The Federation of Australian Radio Broadcasters Limited

The association of commercial radio stations A.C.N. 059 731 467

House of Representatives Standing Committee on Communications, Transport and the Arts

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Chairman
House of Representatives Standing Committee on
Communications, Transport & the Arts
Parliament House
CANBERRA ACT 2600

Regional Radio Inquiry

Dear Paul

At our most recent appearance before the Committee at its Brisbane hearing, there were several questions that we took "on notice" and agreed to provide you with further information.

The following comment is now provided to you for consideration.

The Committee expressed some concerns at the industry's view of localism. While the Committee has expressed concern at the industry's view of localism, the industry's view is based on the requirements of the *Broadcasting Services Act* and, significantly, was supported by the industry regulator, the Australian Broadcasting Authority in its appearance before the Committee:

> *" If you look at our legislation it is premised very much on the idea about what comes out of the radio – what it sounds like – rather than where it is made". (CTA 904, Tanner, Tuesday 29th May 2001).*

As FARB has previously submitted, the question of local content is not one which can be directed solely to commercial radio broadcasters, and the issue cannot be considered in isolation of other broadcast sectors. The BSA contemplates that all broadcast sectors in a market, including the ABC and community broadcasters, have a shared obligation to contribute to the diversity of programming.

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Driven in many cases by viability factors commercial radio operators have opted for a variety of ways in which to provide listeners with a service. Whether that be via locally produced programming, networked from a hub or syndicator, automated, or most commonly, a combination of all these, the services all retain a local team, living and involved in the community.

The recent decision by Prime Television to cut its local news service to the major provincial centres of Canberra, Newcastle and Wollongong – with the loss of 30 jobs - because, apparently, the costs of providing the service cannot be sustained, exemplifies the problems faced by smaller regional commercial radio operators in maintaining viability. Clearly, if regional television operations with their larger revenue and asset base, and in some of the largest and most lucrative regional centres in Australia, cannot justify the continuation of local news services for reasons of costs, the commercial radio industry's arguments must have increased resonance in the Committee's deliberations.

The 1984 Department of Communications review of the policy relating to localism in Australian Broadcasting, the so-called *Oswin Report* made some interesting observations on the concept of localism that are pertinent to this Inquiry.

As the report states, the concept of localism has never been explicitly prescribed, nor fully explained, in any broadcasting legislation or single government policy statement – this is still the case. Notwithstanding its existence over a long period, the ambiguity and the complex nature of the concept means it cannot be easily or precisely defined.

The Information Paper accompanying the 1984 Inquiry pointed to the fact that a major criticism of localism is that it results in a reduction in the choice of services available to the local community. Because localism requires a degree of local production, it generally results in a higher cost structure than would be the case if the station broadcast only "non-local" programs (from another station or network). These higher operating costs raise the level at which a station with local input becomes commercially viable.

The report noted that networking in commercial radio has been around since the 1930s.

> *"The growth of networks and relay stations was not opposed, and was sometimes encouraged by successive governments. Co-operative networks were seen as the economic salvation of many small country stations and provided 'high class' city programs which were beyond the financial resources of individual stations. In the case of relay stations, the benefits to country listeners of receiving a service of any type (when such would be otherwise not available) were seen as paramount. Through these means radio gradually increased its popularity".*

The Report recommended against local program quotas, but said that the local 'sound' of the station should predominate – sound meaning not music, voice, or other single elements of a broadcast, but the 'mix' which causes listeners in the area to be conscious that they are listening to 'their' station. FARB would strongly urge the current Inquiry Committee to also reject any local program quotas.

As has been previously argued before the Committee, commercial broadcasters are committed to retaining localism, the degree of which is being determined by market forces. FARB strongly believes that its members should continue to be able to choose the kind of local programming and associated services they broadcast, provided that they are meeting their requirements under the BSA.

It is also worth reiterating that while the Inquiry has received a number of submissions criticising the perceived lack of localism in regional radio, official research shows a high acceptance of listening to regional commercial radio stations.

While the Committee has received submission from 275 individuals/organisations around the country, research of more that 26,000 people conducted around the country between 1998 and 2000 (see attachments) shows that commercial radio captures 76% of the potential 6 million listeners (aged 10-plus) to radio in regional Australia. On a weekly basis the regional population regularly listen to commercial radio for 18 hours 2 minutes. These figures have remained static throughout the nineties, strongly suggesting that despite increased automation and networking, commercial radio is providing listeners with the programming – and increased diversity - they wish to hear. Despite the proliferation of new services during the same period commercial radio still has by far the biggest audience share.

The Committee sought the industry's view on a proposal for three/five year review of licences.
The industry is clearly opposed to any licence reviews for several reasons.

The introduction of the *Broadcasting Services Act* in 1992 brought with it an era of "light touch" regulation, moving away from the "black letter" law approach of the 1942 Act in which licensees had to regularly justify how they were serving their market. Licence renewal under the 1942 Act was an administratively time consuming and costly exercise for licensees and the regulator, and one which many regional operators would find extremely difficult to undertake with the more streamlined staffing operations of today.

Importantly, the industry is extremely concerned about the adverse impact any re-introduction of licence reviews would have on the value of licences. Broadcasters have invested hundreds of millions of dollars on purchasing licences based on a particular set of rules. The presumption under the BSA now operates in favour of a licensee in the absence of certain conduct. To now place a condition on those licences, which introduces the possibility of revocation should they be found to be not meeting certain requirements, would most likely result in a significant change to licence valuations, thereby changing the dynamics of the industry and the basis for investment.

As the Committee has not suggested that this review would apply to other broadcasting sectors, commercial radio would also be placed at a significant operational disadvantage in the marketplace as it would have to "live up" to a different set of rules to its competitors.

The only result this can have is to lead to a further detrimental impact on the viability of regional commercial operators, an issue which has been the main focus of this Inquiry.

The Committee sought an industry view on the proposal for repeal of s.54
This is an issue which has been debated by the industry in other forums in recent years and on which there is no consensus. It is a complex issue and goes much further than the simple repeal of s.54, having the potential to open up the entire ownership and control debate.

It is worth noting that when the "two to a market" rule was introduced in relation to commercial radio services in 1992, the Explanatory Memorandum to the BSA stated the following in relation to s.54 [control of commercial radio broadcasting licences].

> *"The change in market limit allows for some small degree of economies of scale to be realised in markets where competition is not a concern but in combination with clause 39, still protects smaller markets from undue concentration of ownership."*

Historically, limits on control of commercial licences have been put in place to address two main policy concerns - concentration of ownership in media and competition policy.

Essentially, then, the primary considerations bearing upon the repeal of s54 are policy considerations. Any proposals to remove or amend controls on the ownership of commercial broadcasting services are likely to be controversial and produce divided opinion in the electorate.

The Committee asked the FARB representatives what the industry was prepared to offer in return for the proposed moratorium on licence fees
It is presumed that the Committee is suggesting a trade-off based on stations meeting a certain level of local content to be able to claim a reduction in licence fees.

Again, one difficulty with this proposal is that it places some form of additional regulation on commercial broadcasters, while allowing other sectors to escape similar regulations. Even assuming that meeting a pre-determined level of local content would be optional, the industry's general view is that any savings in licence fees would not release any significant funds, having regard to the cost of providing additional local content. Furthermore, any station taking up the option would again be placing itself at a competitive disadvantage against other sectors and media. The end result would be to further impact on the profitability of stations and it is estimated to provide little incentive for stations. The recent regional radio funding announced by the ABC is indicative of the costs associated with significant local content provision.

The Committee asked whether the industry had a view on the re-broadcast of the John Laws program on community stations.
At the hearing, it was indicated by FARB representatives that any syndication of such programming would need to be on the basis that the community stations were meeting their licence conditions, in particular the restriction on a maximum of five minutes sponsorship per hour.

While the Committee may have a view that the airing of, for example, the John Laws program on a community station may be filling a local need, it would appear to run counter to the Committee's concerns in relation to networking/syndication of programs and the so-called centralisation of opinion.

As the Committee is aware, the *Broadcast Standards 2000* relating to disclosure and other matters now apply exclusively to commercial radio broadcasters. The industry believes that where syndication of commercial programming to other categories of service occurs, such services should be subject to the same standards.

Additional Recommendation: The repeal of s.40 of the BSA to remove the opportunity for unplanned commercial services to further impact on regional operators.
FARB has already called for a moratorium on the issue of further licences in regional markets following completion of the ABA's planning process, having regard to the viability of many incumbent operators in these markets.

However, the industry now seeks an amendment to the BSA to repeal s.40 to overcome what is emerging as a disturbing anomaly in the planning and allocation of licences under the BSA.

The significant difference between s.40 commercial radio licences and licences allocated under s36/39 is that a service licensed under s.40 does not use the broadcasting services bands to deliver its service. It is nonetheless a commercial broadcasting service subject to the same regulatory scheme under the legislation.

The ABA's website indicates that the Authority has issued 10 such licences around the country with some having a licence area of the totality of Australia.

The BSA sets out detailed provisions relating to the planning of new commercial services which are then allocated using the ABA's auction-style price-based allocation system. In contrast, there is no requirement under the BSA for the planning of services which do not use the designated broadcasting services bands. A s.40 commercial licence may be allocated by the ABA, in its discretion, on application in writing and "over-the-counter" for a fee of $2,400. The ABA designates a particular area in Australia as the licence area.

Given the extensive provisions in the BSA relating to the planning of commercial broadcasting services, (and the submissions to this Inquiry as to the impact of the further allocation of such services on the viability of existing commercial radio services in these "planned" markets) it seems inconceivable that after the ABA has determined that no further commercial service/s should be issued, a non-BSB

commercial radio licence can be purchased "over-the-counter" (from the same Authority) for that same market.

Further, the incumbent licensee receives no prior warning from the ABA that an application for such a licence has been made and/or approved, and apparently has no right of appeal. An example in question is the market of Bathurst in New South Wales. The Committee has heard extensive evidence from the incumbent commercial operator in the Bathurst licence area. The market was planned by the ABA and a decision taken not to issue a further commercial licence, however, the licensee has now become aware through the local council of a development application for a transmitter for such a service.

s.40 licences are restricted to 400w power in the upper end of the AM band on 1611kHz, 1620kHz and 1629kHz in what can be regarded as at times marginal reception quality. While they cannot adequately cover larger city areas, in a smaller regional centre they can cover an entire town and represent a major threat to the viability of an incumbent commercial operator.

Given the extensive submissions put to the Committee regarding the impact of additional services on the viability of regional commercial radio operators, FARB believes that the Committee should give earnest consideration to recommending the repeal of s.40 of the BSA. While any repeal would, as a matter of equity, require the grandfathering of existing s.40 licences, removing the opportunity for unplanned commercial services would limit further impact on regional operators already under financial pressure.

Conclusion

The key focus of this Inquiry has been on the viability of regional commercial broadcasters. Evidence presented to the Committee shows that based on the latest available statistics, some 20% of regional commercial services are in loss.

Economic factors force broadcasters to seek economies of scale. On the other hand, viable operators contribute to a healthy, diversified radio sector.

The industry would strongly urge the Committee not to make recommendations that will impinge on regional commercial radio operators' viability, or reduce their ability to compete in the marketplace with other sectors.

In the alternative, if the Committee is minded to recommend regulation, FARB submits that the Committee cannot simply look to the commercial radio broadcasting sector for the answers.

Clearly, all broadcasting sectors serving regional Australia – national, community, narrowcasting and commercial broadcasters, including audio and audiovisual services – are required to share some responsibility for contributing to the diversity of services in a market, as contemplated by the Schedule 2, Part 8 Standard Licence Conditions of the *BSA*. Any recommendations the Committee sees as necessary should therefore apply equally to all sectors.

For the information of the Committee I have also provided two documents that will provide further background to Committee members to assist in their deliberations. The first is a copy of FARB's submission responding to a discussion paper by DCITA on proposed options for legislative reform and related issues following the final report of the Australian Broadcasting Authority into commercial radio, which addresses a number of issues raised by the ABA in its appearance before the Inquiry. The second is FARB's submission to the current s.19 Inquiry being conducted by the ABA to clarify the definition of narrowcasting.

Yours sincerely

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FEDERATION OF AUSTRALIAN RADIO BROADCASTERS LIMITED

SUBMISSION TO

AUSTRALIAN BROADCASTING AUTHORITY

in response to

OPEN NARROWCASTING RADIO SERVICES
Clarifying the Criteria
Discussion Paper

May 2001

INTRODUCTION

FARB welcomes this opportunity to comment on the operation of the criteria applicable to the open narrowcasting radio category under the *Broadcasting Services Act 1991.* ("BSA"). The review of open narrowcasting criteria is both timely and necessary.

FARB believes that, in its present form, the open narrowcasting radio category is not operating efficiently or reliably in accordance with the spirit of the BSA. FARB acknowledges the BSA's philosophical approach that open narrowcasters should be subject to lower levels of regulatory intervention, but is of the view that the regulatory approach presently in use is at too low a level and too vague to effectively preserve the distinction between the commercial broadcasting and open narrowcasting categories in the radio industry. This undermines the achievement of the BSA's objects, as set out in Section 3(1), particularly the following:

(a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information

(b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs

(e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity

In FARB's experience, there are a significant number of radio services that, while purporting to comply with the open narrowcasting class licence, provide services that are essentially intended to have broad appeal to the general public. Anecdotal evidence from FARB's members indicates that this is a significant and growing problem. The nature of the content of broadcasts is, in FARB's view, the most critical issue in this review. The format and other limitations placed on narrowcasters are the principal quid pro quo for their being excused from the ownership and control regulations, annual earnings-based licence fees and much higher auction prices applicable to the commercial broadcasting sector. Commercial broadcasters therefore regard it as vital that a clear distinction between the two classes of service be established and maintained.

There are two major difficulties in maintaining this distinction: firstly, the lack of clarity which surrounds the limitation criteria and secondly, the lack (for a variety of reasons) of effective enforcement action when the narrowcasting boundaries are overstepped.

Clearly, detailed discussion of the enforcement issue is beyond the scope of the present submission. Enforcement issues will only be addressed to the extent that they overlap with issues surrounding the definition of limitation criteria. However, the objective of Section 5(1)(b)(ii) of the BSA – "deal effectively with breaches of the rules established by this Act" is not being achieved in this respect. FARB believes that improvement of enforcement is critical and would welcome the opportunity for further discussion of this matter.

As to the clarity issue, FARB believes that limitation criteria are best clarified by the introduction, as far as is possible, of objectively ascertainable and measurable

parameters, by increased transparency in the Section 21 opinion process and by the establishment of readily accessible data registers. These views are elaborated in more detail below.

SPECIAL INTEREST GROUPS AND PROGRAMS OF LIMITED APPEAL

The most critical distinctions to be drawn between narrowcasting and broadcasting are to be made in the area of the content of programs. In FARB's view the current regime relies far too heavily on the use of discretion and interpretation, with the result that it is comparatively easy for self-proclaimed narrowcasters to transmit programming which mimics commercial formats and content, and which appears to be intended to appeal to the broadest possible audience. This ongoing encroachment into the sphere of commercial broadcasting is a threat not only to FARB's members but to the achievement of the objects of the BSA.

Degree of influence

It is the clear intention of the BSA that the level of regulatory supervision of each category of service vary according to the degree of influence they are able to exert in shaping community views in Australia.

There is no statutory definition or other explanatory guidance provided as to the relevant "community" upon whom the influence is to be exerted. One can therefore only assume that what is meant is the general usage of the word, to mean the Australian society and polity in general.

There is also no definition or guidance provided as to the meaning to be given to "influence", leaving us once again to fall back on common usage. The Australian Concise Oxford Dictionary defines the term as "having an effect" on someone or something. There is no concept of degree or quantum inherent here, with the result that the term "influence" establishes a fairly low hurdle. It is quite possible for narrowcasting services, even those which the ABA considers to be uncontroversial in their classification, to have a significant impact not only within their niche communities but on the wider Australian community overall.

For example, consider a service broadcasting in a language other than English, particularly in a talk back format. None of the factors which the ABA identified in its *Commercial Radio Inquiry Report on the Hearing into 2UE Sydney* (see p8) as critical to the success and impact of such formats is limited to English language programming. In fact it might be argued that its impact is magnified in small and more tightly knit sub-communities. Recent scandals, and public inquiries, into ethnically based branch stacking activities involving both sides of politics amply demonstrate the potential for direct impact on the political life of the Australian democracy. Similarly, a dance or rave party music service may potentially have a significant impact on attitudes in its target community – for example to recreational drug use – which are of vital interest to the broader community and the subject of political controversy.

In FARB's view the current regulatory approach to the narrowcasting category underestimates the potential degree of impact that such services can have. It appears to assume that their influence on the broader community is non-existent, a view with which FARB strongly disagrees. In FARB's view, an appropriate response is to clarify the criteria to ensure that they properly reflect the potential for impact of the category, to improve the transparency of ABA processes and to create appropriate and transparent records that will permit proper assessment and evaluation of this impact.

Special interest groups

In FARB's view the "special interest group" category is in fact redundant.

Special interest groups form, and continue to exist, because they support their members' common interest in matters with limited appeal to the broader community. Properly understood, therefore, they are merely an alternative method of expressing the idea that their subject matter appeals to a relatively small group in the community. In other words, the proper construction of criterion (i) of Section 18(1)(a) is that it has no real work to do.

Given this, FARB believes that the ABA should not move to clarify the provision further, or to create for it an artificial independent life. Instead, the ABA should recommend to the Minister that the wording of Section 18 be varied as follows:

- Open narrowcasting services are broadcasting services:
  (a) whose reception is limited:
    (i) by being targeted to special interest groups; and
    (ii) by providing programs of limited appeal; or
    (iii) by being intended only for limited locations, for example arenas or business premises; or
    (iv) by being provided during a limited period or to cover a special event.

The current subsection (v), "for some other reason", should be deleted in the interests of clarity and predictability.

If however the ABA is not inclined to accept this view, and wishes instead to create an independent meaning for Section 18(1)(a)(i), FARB submits that the definition of "special interest group" should be confined as far as possible to objectively ascertainable and measurable criteria.

To be a "special interest group" a group should have an objectively definable and measurable membership and address a particular interest or constellation of related interests, outside the general interest of the broader community. By way of example, a service targeted to "people interested in New Age spirituality" would not be a "special interest group" within this definition. A service targeted to "the Muslim community of X area" would. Further, to be considered to be limited under Section 18(1)(a)(i) the service must be targeted to meeting only the relevant special interest and not to any broader needs or interest of the members of the group. Hence, the example Muslim service discussed above would be limited to broadcasting material directly relevant to the practices and beliefs of Islam. Such an approach would ensure that the service remains both relevant to the target group and unlikely to have broader general appeal.

Summary responses to options for comment

10.11.1 – 3: If an independent definition is to be given to "special interest group" it should require the group to have an objectively identifiable and measurable membership. Further the group should focus on a clearly definable interest or constellation of interests outside those that appeal to the general public.

10.11.4: This will depend on the nature and circumstances of each broadcast program. For example, a broadcast in a language such as, say, Serbian might be of limited appeal to the broader English speaking community but might nevertheless have a significant impact on the community at large because of its content. The answer is so highly dependent on context that further examination of the question is unlikely to be fruitful.

10.11.5: Yes, potentially. Again this will be highly context dependent and detailed examination is therefore unlikely to be helpful.

10.11.6: Yes, potentially. Further exploration is unlikely to assist, as noted in answers to questions 10.11.4 and 10.11.5 above.

10.11.7: Yes. Such discussions, in whatever language or context, are among the fundamental underpinnings of any participatory democracy.

Programs of limited appeal

Much of what "appeals" to the broader public at any given time is a matter of fashion, particularly when it comes to music and entertainment. The "programs of limited appeal" criterion is highly fashion dependent, and as such is inherently conceptually unstable. This instability detracts substantially from the achievement of the statutory objects referred to above, and particularly object 3(b).

FARB is critical of the lack of transparency that currently surrounds the issue of Section 21 opinions, and believes that this could be considerably improved. While Section 210 of the BSA protects the right of aspirant broadcasters to keep their intended format a secret in the establishment period, there is no such protection once they are established. Transparency and efficient operation of the narrowcasting category could be enhanced by the creation of an easily accessible register of published Section 21 opinions, preferably searchable by key words on the ABA's website. A further useful step would be to circularize the relevant industry stakeholder representatives – FARB, FACTS, ASTRA and CBAA – with copies of each opinion as it is published.

FARB sees limited utility and some potential problems in the establishment of any summary form register of Section 21 opinions. Section 21 opinions are highly dependent on the facts and circumstances on which they are based. Many are borderline decisions, dependent on particular significant facts. Until the service actually commences, if it ever does, to allude to those facts and circumstances is to breach the applicant's commercial confidentiality. This means that, in the case of unpublished opinions, it is highly unlikely that any summary form reference to the kind of service could provide reliable guidance, particularly for people whose commercial survival may

depend on the outcome. The resultant list of "formats, which may or may not be of limited appeal", might be expected to be so broad and vague as to be of limited use, and might actually mislead anyone consulting it.

Nevertheless, FARB agrees that the proposed schedule would constitute an improvement on the present position, since it would at least facilitate a degree of monitoring and dialogue. On the other hand, FARB strongly opposes any attempt to define narrowcasting status by reference to any summary form description of format, or register of formats.

In FARB's view a more comprehensive approach, such as that outlined below, is called for.

FARB's proposal

In the absence of statutory amendment to specify a time limit on the confidentiality of section 21 opinions, FARB believes the ABA should adopt the following approach.

There should be no further attempt to clarify the "limited appeal" category until there is a transparent basis for evaluating the claims made to fit within it. The ABA should therefore go about establishing such a basis first.

FARB submits that the ABA should use its powers under Section 120 of the BSA to vary the terms of the radio open narrowcasting class licence as follows.

- Persons who operate a narrowcasting service should to be required to notify the ABA within 30 days of commencement of the service, presumably by lodging an appropriate form. Existing operators should be given a period of three months within which to lodge the appropriate form.

- The notification should specify the identity of the service operator, the location of the service and the means of transmission. It should also specify the grounds on which the operator claims to be narrow within the terms of the class licence.

- Further notification of changes to these particulars should also be required to be lodged within 14 days of their coming into effect.

- This information should then be published in a register, maintained by the ABA, and accessible by the public. It should be available and searchable by keywords on the ABA website.

The ABA should then be entitled to rely on the information provided by the operator for the purposes of the BSA, and the notice should include a statement to this effect. It should also include a disclaimer to the effect that the absence of requisitions or enquiry by the ABA does not constitute acceptance that the service complies with the BSA. Further in the interests of more efficient enforcement FARB is of the view that the ABA should seek a statutory amendment which would deem that the information recorded in the register is accurate unless and until the ABA determines otherwise.

The creation of such a register would enable the ABA and others in the industry to understand the way in which the class licence is being interpreted and to identify areas that might require further clarification. The need to notify only after commencement of the service would continue to provide protection for the commercial in confidence information of aspirant broadcasters who are still building their businesses. The existence of the register would also enable the ABA to better monitor the performance of this category and to assess the extent to which it is meeting the objectives of the BSA, particularly the diversity objective.

Further, the records would assist in streamlining the enforcement process in those cases where such action is required. Presently it can be a frustrating and almost impossible task even to identify precisely who is providing an alleged narrowcast service. The ABA has little means of doing so and competitors even less. FARB believes that such a register would be readily adaptable to support an improved enforcement process, for example by allowing the ABA to proceed against the operator notified on the register without having to demonstrate that the operation had not changed hands, and by providing a rebuttable presumption as to the character of the service on the basis of the description provided. FARB would welcome the opportunity to meet and discuss these and other enforcement issues with the ABA, outside the context of the current enquiry.

Summary response to options for comment

10.26: If there is to be a separate definition of "special interest group" it should require that the group have an objectively definable and measurable membership and that it address a particular interest, or constellation of related interests, outside the general interest of the broader community. The ABA should not create a register of deemed "limited appeal" formats, but should instead improve the transparency of the existing regime and then review the possibility of clarification of this criterion at a later date.

LIMITED LOCATIONS

The "limited locations" criterion specified in Section 18(1)(a)(ii) is intended to be especially small in scale. This is indicated by the examples set out in the BSA itself, and is not diminished by the addition in the Explanatory Memorandum of the domestic dwellings in a specified limited area or suburb or isolated town. It is noteworthy that the Explanatory Memorandum refers to "isolated" town rather than "town" *per se*. In FARB's submission this is because the intention is to describe an area with severe limitations on the size of the maximum potential audience. The common denominator between an "isolated town" and "an arena", as distinct for example from "a town" *per se*, is that the maximum available audience is finite and comparatively small.

The policy intent is one of providing smaller services, with smaller revenue bases and correspondingly smaller financial imposts, so that niche markets can be developed to provide a range of services beyond the capacity and interest of broad based commercial stations. In so doing it directly supports the statutory objectives of Section 3(1)(a), (b) and (e) referred to above.

The appropriate clarificatory criteria to be applied to Section 18(1)(a)(ii) are those set out in Sections 22(a) and (b):

(a) the geographic coverage of those services; and
(b) the number of persons who receive or are able to receive those services.

In FARB's view these criteria should be applied together, to establish parameters for the Section 18(1)(a)(ii) category based on the kind or size of area and the size of the maximum potential audience.

Low power transmitters

The power of a transmitter limits only its potential geographic reach. Whether or not the service provided using any given transmitter can properly be considered to be narrowcasting depends on other factors as well: the content of the broadcasts and the size of the potential audience.

By way of example, even a one-watt transmitter in an urban area can potentially reach a larger audience than the total population of the smaller commercial broadcast licence areas. If that transmitter is then used to broadcast content with a broad appeal, the service would clearly be unfairly competitive with the commercial broadcasters in the area, who are subject to far higher establishment and ongoing costs. It would contribute nothing to increased diversity or the provision of new services. To deem such a service to be narrowcasting merely because that was the use envisaged by the planners at a time prior to its establishment is inconsistent with the policy intent of the BSA.

FARB is strongly opposed to any proposal that a service be deemed to be narrowcasting by reference solely to the power of the transmitter.

Premises as limited locations

The Australian Concise Oxford Dictionary defines "premises" as "a house or building with its grounds or appurtenances". As with the example of low power transmitters discussed above, the concept of premises alone is not useful when defining narrowcasting parameters.

For example, a suburban "mega mall" would meet the dictionary definition of premises, being essentially one large building with "appurtenances" such as a car park. Within that building however are located facilities of such breadth and variety, from shopping to restaurants to cinemas, that people attend in large numbers for often substantial periods of time. (The usual provision of 3 to 4 hours free parking is a good indicator of the average length of stay). Such "premises" would have a potential audience of more than ten times that of small commercial broadcasters.

FARB is strongly opposed to any proposal that a service be deemed to be narrowcasting by reference solely to its provision to "premises".

Signal contours

FARB believes that there is merit in this approach, because it combines measurements of both area and population.

The BSA does not prescribe a critical size above which an intended service would cease to be limited by reference to location. It is however open to the ABA to do so using its Section 19 clarificatory powers.

The basic approach should be one of estimating the number of people who might receive an adequate signal from the service's transmitter, using census data where the transmitter serves more than a single premises. Where the transmitter is intended for "premises" a similar approach ought still to be taken, but based instead on substantiated estimates of the number of people passing through the premises, calculating instead an average daily maximum potential audience which should then function in a similar way to the population estimate for localities.

FARB does not accept that there needs to be distinctions drawn between different kinds of localities, although it would be reasonable to distinguish between localities and premises, where the available audience is transient and continually varying in its composition.

FARB proposes that any service intended for a locality (large or small, rural or urban) with a maximum potential audience greater than the smallest commercial operator should not be able to be classified as narrowcasting under the "limited location" criterion. Currently the smallest such licence is in Queenstown Tasmania, with a population of 6,764.

Where the service is intended for premises, FARB submits that the service should not be able to be classified as narrowcasting under the "limited location" criterion if the estimated daily maximum potential audience is more 5% of the exclusive population of the commercial broadcasting licence market in which the premises is situated.

FARB accepts that there are limitations to the accuracy of calculations of signal contours and audience sizes. It would be reasonable therefore to make allowance for a margin of error, the nature and size of which would depend on the method of calculation to be adopted. Should the ABA decide to proceed in this way, FARB seeks the opportunity for further discussions on this point.

FARB acknowledges that its preferred approach may require the diversion of ABA planning resources, which are already heavily if not over committed. However, FARB is also strongly of the view that it is inappropriate to shun the best available solution simply on the basis of resource convenience. FARB believes that appropriate additional funding should be provided to the ABA to enable this work to be undertaken without derogating from its current planning priorities.

Networks

FARB strongly endorses the proposal that services which are part of a network should not be able to be considered to be narrowcasters by reason of the limited location

criterion. In such cases, all the services in the network should be considered to be a single service for the purposes of the application of Section 18(1)(a)(ii).

A further and more complex issue arises in the case of services, which, although not in common ownership, broadcast substantially the same content. FARB submits that where stations broadcast such syndicated content for 50% or more of their airtime, they should be deemed to be networked for the purposes of the application of Section 18(1)(a)(ii).

Summary responses to options for comment

9.28.1 – 3: "Limited locations" should be defined as premises and localities, with suitable definitions of each. "Premises" should be defined in accordance with the dictionary definition of a building and its appurtenances. "Localities" should be defined by reference to signal contours. To be limited for the purposes of Section 18(1)(a)(ii) the maximum audience should not exceed:

(a) in the case of localities, the population size of the smallest exclusive coverage area applicable to a commercial broadcasting licence;
(b) in the case of premises, if the estimated daily maximum potential audience is more than 5%of the exclusive population of the commercial broadcasting licence market in which the premises is situated.

9.28.4: No.

9.28.5: Yes, and the definition of network should include services which, although not in common ownership, broadcast the same content for 50% of their airtime or more.

RACING RADIO

FARB notes the findings of House of Representatives Standing Committee on Communications, Transport & the Arts into Regional Radio Racing Services ("the *Regional Racing Report*") to the effect that racing radio is an important and traditional part of life in rural Australia (at p. 3). FARB also notes that there is a clear demand for racing radio services in those areas, although the ABC's research indicates that that demand may be declining into the future. (*Regional Racing Report* at p. 11ff)

What is clear from the *Regional Racing Report* is that it is the racing industry, and associated wagering, which holds this traditional place. It is only this particular industry that "represented a way of life and direct involvement in the euphoria generated by the racing industry" (*Regional Racing Report* at p.6). The same cannot be said of a generic gambling service, offering betting opportunities on various sports and possibly on other activities as well. Indeed the broadening of racing radio style services to encompass other sports would have the effect of substantially diminishing the traditional racing coverage that the Parliamentary Committee found to be so important.

In the context of television broadcasting, the ABA has always avoided any attempt to classify mainstream popular sports coverage as narrowcasting. FARB sees no reason

why mainstream sports coverage should be considered narrowcasting for the purposes of radio when it is not so classified for the purposes of television broadcasting.

Services offering coverage of sports such as football, soccer, motor sports and most of the others listed as being the subject of the TAB's SportsBet services have always been regarded by the ABA as being apparently intended to appeal to the general public: that is, within the ambit of the Section 14 definition of commercial broadcasting. There is nothing inherent in their being broadcast by a TAB or similar gambling operator that would significantly limit the attractiveness of the broadcast to the broader community. The combination of sports could only broaden the appeal of the broadcast and the association with gambling opportunities would have no significant limiting impact – indeed, it may even broaden the appeal further by introducing gamblers to new gambling opportunities and by introducing sports fans to the idea of sports gambling.

As the Productivity Commission has pointed out and the ABA has noted, TAB's and on-course totalisators account for massive takings each year. In the commonly used sense of the word, they are quintessentially commercial operations – large and successful, and growing. In FARB's view, while there is a case for (at least temporarily) retaining a niche for traditionally significant racing services, there is no case for stretching the narrowcasting category to encompass broadly attractive content simply because the entities which operate the traditional racing services have chosen to broaden their operations. The consequence of such broadening is the need to buy and operate a commercial broadcasting service.

There is also a strong public policy argument against the expansion of racing radio services to create a new and far broader gambling radio service. As the Minister has pointed out, in the context of explaining his proposed ban on internet gambling services:

- Australia has approximately 290,000 problem gamblers who lose on average at least $12,000 per head per year
- 130,000 of these problem gamblers are severe problem gamblers who lose considerably more than this
- 70% of Australians believe that gambling does more harm than good
- this has an enormous negative social impact.

FARB would not oppose the establishment of a racing radio narrowcast category, the content of which is to be directed only at the sports of horse and dog racing and consequent wagering, if the ABA were to prefer this option. However, FARB is of the view that such a service would be of limited appeal (within the current criteria), provided that its programs addressed only racing and racing related subject matter. If more certainty were desired, FARB would support a recommendation to the Government that the Parliament legislate to create such a category, provided that its ongoing relevance and utility were to be reevaluated after a specified period of time, say 5 years.

Summary responses to questions and options for comment

11.6.1: Accepting that racing radio is of limited appeal, that limitation would cease if any other sports betting services were added. Only programming relating to horse and dog racing and betting on such racing should be able to be transmitted.

11.6.2: No.

11.6.3 No.

11.31.1: FARB strongly opposes this proposal. Such a service would not be consistent with the concept of narrowcasting. It would be commercial broadcasting.

11.31.2: FARB opposes this proposal. It is too vague and uncertain to promote regulatory certainty and industry stability and in our view is likely to promote services far broader than are suitable for the narrowcasting classification. Racing radio should be confined to traditional racing, betting on traditional racing and material directly connected to these things.

11.31.3: FARB endorses the broad parameters of this proposal, but takes no position on whether the old Regulations or a newer version should form its basis.

11.31.4: FARB does not oppose this approach, but would wish any such report to note FARB's view that a narrowly constructed racing radio service, within the parameters of the old Regulations, would meet the current class licence criteria for programs of limited appeal, and that any broadening beyond racing would constitute commercial broadcasting.

CONCLUSION

In its present form, the open narrowcasting radio category does not effectively or reliably support the objectives of the BSA. Unlike narrowcasters, commercial broadcasters are subject to onerous regulation, including ownership and control regulations, annual earnings-based licence fees and much higher auction prices for their licences. The principal quid pro quo for these imposts is the ability to transmit broad based programming designed to appeal to the general public. When the distinction between narrowcasting and commercial broadcasting is allowed to be broken down, the assets and businesses of FARB's members are considerably and unfairly devalued.

There are two central problems: the lack of clarity surrounding the limitation criteria and the lack of any effective enforcement action against purported narrowcasters who overstep the boundaries.

The criteria by which a service is determined to constitute narrowcasting should, where possible, be amended by improving their clarity and predictability. In FARB's view this is best achieved by reducing the introduction of objective and measurable criteria and the reduction of the present reliance on discretionary decisions. Increased transparency in the Section 21 opinion process is necessary, and no further clarification of the "limited

appeal" criterion should take place until there has been an adequate opportunity to consider and evaluate the way the criterion is being interpreted in the market place.

It is also essential that these steps be accompanied by a greater commitment by the ABA to effective enforcement against narrowcasters who are effectively operating as commercial broadcasters without the appropriate licences.

FARB looks forward to engaging in ongoing dialogue with the ABA on these issues.

DISCUSSION PAPER

PROPOSED OPTIONS FOR LEGISLATIVE REFORM AND RELATED ISSUES FOLLOWING THE FINAL REPORT OF THE AUSTRALIAN BROADCASTING AUTHORITY INTO COMMERCIAL RADIO

FARB RESPONSE

1. Introduction

The commercial radio industry welcomes the opportunity to comment on the proposals put forward in the Discussion Paper issued by the Department of Communications Information Technology & The Arts.

The Paper assumes that all of the sanctions and options discussed would apply to all sectors. The Department requests comments on this approach.

The Paper discloses no circumstances where the public interest could be said to differ as between commercial radio and television broadcasting services, subscription and community broadcasting services or narrowcasters. The public interest in the conduct of presenters, effective complaints processes and content regulation does not differ with the categorisation or popularity of a service.

Each sector also is equally open to engage in conduct which may breach the provisions of the Broadcasting Services Act 1992 ("Act"). Commercial, community and subscription broadcasting services and narrowcasting services provided under a class licence all are subject to licence conditions and required to develop Codes of Practice under the Act.

Where broadcasters are subject to substantially similar regulatory regimes, there is no sustainable basis on which to differentiate between the remedies that may be available to the ABA under the Act. While different penalties may be appropriate, having regard to the nature of the offence and the degree of influence of the broadcast concerned, there is no logical basis on which to distinguish between the powers of the regulator to respond to conduct contrary to the Act.

2. Proposals

(1)

The Department seeks views on:

- *The relative merits or otherwise of introducing direct sanctions against presenters and other employees of a licensee for non-disclosure of any arrangements under which they or any other person are entitled to receive a benefit in return for any on-air conduct; and*

- *Issues requiring consideration in the drafting of any proposed legislative amendment, for example:*

- *to whom the sanctions would apply, i.e. all or specified categories of employees of a licensee;*

- *to whom disclosure would be, i.e. the employer, the ABA or a publicly available register; and*

- *the action required, i.e. Would on-air disclosure be required in all circumstances?*

The commercial radio industry takes the view that it is the licensee which is responsible for the programs broadcast on its service and for complying with regulations and laws which affect on-air content.

Since the recent ABA inquiry into commercial radio drew attention to the issue of possible appropriation of broadcast inventory, FARB understands that many of its members have reaffirmed company policies precluding the use of air time for private commercial gain and reviewed contractual arrangements with presenters and others to ensure that the interests of shareholders and the public are protected in this regard.

FARB does not endorse the introduction of direct sanctions against presenters or other personnel and believes control of program content is an important aspect of corporate governance, for which the licensee must assume responsibility.

(2)

The Department seeks views on:

- *The relative merits or otherwise of granting the ABA the power to require a licensee to broadcast an on-air statement of ABA findings with regard to any statutory, licence or Code breaches by that licensee.*

In principle, the commercial radio industry accepts that where a station has been found to have committed a serious breach of the Act or a serious and sustained breach of a Code of Practice, on-air disclosure may be appropriate.

However, the industry would not endorse unfettered ABA powers in this regard. There must be express limitations on the nature of the offence which gives rise to the ability to order an on-air statement and the wording, timing and frequency of a statement.

FARB believes that the scheduling of any statement should have regard to the time and nature of the offence and that the ABA should not have the power to make an order that extends beyond 5 days. The times should be subject to agreement between the ABA and the licensee, and the announcement itself should not occupy more than one minute of air time.

As the ABA is aware, programming and advertising schedules often are committed well in advance. If the objective of broadcasting such an

announcement is to inform the public when a licensee has committed a serious breach of the regulations, as distinct from "punishing" the licensee, then the scheduling of the announcements co-operatively should not be seen as any concession to the licensee.

Any amendments to the legislation must contain the precautions included in the Discussion Paper whereby such announcements can only be ordered if the findings have been made as a result of an investigation conducted by the ABA, any on-air statement must be confined to a statement of the findings of that investigation and the licensee must have the right to appeal the decision to the AAT.

If the specification of the form and timing of any statement is confined by the legislation, then appeal rights to the AAT may be less likely to be exercised.

(3)

The Department seeks views on:

- *the costs and benefits of providing the ABA with injunctive relief powers in certain circumstances; and*

- *other options for addressing these concerns.*

At the outset of the Discussion Paper, the following extract from the ABA Report into Commercial Radio is quoted:

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

FARB assumes that the proposal to grant the ABA injunctive powers is intended to address the ABA's perception that there are deficiencies in the remedies available to it under the Act.

FARB does not agree that the ABA lacks sufficient powers under the Act. The very inquiry which led to the Report and the subsequent imposition of conditions on one licensee and standards across the commercial radio industry clearly demonstrates that the ABA has substantial powers to regulate the conduct of licensees.

A breach of the Act or a serious or sustained breach of a Code of Practice has significant consequences for a licensee and could not be determined by an arbitrary or superficial investigation by a regulator. There must be appropriate checks and balances which will always require that the ABA devote a certain level of resources, including financial resources, in performing its statutory function.

The powers granted to the ABA at Part 10 Division 3 of the Act are substantial powers. It is difficult to envisage any circumstances where a commercial broadcasting licensee would not respond to a notice issued by

the ABA under Section 141 (Notice to Stop Breaches of Conditions of Licences, Class Licences or of Codes of Practice).

In so far as FARB is aware, the ABA has never tested the Court's approach to these provisions. It is, therefore, difficult to see on what basis the ABA has formed the view that they are ineffective. FARB understands that one of the difficulties experienced by the ABA may be the delay between gathering evidence (particularly in the case where it is asserted that a licensee is broadcasting outside the scope of its permitted service description) and initiating an application to the Federal Court, if a broadcaster has not responded to a notice issued by the ABA.

As the ABA has no prosecution branch, we understand that the matter must be referred to the DPP and delays can be experienced as a result of pressures on that organisation. Accordingly, by the time a matter is prepared for application to the Court, the evidence may be "stale".

If the ABA is unable to conduct an investigation within a reasonable time frame, or prosecution of a case is delayed because the ABA must rely on the DPP to initiate a prosecution, the problem may lie not with the powers granted to the regulator under the Act, but rather with its resourcing.

FARB does not believe the addition of injunctive powers will resolve the ABA's perceived problems, in any event, for the following reasons:

(i) It is unlikely that a Court would be prepared to grant an injunction, whether a restraining or a performance injunction, other than in circumstances where there is extensive evidence as to the basis on which that injunction is sought. This would require significant resources to be devoted to obtaining evidence and for the DPP to have the ability to act on the matter speedily.

Even if it is proposed to introduce an injunctive power along the lines of that contained at Schedule 6 s56 of the Act [an injunction may be granted "*if the Court is satisfied that the person has engaged in conduct of that kind – whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind*"], detailed evidence of the conduct still will be necessary to support the application and in order to frame the terms of the injunction.

(ii) It is unclear, in fact, how the Court would frame an injunction where it relates to specified conduct – for example, providing a commercial broadcasting service without a licence. In FARB's submission, the Court could only frame an injunction in relation to the precise conduct in respect of which evidence is provided (and assuming that evidence establishes the conduct).

If the conduct has changed in the interim, even in reasonably subtle ways, arguably the new conduct may be outside the scope of the

injunction and, in effect, the whole process would need to be commenced again.

(iii) A restraining injunction will only be made by a Court for a particular period.

In FARB's view,there can be no "short-cut" which will entitle the ABA to take action against a licensee without proper investigation.

If the ABA cannot obtain evidence and prepare a case in a timely manner using the resources of the DPP then, with respect, the appropriate remedy may be to increase the resources, rather than the powers, of the ABA.

FARB opposes the granting of further injunctive powers to the ABA and believes it is unlikely that any additional powers could be used by the ABA more effectively, or with any better results, than the remedies currently available.

(4)

The Department seeks views on:

The merits or otherwise of:

- *amending clause 5(iii)(b) of Schedule 2 of the BSA to require licensees to retain records of all broadcasts for a period of at least six months; or*

- *amending clause 5(iii)(b) of Schedule 2 of the BSA to require licensees to retain records of all broadcasts for a period of at least three months.*

The Discussion Paper notes that the ABA recommended the above amendments as a result of difficulties in gathering evidence during the Commercial Radio Inquiry. That inquiry dealt with matters occurring, in some cases, a number of years before the commencement of the investigation. Requiring a broadcaster to retain records for six months would not have assisted in this case.

There is no evidence that a requirement to retain a record of matter broadcast for six weeks, or for 60 days where a complaint has been made, is not satisfactory in most situations.

Further, it has been the experience of the commercial radio industry that the current requirement under the Act is most often used by lawyers seeking evidence in civil proceedings including, for example, records of news broadcasts where a strike has been reported (a BHP action) or, occasionally in criminal cases, such as where a defendant's lawyer again recently sought records of news broadcasts relating to the events in issue. Invariably requests under Schedule 2 sub-section 5(4) are made as a cheap alternative to obtaining records from commercial monitoring services or as a "fishing expedition" where it is believed there may be material broadcast that assists a particular case.

Most commercial radio broadcasters use digital tapes or digital storage to record broadcast output, although some still use logger tapes. It would impose an unacceptable financial burden, particularly on regional stations where logger tapes are most likely to be used, to have to purchase either additional logger tapes or upgrade to digital storage sufficient to record additional broadcast output, even for three months.

Broadcasters should not have to retain broadcast output beyond the period of six weeks, except in circumstances where a complaint within the meaning of the Act or Codes of Practice has been made to the broadcaster or the ABA and that complaint has not been resolved. Where there is no complaint or action relating to the broadcast per se, FARB suggests the Act should be amended to provide that access to such records only be available to the ABA, so as to avoid licensees having to underwrite the costs of private litigants.

Once the ABA is aware of a complaint, it is open to the Authority to issue a notice pursuant to Schedule 2 sub-section 5(3) for the retention of records. Accordingly, any prospective period following a complaint and commencement of an investigation can be dealt with by corresponding directly with the licensee concerned.

The only circumstance of which FARB is aware where the six week period has not been sufficient is in the case of the ABA Commercial Radio Inquiry. As the Department is aware, these matters took some considerable time to investigate and, even if the present recommendations had been in place, the ABA would have to have resorted to commercial monitoring services to obtain the historical material that it sought.

(5)

The Department seeks views on:

The relative merits or otherwise granting the ABA the power to direct advertising free periods for a specified time.

Properly characterised, the effect of this proposal is to impose a financial penalty on the licensee. Currently the Act contains provisions which permit substantial financial penalties to be imposed on licensees and the providers of services under a class licence for a breach of condition of the licence [s.139]. A breach of an industry standard constitutes a breach of a licence condition.

Significant financial consequences also flow where a licensee provides a commercial, subscription or community broadcasting service without a licence [s.131-136]. A breach of a licence condition or failure to comply with a notice issued by the ABA pursuant to s.138 also is an offence under the Act which attracts a monetary penalty.

Therefore, it is unclear to FARB how the proposal would add to the remedies presently available to the ABA, unless it is intended that the ABA could impose such a sanction without having to initiate a prosecution.

FARB would strongly oppose such a course. It would also be counter productive from the ABA's point of view. Any imposition of a penalty arbitrarily determined by the ABA undoubtedly would result in an immediate application on the part of the licensee to the Administrative Appeals Tribunal or the Federal Court. Such proceedings are likely to be as costly and time consuming as pursuing a prosecution under the current provisions of the Act and would require the ABA to establish its case - that is, that there has been a breach of the Act, a licence condition or a standard.

Giving the proposal the best interpretation available, it is difficult not to view it as an attempt to allow the ABA to impose penalties without having to deal with the due processes of law or to expend resources on establishing its case. It is hard to avoid this conclusion when one looks closely at the rationale contained in the Discussion Paper. The Paper states that "the advantage of this proposal is that it would provide an effective penalty for licensees without necessarily affecting the audience".

This argument lacks credibility because the present provisions in the Act equally allow for the imposition of a financial penalty on a licensee (and for the same breaches as contemplated under the proposal) without affecting the audience. A prosecution and the imposition of a financial penalty in accordance with the Act would not effect the licensee's day to day programming. The audience is unlikely to be aware of the action, unless it is of sufficient interest to be reported as part of a news item.

Furthermore, imposing an advertising free period would affect the rights of third parties, as noted by the Australian Association of National Advertisers. Advertising campaigns are determined and scheduled in some cases months in advance. Advertising may be linked to a national product launch. Substantial resources are devoted by advertisers, not only to the advertising content itself and the purchase of a co-ordinated media campaign but to related events such as product distribution, in-store promotion and marketing. Small business in rural communities could also be disadvantaged as many depend on the local commercial radio station to advertise at very competitive rates.

The proposal also suffers from the deficiency that the ABA could not with any precision calculate the financial impact of imposing an advertising free period on a licensee. Advertising is sold at different rates for different periods and the rate may depend on the date on which the advertising is sold. Licensees also may be liable to claims for damages by advertisers where schedules are required to be cancelled as a result of an ABA sanction. It would be difficult, if not impossible, for the ABA to calculate the precise penalty, having regard to the nature of the breach. The same breach (even as between stations broadcasting in the same market) also could attract vastly different penalties, depending on the station's rate card.

In FARB's submission, it is also questionable as to whether the proposal would result in the Authority exercising the judicial powers vested in the Commonwealth. If that were the case, obviously serious consequences would follow.

FARB is strongly opposed to the proposal and suggests that where a broadcaster is in breach of the Act, a licence condition or an industry standard, substantial financial penalties already are available to the ABA, where it devotes the resources to pursuing the breach.

(6)

The Department seeks views on:

Complaints processes –

- *Shorten the time after which unresolved complaints may be referred to the ABA*
- *Acceptance of e-mail complaints*
- *Provide information on complaints processes on website*

It is unclear what problem the first proposal is attempting to remedy. Inherent in the proposition is an assumption that an ABA investigation of a complaint will provide a more timely or satisfactory response to the complainant. FARB suggests that a consideration of the average time taken by the ABA to complete investigations into complaints would reveal that it can take months, or longer, to provide a final report to the complainant. The ABA's 1999 – 2000 Annual Report indicated that at the end of the reporting period, the Authority had 16 investigations that were over 6 months old, 16 between 3 and 6 months and 23 less than 3 months old.

The ABA noted that it completed more than 85% of code investigations "within four months of receipt of complaint or receipt of further information relating to the investigation". As it is unclear how many complaints required additional information and what intervening period occurred between the complaint and request for further information, that statistic is not particularly helpful. While the time taken by the ABA may be a question of allocation of resources, the number of matters referred to the ABA compared with the total number of complaints received by commercial radio broadcasters indicate that it is clearly more efficient for complainants for such complaints to be resolved at licensee level.

The vast majority of complaints received by commercial radio broadcasters are resolved within the 45 days contemplated under the Code of Practice and few matters are referred to the ABA by complainants. In 1998-99, only 4 matters referred to the ABA resulted in a finding of a code breach. While that figure rose to 103 in 1999-00, 90 of these were breaches by 2UE.

It is not unreasonable, in FARB's submission to allow a period of 45 days for a licensee to investigate and provide a final response on a matter. Many matters are dealt with in the 30 day period. For the legislation to allow for a 15 day extension on the 30 day period upon application to the ABA would add an unnecessary administrative burden, both for the ABA and the broadcaster, and would not appear to advance the public interest.

FARB notes the commercial radio industry already accepts e-mail complaints under its Code of Practice.

FARB has no difficulty with the ABA's website and Department website providing comprehensive information on how to make complaints about the conduct of the media but we presume that this would not require legislative intervention.

In so far as the Productivity Commission and the Senate Select Committee have found that there is confusion amongst the public about complaints in relation to the content of media, we make the observation that this is not surprising given the increasing media options available for public consumption, including media services delivered via the internet.

The primary responsibility for advising the public about regulatory processes, including content regulation, must rest with the regulator. The commercial radio industry however, has taken steps to ensure the public is informed about the complaints process. The FARB Codes of Practice already require the industry to broadcast each week, and at different times and in different programs, an announcement publicising the existence of the Codes and a general description of the nature and effect of their operation, including complaint procedures.

It is appropriate these matters be dealt with under industry Codes of Practice and not by legislation, unless it is the intention of the Parliament to move away from the previously endorsed position of co-regulation.

(7)

The Department is seeking views on the merits or otherwise of amending the BSA to change the current requirement for "majority support" to a requirement for "general" support of the providers of broadcasting services in the relevant section of the industry in relation to Codes of Practice.

This amendment appears to have been proposed as a result of the Productivity Commission finding that "majority support" does not prevent "oppression of the minority" by the majority and does not allow for an unknown or unclear number of licensees in a particular broadcasting category.

In FARB's view, the test of general industry support is less specific than majority industry support. It is unclear what is meant by "general support". The New Oxford Dictionary of English defines "general" as meaning

"concerning all or most people". Would general support require the support of *all* or *most* broadcasters?

"Majority", in contrast, means "the greater number". The concept of "majority support" has the benefit of quite clearly meaning more than 50 per cent of industry members. In so far as we are aware, the only broadcasting category where the number of licensees is unknown is where a service is provided under a class licence. The answer to this particular issue is to implement steps to ensure that the regulator is aware of all services operating under a class licence. This is appropriate in FARB's submission for many reasons, not confined to the issue of Codes of Practice.

Amending the test as proposed would not resolve the Productivity Commission's concerns in so far as the providers of services operated under a class licence are concerned. If it is unknown how many service providers are within this category, how is it proposed that the regulator can determine whether or not there has been general support or majority support?

FARB offers its members ample opportunity to comment on draft Codes of Practice and the industry has a representative committee which is responsible for Codes and Codes amendments. It has never been the case in FARB's experience that a member has disagreed with the final form of the Codes or otherwise indicated that the member had been oppressed or felt under a disadvantage in expressing views about the draft Code.

In our view, the real issue for review here is the fact that there are an unknown number of services provided under a class licence. In these circumstances, there appears to be no scope for a regulator to determine whether or not the industry sector is complying with the present provisions of the Act

FARB would be pleased to provide any further information that the Department may require on the matters raised in this submission.

Kind regards

Graeme Carroll
Manager Public Affairs

AUSTRALIA - REGIONAL RADIO

Source: **ACNielsen Radio Surveys**
NSW Regional 1999, VIC Regional 99/00, QLD Regional 99/00,
SA Regional 2000, WA Regional 99/00, Tasmania 99/00, Darwin #1/98.

Sample Size = 26,157 people 10+

POTENTIAL (000s)	PPL 10+	PPL 10-17	PPL 18-24	PPL 25-39	PPL 40-54	PPL 55+	G/B All	MEN 18+	WMN 18+
	6018.7	823.6	637.4	1526.4	1459.0	1572.3	2787.4	2583.0	2612.1

MON-SUN 5:30am-12midnight - Station Shares (%)

	PPL 10+	PPL 10-17	PPL 18-24	PPL 25-39	PPL 40-54	PPL 55+	G/B All	MEN 18+	WMN 18+
COMM	65.0	78.2	76.0	75.1	68.3	46.3	63.0	62.4	65.7
ABC	28.9	18.2	21.3	19.9	25.5	45.1	30.7	31.0	28.3
O/AM	1.6	0.4	0.3	0.8	1.8	2.8	1.7	1.9	1.4
O/FM	4.5	3.2	2.4	4.2	4.4	5.9	4.6	4.6	4.6

MON-SUN 5:30am-12midnight - Cumulative Audience (%)

	PPL 10+	PPL 10-17	PPL 18-24	PPL 25-39	PPL 40-54	PPL 55+	G/B All	MEN 18+	WMN 18+
COMM	75.7	82.7	79.9	83.4	78.8	59.8	75.3	72.9	73.9
ABC	42.8	30.6	38.9	35.2	42.8	58.2	43.6	48.5	41.0
O/AM	4.2	1.3	2.1	2.8	5.1	7.1	4.5	5.4	3.9
O/FM	10.3	6.6	9.1	9.7	11.7	12.0	10.6	11.5	10.3
ALL	94.6	92.7	93.1	95.7	95.4	94.3	95.7	94.5	95.3

MON-SUN 5:30am-12midnight - Time Spent Listening (hr:mn)

	PPL 10+	PPL 10-17	PPL 18-24	PPL 25-39	PPL 40-54	PPL 55+	G/B All	MEN 18+	WMN 18+
COMM	18:02	11:13	19:41	19:31	19:20	18:32	18:25	20:33	18:31
ABC	14:09	7:02	11:19	12:15	13:18	18:31	15:31	15:21	14:23
O/AM	7:55	3:40	2:55	6:26	8:00	9:20	8:20	8:26	7:32
O/FM	9:14	5:43	5:20	9:29	8:24	11:40	9:29	9:41	9:21
ALL	22:11	12:52	22:13	22:39	23:25	25:22	23:01	25:24	21:52