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The Secretary
Standing Committee on Communications,
Information Technology and the Arts
House of Representatives
Parliament House
CANBERRA ACT 2600
By email: cita.reps@aph.gov.au

Attention: Anthony Overs, Inquiry Secretary

Dear Mr Overs

Submission to Community Broadcasting Inquiry

I am a partner of law firm Allens Arthur Robinson, practising in the communications, media and technology area, but make this submission in my personal capacity.

I have acted for community licensees in various states, mostly on a pro bono basis, to assist with licence compliance and other issues, and have seen the practical difficulties that the current station sponsorship regime causes licensees. It creates very significant compliance risks and costs and makes station fundraising more difficult than it should be for a sector which relies so heavily on community funding and support. This is an issue of real concern if Australia is to achieve a robust network of community broadcasters.

Summary

This submission seeks 3 things:

(a) (**permitting advertising – no more tagging**) the removal of the prohibition against community broadcasting licensees broadcasting advertisements, while retaining the existing limitation of 5 minutes per hour (community radio) or 7 minutes per hour (community television) (although that hourly limitation would need to be modified to apply to advertising, rather than sponsorship announcements and this submission suggests it be moved to the Code of Practice);

(b) (**ACMA power to make determinations and grant exemptions**) the introduction of a power for the ACMA to issue binding determinations about sponsorship (if that is retained) and advertising (regardless of whether the first submission is accepted) and about the 5 or 7 minute-per-hour limit and codes of practice. The ACMA should also be given the power to exempt in appropriate circumstances, where the interests of the station's community of interest would not be damaged by doing so. Both determinations and exemptions might be specific to a licensee or to a class or all licensees; and

(c) (**move the 5 or 7 minute limit to the Codes of Practice**) the existing limitation of 5 minutes per hour (community radio) or 7 minutes per hour (community television) should be removed as a schedule 2 licence condition and instead should form part of the

Community Broadcasting Code of Practice (where most other important content restrictions currently are placed, such as restrictions on vilification), which is consistent with the approach used for commercial broadcasting.

In combination, these 3 measures would:

- remove significant compliance risk from a meaningless restriction (sponsor tagging);
- enable the ACMA to assist community broadcasters to comply (through the determinations and exemption power), rather than limiting its role to investigating and punishing non-compliance; and
- ensure the limitation on the volume of advertising is placed with other content regulation (in the Code of Practice), so that licensees have one source for their content regulatory compliance and so advertising restrictions are not irrationally elevated in importance above other important content regulation (such as vilification).

The goal is to promote and support licensees so that a robust network of community broadcasting might be achieved.

1. The current environment – advertising and sponsorship

1.1 The law - advertising

Clause 9(1)(b) of schedule 2 of the Broadcasting Services Act 1992 (the ***BSA***) applies to each community broadcasting licence a condition that the licensee will not broadcast advertisements.

The BSA does not define what constitutes an advertisement, so we are left to decide that from case law such as *Rothmans of Pall Mall v Aust. Broadcasting Tribunal, DPP v United Telecasters Sydney* and (the decision most often cited by the ACMA in its investigation decisions) *Australian Capital Television Pty Ltd and the State of NSW v. The Commonwealth* (1992) 177 CLR 106.

Distilling that case law produces a test along the following lines, namely that material which is designed or calculated to draw public attention to a product, or to promote its use, may constitute an advertisement. Presumably the same would apply if the material draws attention to a provider of the product, rather than the product itself.

This is very open and gives very little guidance to community broadcasters, who typically do not have access to (or financial resources to obtain) expert legal advice to assist them. Neither can the ACMA give guidance, rulings or exemptions that have legal effect and on which licensees therefore can rely.

Clause 2 of schedule 2 of the BSA outlines circumstances which do not constitute advertising (and which therefore are permitted – subject, in the case of sponsorship announcements, to the hourly limit):

- advertising-like material that is unpaid (ie the licensee receives no consideration to broadcast the material) and which is an accidental or incidental accompaniment to some other (non-advertising) matter (which I will call the '***incidental material exception***') (clause 2(1) of schedule 2 BSA);

- community information material or community promotional material (which I will call the '***community service exception***') (clause 2(2)(a) of schedule 2 BSA);
- ***sponsorship announcements*** (clause 2(2)(b) of schedule 2 BSA); and
- announcements promoting the licensee's services (which I will call the '***station promotion exception***') (clause 2(2)(c) of schedule 2 BSA).

Clause 9(3) of schedule 2 BSA limits a licensee's broadcast of sponsorship announcements to 5 minutes per hour (for community radio) or 7 minutes per hour (for community television). I will call this the '***hourly limit***'.

Distilling the elements of clause 2(2)(b) of schedule 2 BSA, something will be a permitted sponsorship announcement only if:

- there is actual financial support by a person of the licensee making the sponsorship announcement; and
- the announcement acknowledges the financial support of the licensee or a program broadcast by the licensee. In practice, that means the station must add a tag to the effect "station sponsor" or "our sponsor".

Since 2002, it has not mattered that a sponsorship announcement might promote a sponsor's products or might specify the sponsor's trading name or address (acknowledged by clauses 2(2)(b)(i) and (ii) of schedule 2 BSA). This very helpful and practical approach means in effect that, if we assume there is actual financial support (ie the sponsor has paid the station to run the announcement), the only difference between a permitted sponsorship announcement and a prohibited advertisement will be the sponsorship tag.

It should be noted in passing that, in the case of community broadcasting targeted to remote indigenous communities, the advertising ban applies only if the licensee receives consideration for broadcasting the advertisement, whether in cash or in kind (refer to clause 9(6) of schedule 2 BSA). In other words, the first element (requiring the existence of actual financial support) does not apply for such broadcasters. Most community stations struggle for funds. Some might think it an odd result that a community station is permitted to run an advertisement for free, but not if the station charges money for it. That hardly seems a regulatory result consistent with stimulating a robust network of community broadcasters.

1.2 The ABA guidelines

The ACMA continues to apply the ABA's "Guidelines for broadcasting sponsorship announcements and other promotional material on community radio and community television" published in August 2003 (the ***Guidelines***).

These attempt to provide help to community licensees about how the advertising restrictions work, but are not binding.

The fact the Guidelines are 9 pages long – and yet, even if followed by licensees, give no certainty that the advertising restriction will not be contravened in a particular case – is an indication of the compliance burden that community licensees operate under.

1.3 The Codes of Practice

The ABA registered Codes of Practice for community broadcasting (including radio) on 24 October 2002 and for community television services (on 23 September 2004). The codes were made under Part 9 of the BSA.

These are discussed in more detail in section 4 of this submission.

2. Removing the need to 'tag'

This submission proposes the removal of the prohibition against community broadcasting licensees broadcasting advertisements, while retaining the existing limitation of 5 minutes per hour (community radio) or 7 minutes per hour (community television) (although that hourly limitation would need to be modified to apply to advertising, rather than sponsorship announcements).

If community stations were permitted to broadcast advertisements, the only changes in practical terms would be that:

- material currently broadcast as a 'sponsorship announcement' could be broadcast without the 'tag' of "station sponsor" or "our sponsor"; and
- stations could broadcast an advertisement where the benefit the station derives is indirect or non-financial in nature.

While that might seem a small change, it would eliminate a substantial compliance risk for licensees who, because of their community status, are not well placed to meet the practical compliance costs, and who frequently do omit the 'tag' inadvertently. Such omissions have occupied licensees and the ACMA (and the ABA before it) in numerous investigations and compliance reports – perhaps representing thousands of hours of the regulator's time and absorbing management and financial resources of the relevant community stations, which they can little afford.

The requirement that stations are for community purposes and not-for-profit (section 15 BSA) will continue to differentiate community broadcasting from commercial broadcasting. By retaining an hourly limit of 5 or 7 minutes for advertising content (in the place of the current limit on 'sponsorship announcements'), the character of community stations as vehicles for culturally diverse Australian programming is preserved and the public interest remains protected.

This is no minor issue for licensees. Because it is a condition of the licence that no advertisement be broadcast, non-compliance is a risk to the community broadcaster's licence - an extremely serious risk for what can be a minor or inadvertent omission of the 'tag'.

Deciding what is advertising can be very difficult in some cases, as evidenced by the complexity of the ABA guidelines on the subject (which are still applied by the ACMA) and most community stations are not equipped with the legal and compliance infrastructure to enable that to be done consistently.

In my submission, the proposed change has no negative impact on the public interest. When a 'sponsorship announcement' is broadcast it can be easily understood by listeners

to mean that the sponsor has given the community station some form of support – usually money. That is so whether the announcement includes the words 'station sponsor', or not. Audiences are sophisticated enough to understand this, and the 'tag' really adds nothing that cannot be inferred anyway from the content.

The proposed change would mean greater flexibility for community stations in the nature of support they can seek from a sponsor. Currently, to qualify as sponsorship, there must be a relationship of financial support between the sponsor and the community station (flowing from clause 2(b) of schedule 2 of the BSA). However, some forms of support do not qualify and, if broadcast, risk being a prohibited advertisement.

For example:

(a) A well known personality (perhaps a 'rock star' or well known author) might want to offer support to a community station by giving live interviews on the station. Naturally enough, that person might want to mention a new CD release, upcoming concert or newly published book – the station gets 'star power' to add weight to its appeal to its community of interest and the guest has the opportunity for exposure to that community of interest. Currently, the opportunity for a community station to do this is very limited. Any mention of CDs or concerts risks being an untagged advertisement, as illustrated in the recent *Blacktown Community Radio* investigation by the ACMA. Even if the focus of the interview is on issues of interest to the audience, rather than the guest's product, mentions of the product risk that the entire interview be seen as an untagged advertisement. Even if the segment is tagged as sponsorship, there is some doubt about whether the guest has provided financial support to the station.

(b) Commercial organisations may want to support a community station by giving them products to give away on air, for example CDs or movie tickets. Audiences like being able to phone in for give-aways, and stations receive increased listener support and interaction because of the popularity of give-aways. If the product is a commercial product, the on-air mention of the give-away risks being a prohibited advertisement if not tagged. Also, there is some doubt about whether the product would be 'financial support' for the station (since the station ordinarily would not have purchased the product – it is gratuitous) – and therefore, in the absence of financial support by the supplier, about whether the give-away could be legitimately 'tagged' as sponsorship.

(c) Some stations take syndicated content – perhaps an interview or discussion piece that is of interest to the station's audience, for example a discussion about issues raised in a recently published book. If that content contains any promotion of the book (which one would expect the author or publisher would want in return for participating in the discussion about the book's issues), that support would have been given to the creator of the syndicated content – and would not be direct support of the station broadcasting the syndicated content. It therefore cannot be tagged as a 'sponsorship announcement' and, if broadcast, risks being a prohibited advertisement. This is despite the station receiving support in the form of the syndicated content and the audience's interest in the interview subject matter.

These are a few examples, but for most community licensees the issue arises daily and in a host of different factual circumstances.

In my submission, the public is sufficiently protected by the 5 or 7 minutes-per-hour rule to ensure that the character of the community station is preserved, without limiting the station's ability to choose whether it uses that hourly allocation for support that is directly financial, or which may instead have indirect benefits.

It is acknowledged that, if this submission is accepted, stations would still need compliance measures in place to meet the remaining hourly limit of 5 or 7 minutes for advertising content. That would require that community support announcements and station promotional announcements be distinguished from any announcement that promotes a commercial product. However, that is a more manageable compliance task, and avoids the compliance risk of an inadvertent omission of a 'station sponsor' tag.

3. ACMA power to issue binding rulings and exemptions

3.1 The law – ACMA making rulings and granting exemptions

The ACMA has power under section 87 BSA to vary or revoke a condition of a community broadcast licence, but not a condition set out in Part 5 of schedule 2 BSA – which is where the prohibition on advertising and the hourly limit are set out.

Consequently, for the moment, the ACMA may issue non-binding guidelines, but it cannot give guidance that licensees can rely on or which might authorise something that would otherwise constitute advertising or which might exceed the hourly limit.

3.2 The proposal of this submission

This submission proposes:

(a) the ACMA be given power to issue binding determinations about sponsorship (if that is retained) and advertising (regardless of whether my first submission is accepted), about the 5 or 7 minute-per-hour limit and about the Codes of Practice; and

(b) the ACMA should be given the power to exempt community licensees from a sponsorship or advertising restriction (if retained) or the 5 or 7 minute-per-hour limit, in appropriate circumstances, where the interests of the station's community of interest would not be damaged by doing so.

Both determinations and exemptions might be specific to a licensee or to a class or all licensees.

This would mean stations could operate in an environment of greater regulatory certainty - which is currently a significant threat to community broadcasting.

While determinations and exemptions might create additional work for the ACMA, one would expect a corresponding reduction in investigations and a more user friendly regulatory environment for this important non-profit sector.

4. Moving advertising restrictions to the Code of Practice

The Codes of Practice contain a range of important principles and rules for programming content, including prohibitions on broadcasting material which may:

- incite violence;
- misrepresent news or events;
- present as desirable the misuse of drugs;
- vilify a person based on his or her ethnicity, nationality, race, language, gender, sexual preference, religion, age, physical or mental ability, occupation, cultural belief or political affiliation.

The codes also promote:

- fair and balanced news reporting and current affairs programming;
- sensitive and respectful treatment of Indigenous peoples' culture and customs;
- Australian content; and
- in the case of community television, children's programming and classification of program content.

For commercial broadcasters, the relevant codes also deal with broadcasting time devoted to advertising (specifically endorsed by section 123(2)(f) BSA), whereas the present law leaves advertising time limits for community broadcasting as a condition of the licence under clause 9(3) of schedule 2 BSA.

In my submission, the codes of practice are also the appropriate place for advertising restrictions for community broadcasting.

There seems no logical reason why Parliament should elevate policy objectives about limiting the amount of advertising on community stations above the other important content policy objectives already entrusted to regulation via codes of practice.

The codes of practice have been effective in regulating broadcast content and shaping the behaviour of licensees and the codes are the appropriate place to also regulate the amount of broadcasting time a station may devote to advertising. The codes contain well tested mechanisms for complaints resolution if those restrictions are not complied with.

The ACMA would retain power to investigate complaints about a station's handling of a complaint about a breach of a code of practice about advertising time, in the same way as it might investigate a person's complaint about a broadcast of material that vilifies or misrepresents news. These matters can be taken into account by the ACMA in deciding if a licensee is, or remains, a person fit to hold a community broadcasting licence.

In this way community licensees would have a single, and accessible, source of regulation of content restrictions and would be placed on a footing similar to the position of commercial licensees, for whom the codes of practice regulate advertising time.

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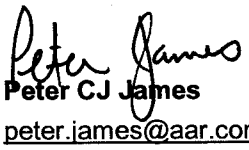
I would be happy to expand on or clarify any of these matters.

Yours faithfully



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