



Commercial Radio Australia Ltd  
ACN 059 731 467  
Level 5, 88 Foveaux Street  
Surry Hills NSW 2010  
T 02 9281 6577  
F 02 9281 6599  
E [mail@commercialradio.com.au](mailto:mail@commercialradio.com.au)  
I [www.commercialradio.com.au](http://www.commercialradio.com.au)

## **COMMERCIAL RADIO AUSTRALIA**

**SUBMISSION TO THE DEPARTMENT OF COMMUNICATIONS,  
INFORMATION TECHNOLOGY AND THE ARTS**

**PROPOSED REFORMS TO THE BROADCASTING  
REGULATORY POWERS OF THE AUSTRALIAN  
COMMUNICATIONS AND MEDIA AUTHORITY**

**DECEMBER 2005**

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
1. ABOUT COMMERCIAL RADIO AUSTRALIA .....	5
2. GENERAL COMMENTS ABOUT THE ISSUES PAPER .....	5
2.1 Special considerations that apply to the media sector .....	5
2.2 Proposed reforms represent a departure from the current regulatory system .....	6
2.3 The current regulatory system ensures that the objects of the BSA are met .....	7
2.4 Breach findings are mostly isolated incidents .....	8
2.5 Some problems with the current affairs disclosure requirements.....	11
3. RESPONSES TO THE SPECIFIC REFORM PROPOSALS IN THE ISSUES PAPER .	14
3.1 A new power for ACMA to accept enforceable undertakings .....	14
3.2 A new power for ACMA to seek injunctions for unlicensed broadcasts .....	15
3.3 A new power for ACMA to seek civil monetary penalties .....	16
3.4 A new power for ACMA to issue infringement notices .....	19
3.5 A new power for ACMA to direct on-air statements in relation to breaches .....	19
4. REFORM PROPOSALS FOR NARROWCASTING RADIO SERVICES .....	20
4.1 Issues with the commercial radio narrowcasting services.....	20
4.2 New proposed definition of a narrowcasting services .....	21
4.3 Proposed clarification for music narrowcasting services .....	22

## EXECUTIVE SUMMARY

Commercial Radio Australia makes the following comments on behalf of the commercial radio broadcasting industry in Australia in response to the Government's issues paper of November 2005 titled *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority (Issues Paper)*:

### General comments

- The media sector has a key role to play in our system of democracy by keeping the public informed about matters of public interest and by making available to the public a wide range of views and opinions. Governments or their agencies should only regulate broadcasters if there is an overriding public interest to do so. Given that ACMA already has a wide range of effective regulatory powers at its disposal, it's not clear why additional powers are needed. Most of the new proposed powers would add nothing more to the effectiveness of the current regime. Arming ACMA with stronger powers will create censorship by default as commercial radio broadcasters alter their practices to comply with views of ACMA that they may not have capacity to or cannot afford to challenge.
- Many of the reforms in the Issues Paper, if implemented, would take broadcast regulation back to the over-regulated, highly litigious regime that existed prior to the *Broadcasting Services Act 1992 (BSA)*. Under the previous regime, the Australian Broadcasting Tribunal (**ABT**) used a highly interventionist and legalistic approach to regulation of the broadcast sector. That regime has been widely discredited.
- The enactment of the BSA, was motivated by a desire to develop a simpler and more practical system of broadcast regulation. The BSA is designed to ensure that the broad policy objectives of the legislation are met using a flexible and mixed approach to regulation. Central to this is a co-regulatory system under which different industry sectors develop and implement their own codes of practice with the oversight of ACMA. ACMA has a wide range of powers at its disposal but is supposed to act more as an oversighting body, monitoring industry performance and only intervening when it has real cause for concern. Most of the proposed reforms are inconsistent with this philosophy.
- There are many indicators which show that the current regulatory system is effective in ensuring that the objectives of the BSA are met. For example, attitudinal research conducted by the ABA in 2003 shows that there are high levels of satisfaction with programs provided by commercial radio broadcasting services especially music, local news and information and talkback and very low levels of concerns about commercial radio content. The Australian music industry has also commended the commercial radio sector for high levels of airplay of music of Australian artists.
- Contrary to the suggestion in the Issues Paper that there are high numbers of recurring breaches, the statistics show that breach findings in the commercial radio broadcasting sector are mostly isolated incidents. For example, 70% of all breaches of the *Commercial Radio Codes of Practice (Codes)* since 1995-96 are attributable to

4 commercial radio licensees (in an industry where there are over 250 licensees operating 24 hours a day, 7 days a week) and resulted from the *Commercial Radio Inquiry* and another investigation in 2003-04. Other than those years, the number of breach findings are usually in single figures in most years.

- Nearly half (48%) of all Codes breaches since 1995-96 have been based on a highly questionable interpretation of a previous version of Code 2.2(d) which deals with the presentation of current affairs programs. The industry never intended that provision to be interpreted in the way in which the ABA interpreted it – most notably during the Commercial Radio Inquiry. In order to remove any doubts about the proper application of Code 2.2(d), the industry sought an amendment to it at the earliest opportunity. That amendment was finally accepted by the ABA in September 2004.
- After the two investigations described above (which gave rise to 70% of all Codes breaches), the ABA was able to apply the substantial powers at its disposal to address the issues it identified. For example it determined 3 program standards for the whole industry after the Commercial Radio Inquiry and has also used its powers to impose additional licence conditions on licensees. These enforcement measures have been effective in addressing the issues identified by the ABA. Therefore, the regulator has never needed to call on the powers at the very top of the enforcement pyramid identified in page 48 of the Issues Paper.
- One of those major investigations has highlighted the fact that there are problems with the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (Current Affairs Disclosure Standard)*. Specifically the requirement for current affairs presenters to make contemporaneous on-air disclosures using a prescribed form of words. In that investigation, the ABA found that the licensee breached the Current Affairs Disclosure Standard on multiple occasions only because the presenter disclosed his commercial sponsorships using a form of words that varied only slightly from the specific form of words required. In some cases the presenter inadvertently failed to make disclosures at the relevant time but there was no attempt to conceal those sponsorship arrangements because they were fully disclosed at other times during the program and on the station's website.
- Because of these problems, Commercial Radio Australia is recommending that the Current Affairs Disclosure Standard be amended to give licensees the flexibility to make relevant disclosures in a way "that is readily understandable to a reasonable person" rather than having to quote a prescribed form of words. This would be consistent with the objectives of the Current Affairs Disclosure Standard and also the flexible approach adopted by the commercial TV sector and the Australian Journalist's Association Code of Ethics.
- We also recommend that rather than a requirement to make contemporaneous on-air announcements, the Current Affairs Disclosure Standard could be changed to require such announcement to be made at appropriate times within the relevant program. This would place compliance more firmly in the hands of a licensee rather than announcers who have many other competing demands on their time during their

programs including delivering entertaining radio while dealing with unscripted discussions.

### **Responses to the specific reform proposals**

- **(enforceable undertakings)** Commercial Radio Australia does not support the proposal to grant ACMA such additional powers. ACMA (and the ABA before it) has always accepted voluntary undertakings from licensees and the evidence shows that this system works effectively and provides a speedy and flexible system of resolution.
- The Codes have also been developed on the basis of the powers currently available to ACMA which are effective. If enforceable undertaking were introduced for Codes breaches, the commercial radio broadcasting industry might re-visit its commitment to the Codes or seek to draft them in a more narrow and legalistic way.
- **(injunctions for unlicensed broadcasts)** Commercial Radio Australia supports the proposal to give ACMA a narrow power to approach a Court to seek injunctive relief but only in relation to a breach of section 137 of the BSA.
- **(civil monetary penalties)** Commercial Radio Australia does not support any of the proposals to give ACMA additional powers to approach a court to seek civil monetary penalties
- The Issues Paper incorrectly assumes that the powers currently available to ACMA are inadequate. Commercial Radio Australia rejects those conclusions. In fact the evidence shows that whenever the regulator has identified problems with compliance in the commercial radio broadcasting sector, it has applied the wide range of powers at its disposal to effectively deal with those issues.
- The Issues Paper does not discuss whether civil prosecution would be conducted on the basis of strict liability or require proof of culpability to the civil standard. There are major problems with either option. Strict liability would penalise a licensee even if it was not at fault and as such does not add anything more to the effectiveness of the current regulatory regime. The case study used in the Issues Paper (2UE Investigation in 2003-04) also demonstrates that even if a civil standard of proof was available to the regulator, a civil prosecution against the licensee would not have succeeded because the ABA acknowledged that the licensee had done everything that was reasonable and practical to ensure compliance.
- Contrary to the assumptions in the Issues Paper, there are many other practical reasons (such as adverse publicity and loss of credibility with audiences and advertisers) for commercial radio broadcasting licensee to avoid conduct that might be subject to complaints or regulatory intervention.
- **(infringement notices)**: Commercial Radio Australia supports the proposal to give ACMA the power to issue infringement notices but only for breaches of sections 62, 63, 64, 65, 112 and 205B of the BSA and late payment of licence fees under the *Radio Licence Fees Act 1964*. Such a scheme should also be consistent with the

recommendations of the Australian Law Reform Commission set out in pages 112 to 117 of the Issues Paper.

- However, we believe that the proposal should be modified slightly by requiring ACMA to first give the relevant licensee a written warning. In other words, ACMA would only have the power to issue an infringement notice if the licensee failed to respond within the time and in the manner required in the written warning.
- The level of penalties levied for these infringement notices should be appropriate and proportional and consistent with the fact that these are relatively minor offences. We suggest that the fines levied by ASIC for late lodgement of required notifications under the Corporations Act are an appropriate guide.
- **(power to direct on-air statements):** Commercial Radio Australia does not support giving ACMA the power to direct a licensee to broadcast on-air statements. There is already a lot of media attention given to breach findings because ACMA issues press releases and publishes investigation reports on its website and in its newsletters. There is also a lot of scrutiny in the wider media in relation to breach findings and in some cases, investigations have been initiated on the basis of programs like ABC TV's *Media Watch*.
- Further, Code 2 of the Codes already contains a provision that requires commercial radio broadcasting licensees to make reasonable efforts to correct substantial errors of fact at the earliest opportunity. Commercial radio stations broadcast on-air corrections or apologies when that is considered to be appropriate in the circumstances.
- Mandated on-air statements are also contrary to the principle of editorial freedom and could prejudice the licensee in respect of other potential legal proceedings.

#### **Reform proposals for narrowcasting radio services**

- We believe that the lack of clarity in the way in which narrowcasting services are defined in section 18 of the BSA is a fundamental problem which contributes to many of the regulatory problems identified in the Issues Paper. We believe that the Government should remove this ambiguity by enacting clearer definitions of a narrowcasting service.
- We believe that on balance, the definition of a narrowcasting service should refer to the fact it's a service that provides "programs of limited appeal". Our specific reform proposals are set out from page 21 of this submission onwards.

## 1. ABOUT COMMERCIAL RADIO AUSTRALIA

Commercial Radio Australia is the peak industry body for commercial radio *broadcasting* stations in Australia. Commercial Radio Australia has 252 members and as such represents approximately 98% of the commercial radio broadcasting industry in Australia.

We welcome the opportunity to comment on the Government's issues paper of November 2005 titled *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority (Issues Paper)*.

The views in this submission represent the views of all our members.

## 2. GENERAL COMMENTS ABOUT THE ISSUES PAPER

### 2.1 Special considerations that apply to the media sector

The media sector is very different to other industry sectors as it plays a key role in our system of democracy. As such, there are strong arguments in favour of applying special considerations to the regulation of broadcast or other media.

The media plays an important role in keeping the public informed about matters of public interest (such as the activities of the Government) as well as making available to people a wide range of views and opinions. A freedom of communication has been recognised in the Australian Constitution by the High Court.

Therefore, there is a strong public interest in limiting the power of the Government or its agencies to regulate the media. In practice, this means that the Government should not be able to exert influence over the editorial practices of the media unless there is an overriding public interest reason for it to do so. Under the current regulatory system, this can be seen for example, in the mandatory quotas for 'Australian music' for commercial radio broadcast stations.

External influences can also come from giving the industry regulator (which already has a wide range of effective regulatory powers), additional powers which add nothing more to the effectiveness of the current regulatory regime. As we will show in this submission, there have been times where the broadcast regulator has exercised its discretion in highly questionable ways – for example, by interpreting a particular provision of the *Commercial Radio Codes of Practice (Codes)* in a way that was not supported by the industry but which could not be effectively challenged by the industry or individual licensees

Under such circumstances, giving ACMA new enforcement powers, beyond those which are necessary to ensure that the objectives of the *Broadcasting Services Act 1992 (BSA)* are met, must be avoided. It is not inconceivable that such additional powers may lead to censorship by default as commercial radio broadcasters alter their practices to comply with bureaucratic decisions made by ACMA which they have no capacity to challenge or which they cannot afford to challenge.

## 2.2 Proposed reforms represent a departure from the current regulatory system

Many of the recommendations in the Issues Paper, if implemented, will take the current broadcasting regulatory regime back to the highly interventionist, over-regulated approach to broadcast regulation that preceded the enactment of the BSA.

The previous regulatory scheme, under the *Broadcasting Act* 1942, relied on an interventionist regulator - the Australian Broadcasting Tribunal (**ABT**) – administering a set of very prescriptive rules and on many occasions facing legal challenges on the basis of its decisions. It's been reported that in a 14 year period to 1991, the ABT was party to 55 cases in the Federal Court, six in the Administrative Appeals Tribunal and 10 in the High Court.<sup>1</sup>

The philosophy behind the current regulatory regime was motivated by a desire to develop a simpler and more practical system of broadcast regulation. Gareth Grainger, former Deputy Chairman of the ABA described this approach as follows:

*The then Australian Government was particularly keen that the regulation of broadcasting move away from the litigation-prone regime administered by the Australian Broadcasting Tribunal to a more cooperative and mutually responsible scheme of regulation driven by market forces where a key role of the regulator was to ensure that community interests were met in areas where the market might fail to do so.*<sup>2</sup>

With the enactment of the BSA, the Government adopted a principles-based approach to broadcast regulation which emphasises substance (the achievement of a broad set of policy objectives<sup>3</sup>) over form. Therefore, the BSA applies a flexible and mixed approach to broadcast regulation which includes:

- a 'co-regulatory system' under which different industry sectors develop and are primarily responsible for the implementation of their own codes of practice – with the oversight of ACMA;
- direct government control through licence conditions enacted in the BSA; and
- the option for ACMA to impose additional licence conditions (as necessary) on an individual licensee or on an entire broadcast sector via program standards.

The sanctions available to ACMA under the current regulatory regime are also flexible and based on several different tiers which increase in severity – in other words they are appropriate for the regulatory regime that currently exists.

Since the enactment of the BSA, the regulator has often expressed the view that it prefers to secure compliance through voluntary co-operation with broadcast licensees. For example, the 2003-04 *ABA Annual Report* states that:

---

<sup>1</sup> Peter Westerway (1991), "Reforming the Broadcasting Act", *Communications Law Bulletin*, (Vol 11, No. 2), page1.

<sup>2</sup> ABA, (1998), "Supervision of Broadcasting and Telecommunications and International Comparison to the Australian Experience", speech made at *communications 2000* on 9 September 1998, page 6.

<sup>3</sup> Found in section 3(1) of the BSA.

*In its investigations, the ABA focuses on ensuring that broadcasters take action so that problems are rectified and not repeated.*<sup>4</sup>

This approach is consistent with section 5 of the BSA which sets out the role of the regulator and the way in which it should apply its broad range of powers to ensure that the objects of the BSA are met. The Explanatory Memorandum to the *Broadcasting Services Bill 1992* provides the following explanation of this section:

*[Clause 5] ... sets out the role of the ABA intended by Parliament for the achievement of the objects of the Act, and the administration of the regulatory regime provided by the Act. It promotes the ABA's role as an oversighting body ... rather than as an interventionist agency hampered by rigid, detailed statutory procedures and formalities and legalism, as has been the experience with the ABT. It is intended that the ABA monitor the broadcasting industry's performance against clear, established rules, intervene only when it has real cause for concern, and has effective repressive powers to act to correct breaches. [our emphasis]*

Commercial Radio Australia supports the current regulatory system and the philosophy behind that system. It is a more practical system of broadcast regulation and is effective in ensuring that the broad objectives of the BSA are met. We do not support the majority of recommendations in the Issues Paper because they are inconsistent with this philosophy and therefore with the BSA.

### **2.3 The current regulatory system ensures that the objects of the BSA are met**

With few exceptions (e.g. the problems related to narrowcast services), the current regulatory system is effective in ensuring that the objectives of the BSA are met. We believe that this point is significant and that any reform proposals need to demonstrate the way in which the current regulatory system is failing to deliver such outcomes.

The Issues Paper is deficient because it is too narrowly focussed and does not make that type of analysis about the current regulatory system.

For the record, we can point to many external indicators which show that the objectives of the BSA are being met by the commercial radio broadcasting sector under the existing regulatory regime.

For example:

- recent ABA research shows that there are high levels of community satisfaction with the choice of radio services available and the diversity of programming provided by commercial radio stations across Australia especially in terms of music, local news and information and talkback programs;<sup>5</sup>
- that same research shows that the levels of concern (especially spontaneous, unprompted concerns) about radio content are very low;<sup>6</sup>

---

<sup>4</sup> ABA, *Annual Report*, 2003-04, page 45.

<sup>5</sup> ABA, (2003), *Understanding Community Attitudes to Radio Content*.

<sup>6</sup> Ibid.

- independent research shows that the ‘Australian music’ quota requirements under the Codes have helped to stimulate extra production and sales of Australian musical recordings;<sup>7</sup>
- key music industry bodies have commended the commercial radio broadcast sector for the support it shows to the Australian contemporary music industry through high levels of airplay of musical recordings by Australian artists;<sup>8</sup>
- A major review of the Codes was recently completed by Commercial Radio Australia and the Codes were registered by the ABA in September 2004 with very few amendments demonstrating the fact that the regulator is satisfied that the Codes provide “appropriate community safeguards” in accordance with section 123(4) of the BSA;
- During the public consultation phase of the Codes review process described above, only 9 submissions were received from members of the public. This low number and the fact that none of those submissions discussed the issues in the Issues Paper suggests that another key stakeholder group in the co-regulatory system does not share the concerns of ACMA expressed in the Issues Paper; and
- The number of breach findings for commercial radio broadcast stations are relatively low and tend to be isolated incidents.

On the basis of this evidence, it is clear that the current regulatory system is not failing ACMA in its dealings with the commercial radio broadcast sector.

#### **2.4 Breach findings are mostly isolated incidents**

The Issues Paper states that there are large numbers of code breaches of a recurring type in the commercial radio sector. This is not supported by the available statistics. Table 1 below contains a summary of breach findings for the commercial radio broadcasting sector since 1995-96.

In this time, there were a total of 198 Codes breaches. 119 of those (60%) resulted from the *Commercial Radio Inquiry* (1999-00 and 2000-01) and involved just 3 commercial radio licensees. A further 19 Codes breaches in 2003-04 resulted from the ABA’s investigation of 2UE in relation to Telstra and NRMA’s sponsorship of John Laws (**2UE Investigation**).

**The total number of breaches of the Codes from these investigations (138) represents approximately 70% of all Codes breaches since 1995-96. Those breaches involved just 3 licensees.**

---

<sup>7</sup> Paul Mason (2003), “Assessing the Impact of Australian Music Requirements for Radio”, research paper prepared for the Music Council of Australia and published at <http://www.mca.org.au/research.htm>.

<sup>8</sup> For example, see PPCA, “2004’s Most Broadcast Artists and Recordings” <http://www.pcca.com.au/2004sMostBroadcastArtistsandRecordings.htm>

**TABLE 1: BREACHES BY COMMERCIAL RADIO BROADCASTING LICENSEES**

Year	Codes of Practice	Licence Conditions	Standards
1995-96	2	1	N/A
1996-97	9	1	N/A
1997-98	5	1	N/A
1998-99	4	1	N/A
1999-00	103 (a)	9 (b)	N/A
2000-01	40 (c)	1	0
2001-02	5	1	0
2002-03	3	0	0
2003-04	24 (d)	25 (e)	19 (f)
2004-05	3	1	14 (g)
<b>Total</b>	<b>198</b>	<b>41</b>	<b>33</b>

**Sources: ABA Annual Reports, information on ABA and ACMA websites**

(a) 2UE - 90 breaches from the *Commercial Radio Inquiry*

(b) 2UE - 5 breaches from the *Commercial Radio Inquiry*

(c) (6PR, 5DN) 29 breaches from the *Commercial Radio Inquiry*

(d) 2UE Telstra/NRMA sponsorship investigation – 19 breaches of Code 2.2(d); (e) 15 breaches of 2UE licence conditions; (f) 19 breaches of the Current Affairs Disclosure Standard

(g) 5AA – 14 breaches of the Current Affairs Disclosure Standard

After these investigations, the ABA applied the substantial powers at its disposal to address the issues it identified. For example, after the Commercial Radio Inquiry, additional licence conditions were imposed on the licensee of 2UE. Further, the ABA determined the *Broadcasting Services (Commercial Radio Advertising) Standard 2000 (Advertising Standard)*, the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (Current Affairs Disclosure Standard)*; and the *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000 (Compliance Program Standard)* to apply to all commercial radio broadcasters.

Significantly, the ABA formed the view that it was appropriate to determine the 3 program standards for the whole industry notwithstanding the fact that only 4 licensees and 6 presenters were implicated in the Commercial Radio Inquiry in an industry where there were (at the time) approximately 240 licensees.

On 10 May 2004, following the 2UE Investigation, the ABA imposed an additional licence condition on the licensee of 2UE requiring it to engage a third party (at its own cost) to monitor the John Laws show for ongoing compliance with the Current Affairs Disclosure

Standard. That licence condition was only recently revoked on 29 September 2005.<sup>9</sup> No breaches of the Standards were revealed during that monitoring period.

Some of the conduct related to the Code breaches in Table 1 was also deemed to constitute a breach of the licence conditions and/or Standards leading to an overlap in the numbers shown. For example, the apparently high numbers of breach findings in 2003-04 can be attributed to the fact that as result of the 2UE Investigation, the ABA determined that some conduct was a breach of the Codes and also a breach of 2UE's special licence conditions as well the Current Affairs Disclosure Standard.

Table 2, below, provides an analysis of the same Code breaches by type.

<b>Code</b>	<b>Description</b>	<b>Breaches</b>
<b>Code 1</b>	Programs unsuitable for broadcast	9
<b>Code 2</b>	News & current affairs	101 (a)
<b>Code 3</b>	Advertising	45 (b)
<b>Code 4</b>	Australian music	5
<b>Code 5</b>	Complaints handling	33 (c)
<b>Code 6</b>	Interviews & talkback programs	5
<b>Total</b>		<b>198</b>

**Sources: ABA Annual Reports, information on ABA and ACMA websites**

(a) 95 breaches of Code 2.2(d) – before its amendment in September 2004  
 (b) (2UE, 5DN, 6PR) From the *Commercial Radio Inquiry*  
 (c) In some cases the licensee responded substantively as required by Code 5 but outside of the prescribed periods in Code 5 (30 or 45 days)

Most of those breaches (101) relate to Code 2. Of those breaches, 95 (approximately 48% of all Codes breaches) were deemed to be breaches of the old Code 2.2(d). That code provision (before being amended in September 2004) read:

*In the preparation and presentation of current affairs programs, a licensee must ensure that viewpoints are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, by editing out of context, or by withholding relevant available facts; [our emphasis]*

The words “withholding relevant available facts” were used to ground most of the breaches in the Commercial Radio Inquiry and also the 2UE Investigation. Specifically, the ABA held that the failure of some current affairs announcers to disclose certain commercial agreements was a withholding of relevant available facts within the meaning of Code 2.2(d) as it then was.

<sup>9</sup> [http://www.ag.gov.au/portal/govgazonline.nsf/0/0DCDD18E3E8F1913CA2570910003BFCE/\\$file/GN39.pdf](http://www.ag.gov.au/portal/govgazonline.nsf/0/0DCDD18E3E8F1913CA2570910003BFCE/$file/GN39.pdf)

This interpretation has always been rejected by the industry and we have previously expressed the view that it was arrived at fortuitously and after the fact. The industry never intended Code 2.2(d) to be read in that way. Proper statutory construction also supports our view that Code 2.2(d) relates to viewpoints of third parties that are expressed to a licensee for broadcast rather than viewpoints expressed by current affairs presenters.

In order to remove any further doubts about the operation of Code 2.2(d), the industry insisted and the ABA agreed on the following changes to Code 2.2(d) in September 2004 (highlighted):

*... viewpoints **expressed to the licensee for broadcast** are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, **or by editing out of context, or by withholding relevant available facts**;*

In summary, Tables 1 and 2 show that the overall industry figures for breach findings since 1995-96 are relatively low in each year and, with the exception of the years coinciding with the Commercial Radio Inquiry and the 2UE Investigation, are usually in single digit figures. **In respect of all 272 breaches (Codes, licence conditions, Standards) identified in Table 1, 191 (70%) are attributable to just 4 commercial radio licensees in an industry where there are currently over 250 licensees broadcasting 24 hours a day, 7 days a week.**

In the case of the breach findings grounded on the old Code 2.2(d) – approximately 48% of all Codes breaches since 1995-96 – we believe that had the ABA applied proper statutory construction, those findings would not have been made.

However, the most important point for the purposes of this submission is that the evidence shows that **whenever the regulator has identified what it considered to be major compliance problems, it has taken swift and powerful action using the enforcement powers currently available to it.**

This contradicts the main premise of the Issues Paper that the powers currently available to ACMA are deficient. Two additional points should be made here:

- firstly, the enforcement measures used against commercial radio broadcasters (as identified above) have been effective in dealing with the issues of concern identified by the regulator; and
- secondly, the regulator has never needed to call on the powers at the very top of the enforcement pyramid which is identified on page 48 of the Issues Paper.

## **2.5 Some problems with the current affairs disclosure requirements**

The 2UE Investigation highlighted the fact that there are a number of problems with the Current Affairs Disclosure Standard. Specifically, with the requirement for licensees:

- to make contemporaneous on-air disclosures about relevant commercial agreements (section 7(1)); and
- to use a specified form of words in making such disclosures (section 7(3)).

The ABA's final investigation report determined that 2UE breached:

- section 7(1) of the Current Affairs Disclosure Standard on 10 occasions by failing to broadcast any form of disclosure announcement at the required time; and
- section 7(3) of the Current Affairs Disclosure Standard on 9 occasions by failing to broadcast a disclosure announcement using the specific form of words in that section. On 8 occasions, John Laws referred to Telstra as a sponsor of “ours” rather than “mine” and on another occasion referred to his “arrangement” with Telstra.

We support the objects of the Current Affairs Disclosure Standard (found in section 3) which states that the Standard is designed to:

*... encourage commercial radio broadcasting licensees to be responsive to the need for a fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs.*

These objectives help the industry to maintain the credibility and integrity of current affairs radio programs.

However, the 2UE Investigation revealed that section 7(3) of the Current Affairs Disclosure Standard actually favours form over substance. Half of the breach findings from that investigation did not involve the failure of the licensee to make disclosure announcements, but rather the making of good faith on-air disclosure announcements that differed only very slightly from the form of words required by 2UE’s licence conditions and section 7(3) of the Current Affairs Disclosure Standard. Good faith efforts to comply were made in each of these instances and so any resulting breaches were clearly unintentional.

We believe that it is unreasonable to expect perfect “word for word” compliance with the disclosure announcement requirements in section 7 given the pressures on presenters to deliver entertaining radio whilst dealing with unscripted and unpredictable callers and trying to keep discussion within time limits to allow advertisements to run as scheduled.

Further, there was no attempt to conceal John Law’s sponsorship arrangements. These arrangements were fully disclosed both on 2UE’s website (as required by the Current Affairs Disclosure Standard) and through general disclosure announcements which 2UE continued to broadcast voluntarily during the Laws program each day, despite the requirement to do so having been removed. John Laws’ sponsorship arrangements were also subject to a significant amount scrutiny in the wider media.

The licensee of 2UE (and its parent company Southern Cross Broadcasting) took reasonable steps and went to great lengths to ensure compliance with its licence conditions and the Standards including voluntarily adopting additional compliance measures (such as additional training and counselling sessions John Laws and “auto correction” of pre-prepared scripts to incorporate disclosure announcements) to ensure future compliance;

Therefore, it cannot be suggested that 2UE intended not to comply with the Current Affairs Disclosure Standard, its licence conditions or the Codes. Indeed, the Issues Paper acknowledges (at page 44) the efforts taken by the licensee to ensure compliance. We submit that the ABA’s frustration at its inability to impose penalties on the licensee of 2UE following the 2UE Investigation is misplaced. The availability of alternative sanctions (such

as civil penalties) would not have added anything more to the effectiveness of the current enforcement regime given that the breaches were inadvertent rather than deliberate and the licensee of 2UE had taken, all reasonable measures to ensure compliance with the Current Affairs Disclosure Standard.

We believe that the breach findings from this investigation are instead testament to the difficulties caused by the highly prescribed and inflexible nature of the on air disclosure requirements in the Current Affairs Disclosure Standard. We believe that ACMA could adopt a more flexible approach to these requirements which would still be consistent with the objects of the Standard extracted above.

The disclosure obligations for commercial radio broadcasting licensees under the Current Affairs Disclosure Standard are far more onerous (and specific) than those which apply to commercial television broadcasting licensees. Clause 1.20 of the Commercial Television Industry Code of Practice (**CTV Code**) provides that

*1.20 A licensee will require each presenter it employs to appear in a **factual program** to inform the licensee of any commercial arrangement under which the presenter agrees to endorse or feature a third party's products or services in the program.*

*1.20.1 If a presenter informs the licensee of the existence of such a commercial arrangement and the presenter endorses or features the third party's products or services in the program, the licensee must disclose the existence of that commercial arrangement.*

*1.22 A disclosure required by this clause **must be made either during the program or in the credits of the program and should adequately bring the existence of any such commercial arrangement to the attention of viewers in a way that is readily understandable to the reasonable person.** [our emphasis]*

The definition of a "factual program" (clause 1.18.2 of the CTV Code) includes current affairs and documentary programs.

Similarly, the Australian Journalists' Association Code of Ethics (**AJA Code**) provides in clause 5 that **members should disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of their journalism.** The manner in which this is to be done is not specified, but it is typically through a statement at the end of the article disclosing the relevant interest of the journalist which might be seen to create the conflict of interest.

It would be entirely consistent with the object of the Current Affairs Disclosure Standard if it were amended to more closely mirror the requirements of the CTV Code in respect of sponsorship disclosure. That is, by requiring that the licensee either during the program or in the "credits" of the program to adequately bring the existence of any such commercial arrangement to the attention of listeners in a way that is readily understandable to the reasonable person. Such a requirement would enable the licensee to control the making of required disclosures, rather than relying on the presenter to make them.

By way of example, a licensee could satisfy this requirement by making the following form of disclosure either at the beginning, during or at the end of the relevant program:

*[Presenter name] is sponsored by [insert sponsor names]. Further details of those sponsorships are available on [name of licensee] website, which can be found at [web URL].*

Not only would such a requirement place compliance with the Current Affairs Disclosure Standard more firmly in the hands of the licensee, it would actually ensure a higher quality of disclosure, as it informs listeners where to find out more about the precise nature of relevant sponsorship arrangements should they wish to.

For purposes of consistency with the CTV Code, the requirement for the register of current commercial agreements to specify the amount or value of the benefit received by the presenter should also be removed. The register should list any material benefits received by presenters (e.g. more than \$1,000). Whether the benefit received only just exceeds this material level, or greatly exceeds it, is really irrelevant – it is the fact that a benefit is received that should be disclosed.

It is our submission that if ACMA wishes to ensure reliable disclosure of presenters' commercial agreements as part of relevant broadcasts, then the adoption of these proposals would be entirely credible and responsible.

### **3. RESPONSES TO THE SPECIFIC REFORM PROPOSALS IN THE ISSUES PAPER**

#### **3.1 A new power for ACMA to accept enforceable undertakings**

The Issues Paper recommends that ACMA should be given a new power to accept enforceable undertakings. **Commercial Radio Australia does not support the proposal to grant ACMA such additional powers.**

Firstly, as noted above, the broadcast regulator has always accepted voluntary undertakings from licensees in relation to breaches of the broadcast regulation. In 2004-05, the ABA initiated a requirement that licensees provide a written undertaking to take certain steps to ensure compliance with a licence condition or code that was breached.<sup>10</sup>

Secondly, there is no evidence to show that the current system of voluntary undertakings is deficient or is being manipulated by broadcasters for their benefit. It would be highly unlikely for a commercial radio broadcasting licensee to treat a voluntary undertaking frivolously.

A voluntary undertaking involves a direct expression of intent from a licensee to the regulator about how it will comply with its regulatory requirements in the future. As such, it is a serious step in the co-regulatory system. Even though such an undertaking may not be enforceable in court, licensees are aware that it invites a greater level of scrutiny from the regulator and non-compliance can give rise to further serious consequences.

Further all the stated benefits of enforceable undertaking are equally applicable to voluntary undertakings. For example that they save time and allow compromises and flexibility and co-

---

<sup>10</sup> ABA, (2005), *2004-05 Annual Report*, page 43.

operation between the regulator and the regulated. In fact voluntary undertakings are an even faster and cheaper method of regulation than enforceable undertakings.

Finally, a system of court enforceable undertakings would also lead to a more legalistic and interventionist system of broadcast regulation which, as described above, is inconsistent with the current regulatory regime.

In the case of Codes breaches, enforceable undertakings would represent a significant change because they would give rise to the prospect of prosecution instead of or in addition to ACMA's powers to impose additional licences conditions on a licensee (section 43 of the BSA) or to determine program standards for an industry (section 125 of the BSA).

The Codes have been developed by the commercial radio industry on the understanding that they are a key part of the co-regulatory system and also in recognition of the powers currently available to ACMA to deal with Code breaches. If the power to accept enforceable undertakings was given to ACMA, the commercial radio industry would have to re-visit its commitment to the Codes or it might seek to re-draft the Codes in a more narrow and legalistic way.

### **3.2 A new power for ACMA to seek injunctions for unlicensed broadcasts**

The Issues Paper recommends that ACMA should be given broader powers than it currently has to approach a court to seek injunctive relief. The Issues Paper discusses a number of possibilities for the scope of such a power but ultimately appears to be recommending that it should only be available in relation to breaches of section 137 of the BSA.

**Commercial Radio Australia supports the proposal to give ACMA a narrow power to approach a Court to seek injunctive relief but only in relation to a breach of section 137 of the BSA.**

We understand that such a power would only apply:

- If the ABA had first issued a 'stop notice' to the relevant person in accordance with section 137 – i.e. upon being satisfied that a person is providing a commercial TV, commercial radio or subscription TV or a community broadcasting service without a relevant licence; and
- that person had failed to comply with such a notice.

We believe that there is merit in providing ACMA with such a power. Firstly, because it's likely that a person providing unlicensed services would not have submitted themselves to the relevant co-regulatory scheme under the BSA.

Secondly, structural diversity amongst the different broadcast sectors is one the key features of the Australian broadcasting regulatory system. It's designed to support one of the leading objects of the BSA – section 3(1)(a). That object seeks to ensure that Australian audiences have a diverse range of radio and TV services offering a multitude of different programming choices.

It's contrary to this object (and an inefficient use of broadcast spectrum) to have some licensees exploiting the regulatory regime by using the least costly and least regulated

licence categories (e.g. those provided under class licences) to provide advertiser-supported commercial broadcasting services with significant levels of overlapping programming with the commercial broadcasting sectors given that all commercial broadcasting licensees are subject to very high barriers to entry and higher levels of regulation.

In particular, the Issues Paper has identified the difficulties that the regulator has in regulating what are supposed to be commercial *narrowcasting* radio services (i.e. niche format radio services) that choose to operate as commercial radio *broadcasting* services (i.e. with program formats of wide appeal which mirror those already provided by members of Commercial Radio Australia). For these reasons we support the limited injunction powers discussed above. We also have some additional suggestions for reforms in relation to narrowcasting services which are discussed in section 4 of this submission.

Commercial Radio Australia does not support a wider range of injunctive powers – for example to deal with breaches of the Codes, the Standards or the standard licence conditions under the BSA. This would be a fundamental departure from the co-regulatory system under which licensees have the responsibility for determining whether material they propose to broadcast complies with the regulatory requirements.

A more wide-ranging statutory injunctive powers could potentially overturn this system by enabling ACMA to pre-empt editorial decisions by broadcasters and as such would curb editorial freedom and amount to censorship.

### **3.3 A new power for ACMA to seek civil monetary penalties**

The Issues Paper recommends that ACMA should be given the power to seek civil monetary penalties for breaches of a range of licence conditions which in most cases are currently subject to criminal penalties. In effect, the new proposed civil monetary penalties would sit alongside the current criminal penalties as an alternative enforcement option for ACMA when the necessary fault element to prove a criminal offence is not present.

#### **Commercial Radio Australia does not support any of the proposals to give ACMA additional powers in the form of civil monetary penalties.**

The Issues Paper incorrectly assumes that the powers currently available to ACMA are inadequate. It cites the outcomes of the *Commercial Radio Inquiry* and the 2UE Investigation as evidence. Specifically, that the regulator did not pursue or was precluded from pursuing the higher-level regulatory sanctions available under the BSA.

We reject those conclusions. It's clear that the Issues Paper has underestimated the powers which ACMA currently has and was able to apply after those investigations. For example, the Commercial Radio Inquiry led to additional licence conditions for the licensee of 2UE and the determination of 3 Standards for the whole commercial radio broadcasting sector.

After the 2UE Investigation, the ABA imposed an additional licence condition on the licensee of 2UE requiring it to pay a third party to monitor the John Laws show for compliance with the Current Affairs Disclosure Standard. That licence condition commenced on 10 May 2004 and was only recently revoked on 29 September 2005. No breaches of the Standards were revealed during that monitoring period.

The Issues Paper also focuses on the fact that the ABA was unable to pursue criminal prosecution against the licensee of 2UE on the basis of advice from the Director of Public Prosecutions (**DPP**) that the available evidence did not establish intent to the criminal standard of proof.

However the Issues Paper (at page 44) also acknowledges that the Board and management of 2UE had acted reasonably and in good faith and implemented very strong compliance systems. Further, as discussed above in section 2.5, half of the breaches resulted from the use of disclosure statements that varied only slightly from the prescribed form of words required by the Current Affairs Disclosure Standard. It is also clear that there was not an attempt to conceal John Laws' commercial agreements with Telstra and NRMA given the fact that relevant disclosure statements were broadcast at other times during the program and that the relevant agreements were fully disclosed on 2UE's website.

In other words, these breaches were inadvertent rather than intentional and the Board and management of 2UE were neither reckless nor negligent in the way in which they conducted themselves. Under these circumstances, it would have been unfair for a trial to proceed and for the regulator to secure the enforcement of criminal or for that matter civil penalties against the licensee.

There are some further problems with these proposals in the sense that the Issues Paper does not discuss whether civil prosecution would be conducted on the basis of strict liability or require proof of culpability to the civil standard. We submit that there are major problems with either option.

A strict liability approach to broadcast regulation would be inappropriate as demonstrated by the facts in the 2UE Investigation where the ABA accepted that the licensee had taken reasonable steps to comply with its regulatory requirements yet was still found to have breached its licence conditions and the Current Affairs Disclosure Standard – in other words the licensee was not at fault. The existence of a civil penalty or penalties would not have added anything more to the effectiveness of the current regulatory regime. As we have pointed out above, the breaches are attributable to the drafting of the Current Affairs Disclosure Standard which favours substance over form and which places an unreasonable burden on current affairs announcers by requiring contemporaneous disclosures using an exact form of words.

It is not inconceivable that in response to a strict liability approach to broadcast regulation, commercial radio broadcast licensees might decide not to take *any* risks in their editorial or programming practices thus negating many of the features which make commercial radio programs compelling to their listeners – for example 'edgy' or entertaining or interactive programs or those which encourage debate about controversial issues of public importance. In other words, a strict liability approach to broadcast regulation would lead to censorship.

Prosecution requiring proof of culpability to the civil standard would also create further difficulties. The issues identified with the 2UE Investigation above confirm that the criminal standard of proof is appropriate for the matters which were referred to the DPP by the ABA. It would have been manifestly unfair to allow civil rules of procedure and a civil standard of proof to be used to determine liability and impose civil monetary penalties on the licensee of

2UE because the licensee could not have taken any other reasonable steps to guard against the inadvertent breach of its licence conditions or the Current Affairs Disclosure Standard. Given the facts from the 2UE Investigation, it's also arguable that even if a civil standard of proof was available to the regulator, a civil prosecution against the licensee of 2UE would not have succeeded.

Further, even though the imposition of a civil penalty does not amount to a criminal conviction, we believe (contrary to the suggestions in the Issues Paper) that members of the ordinary public (especially where it relates to corporate liability) would not recognise the procedural differences and so the stigma associated with a criminal conviction would exist even with civil penalties.

The fact that 'double jeopardy' would be excluded but the threat of criminal penalties would remain is also curious. Licensees would not know which standard their conduct would be judged against.

This proposal is also inconsistent with the current regulatory regime as it would reinstate more opportunities for litigation (that were a feature of the pre-1992 regulatory system) even though ACMA already has very effective powers at its disposal. This situation could lead to unnecessary antagonism between ACMA and the broadcast sector which should be avoided.

Contrary to the assumptions in the Issues Paper, there are many other practical reasons (other than the threat of the regulatory sanctions) for commercial radio broadcast licensee to avoid conduct that might be subject to complaints or regulatory intervention.

For example:

- The presenters and the stations involved in the Commercial Radio Inquiry and the 2UE Investigation have suffered from bad publicity and damage to their reputations which affects their relationships with their listeners and advertisers;
- Since the Commercial Radio Inquiry, a blaze of publicity and high levels of media scrutiny often follow investigations conducted by the regulator and in some cases (especially those involving high profile radio personalities) that publicity can give the impression that a licensee has breached the law even if the investigation finally reveals no breaches;<sup>11</sup>
- Responding to or defending allegations of breach involves additional (sometimes significant) costs for a licensee in terms of legal fees and diverts station management away from the important duties;
- In some cases, (e.g. those involving allegations of defamation or discrimination or breaches of privacy) a complainant may be able to pursue action against a licensee in

---

<sup>11</sup> For example, the Media Watch program in April 2004 in relation to Telstra's sponsorship of the licensee of 2GB which asserted that the station was in breach of the Current Affairs Disclosure Standard and the Codes contrary to the ultimate findings of the ABA which found no breaches, ABA, (19 April 2004) NR36/2004 [http://www.aba.gov.au/newspubs/news\\_releases/archive/2004/36nr04.shtml](http://www.aba.gov.au/newspubs/news_releases/archive/2004/36nr04.shtml)

more than one jurisdiction which exposes licensees to investigation by more than one regulator;<sup>12</sup> and

- A breach finding invites a greater level of scrutiny not just from the regulator but from the wider media (e.g. ABC TV's *Media Watch*).

In addition licensees may incur significant costs complying with the requirements of additional licence conditions. For example, 2UE was required to pay for a third party to monitor the John Laws show. In this case, (and from the licensee's perspective) these costs amounted to a default civil monetary penalty.

### **3.4 A new power for ACMA to issue infringement notices**

The Issues Paper recommends that ACMA should be given the power to issue infringement notices for a breach of certain sections relating to the failure to comply with certain notification requirements.

**Commercial Radio Australia supports the proposal to give ACMA the power to issue infringement notices but only for breaches of sections 62, 63, 64, 65, 112 and 205B of the BSA and late payment of licence fees under the *Radio Licence Fees Act 1964*. Such a scheme should also be consistent with the recommendations of the Australian Law Reform Commission set out in pages 112 to 117 of the Issues Paper.**

However, we believe that the proposal should be modified slightly by requiring ACMA to first give the relevant licensee a written warning. In other words, ACMA would only have the power to issue an infringement notice if the licensee failed to respond within the time and in the manner required in the written warning.

We do not support any wider use of infringement notices as this would be inconsistent with the current co-regulatory regime.

The level of penalties levied for these infringement notices should be appropriate and proportional and consistent with the fact that these are relatively minor offences. We suggest that the fines levied by ASIC for late lodgement of required notifications under the Corporations Act are an appropriate guide.

### **3.5 A new power for ACMA to direct on-air statements in relation to breaches**

The Issues Paper recommends that ACMA should be given the power to direct a licensee to broadcast on-air statements which report the results of an ACMA investigation that finds a breach of the Codes or licence conditions.

**Commercial Radio Australia does not support giving ACMA the power to direct a licensee to broadcast on-air statements.**

As discussed above in section 3.3, there is already a lot of scrutiny in the wider media in relation to investigations of commercial radio broadcast licensees. In some cases, such as

---

<sup>12</sup> For example, complaints against John Laws alleging vilification of homosexuals were dismissed by ACMA (MR 20/2005) but the complainant has also pursued a complaint with the NSW Anti-Discrimination Board.

the Commercial Radio Inquiry, those investigations have actually been initiated after scrutiny provided in the wider media (e.g. ABC TV's *Media Watch* program).

Breach findings have also been given a lot more prominence since the ABA introduced a new policy (February 2005 - NR10/2005) of issuing news releases relating to Code breaches and publishing that information on the homepage of its website – a practice which has been continued by ACMA. Prior to this, the ABA only issued news releases in relation to breaches of the licence conditions and standards. This information is also published in its bi-monthly newsletter: *ACMAsphere*.

Relative to the large number of complaints actually dismissed by the regulator<sup>13</sup> or properly resolved at the level of individual licensees/complainant, we believe that the media attention paid to breaches creates a distorted impression about the actual levels of industry non-compliance.

Further, Code 2 of the Codes already contains a provision that requires commercial radio broadcasting licensees to make reasonable efforts to correct substantial errors of fact at the earliest opportunity. Commercial radio stations broadcast on-air corrections or apologies when that is considered to be appropriate in the circumstances.

We also note that the Issues Paper (at page 123) states that the proposed power to order on-air statements should not be applied to the national broadcasters. One of the rationales for this suggestion is that the national broadcasters are:

*“subject to legislation which ensures their independence from directions by or on behalf of the Government and allowing [ACMA] to order on-air statements ... may be in conflict with these provisions”.*

Although, commercial radio broadcasting licensees are not subject to such legislation, we believe that these arguments are equally applicable to the commercial broadcasting sectors on the basis of editorial freedom. In other words that the relevant licensee alone, and not the Government or Government agencies, should determine the content of its broadcasts. This freedom is fundamental to the proper functioning of our democratic processes and is underpinned by Australia's Constitution.

Finally, we believe that mandated on-air statements could prejudice the licensee in respect of other potential legal proceedings.

#### **4. REFORM PROPOSALS FOR NARROWCASTING RADIO SERVICES**

##### **4.1 Issues with the commercial radio narrowcasting services**

The Issues Paper has identified problems which the regulator has experienced in trying to regulate narrowcasting radio services. Commercial Radio Australia has often raised the same concerns with the regulator particularly in relation to what are supposed to be narrowcasting services which operate as commercial radio broadcast services broadcasting popular music of wide appeal.

---

<sup>13</sup> For example, refer to the ABA's "Summary of Investigations" on page 42 of its 2004-05 Annual Report published on ACMA's website (MR 34/2005).

Narrowcasting services were introduced as a separate category under the BSA and were designed to be used for the provision of specialised or niche programming or to be used for experimental purposes. For this reason, very low levels of regulation were applied to narrowcasting services.

Open narrowcasting radio services have not always developed in accordance the original intentions. For example there are now many services which are networked over multiple locations and (as acknowledged by the Issues Paper) there is a significant problem with open narrowcasting services operating outside the terms of their licence conditions – i.e. as commercial broadcast services.

The regulator has used it's section 19 power to issue 2 clarifications notices for open narrowcasting radio services on two occasions (in 2001 and 2002). However, this has not cured the fundamental problem which is the lack of lack of clarity in the way in which narrowcasting services are defined in section 18 of the BSA. This is confirmed by the judgement in the *Taliglen* case which is discussed at page 38 of the Issues Paper.

We believe the Government should remove this ambiguity by enacting clearer definitions of a narrowcasting service. Therefore, in addition to our comments on the reforms proposals in the Issues Paper, we have prepared some suggestions for reform to section 18 of the BSA and a proposal for an additional clarification notice to deal specifically with those narrowcast services that broadcast significant amounts of music.

#### **4.2 New proposed definition of a narrowcasting services**

The current definitions lack clarity because in some cases they relate to niche programming formats (“special interest groups” “limited appeal” criteria) and in other cases technical coverage constraints (“limited locations”, “limited period or to cover a special event”). The presence of sub-section 18(1)(a)(v) criteria (i.e. “for some other reason”) is clearly undesirable because some narrowcasting have developed in ways that are inconsistent with the original intentions of the BSA and this provision leaves the door open for ACMA to determine an entirely new class of narrowcasting services.

On balance, we believe that the most appropriate criteria for defining a narrowcasting service should be that it “provides programs of limited appeal”. In investigations involving the programming issues and narrowcasters, the regulator usually makes an assessment about whether the programming in question is of limited appeal by contrasting it with programs of wide appeal found on commercial radio broadcasting services.

### **New proposed definition for narrowcasting services**

- 18(1) Open narrowcasting services are broadcasting services:
- (a) that provide [programs](#) of limited appeal; and
  - (b) that comply with any determinations or clarifications under [section 19](#) in relation to open narrowcasting services.
- 18(2) [No change, relevant to TV]
- 18(3) Without limiting the generality of sub-section 18(1)(a), a narrowcasting service may be of limited appeal because it is:
- (a) targeted to special interest groups; or
  - (b) intended only for limited locations, for example, arenas or business premises\*; or
  - (c) provided during a limited period or to cover a special event\*.

*\* Services under this criteria should also be required to provide program formats that are of limited appeal*

### **4.3 Proposed clarification for music narrowcasting services**

This is a proposed clarification notice relating to music narrowcasting services. It is based on the principles enunciated in past ABA investigations.

#### **Proposed clarification for open narrowcasting music radio services**

##### **Music narrowcasting service**

- (1) This section applies if the broadcasting service has the following characteristics:
- (a) music comprises a **significant** element of the programming on the broadcasting service or is otherwise significant in the context of the broadcasting service; and
  - (b) the overall style of music is of a **broad appeal** to the population in the service area of the broadcasting service or otherwise is, or appears to be, intended to appeal to the general public.
- (2) The broadcasting service is not an open narrowcasting service.

##### **Comment**

“**Significant**” means that music, as a particular programming element, is important or of consequence when considered in the context of the overall broadcasting service. It does not have to be the predominant programming format (i.e. more than 50% of airtime). In some instances, a programming format may be significant even if it takes up less than 50% of the total airtime. **One test adopted by ACMA is whether the music format is likely to attract listeners that are only interested in the music broadcast on that service.**

Whether music has a “**broad appeal**” will depend on an examination of all the relevant facts. The starting point for ACMA when determining whether programming is of limited appeal is to contrast it with the type of music broadcast on a commercial radio broadcasting service. Commercial radio broadcasting services provide programs that are intended to appeal to the general public. **If the music format on a narrowcasting service is identical to or has similarities with the type of music broadcast on a commercial radio broadcast service, it is likely to be considered to have a broad appeal.**