As Counsel assisting the ABA stated in his opening address: "As a matter of ordinary human observation, one would have to say that a person who is known to be paid by a sponsor is likely to be listened to with a little more scepticism than a person who is thought to be making the observations entirely gratuitously". This proposition would have to apply to both on-air and off-air promotional agreements.

It is important in this context to distinguishthe public interest from commercial interest. The ABA should *not* be concerned with whether announcers are using a licensee's airtime for personal gain. This is a commercial issue between the announcer and the licensee. The ABA should be concerned that listeners are *not being misled*.

In our view, listeners will be misled if:

the announcer or station has a *relevant interest* inthe *subject matter* of a program; and
listeners are *unaware* of the relevant interest.

A "relevant interest" may include any payment or benefit received in connection with the promotion of a person or organisation mentioned in or affected by the program. It may include an agreement to *refrain* from making negative statements. It may include a s hareholding or other financial interest. The concept of disclosure of "conflict of interest" is very familiar in company law and is not unknown to print journalism. It is appropriate that it also apply to the practice of broadcasting.

Listeners will be unaware of the relevant interest where there has not been *effective disclosure* of it. Where there is effective disclosure, it will be up to listeners to make up their own minds about the announcer's or the station's credibility and for the station to judge whether the existence of numerous "relevant interests" in program material is good or bad for ratings.

Responsibility for editorial standards in media organisations: principles and practice

No different standard for employees and independent contractors

The Law

There are a number of laws and self-regulatory codes which may have been breached by the conduct which is the subject of this inquiry. These include the self-regulatory codes of practice developed by the commercial radio industry under the Broadcasting Services Act (BSA), the Radio Licence Fees Act and some provisions in Part IV and Part V of the Trade Practices Act.

The Broadcasting Services Act and the FARB Code

The BSA includes among its objects:

"to encourage commercial and community broadcasters "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." (s3(g))

Section 4(1) states the intention of Parliament:

"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."

Part 9 of the Act provides for the making of program standards by the ABA, and, for the making of codes of practice by radio and television industry groups and their registration by the ABA. The ABA must make standards for commercial television licensees relating to programs for children and the Australian content of programs. Codes of practice developed by industry groups may relate to a numebr of matters, including "promoting accuracy and fairness in news and current affairs programs." (s123(2))

Where a registered code is not operating to provide "appropriate community safeguards" for a matter referred to in section 123(2), section 125 requires the ABA to determine program standards "if the ABA is satisfied that it should do so".

Under the terms of reference for this Inquiry, the ABA is required to make findings in relation to specified matters. These findings will be applied to the question of whether the ABA will:

take enforcement action against 2UE under the BSA (eg impose a licence condition requiring compliance witha code);
need to implement a program standard;
make recommendations to the Minister on the operation of BSA.

The ABA has directed its Inquiry at whether 2UE is in breach of paragraphs 2.1(c), 2.2(a) and (d) and 3.1(a) of the Commercial Radio Code of Practice ("FARB Code"). These state:

2.1 News programs (including news flashes) broadcast by a licensee must ...

(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...;

(d) viewpoints are not misrepresented...;

3.1 Advertisements broadcast by a licensee must:

(a) not be presented as news programs or other programs.

This submission does not attempt to exhaustively list instances of conduct in breach of the FARB Code or pre-empt the findings of the panel on matters where it will have to weigh substantially conflicting

evidence. However, there appears to be substantial prima facie evidence that 2UE has acted in breach of the FARB Code.

Conduct by announcers

First, the following kinds of conduct have been engaged in by Mr Laws and Mr Jones:

Breach of Code 2.2(a) and (d) - accuracy and representation of viewpoints

1. Mr Jones and Mr Laws have signed endorsement agreements with their sponsors which contain provisions for them to make or refrain from making certain kinds of on-air statements.

Examples include:

[JL.0006.1233-42] April 1995 Optus agreement with John Laws which includes a provision for the "reading and embellishing of ....press releases on Radio Station 2UE during the Programme from advertising scripts and releases provided by Optus....".
[ASC.0001.0041] February 1999 agreement between Australia Street Consulting and Australian Bankers Association, which included a provision that Mr Laws "not bring the reputation of members of the ABA into disrepute during 1999".
[QAN.004.0697] June 1997 agreement between Jones and Qantas which included a provision that "where appropriate (in the opinion of Jones)", he wouldprovide "regular on air editorial comment on Qantas based legitimate news stories and topics proposed from time to time";
[ref] April 1991 agreement between Jones and Walker Corporation, where the three of Jones' four specified obligations relate to conduct on-air.

2. the making of on-air editorial comments during programs about parties with whom the announcers have an endorsement agreement , without the announcer disclosing the existence of the endorsement arrangement. On-air statements were made about each of the parties mentioned in the above examples,

3. the making of on-air editorial comments during programs about parties with whom the announcers have an endorsement agreement, as a consequence of the agreement, without disclosure.

Examples include:

Laws/ABA agreement:
[] Agreement between Jones and Walsh Bay entered into on 1 June 1998, and supportive statements made by Jones the following day. We note that Jones has given evidence that the statement was coincidental. While this is a matter of evidence for the panel, it would certainly be open to it to draw an inference that the statement was a natural consequence of the agreement, rather than a coincidence.

The Centre believes the existence of such agreements is of itself sufficient to constitute a breach of this provision of the Code, unless the existence of the endorsement agreement is disclosed. The announcer's viewpoint is misrepresented because the audience has not been made aware of the commercial arrangements, regardless of whether the announcers were in fact influenced by them. Whether or not the announcer held the same opinion before entering into the agreement, the commercial deal has irretrievably put the announcers in a position where they will be (or will be perceived to be) more reluctant to be critical of the advertiser/sponsor.

Code 3.1(a) - advertising presented as news or other programs

4. The presentation of paid advertising material in a manner which does not make it clear to readers that it is paid rather than program material.

For example:

The broadcast of a lengthy interview between John Laws and Hugh Rimington concerning the program *Australia's Most Wanted*. [date]

5. The presentation of a sponsored program interspersed by the announcer' s comments, in a manner which did not make it clear that the announcer's comments were separately paid for:

For example:

The 15-20 second break in the middle of *The Whole Story* inwhich Laws told listeners that "speaking of the whole story he had checked out the whole story on a particular banking issue of the moment and had been very interested to discover the whole story about the issue".

Throughout the hearings, witnesses and counsel have spoken of the "blurry line" between different types of editorial and program material. The Code is very clear on this point: "Advertisements should not be presented as news programs or other programs".

There should not be a blurring of this type of material. Listeners should not be misled. The panel has heard evidence that "live read" advertisements are charged at a higher rate than pre-recorded advertisements. Clearly, advertisers regard these types of advertisements as highly effective and are prepared to pay for them. Mr Conde's statement [at paragraph 2.8] says "The attraction of "live read" advertising to clients is the impression of immediacy and personal warmth conveyed by that form of commercial presentation. To a certain extent that impression is conveyed by the apparent spontaneity of the advertisement." [Brennan evidence]. [Laws statement re verging on]

Conduct by 2UE

The evidence given by 2UE executives suggests that 2UE was not aware some of the announcers' conduct. They described Laws and Jones as "independent contractors", rather than employees. Mr Brennan said in his statement that "Against this background it would be impractical and inappropriate for 2UE to exercise the sort of direct supervision that one might expect in the course of an ordinary employment relationship". (p7

However, the Code appears to provide for strict compliance: neither the element of licensee knowledge nor the status of whoever made the on-air comments is relevant to determining a breach. Codes 2.1 and 3.1 include a mandatory requirement ("News programs.....*must:*", "Advertisements broadcast....*must*"). Clause 2.2 requires that the licensee "*must ensure*" that the specified conduct is followed in relation to all broadcasts. The term "*must ensure*" suggests that it is the licensee's responsibility to put adequate measures in place to prevent a breach. The Codes are not confined to conduct by employees (as opposed to independent contractors) and the licensee does not escape liability through lack of awareness of the conduct which is found to be in breach.

Section 1.3 provides for this provision to be read down where the licensee's failure to comply was, among other things, due to reliance on another, or the fault of another person where the licensee took due diligence to avoid the breach.

Even if Codes 2 and 3 are read down in this way, the evidence before this hearing suggests that 2UE has, on a number of occasions, over a period of years, failed to exercise due diligence and, in so doing, breached the FARB Code. This has happened because 2UE has either authorised , allowed or failed to prevent breaches.

If the ABA finds that "reliance on another person" is sufficient grounds to excuse a licensee's conduct, then the Code reveals itself to be grossly inadequate in its allocation of responsibility and this inadequacy needs to be urgently addressed.

The Radio Licence Fees Act and understatement of gross earnings

While informationput before the inquiry appears to provide strong evidence that income earned directly by some announcers through their on-air activities should be treated as gross earnings of 2UE and its networked stations for the purposes of the radio Licence Fees Act, the CLC makes no submissions on this point.

The Trade Practices Act

The Trade Practices Act contains several prohibitions which seem relevant to the forms of conduct disclosed in this inquiry.

Misleading and deceptive conduct

Section 52 of the Act makes it an offence for a corporation, in trade or commerce, to "engage in conduct which is misleading or deceptive or which is likely to mislead or deceive". Section 65A exempts the publishing activities of "prescribed information service providers" from s52, except certain kinds of promotional activities. These include "advertising" and publication in accordance with an arrangement with a person who supplies goods or services or sells land of matter promoting, or in connection with, those goods or services or the land.

That is, if a media organisation is advertising, or publishing promotional material, it is no longer protected from the offence of misleading and deceptive conduct.

It's where consumer protection meets the freedom of the press. Advertisers and promoters can fall foul of consumer protection law, where "the press" can only fall foul of the Broadcasting Services Act.

The CLC believes that some conduct of which evidence has been provided to the hearing may constitute advertising or promotional activity, so as to prevent 2UE or the announcers relying on s65A and its state equivalents to protect them from committing the offence of misleading and deceptive conduct. This includes Mr Jones' on-air endorsements of the Walsh Bay development. Such statements may be misleading if they have not been accompanied by disclosure of the commercial arrangements entered into by Mr Jones. The CLC would submit that the existence of the agreements themselves, even without demonstrated evidence that announcers' on-air behaviour has been modified as a result, should be sufficient to constitute misleading and deceptive conduct. In these circumstances, it would be appropriate for the ACCC to investigate these and similar examples of conduct to determine whether any breaches of s52 or its state equivalents have occured.

Even more effective enforcement of the existing provisions of the TPA is likely to leave untouched some inappropriate forms of conduct, such as "misleading or deceptive" conduct which does not occur in trade or commerce, and is thus not caught by the TPA (eg. discussion of political issues). It may also leave untouched some forms of behaviour which appears to be neither advertising nor promotional, within the definitions of s65A (eg. an agreement not to make negative comment about an issue).

Exclusive dealing

The CLC also believes that some conduct about which evidence has been provided to the hearing should be investigated by the ACCC to determine whether it breaches the exclusive dealing provisions of the Trade Practices Act or its state equivalents. For example, there have been suggestions that particular on-air announcers require companies with whom they sign endorsement agreements to purchase advertising time on 2UE, and that 2UE or particular announcers will only agree to do live reads for one advertiser in a product category.