SUBMISSION

BY

THE MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

PRODUCTIVITY COMMISSION
REVIEW OF BROADCASTING LEGISLATION

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The Media Entertainment and Arts Alliance

Established in 1992 following the amalgamation of the Australian Journalists Association, Actors Equity and the Australian Theatrical and Amusement Employees Association, the Media Entertainment and Arts Alliance is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers and film and television technicians.

1. EXECUTIVE SUMMARY

The Australian Federation of Film and Television Associations (AFFTA) has submitted a response to the Productivity Commission's Draft Report. As a member of AFFTA and a contributor to that submission, the Alliance endorses the views outlined in that submission.

This submission principally confines itself to the cross-media rules, foreign ownership and Australian content.

The Alliance welcomes the Productivity Commission's recognition of the social and cultural importance of cross-media rules. However, we do not believe there is any compelling evidence that would warrant the repeal of the current cross media ownership regulatory framework.

The Alliance has reluctantly reached the conclusion that whilst an Australian owned media is the most desirable situation, this is unrealistic and the current rules have not been effective.

The Alliance welcomes the Productivity Commission's recognition of the need for levels of Australian content to be mandated in respect of drama, children's programming and documentaries. However, we also strongly support the retention of the overall transmission quota and the quota in respect of television commercials. Further, the Alliance believes that mandated levels of Australian content should apply in respect of predominantly drama, documentary and music pay television channels.

The Alliance appreciates the opportunity to make this response to the Draft Recommendations and to appear at the Public Hearings.

2. MEDIA OWNERSHIP

The Alliance welcomes the recognition by the Productivity Commission that concentration in media is a significant issue with social and cultural ramifications.

We also welcome the recognition that media ownership is already concentrated and that this impacts on content and diversity.

2.1 Cross-media rules

The Alliance believes the cross media ownership rules have one compelling argument in their favour: they work.

We believe this test, rather than any ideological purity, should be the basis on which their retention should be judged.

Since the introduction of the rules, there has been a significant expansion in the number of media players in major markets. In Sydney, for example, there has been an expansion from three players to five in commercial television and print alone.

As the Report rightly recognises, this is not just a national issue. The cross-media rules have had a significant impact in regional areas, breaking up previous local monopolies which were just as damaging to their own communities as national concentration is to Australia as a whole.

And it is clearly the case that the removal of the cross-media rules would result in an almost immediate reduction in diversity of ownership and the establishment of no more than two dominant media players.

Accordingly, the Alliance welcomes the Productivity Commission's recommendation that there should not be an immediate removal of the cross-media rules and the Commission's recognition that the likely impact of so doing would be a reduction in diversity.

However, we remain unconvinced that reform is warranted for its own sake unless it can be demonstrated that the current rules are causing some social harm that may outweigh all the good they are doing.

We do not see how the changes proposed by the Productivity Commission can meet this test.

We note the comments about the applicability of cross-media rules in a converged on-line environment and agree that there should be practical steps taken to ensure the dominant players in traditional media do not also come to dominate new media.

Unfortunately, the current evidence is that this dominance is extending to new media as the weekly figures for the most-visited – and what we know to be the most resourced – on-line sites reveal.

And there is evidence that a growing nexus between content providers and carriers is laying the ground for on-going dominance of the on-line environment by a small number of players.

One action that could be taken is to use cross-ownership rules to create a divide between content providers and delivery systems. By requiring owners of delivery systems – usually telecommunications companies – to sell equally to content providers, the probability of new players emerging would be greatly increased.

2.2 Foreign ownership

The Alliance has regretfully come to the view that foreign ownership of Australian media is a lesser evil than domination by a handful of Australian companies.

It is also clear, as the Report points out, that the restrictions have not been very effective in practice.

One major newspaper group, the News group, is foreign-owned and the other, Fairfax, has effectively been foreign-controlled, first by the Black consortium and then by BIL; and the Ten Network has been under effective foreign control, despite its actual ownership structure.

However, some restrictions are useful. The threat of the Foreign TakeOvers and Acquisitions Act was able to be used to prevent the Maxwell group from buying the Melbourne *Age* and the restrictions in the then Broadcasting Act forced the sale of both the Seven and the Ten Sydney and Melbourne licences by the News group in 1987.

Accordingly, we broadly support the recommendations in the Report.

2.3 Limits on television reach

There is no doubt that the restrictions on reach in the Act have failed to produce any alternative to the Sydney-Melbourne domination allowed by the two station rule in the previous act. Indeed, coupled as it was with aggregation, the 1987 changes shifted the balance of power to the networks from the regional operators, resulting in effective national networking.

However, we are of the view that extending the reach to 100% could have a negative impact on regional Australia and agree that further evidence should be sought on the effect of this rule.

2.4 Limits on the number of licences

The Alliance is not convinced that the removal of the limit on the number of radio licences in a single market would have no deleterious effect.

As the Report suggests, it is probably correct that owners of multiple licences in a single market would be encouraged to target the operations of each licence at a different segment of the market.

However, it does not follow that the different operations would benefit from any diversity in particular key operations, such as news and current affairs. Indeed, the evidence to date is that common licence holders already work from a single news and current affairs service. So, expanding the number of licences able to be held in a single market would correspondingly reduce diversity in news and current affairs information.

3. AUSTRALIAN CONTENT

The Alliance applauds the Productivity Commission's recommendation that the existing quotas for Australian first release drama and documentaries be maintained. The Commission is to be commended for its examination of these program types and its recognition of the vulnerability of such programming in the absence of strong protection mechanisms.

However, we are concerned that the Commission is not convinced that an overall transmission quota is required nor that a quota is required in respect of advertising or that Australian programming or other content regulation should apply to subscription television. We therefore appreciate the opportunity to make comment on these proposed recommendations.

3.1 Overall Transmission Quota

In suggesting that there is no need for an overall transmission quota, the Commission has looked at the extent to which local news, sport and infotainment programs fill the quota, noting: "These programs are naturally protected because they are not easily substituted by imported programs and are in high demand from both viewers and advertisers."[1] The Report also questions "whether all these program types contribute to stated cultural and social objectives."

Australian television drama programs rate highly and audience demand is easy to identify. Yet they are vulnerable to displacement by cheaper imported programming, a fact recognised by the Commission.

We believe that sport, news, current affairs, life-style programs and infotainment amongst other program types covered by the transmission quota will also be subject to replacement by cheaper imported programming. Further, we believe these program types play an important role in delivering the Government's stated cultural and social objectives. It can be argued that the overall quality and diversity of much programming needs analysis and that there is considerable room for improvement. However, that is a separate issue.

Free to air commercial television broadcasters are in business to sell advertising, not to broadcast programs. As the Productivity Commission Draft Report noted at page 219, "Advertisers pay for broadcasting time according to ratings, not community welfare, and will not pay more to advertise during programs with greater social or cultural benefits".

That free-to-air broadcasters currently transmit certain numbers of hours of Australian content and that audiences demonstrate a preference for such programming to continue does not, however, mean that this will be the case in the absence of regulation.

Ratings alone demonstrate the desire of Australian viewing audiences to see programming that is relevant to their own life experience, informs their views from a perspective that is accessible to them, reflects their own way of life and affords them the opportunity of seeing the nation's own stories on their screens. However, as indicated above, it is the ratings that the broadcasters seek and high ratings can be secured more cost effectively by purchasing programming from other countries.

The Productivity Commission's Report noted that the networks currently comply with the transmission quota. However, that compliance warrants consideration. For 1996

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[1] Productivity Commission, *Broadcasting, Draft Report*, October 1999, p.236

and 1997, the transmission quota was 50%. The following year the quota requirement increased to 55%.

Compliance with Transmission Quota

Network	Station	1996	1997
7 Network	ATN 7	56.40%	52.70%
	HSV	57.35%	56.01%
	BTQ	57.61%	53.86%
	SAS	60.98%	61.08%
	TVW	60.54%	58.95%
9 Network	TCN	60.60%	62.90%
	GTV	59.10%	60.00%
	QTQ	62.50%	63.50%
10 Network	TEN	51.32%	50.90%
	ATV	51.32%	50.90%
	TVQ	51.32%	50.90%
	ADS	51.32%	50.90%
	NEW	51.32%	50.90%

Compliance for 1997 showed a consistent decline over the previous year for the Seven Network for all but SAS. Conversely, the Nine Network showed a consistent but small increase. The Ten Network showed a consistent decrease with all stations screening the bare minimum at 50.90%.

Thus whilst Seven and Nine exceeded quota to differing degrees with trends going in different directions, the figures for Network Ten indicate that they will air only what is legally mandated. Network Ten is the lowest cost network with the highest earnings before interest and tax. Reporting in *BRW*, Adele Ferguson noted "the recipe for Ten's fat margins and strong shareholder return is simple: spend no more than 31% of total advertising revenue on programming and keep the profit stable."[2]

Interviewed for that article, Ten Network Chief Executive John McAlpine said, "We are number three in the ratings game, so why should we spend big on programs to get to number two or number one? Advertisers are always going to want to advertise on the third-ranked commercial network, particularly if it has a niche demographic [the 16-39 age group] and it is pitched cheaper than the other networks."[3]

The clearest example of what happens to content in the absence of quota is that of New Zealand. Without a transmission quota, New Zealand has struggled to achieve New Zealand content levels in excess of 21%. The results for 1998 showed a promising increase to 24% but on closer examination the increase was due to coverage of the Commonwealth Games and a dramatic increase in repeats now running at 26% of total hours, up from 16% four years previously.[4]

In coming years the free to air broadcasters will face increased competition from pay television – an unregulated industry in respect of content for all but drama channels. It is unlikely in the absence of a transmission quota that they will opt to continue to produce and/or commission Australian programming when their perceived competitors have no obligation to do so.

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[2] Ten's Fuzzy Future, Adele Ferguson, BRW, October 22, 1999, p32.
[3] Ten's Fuzzy Future, Adele Ferguson, BRW, October 22, 1999, p32
[4] NZ On Air, Local Content Report, 1999

For these reasons, the Alliance believes that program types not protected by sub-quota will be subject to displacement in the absence of an overall transmission quota.

3.1.1 Sport programs

Australians are enthusiastic sports viewers. For many, it is central to the way they view their lives. It informs, indeed dictates, the manner in which they utilise leisure time. That sport is important to Australia can be demonstrated by that fact that Australia's sports industry is larger than the nation's grain industry or car industry. Sport is a relatively high cost form of programming that is consequently susceptible to replacement by cheaper imported programming. As pay television channels increase, sport is already being siphoned away from the free-to-air broadcasters, hence the need for anti-siphoning rules.

However, even with the current transmission quota in place for commercial free to air television broadcasters, Australian televised sport does not represent the diversity of sport played in Australia. Broadcast sport is heavily skewed towards the mainstream male dominated sports of the major football codes, cricket, car racing and horse racing. Coverage of Australian soccer is under-represented on Australian television screens and the position for all women's sports is woeful. This is undoubtedly in part the reason that while 54.9% of males have been found to regularly watch sports programs, the figure for women is only 22.2%.[5]

Australian audiences for overseas sport are already well-established.

Programs like the highly successful British *Pot Black* demonstrate that Australians will watch sport of any kind from anywhere if well produced. Obviously, broadcasts of test series cricket, world soccer and so on demonstrably have committed audiences.

If an overall transmission quota is removed, over time, we are more likely to see Australian audiences' desire to view soccer, basketball and baseball satisfied by the low-cost acquisition of American basketball and baseball and European soccer than satisfied by the costly alternative of outside broadcasts of Australian basketball, baseball and soccer games. All would attract the ratings required to secure the advertising revenue needed by the broadcasters to ensure financial viability. But acquiring the rights to overseas sports programs is cheaper.

3.1.2 Talk shows and light entertainment programs

The popularity of American programming such as *The Oprah Winfrey Show* and the *Late Show With David Letterman* gives cold comfort to those who might expect Australian talk shows would not be subject to replacement by imported programs. The increasing popularity of 'reality television' being produced in the United States, for instance *Judge Judy*, is also like to create increased competition for Australian lifestyle and infotainment programming in a deregulated environment.

3.1.3 Religious programs

While the ABC consistently produces excellent religious programs, for instance *Compass*, the commercial broadcasters already primarily rely on overseas programmes to fill religious programming slots usually broadcast outside current transmission quota hours, for instance the American *Hour of Power*.

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[5] Measuring Community Benefits of Australian TV Programs, Bureau of Transport and Communications Economics Occasional Paper 113, F, Papandrea, p17

3.1.4 Compilation programs

Australian programs that, by contrast with drama, are cheap to produce such as compilation programs like *Australia's Funniest Home Videos*, could also be replaced with even cheaper imported programming. Whilst there is undoubtedly a direct equivalent to *Australia's Funniest Home Videos* produced elsewhere, Australian audiences have already seen a range of similar programs from overseas with no Australian components, including compilation shows of the world's worst commercials, the world's worst drivers, and so on.

Whilst the intrinsic merit of programs such as *Australia's Funniest Home Videos* could be debated, they nonetheless do provide an Australian perspective and reflect some aspects of what constitutes life in Australia.

3.1.5 News and current affairs

NBC Today and *NBC Meet The Press* currently go to air outside transmission quota hours and in a deregulated environment would offer competition to programs like *Good Morning Australia* and similar programs. Expenditure on Australian produced news and current affairs is already experiencing a downward trend, dropping from $336.9m in 1993/4 to $277.8m in 1996/7.[6]

3.1.6 Programming in accordance with audience preference

In contemplating whether the overall transmission quota is needed in order to protect program types not covered by sub-quota it is worth reviewing past performance.

During the 1960s, an overall transmission quota was in place that was consistently breached. Administered by a sympathetic Australian Broadcasting Control Board (ABCB), non-compliance went unremarked.

Australian Content: Sydney Commercial Stations[7]

		ATN		TCN	
Period	**Quota**	**%**	**Hrs/week**	**%**	**Hrs/week**
1959-60	-	38.60	35.75	32.00	24.00
1960-61	40%	37.8	33.00	36.20	33.25
1961-62	40%	34.10	28.75	39.7	35.50
1/7/63-19/1/64	40%	36.3	34.25	39.00	35.25
1/7/64-17/1/65	45%	39.4	28.25	43.7	32.00
18/1/65-30/6/65	50%	44.4	35.50	49.00	37.50
1965-66	50%	37.9	33.25	41.90	36.00

By 1966, only two of thirteen metropolitan commercial stations complied with the quota. The scant regard given to compliance and the paternalistic approach of the ABCB in taking no action earned strong criticism. Following the Vincent Committee's report and public outrage, regulatory changes were introduced. Although compliance improved substantially from 1967, the low levels of Australian content broadcast during the early sixties are an indication that in the absence of appropriately administered regulation, the levels of Australian content will slip if cheaper programming can be acquired that will still secure an audience for the advertisers.

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6 *Get The Picture*, Australian Film Commission, 1998, p65

7 Cultural Regulation of Australian Television Programs, F. Papandrea, Bureau of Transport and Communications Economics, Australian Government Publishing Service, Canberra, 1997, p75

Further, evidence that the broadcasters show whatever will draw viewers at the cheapest price possible to attract audiences of sufficient size to sell advertising space can be found in their lack of response to audience preference.

Documented evidence that audiences would like to see an increase in Australian news, current affairs, documentaries, light entertainment and children's programming has gone unheeded[8].
The results of the survey undertaken by Franco Papandrea to measure the community benefits of Australian TV programs for the BTCE provide an interesting insight into community viewing habits. Papandrea found that respondents regularly watched the following program categories :

News and current affairs	80.8%
Movies	46.4%
Documentaries	41.2%
Sports	38.9%
Series/serials	23.0%
Game/panel shows	16.4%
Children's programs	8.5%

Papandrea found there was a substantial unmet demand, 25% of respondents wishing to see more Australian news and current affairs, 51% wanting to see more documentaries and 22% wanting more light entertainment programs. Interestingly, only 6% wanted to see more game/panel shows, compared with 29% who felt there were too many.

He also confirmed results of earlier studies, Throsby and Withers (1994) Thompson, Throsby and Withers (for the Australia Council, 1983), namely that there is widespread positive perceptions of the benefits of Australian film and television programs.

Importantly, Papandrea found that despite the widespread belief that Australian programs are more meaningful to viewers than imported ones and add to an understanding of the country and their way of life, only 35% of respondents agreed that Australian television would appeal less if fewer Australian programs were shown.

Whilst Papandrea concluded that this indicated many Australians felt some Australian programming was inferior to some imported programming, the Alliance believes that the more appropriate conclusion is that viewers will continue to watch television even if their stated preferences for enhanced levels of Australian news, current affairs, light entertainment and so on are not delivered.

In 1994, the Australian Bureau of Statistics published its first nation-wide Time Use Survey in Australia. Time spent watching television dominated all leisure activities.

Use of Leisure

Activity[9]		**Average Time Spent Per Day in Minutes**
Social life and entertainment	Socialising	77
	Associated travel - social	17
	Visiting entertainment & cultural	4

[8] Measuring community benefits of Australian TV programs, BTCE Occasional Paper 113, F. Papandrea, Commonwealth of Australia, 1996

[9] *The Arts: Some Australian Data, The Australia Council's Compendium of Arts Statistics, Fifth Edition,* Australia Council, 1996 quoting Australian Bureau of Statistics 1994, *Time Use on Culture/Leisure Activities 1992* (Catalogue No. 4173.0)

	venues	
	Sports events	2
Active leisure	Sport, exercise & outdoor activities	27
	Hobbies, arts, crafts, etc	8
	Games, cards, etc.	6
	Holiday travel, driving for pleasure	5
	Associated travel (excl holiday)	5
Passive leisure	**Watching TV or video**	**108**
	Reading	23
	Relaxing, thinking, etc.	36
	Talking (include phone)	16
	Listening to radio, CDs etc	5
	Writing/reading own correspondence	2

With such a strangle hold on Australian's leisure time, the Alliance believes that Australian audiences will continue to watch television at current rates of consumption even if their preferences in programming continued to be ignored.

Without regulation, it is doubtful broadcasters would deliver an adequate level of Australian content despite audience preference. If cheaper imported programming will still attract audiences, displacement of more expensive Australian programming will be inevitable in the absence of regulation.

3.2 Creative elements test

Rather than relaxing the creative elements test in the Australian Content Standard, the Alliance is strongly of the view it needs strengthening.

3.2.1 The case for strengthening the definition of an Australian program

The Alliance considers the current creative elements test has served the industry and the Australian television viewing audience modestly well to date. However, the changing nature of financing of television programs is resulting in a potential erosion of the integrity of the definition of an Australian program.

The current test of an Australian program is:

- the producer/s must be Australian (whether or not the program is produced in conjunction with coproducers or executive producers who are not Australian);
- either the writer/s or director/s must be Australian
- at least 50% of lead roles and 75% of supporting roles must be cast with Australian actors; and

the program must be produced and post-produced in Australia (although it need not be filmed in Australia).

Additionally, programs made pursuant to a treaty between Australia and another country, or pursuant to a memorandum of understanding between the competent authorities of two countries – in Australia's case the Australian Film Commission – and certified as a qualifying official coproduction are treated as Australian for the purposes of the Standard, as are programs that have been issued a 10BA Certificate by DOCITA. 10BA criteria require demonstration of a preponderance of Australian elements: nationality/residency of personnel; the cultural property, for instance the literary work on which the script is based; where it is made, ownership of the copyright and creative control. The production company must also be Australian.

Not surprisingly, the film and television production landscape has changed during this decade. However, the rate and nature of change accelerated dramatically during the year 1998/9 and appears set to continue to do so for the foreseeable future.

During 1998/9, Australian television drama production dropped significantly, whilst foreign production doubled and coproductions (official coproductions certified by the AFC and unofficial coproductions where creative control was shared with overseas personnel and usually with significant if not all finance deriving from offshore) trebled.

This is confirmed by the AFC's National Production Survey released in November 1999.

In response to rising industry concerns about the state of the Australian film and television production sector, the Hon Peter McGauran, Minister for the Arts and the Centenary of Federation, commissioned a report from the AFC and the FFC. This report was released by the Minister the day after the AFC's National Production Survey was released. This report provides evidence and analysis of the changes in the international market place that are adversely impacting on the Australian industry.

1998/9 was the first year in which producers accessed the official coproduction to produce long form television series.

Until 1998/9, the production of long form unofficial series with creative control shared between Australians and nationals of other countries that might count as Australian content was virtually unknown.

From July 1998 to November 1999, the output of long form unofficial and official coproduction series was as follows:

Title	**Duration**	**Comments**	**Potential Duration**
Beastmaster	22 x 1 hour	Official Australian/Canadian coproduction Still filming	22 hours
Lost World	22 x 1 hour	Official Australian/Canadian coproduction	22 hours
Dr Jeckyll & Mr Hyde	1.5 hours	Official Australian/Canadian coproduction Series pilot	22 hours
Farscape	44 x 1 hour	The first 22 hours have been complete, the 2nd 22 hours will be complete mid 2000	44 hours
Max Knight Ultra Spy	1.5 hours	Series pilot, shooting before Christmas	22 hours
Rubicon	1.5 hours	Series pilot, shooting in the New Year	22 hours
The Product	1.5 hours	Series pilot	22 hours
Untitled project	1.5 hours	Series pilot	22 hours
Total	**95.5 hours**	**Total if pilots go to one series**	**198 hours**

All the above productions are filmed entirely in Australia although none are set in Australia. All require the cast to speak with accents other than Australian, the majority in American accents. [*Farscape* is set in future space and whilst the lead role is an American played by an American the majority of the other characters are aliens/non-earthlings.]

The official coproductions are automatically counted as Australian under the Standard. The unofficial coproductions all have at least one Australian producer in addition to overseas producers, none have scripts written by Australians, all are being directed by Australians and all comply with the casting requirements of the standard.

None will be identifiable to Australian audiences as Australian productions.

It is undeniable that these programs provide considerable work for the Australian industry and the Alliance welcomes such programs and believes they bring considerable benefits to the country economically. They also assist the viability of the infrastructure necessary for the film and television industry.

However, the extent to which such programming will displace programs that will be recognised by audiences as being Australian programs is a matter of serious concern for the Australian industry and for the Australian community.

The Alliance believes the definition of an Australian program needs to be reviewed and strengthened as a matter of urgency.

3.2.2 The case against removing non-creative cast, crew and production services from the definition of an Australian program

The Alliance suggests that proposing the removal of non-creative cast, crew and production services from the definition is to not fully appreciate the production process.

3.2.2.1 "Non-creative" personnel and production services

The production of film and television programs is a collaborative creative complex process at all levels and all phases of production. It is not the case that creative participants are restricted to the roles of writer, director and producer. The production process constitutes a complex interrelated web of creative collaborations working from the foundations laid by the writer in the script, steered to fruition by the director working within a framework constructed by the producer.

The creative personnel are by no means restricted to the positions of writer, director and producer. Obviously performance is a creative process and all actors performing roles are centrally concerned with the creative realisation of the written word.

The cinematographer, the production designer, costume designer, makeup artist, hairdresser, editor, camera operator, visual effects supervisor, props buyer, continuity, set decoration, sound mixer, puppeteer, animatronics fabricator, dolly grip and foley artist are all creative roles. There are many more. On film and television productions, all management positions, including production management and assistant directors demand a high level of creativity. All are working on something that does not exist. All have to be able to creatively interpret the script and the director's conveyed spoken interpretation of that script to achieve an end product – the completed film or television program.

3.2.2.2 Career paths

To remove the requirement for "non creative cast, crew and production processes" is also to remove the possibility of the nurturing the next generation of filmmakers.

Career paths in the film and television industry are many and varied. For cinematographers it is most often the case that a person starts as a clapper/loader, moves to focus puller, camera operator and finally to cinematographer in a clearly defined career path.

However, for producers and directors it is a different matter. Lynda House, producer of *Muriel's Wedding*, started in the industry as a runner. Andrew Mason, producer of the *Matrix* worked for many years as a visual effects technician, as production manager of a film laboratory and as a visual effects supervisor before moving into producing. *Picnic at Hanging Rock* and *Gallipoli* producer, Patricia Lovell started her career in the industry as an actor and television presenter.

Gillian Armstrong first worked with Margaret Fink as a props buyer *on The Removalists*. Five years later, Armstrong directed her first feature film, *My Brilliant Career*, which Fink produced.

Director of *Shine*, Scott Hicks, started as a 3rd assistant director and many of Australia's most respected producers and directors including Peter Weir, Richard Brennan and Chris Noonan served their apprenticeships at the Commonwealth Film Unit starting out as production assistants. The Commonwealth Film Unit's camera department was the training grounds for some of the world's best cinematographers including Dean Semler and Don MacAlpine.

Since the establishment of the Australian Film Television and Radio School (AFTRS) there may be some misapprehension that graduating from that tertiary institution is in many ways similar to graduating from university with a law degree – one simply needs to find a job and that's all there is to it. The film and television industry is dramatically different.

P.J. Hogan graduated from the AFTRS in 1983. It was three years before he directed his first feature film, *The Humpty Dumpty Man* in 1986 and another eight years before he directed his second, *Muriel's Wedding* in 1994. Hogan has now gone on to a career in the United States directing films such as *My Best Friend's Wedding*. His partner, Jocelyn Moorhouse graduated the same year. Her first job after graduating was as a script editor working in network television. She directed her first feature film, *Proof*, in 1991, eight years after graduating. Moorhouse is also now working in the US with *How to Make an American Quilt* and *A Thousand Acres* to her name.

The first intake of the AFTRS was for a one year directing degree in 1973. Of the students of that first year, Phillip Noyce (*Patriot Games, Clear and Present Danger*) directed his first feature *Backroads* four years later in 1977; Gillian Armstrong directed *My Brilliant Career* in 1979 and Ron Saunders, currently ABC Head of Television Drama, went on to an illustrious career, not as a director, but as a producer.

The production assistant on *A Current Affair*, the props buyer on *Water Rats*, the assistant editor on *Blue Heelers* may or may not go on to become directors of international distinction and merit. Maybe they want to or maybe they have other ambitions. If they do want to, it is impossible to know whether they will make it. In any event, their current work is part of a collaborative creative process, their contribution essential to realising the vision of the program's writers, directors and producers.

3.2.2.3 Sustaining a critical mass for a viable industry

It is difficult to see any merit in a proposal that would or could diminish employment opportunities for Australians in an Australian industry. Around the world, film and television industries actively promote the engagement of nationals in their cultural industries. It makes sense both culturally and economically.

Australia has a sophisticated approach to non-Australians working in the television industry that is underpinned by a complex set of principles that are social, cultural and/or economic.

Australia has recognised that different criteria need to be applied to the assessment of non-nationals engaged in the film and television industry for different categories of program types as follows:

- Programs in receipt of government subsidy

Restrictions on the use of non-nationals is most restrictive for programs utilising government subsidy.

- Programs seeking certification as Australian content

Quota is a form of indirect government subsidy as eligible programs achieve higher levels of licence fees. The restrictions are considerably more relaxed than is the case for programs in receipt of direct government subsidy.

- Coproductions

Either official coproductions or unofficial coproductions but where creative control is shared between Australians and non-Australians. Recognition is given to the collaborative nature of the production and the need to achieve a balance between the two coproducing nations and engage nationals of each country.

- Offshore productions financed with offshore funds

Namely overseas productions filming in Australia because it is cheaper or because of the suitability of locations that are produced by overseas companies, with offshore funds and having their primary market overseas, usually in the country of origin of the producer. Such programs engage overseas personnel if, by so doing, compliance with the net employment benefit criteria of the migration regulations can be demonstrated. In short, they need to demonstrate that reasonable opportunities have been offered to Australians.

Australia's system therefore allows for the differing needs of the differing program types. In many other countries, the approach is much blunter. Entry restrictions for persons wishing to work on a film and television production vary around the world. However, most require demonstration that the particular position could not be filled with a national and extensive labour market testing to substantiate the claim.

The most restrictive country is the United States. For performers, entry is reliant on establishing a career of international distinction and merit supported by information regarding above industry standard remuneration, internationally recognised awards, box office and critical acclaim of their work.

Thus, for instance, following her work in *Muriel's Wedding* and *Cosi* Toni Collette was able to secure work in the United Kingdom. However, even with leading roles in British films including *Emma*, *Velvet Goldmine* and Peter Greenaway's *Eight and a Half Women*, Collette was refused entry to the United States to perform a role in which she had been cast in a Broadway production of *Cabaret*. She finally secured approval to perform the lead female role in *The Sixth Sense*. Behind her she had the runaway success of *Muriel's Wedding*, three AFI Award nominations, two AFI Awards and impressive British credits.

Mel Gibson had critical acclaim, roles in box office successes, AFI Awards and credits that included *Mad Max, Mad Max 2, Mad Max Beyond Thunderdome, Gallipoli* and

The Year of Living Dangerously behind him before his role in the US production *Lethal Weapon.*

Given the barriers to entry, it is a testimony to the calibre of Australian actors, directors, producers and cinematographers that so many have been able to meet the tough US entry criteria and go on to careers identified by international acclaim. The restrictive barriers to entry to work in the United States are despite the fact that the American industry is without question the dominant player world wide and the least in need of protection.

Around the world, countries recognise international distinction and merit and labour market shortages as acceptable reasons for engaging non-nationals. It would be a curious position if Australia were to support the engagement of non-nationals for positions such as support cast and technical positions.

To remove the requirement for support cast, crew and production processes to be Australian would be to pull apart the industry's infrastructure and remove the talent base on which an Australian industry is reliant.

3.3 Television Commercials

Seemingly insignificant, the rollback of the Australian quota for television commercials to 80% in 1992 had a serious impact on the industry, despite the fact that the three commercial broadcasters currently exceed the quota. The commercials displaced by overseas commercials have been those with the highest budgets.

The change to the quota took approximately three years to impact on the industry. However, in examining the impact of the change to the quota, it is manifestly evident that there is a need for proper research.

Anecdotal evidence indicates the downturn in the production of Australian television commercials (TVCs) hit the industry in the years 1995 and 1996. The effects are still continuing. Available information indicates that whilst filming activity continues to increase it is hiding the true picture.

Footage (in feet) processed by Atlab Australia for TVCs

Year	16mm	35mm
1996/97	839,228'	3,800,000'
1997/98	887,939'	3,900,000'
1998/9	922,818'	4,100,000'

Thus, whilst footage processed since 1996 continues to increase annually, it is strongly believed by those in the industry that behind these figures lies a decrease in the production of the Australian TVCs and an increase in offshore commercials filming in Australia.

That this is the case is supported by anecdotal evidence that those engaged in postproduction are experiencing a significant downturn in work. Typically, offshore commercials, whilst they film in Australia for location reasons, take the footage back with them and complete the commercials in their country of origin. Consistent with this, therefore, is the fact that filming crews continue to work while picture editors, sound editors, composers, musicians and postproduction facilities are reporting dropping levels of work in TVCs.

An as yet unpublished survey conducted in November this year of picture editors and postproduction facilities found:

- 56% of editors and assistant editors had less work in 1999 than in 1998
- 9% of editors and assistants had no work at all in the past 12 months in their chosen profession as editors or as assistant editors
- 64% of editors surveyed expect work to decrease again next year
- 9% were considering, or had made the decision, to leave the industry.
- 88% of facilities had less in 1998 than in 1998
- 75% of facilities expect to have a decrease in business next year.

The television commercials industry is one key plank in maintaining the critical mass necessary for a viable film and television industry. There is considerable cross-over of employment between commercials, film and television drama, documentaries, and other forms of television programs. A viable television advertising industry is essential to ensure the ongoing pool of talent needed for a viable television industry. Both rely on a freelance workforce.

The Alliance believes that in the event the quota is removed the landscape will dramatically change.

Currently trends in advertising are difficult to quantify with any certainty. Like some other areas of television production, the market seems to be undergoing some significant change.

Until recently, use of foreign TVCs was primarily driven by a desire to cut costs and save money. However, in *Get the Picture* Mervyn Smythe observes companies "are increasingly motivated by a desire to standardise their marketing messages around the world. They are rationalising their product lines, dropping products which might be profitable but are not core activities, aligning advertising agencies world-wide on accounts, making pack designs uniform across different countries and using the same TVCs globally."[10]

Smythe continues, "There appears to be an increase in the number of locally made commercials which are tactical in nature and frugally made. These support much more expensive umbrella TVCs from corporate headquarters overseas."

Consequently, as indicated above, Australian production companies have become much more focussed on capturing work from overseas clients.

3.3.1 Social and cultural role of advertising

The Alliance is concerned that the Commission has not recognised the social and cultural role that advertising plays in Australian society. The Alliance strongly believes that commercials form part of the cultural content on television.

Outraged viewers calling the Alliance to complain about American commercials clearly believe commercials constitute a cultural component of television. To quote a recent telephone complainant to the Alliance: "How many Americans does it take to show an Australian how to wash their hair?" Consistently such complaints are motivated not by "American bashing" but from a view that it is appropriate for advertising within this society to emanate from this society and reflect this society rather than from another.

Advertising, especially television advertising, has long been recognised as being the most pervasive and influential form of advertising – hence the banning of tobacco advertising was first implemented in respect of television; and hence forms of

[10] *Get the Picture*, AFC, 1998, p91

advertising are restricted to ensure some products are not advertised in an age inappropriate manner.

Advertising in many ways reflects a society back to itself in the same way as drama programs. As with most forms of television programs, whilst Australia might broadcast a diverse range of program types, they do not reflect the social and cultural diversity of the community.

The impact this has on society is badly under-researched. In 1992, the Media Alliance commissioned a study which revealed that less than 2% of roles in mainstream Australian television drama were cast with non-Anglo performers.

This state of affairs was born out in the release the same year of Dr Philip Bell's report for the Department of Prime Minister and Cabinet Office of Multicultural Affairs, *Multicultural Australia in the Media*. That report found that neither television advertising nor television drama in any way adequately reflected the reality of multi-cultural Australia. Where non-Anglo Australians were represented in television commercials, it was by utilising stereotypes.

"Advertising ethnic group stereotypes continually reiterate the normality, power and idealised values of the middle-class Anglo-Australian consumer from whom they are dramatically different: it is not the actual depictions of ethnic stereotypes but their triviality when contrasted with the 'normal' that carries most ideological weight. Their differences mark out the norm, reinforcing the apparent naturalness of ethnocentric representations."[11]

Television advertising in 1992, as was the case with drama, was overwhelmingly monocultural in its exclusion rather than inclusion of diversity.

The Alliance is now undertaking in collaboration with the Queensland University of Technology another review of cultural representation on television. Whilst the research is not yet complete, early indicators are that the situation has improved since 1992, but only marginally.

As with drama programming, the impact advertising has on defining how a nation sees itself should not be underestimated. Just what the monocultural representation of Australia that airs twenty four hours a day means for all Australians who are not middle class or of Anglo background requires relevant research and assessment.

The fact that the diversity of Australian society is not adequately reflected in Australian TVCs (and other program types) is deplorable. However, the solution does not lie in repealing the quota. Rather potential solutions need to be developed from a base of comprehensive qualitative research.

Because of the social, cultural and economic role played by TVCs, the Alliance supports the reinstatement of the requirement that television advertising comprise 100% Australian content.

3.4 Pay Television

The history of Australian content on pay television offers two lessons.

Levels of Australian content are not achieved in the absence of an enforceable regime mandating specified minimum levels.

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[11] *Multicultural Australia in the Media*, Dr Philip Bell, Department of the Prime Minister and Cabinet, Office of Multicultural Affairs, 1992, p61.

The second is that predicting the future is a tricky business. The reason the legislation in respect of pay television is unenforceable is simply because predictions about how the industry would operate proved incorrect.

The Government is committed to the principle of reasonable levels of Australian content on pay television, a view the Alliance supports, and the legislation to make enforceable the expenditure requirement for Australian content on predominantly drama channels is currently before the Parliament.

The Alliance believes that:

- there must be a mandatory, transparent, accountable, enforceable requirement to broadcast Australian content on pay television;
- the 10% expenditure requirement be increased to 20%;
- the Australian content requirement for pay television should meet the objectives outlined in the Explanatory Memorandum of the Broadcasting Services Act, specifically that a licence condition be to "provide opportunities for the Australian dama production industry to provide new material for these services that people are willing to pay to watch";
- the definition of "new Australian drama" should mean new for all broadcasting (commercial, free to air, national, pay);
- Australian content requirements be extended to cover scripted learning, documentary and music services.

3.5 Evaluating the social and cultural effects of quota regulation

The Alliance welcomes the Commission's criticism that no "systematic evaluation of the quota's success in meeting the social and cultural objectives is currently in place".

We support the Commission's view that good public program design "should include regular monitoring and evaluation mechanisms".

As indicated above, the Alliance is concerned about the social and cultural impact of a television broadcasting service that pays scant regard to its obligations to reflect the cultural diversity of the community.

4. CODES OF CONDUCT

The success of the system of self-regulation enshrined in the Broadcasting Services Act is itself on trial in the current inquiries into the activities of talk back radio.

These inquiries will test whether the system set up by the Act are sufficient to deal with the very real public revulsion at the matters those inquiries are revealing.

The Alliance has made certain recommendations for practical action to the 2UE Inquiry, together with community interest groups such as the Communications Law Centre. A copy of those recommendations are attached.

4.1 Freedom of expression

The Alliance strongly supports the Commission's recommendation that a further objective "to promote the public interest in freedom of expression" be added to the objectives in s. 3 of the Act. It will provide a clear declaration of an important public policy.

4.2 Regulation of on-line content

The Alliance remains strongly opposed to the recent amendments to the BSA which seek to regulate on-line content. The reasons for our opposition – and that of many others – are succinctly summarised on page 269 of the Report.

Accordingly, the Alliance strongly supports any review of the amendments which holds out any hope for repealing these restrictions on freedom of speech which are doing so much to make Australia a subject of ridicule in the on-line community.

ATTACHMENT

Communications
Law Centre

Submission to the Inquiry into Radio Station 2UE

Australian Broadcasting Authority

November 1999

Introduction

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 199l 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.

How others handle “cash for comment” : the US experience

One of the defining element s of American society is its commitment to free speech, as formulated in the First Amendment: "Congress shall make no law abridging free speech". Yet the US takes a very much more interventionist attitude to “cash for comment” than Australia, and has done since the beginning of radio in the 1920s.

Overview

Working under the long standing principle that the listening public is “entitled to know by whom they are being p ersuaded”[1] the *Communications Act* of 1934[2] expressly prohibits the undisclosed payment or acceptance of money or other valuable consideration in exchange for the inclusion of material in a broadcast program, otherwise known as “payola.” Whether the valuable consideration is cash, cars, or free travel given to a disc jockey, talk show host or program director with the understanding of influencing the material broadcast, the payment must be disclosed to the station. Similarly the station, if it broadcasts the material, must disclose the “sponsorship” to its listeners. Persons who engage in “payola” are subject to criminal penalties of one year in jail and $10,000 per offence. Stations are subject to sanctions from the FCC if they fail to exercise reasonable diligence in ensuring that their employees or others with whom they deal do not engage in payola, and that any sponsored broadcast is identified as such. Sections 317 and 507 of the *Communications Act* of 1934[3] work in tandem to impose prohibitions and penalties on licensees, employees and hidden sponsors for non-disclosure of payments.

Licensees

The requirement that licensees disclose all sponsorship of program matter was first found in the Radio Act of 1927 and continued as Section 317 in the Communications Act.[4] The Federal Communications

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1 *Applicability of Sponsorship Identification Rules, Public Notice* 40 Fed.Reg. 41936 (1975)

2 Communications Act of 1934, “The Act” or “The Communications Act”, 47 U.S.C. " 317, 508.

3 Communications Act of 1934, “The Act” or “The Communications Act”, 47 U.S.C. " 317, 508.

4 Section 317 provides,

Commission (FCC) implemented Section 317 by adopting Section 73.1212 of its rules.

The sponsorship rules require that any material broadcast in exchange for money, services or other valuable consideration be accompanied by a sponsorship identification or disclosure. The announcement must clearly advise the audience that the time was purchased and who purchased it.[5] An announcement is not required where services or property were furnished free or for a nominal charge, unless the item was furnished in exchange for prominent display of the product's name or trademark beyond that reasonably related to the use in the broadcast.*6* The courts have held that the rules apply to all broadcast matter, in a case involving a children's television show based on action figure merchandise.[7] A consumer group challenged the license

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Announcement of payment for broadcast -- Disclosure of person furnishing

(a)(1) 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: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

Disclosure to station of payments

(b) In any case where a report has been made to a radio station, as required by section 508 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.

Waiver of announcement

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

Rules and regulations

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

47 U.S.C. ' 317

5 47 C.F.R. ' 73.1212(a*)*

6 47 C.F.R. ' 73.1212(a)(2).

7 *NABB v. F.C.C.*, 830 F.2d 270, 277 (D.C. Cir. 1987).

renewal of a station that broadcast this program alleging the broadcast required a sponsorship identification of the action figure manufacturer. The FCC dismissed the challenge stating that Section 317 did not apply to children's programs unless "the broadcast is so interwoven with commercial matter that the entire program is commercial in character."*8* The D.C. Court of Appeals held that the FCC's interpretation of Section 317 was inconsistent with the clear language of the statute and the FCC's own past practice.[9]

In the area or political broadcasts and broadcast matter involving the discussion of a controversial issue of public importance the FCC has adopted tighter requirements for sponsorship disclosure. As the Commission stated,

[T]he obligation upon the licensee to disclose, and the right of the listening and viewing public to know by whom it is being persuaded, is greater in the area of political and controversial issue programs than it is in the case of commercial programs…. Perhaps to a greater extent today than ever before, the listening and viewing public is being confronted and beseeched by a multitude of diverse, and often conflicting, ideas and ideologies. Paramount to an informed opinion and wisdom of choice in such a climate is the public's need to know the identity of those persons or groups who solicit the public's support.*10*

Thus for political broadcasts or broadcast matter involving a controversial issue of public importance the FCC requires more frequent and more thorough identification of the sponsor. and greater specificity of the or furnishing material. [11] Stations must exercise reasonable diligence in determining the true identity of those sponsoring the program or on whose behalf the political programming was broadcast.*12*

While the provision of news releases to station and editorial comment based on the release does not require an announcement, in the case of political or controversial issues Section 73.1212(d) requires that an announcement be made for the use of any film, record, transcription, talent, script or other material or service furnished directly or indirectly to a station as an inducement for broadcasting such matter. This rule is drawn from illustrative interpretations of Section 317 that the FCC set

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8 *Id.* at 275.

9 *Id.*. at 277.

10 *Amendment of Sponsorship Identification Rules, Report and Order*, 34 F.C.C. 829, 849 (1963)

11 47 C.F.R. " 73.1212(a)(2)(ii), (d), (e) (Specifying the size and duration of sponsorship label, requiring announcements at beginning and end of broadcast, requiring station to retain a list of executive officers or members of sponsoring organisation)

12 47 C.F.R. " 73.1212(e); *Sponsorship Identification Rules, Report and Order*, 52 FCC 2d 701 (1975); *Loveday v. F.C.C.*, 707 F.2d 1443 (D.C. Cir. 1983) *cert. denied* 464 US 1008.

forth as guidance to stations. The illustrations relating to controversial issues are as follows:

35. (a) A trade association furnishes a television station with kinescope recordings of a Senate committee hearing on labor relations. The subject of the kinescope is a strike being conducted by a labor union. The station broadcasts the kinescope on a "sustaining" basis but does not announce the supplier of the film. The failure to make an appropriate announcement as to the party supplying the film is a violation of the Commission's sponsorship identification rules dealing with the presentation of program matter involving controversial issues of public importance. Moreover, the Commission requires that a licensee exercise due diligence in ascertaining the identity of the supplier of such program matter. An alert licensee should be on notice that expensive kinescope prints dealing with controversial issues are being paid for by someone and must make inquiry to determine the source of the films in order to make the required announcement. (*See KSTP, Inc.*, 17 R.R. 553 and *Storer Broadcasting Co.*, 17 R.R. 556a.) A station which has ascertained the source of kinescope is under an additional obligation to supply such information to any other station to which it furnishes the program.

(b) Same situation as above, except that the time for the program is sold to a sponsor (not the supplier of the film) and contains proper identification of the advertiser purchasing the program time. An additional announcement as to the supplier of the films is still required, for the reasons set forth above.

(c) Same situation as in (a) or (b), above, except that only excerpts from the film are used by a station in its news programs. An announcement as to the source of the films is required. (*See Westinghouse Broadcasting Co.,* 17 R.R. 556d).[13]

Station employees and others involved in broadcasting and program production

Section 317 applies only to payments to licensees and does not cover payola or payments to station employees. After a series of scandals involving fraud and corruption in the broadcasting industry*14* congressional hearings identified the prevalence of payola in broadcasting. While the media attention focused on payola in the nascent rock and roll industry, payola or plugola of retailers was what

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13 *Applicability of Sponsorship Rules, Public Notice,*40 F.C.C. 141 (1963)

14 In the late 1950s, corruption within the F.C.C. forced the resignation and later indictment of Commissioner Mack who allegedly accepted money in exchange for support of a television license applicant and the resignation of F.C.C. Chairman Doerfner for accepting hospitality from a station operator. The late 1950s also saw the scandal involving the rigging of the quiz show the "$64,000 Question" which resulted in a grand jury investigation and congressional hearings. R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 Journal of Law & Econ. 269, 287-288 (1979).

brought the issue to the fore. At the end of an inquiry into the rigging of a quiz show, it was revealed that a retailer had paid television network employees to insert plugs for his store. The retail store owner had also paid newspaper columnists for mentioning the store in their columns.*15* However, as newspapers were beyond the scope of the hearings the congressional committee declined to investigate the columnists.

Congress attacked the practices of plugola and payola as commercial bribery and a fraud on legitimate sponsors and the public.*16* However, as Section 317 only applied to station licensees, it could not reach the practice of payola to station employees. In 1960 Congress outlawed payola, prohibiting broadcast employees, or any persons involved in program production from accepting payment to provide on-air promotions or influence what is broadcast, without disclosure to the employer or licensee.

Section 507*17* requires:

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15 *Id.* at 290.

16 *See generally Id.*. at 286-299 (discussing the payola hearings of the 1950s).

17 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)

(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"

any employee or a radio station;
any person involved in the production or preparation of programming intended for radio broadcast;
any person who supplies programming intended for radio broadcast; and
any person who agrees to pay or pays a station employee, or persons involved in the production or preparation of programming;

to disclose any payments made or received for the purpose of including of material for broadcast to his or her employer, the licensee, or the person for whom the programming is being produced. The actual broadcast of the proposed material under a payola agreement is not a required element for a payola conviction.*18* The person need only agree to accept or pay the money, without disclosure to the station, for the purpose of broadcasting the material.

Sections 317 and Section 507 of the Act form a web of disclosure requirements to ensure the public is aware of the true identity and nature of a broadcast program. Station employees who are responsible for the selection of broadcast matter, including on-air personalities and program directors must under the law disclose any payments made to them by sponsors for product plugs or for influencing the content of the broadcast. The law requiring disclosure of payments extends to independent producers who produce programming for broadcast. Any person involved in the production of programming and the production company itself must disclose the fact that material in the program was as a result of a payment by another party. For instance, if a syndicated talk radio personality is paid by a manufacturer to include a product endorsement within the show he or she must disclose the fact to the producer who must in turn disclose this to the station licensee prior to broadcast of the program.

Broadcast licensees are required by Section 317 to identify sponsored programming during the broadcast, including when the sponsorship arose from a payment to an employee or other person involved in the program selection rather than to the advertising department. In addition to identifying the sponsors, broadcast licensees are required to monitor their employees and independent contractors who are engaged in program creation and selection. A licensee must exercise

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(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. 47 U.S.C. ' 508.

18 *United States v. Goodman*, 945 F.2d 125, 129 (6th Cir. 1991).

reasonable diligence to obtain information from employees in order to comply with the sponsorship rules, including information as required by Section 507. The FCC imposes a higher standard of care for station more susceptible to payola, ie. stations with greater influence measured by ratings or record reporting to chart services. Many licensees require their employees to sign an affidavit affirming that they will not accept any payments or gifts in exchange for broadcasting material and that they will not engage in outside business that might create a conflict of interest in program selection.

Enforcement

The Department of Justice has primary jurisdiction for enforcement of the payola provisions, although the FCC will also investigate incidents of payola as they relate to a station's compliance with the sponsorship identification rules and in the context of license renewals. The penalties for payola are more serious, though criminal convictions for payola are infrequent.*19* Persons who violate Section 507 of the Communications Act are subject to a $10,000 fine and one-year prison-term for each offence.*20*

The sponsorship identification requirements, on the other hand, are investigated and enforced under the FCC rules. A successful complaint against a station for breach of Section 317 can result in a monetary fine, or if sufficiently egregious, can result in license revocation. Violations of the sponsorship identification rules like any breach of FCC rule can be used against the licensee during license renewal proceedings. Breaches of the sponsorship identification rules are rare and the forfeiture amounts are relatively low. The FCC often issues less than three forfeitures in any year. The standard forfeiture amount for failure to identify paid programming properly is $10,000. Where the failure of the station to identify the sponsor could have lead listeners to expect that the program was not a commercial program, the FCC affirmed a forfeiture of $10,000.*21* In contrast where the identification of the sponsor was faulty, although the nature of the program as a commercial was evident the FCC lowered the forfeiture to $4,000.*22*

Allegations of payola, particularly in the music industry, continue despite the prohibition. In the late 1970s and again in the late 1980s, multiple grand juries were convened to investigate allegations of payola, tax evasion and conspiracy. The allegations in the 1970s investigations revolved around payments made to radio station employees by record company executives for increased air-play. Grand

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19 *Id.; United States v. Vega*, 447 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972).

20 Communications Act ' 507(g), 47 U.S.C. ' 508(g).

21 *Southern California Broadcasting Co. (KIEV-AM)*, 6 F.C.C. Rcd 4387 (1991).

22 *Jacor Broadcasting of Colorado (KOA-AM)*, 12 F.C.C. Rcd 9969 (1997).

juries in four cities issued seven indictments naming 19 people and six corporations. As a result:

a program director of a radio station was convicted of perjury for denying receipt of payola;
three record company executives pleaded guilty to conspiring to pay payola;
a general manager of a Union, New Jersey radio station was convicted for tax evasion for failing to report payola payments;
four executives from Brunswick Record Company were fined and given prison terms for tax evasion based on cash payments.

Most of those indicted were ultimately convicted of or pleaded guilty to tax evasion or perjury, rather than a violation of the Communications Act.*23*

The investigation in the late 1980s revolved around allegations of payola in the form of cash and drugs paid by independent record promoters to disc jockeys. Four people were indicted and faced a maximum of 23 years prison sentence and fines of up to $1,640,000.*24* The indictments were ultimately dismissed because of prosecutorial misconduct.*25*

Most recently payola allegations were raised by the *Los Angeles Times* in a series of articles on the music industry.*26* The articles alleged that radio stations were requesting payments or free concert appearances from recording companies in exchange for airplay with the threat of blackballing the artist if the offer were refused. Several observers noted that increased concentration of ownership in radio, resulting from relaxed ownership rules, enabled radio stations to exert such power to demand payments.*27*

A conviction resulted in recent investigations into payola in Los Angeles. In September 1999 a record company execut ive, after a trial in federal court, was fined $700,000 for paying radio stations to play records.*28* Earlier his company pleaded guilty to tax evasion and payola charges.

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23 Coase, *supra* note 13, at 305. J. Gregory Sidak and David E. Kronemyer, *The "New Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 Harvard J. L. & Pub. Policy 521, 546-548 (1987).

24 Fisher, Wayland Cooper Leader & Zargoza LLP, *Payola/Plugola Advisory*, December 1998.

25 *United States v. Isgro*, No. 90-50531 (9th Cir Nov. 25, 1992)

26 Chuck Phillips, Michael Hiltzik, *2 Officials Urge F.C.C. to Probe Possible Payola* , L.A. Times, Jan. 14, 1999; Chuck Phillips, Michael Hiltzik, *Radio Conglomerate Skirts Payola Laws, Critics Say*, L.A. Times, Dec. 16, 1998; Chuck Phillips, *Radio Pushes Bands for Freebies*, L.A. Times, Nov. 5, 1998.

27 Phillips, Michael Hiltzik, *Radio Conglomerate Skirts Payola Laws, Critics Say*, L.A. Times, Dec. 16, 1998

28 *Record Company Exec Fined in Payola Case*, L.A. Times, Business Section, Sept. 28, 1999.

Allegations of payola are common amongst radio and the music industry, but it also affects other areas of broadcast programming. In 1995, a television anchorman was fired for an unethical arrangement with a car manufacturer.*29* The anchor received 99 luxury cars from BMW over a two year period. While the anchor insisted he never promised favourable mentions on the air in exchange for cars, BMW officials maintained he promised to do car reviews. The television station's ethical guidelines, incorporated into his contract, prohibited the acceptance "gifts or free services from anyone in contemplation that the giver will receive some benefit from the station."[30]

As stated in the legislative history of the prohibitions on payola, or undisclosed payments for broadcast defrauds the public. During the congressional hearings prior to enactment of the payola prohibition Representative Orren Harris stated that payola undermines the public interest because "the quality of broadcast programs declines when the choice of program material is made, not in the public interest, but in the interest of those who are willing to pay to obtain exposure of their records."*31* Investigations into the practice by the US Attorney General and the Federal Trade Commission contended that listeners were deceived because they believed the programming was chosen based on the DJ's opinion of what is the best of current releases and are then led to buy these records.[0] Indeed the FTC viewed the "concealment of such payments is a deceptive act within the meaning of Section 5 of the Federal Trade Commission Act since listeners are misled into believing the recordings played are selected strictly on their merits or public popularity."*33* The FTC abandoned its investigation after the passage of the payola prohibition, believing the FCC was now the agency with jurisdiction over the matter.

Broadcast licensees are public trustees in that the government provides them with a powerful mechanism to influence millions of listeners or viewers. While the FCC has scaled back the public interest obligations imposed on licensees, the core obligations such as sponsorship identification remain. Unless otherwise identified the public assumes the programming presented is created by the licensee and his or her employees. Where this is not the case, whether by inducement to the

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29 Tim Kiska, *Broadcast execs tighten ethics guidelines after Pierce firing,* Detroit News, Dec. 8, 1995.

30 *Id.*

31 Coase, *supra* note 13, at 292 (quoting Responsibilities of Broadcasting Licensees and Station Personnel: Hearings before a Subcomm. of the House Comm. on Interstate & Foreign Commerce on Payola and Other Deceptive Practices in the Broadcasting Field, 86th Cong., 2d Sess. (1960) "1960 Congressional Hearings").

0 *Id.* at 310.

33 *Id.* at 295 (quoting 1960 Congressional Hearings at 641)

DJ to increase airplay of a record or to a news commentator to slant the news, the public is deceived and the licensee has committed a breach of the basic trust underlying his license.

Slanting the news

Intentionally distorting the news can lead to a loss of licence. The FCC considers rigging or slanting the news "a most heinous act against the public interest."*34* However, in light of the First Amendment implications, it is loathe to interfere with a stations' journalistic activities. Only in the most extreme cases will the FCC revoke or fail to renew a license based on allegations of slanting.

Under Section 309(a) of the Communications Act the FCC may grant a broadcast license that would serve the "public interest, convenience and necessity".[35] Petitioners may challenge a licensee's suitability with allegations of intentionally distorting the news. The Commission will consider such challenges:

when the petition presents factual allegations that, taken as true, make out a prima facie case that a grant of the license would not serve the public interest; and the allegations together with any evidence must raise a substantial and material question of fact as to whether grant of the license would serve the public interest.*36*

The Commission analyses both the substantiality and the materiality of an allegation of news distortion in determining whether it raises a question of the license grant being against the public interest.*37*

The Commission regards the allegation as material only if the licensee or its top management itself participated in, directed, or at least acquiesced in a pattern of news distortion. As the Commission stated,

[I]f the allegations of staging ... simply involve news employees of the station, we will, in appropriate cases ... inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status.... Rather, the matter should be referred to the licensee for its own investigation and appropriate handling.

.... Rigging or slanting the news is a most heinous act against the public interest .... [b]ut in this democracy, no Government agency can authenticate the news, or should try to do so.[38]

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34 *Hunger in America,* 20 F.C.C. 2d 143, 150 (1969)

35 47 U.S.C. ' 309(a)

36 *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

37 *Serafyn v. FCC*, No. 95-1385, at 4 (D.C. Cir. August 11, 1998)

38 *Hunger in America*, 20 F.C.C. 2d 143, 150, 151 (1969).

An allegation of news distortion will be considered substantial when two conditions are met:

First, the distortion [must] be deliberately intended to slant or mislead, it is not enough to dispute the accuracy of a news report … or to question the legitimate editorial decisions of the broadcaster…. The allegation of deliberate distortion must be supported by "extrinsic evidence," that is, evidence other than the broadcast itself, such as written or oral instructions from the station management, outtakes, or evidence of bribery.

Second, The distortion must involve a significant event and not merely a minor or incidental aspect of the news report…. [T]he Commission tolerates … practices [such as staging and distortions] unless the "affect the basic accuracy of the events reported."*39*

What to do?

Should any enforcement action be taken by the ABA against 2UE?

A lot of the evidence brought before this hearing has centred on the notion of *trust*. Much of it was about the trust 2UE executives placed in their star announcers to "do the right thing" by them and their audiences. Mr Conde spoke of his sense of betrayal, and how he felt he had now become "less trusting".

But, more importantly, this hearing is also about public trust. The public trust in long established and tremendously popular announcers to speak their mind, to express *their* opinions about sometimes controversial, sometimes trivial issues. The public expectation that an advertisment is just that. The public hope that when matters of great public interest are being discussed, they will know exactly whose voice they are listening to. The public *trust* that they "know by whom they are being persuaded".

We think that the evidence has shown a significant breach of that trust.

This public hearing has also been about responsibility.

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39 *Serafyn v. F.C.C.*, No. 95-1385, at 6 (quoting *Galloway v. F.C.C.* 778 F.2d 16, 20 (D.C. Cir. 1985)).

Responsibility for on-air conduct; for on and off-air disclosure; and for ensuring that everything that is put to air meets the public interest standards demanded by the FARB Code and the *Broadcasting Services Act* itself.

We have also heard that despite the fact that allegations about announcers' contracts were first raised in March 1998 and requests were made for modification of arrangements, agreements were allowed to remain on foot until they fell due for renewal - agreements which were not disclosed to the public. We heard that 2UE executives were prepared to act on "assurances" about contracts without further action. We heard that despite "alarm bells" being raised on Christmas Eve 1998 about benefits to Mr Laws under the Bankers' Association proposal, no substantive action was taken by 2UE until after the July 1999 Media Watch program.

We have heard from executives of 2UE, who have given evidence of procedures put in place following the Media Watch program and the announcement of the ABA Inquiry.
In his statement and evidence, Mr Conde[40] indicated that that these included:

1. the issuing of policy guidelines;

2. review of announcer contracts and termination requests;

3. establishment of an independent council to examine the station's broadcasting policies;

3. proposal to establish a register of interests; and

4. amendment of standard advertising terms and conditions to prohibit separate personal endorsement arrangements with announcers.

We have also heard evidence from Mr Conde this week that that while the station ordered historical Media Monitors reports and these were provided to it in September 1999, these had not been analysed for problem broadcasts as at two days ago.

We believe that while it is good that 2UE has acted to address the issues, many of its actions address commercial issues, rather than public interest concerns. In our view, 2UE's conduct:

prior to the first Media Watch program in March 1998, when it failed to regulate announcers' conduct;
in response to that program and in response to the 1999 Media Watch programs;

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40 *Paragraphs 15 onwards*

has been insufficient to address the significant issues of public concern about lack of disclosure which have been aired during this Inquiry. The simple reality is that a large number of these agreements remained in place for a long time, and a number are still on foot and listeners knew little of them until this Inquiry.

Trust alone is not enough.

What should the ABA do? Section 43 and 44 entitle the ABA to vary or revoke a condition of the licence or impose an additional condition on the licence, including imposing a condition "requiring the licensee to comply with a code of practice that is applicable to the licensee."

In the CLC's submission, the ABA should impose on 2UE as a condition of its licence, the following requirements:

1. that it comply with Codes 2 and 3 of the FARB Codes of Practice;

2. that, as part of this compliance, it undertake to obtain and maintain full disclosure to the ABA of agreements entered into by announcers which may be relevant to Codes 2 and 3 of the FARB Codes of Practice;

3. that it regularly monitor all announcer's programs and provide regular reports on its monitoring to the ABA, at intervals and for a period to be determined by the ABA;

4. that it maintain a register of interests in the broad terms that 2UE has proposed. However, a physical on-site register is insufficient to address the disclosure issue because it limits access to those who can travel to the broadcaster's offices. The register should be available on 2UE's website as soon as possible. We understand that the website is currently under construction.

Should the FARB Code be amended?

The CLC believes that the issues raised in this hearing cannot be seen to be confined to particular announcers or a particular network. The announcers who have been the subject of this hearing will not necessarily remain permanently at 2UE. Many of the programs broadcast by 2UE are networked throughout the country to different radio stations.

The hearings have also revealed a lack of clarity about how the news and advertising Codes are to be interpreted. The ABA may well find that some of the conduct disclosed in the hearings does not fall within the established Codes, although its public policy implications justify sanctions of some kind being imposed.

While we believe that the issues are sufficiently serious to warrant the determination of a standard by the ABA, a matter which I will deal with shortly, we recognise that this would involve a reasonably lengthy consulation period.

In the interim, the CLC calls for the FARB code to be amended as a matter of urgency, pending determination of a standard by the ABA. We propose an interim framework to address the so called "blurry lines" between advertising, promotional material and editorial or program material.

The Code should be amended to have the following effect:

Advertising

Code 3 already clearly states that advertisements should not be presented as news programs or other programs. To address the difficulties raised by the practice of "advertorial" the Code should, in addition to the existing provisions, contain somehting along the lines that: "

"Licensees must ensure that to avoid confusion, paid advertisements broadcast in an interview format (such as "advertorials") must be clearly disclosed as such by a statement at the commencement or conclusion of the material."

Other program material

Code 2 currently addresses news and current affairs programs. We see no reason why provisions to avoid listeners being misled should not extend to all program material (as opposed to advertising material) broadcast by a licensee.

The CLC suggests that Code 2 should be headed "Programs" and should be amended by the inclusion of a provision with the following effect:

Stations and their announcers must at all times *effectively disclose* if the announcer or licensee has a *relevant interest* inthe *subject matter* of a program.

A "relevant interest" may be defined to 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 shareholding or other personal or financial interest. The precise terms are a matter for detailed consideration.

We believe that “effective disclosure" should require the followingthree elements:

1. *Compulsory register of interests*: this would be maintained at the broadcaster's offices and, if possible, made available on its website. The licensee and anyone involved in the production and presentation of programs, including employees and independent contractors, would be obliged to provide information for the register.

2. *On-air disclosure of commercial arrangements*: It would be unreasonable to prescribe a form of words to be used on each occasion. The disclosure should be made on-air using words which clearly disclose the existence of a relevant commercial arrangement and not just inferred from a course of conduct or the existence of off-air activities.

3. *Continuous disclosure*: It should not be enough for announcers or licensees to say that the existence of an arrangement was general knowledge or had been raised with listeners on a number of occasions. Audiences are fluid and first time listeners are entitled to the same disclosure as regular listeners.

Should the ABA determine a program standard?

We say yes.

This is a matter of grave public interest. The FARB Code does not adequately deal with the matter and has in any case been breached. The issues raised in this hearing are about *non disclosure.* The problem with the existing complaints based regime is: how can listeners complain about something they don't know about?

A program standard is the only way to communicate the seriousness with which the regulator regards the issue and to ensure the regulatory instrument and the potential for *immediate sanctions* in the event of breaches of it, applies to all licensees. Unlike the US model, breaches of Code conditions do not appear to be relevant to licence renewals. The imposition of alicence condition is essential to ensure that this behavious is a favor in considering licence renewals.

While the ratings attracted by Alan Jones and John Laws suggest they have a particular prominence, there are many other commercial radio identities with a comparable degree of influence. The volume and magnitude of endorsement agreements entered into by these announcers suggests that their occurrence in the commercial radio industry unlikely to be isolated.

The ABA should not be in a position where it has to wait for a breach to occur elsewhere before being able to impose appropriate standards on other radio stations.

The program standard should cover the same territory set out in the revisions to the FARB Code proposed above.

In this regard, we also note that the draft report from the Productivity Commission's broadcasting inquiry includes a draft recommendation that the ABA develop standards dealing with fair and accurate coverage and ethical news gathering and reporting practices.

Should the Broadcasting Services Act be amended?

It is seven years since the Broadcasting Services Act was passed by the federal Parliament. The Act placed a strong emphasis on "self-regulation", replacing regulation by a regulator with regulation by the regulated. While the ABA was given the job of monitoring compliance with the new self-regulatory codes of practice, the clear message was that if audiences didn't complain, there wasn't a problem. The ABA was givensome finely-worded objects, but not the resources, the legislative functions or the political support to scrutinise industry performance in any meaningful way.

The cash for comment inquiry has been one of the more spectacular results.

It's time to confront the lessons of the experiment and amend the Act to ensure Australians get from their broadcasters something of what they're entitled to.

Three amendments should be made to the BSA:

the objects of the Act should be amended to include a new object: "to ensure effective disclosure to audiences of relevant interests, including contracts, arrangements and understandings, held by licensees and their employees, independent contractors, suppliers and sponsors"; s122 of the BSA should be supplemented to require the ABA to make a program standard addressing this object, in the same way it is required to make a program standard about programs for children and the Australian content of programs for commercial television broadcasting licensees; and

following the US example, the BSA 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 caught by the sanctions able to be imposed.

Should any other action be taken or laws be amended?

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

There also 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.

The ABA should investigate related practices in other parts of the broadcasting industy to determine if similar regulation is needed elsewhere.

In conclusion, the Communications Law Centre has suggested that a lot of action be taken by a lot of people to address the issues taken in this Inquiry. We have been critical of the job set for the ABA under the legislation. However, although the ABA doesn't have all the powers it needs, we believe it has plenty it can use.

The ABA needs to do what it can, quickly, to make sure that what Australia's commercial radio listeners hear is what they get.