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Committee Secretary,
Senate Standing Committee on Environment, Communications, and the Arts
Department of the Senate,
PO Box 6100,
Parliament House,
Canberra, ACT 2600

[Delivered by email]

Dear Secretary,

Re: Inquiry into the Effectiveness of the Broadcasting Codes of Practice

Thank you for the opportunity to make a submission to the above-named inquiry. I wish to make a submission specifically in relation to item c of the terms of reference: "the operation and effectiveness of the complaints process currently available to members of the public". My observations on this matter relate generally to the operation of the codes of practice and are not confined to the operation of the codes in relation to the use of language and/or the classification standards.

As the Committee will be aware, one of the key mechanisms used for regulating commercial television and radio, especially content, is the co-regulatory system which relies on a combination of industry self-regulation and statutory back-up and enforcement. The effectiveness of a complaints process will be dependent upon how rigorous the self-regulatory component is, and the ability of the regulator, in this case, the Australian Communications and Media Authority (ACMA) to monitor the operation of the process and to respond when necessary in enforcing breaches of the codes. When the new co-regulatory scheme was introduced as part of the media reforms which culminated in the Broadcasting Services Act 1992 (Cth) (BSA), this was the stated intention of the Government as evidenced by the Explanatory Memorandum:

> "It is intended that the ABA [now ACMA] monitor the broadcasting industry's performance against clear, established rules, intervene only when it has real cause for concern, and has effective redressive powers to act to correct breaches".[1]

However, there have been ongoing concerns about the effectiveness of the broadcasting co-regulatory scheme. Reporting on its inquiry into broadcasting, the Productivity Commission was critical of the limited monitoring role undertaken by the then regulator, the Australian

Broadcasting Authority (ABA), and commented that the system was closer to one of self-regulation than co-regulation.[2] Another long-standing concern related to the inflexible and limited sanctions available to the regulator. However, this matter was addressed by the Communications Legislation Amendment (Enforcement Powers) Bill 2006 and ACMA now has a much greater range of sanctions and remedial powers able to be used in appropriate circumstances. It should be noted also that the Chairman of ACMA, Mr Chris Chapman, has written of the importance of ACMA's monitoring role and acknowledged the need for ACMA to ensure that its handling of complaints is dealt with in a timely manner.[3]

When the ABA made its final report on the *Cash for Comment* Affair, it also expressed concerns about the co-regulatory system, especially in relation to the broadcasting (in this instance, commercial radio) industry's commitment to compliance with and implementation of the codes of practice. The ABA was concerned that the community could have little confidence in the co-regulatory system.[4] Despite, the serious concerns expressed by the ABA, there has been, apart from the remedial action taken by the ABA in response to *Cash for Comment,* no serious examination of the operation of the broadcasting co-regulatory system especially in connection with how industry undertakes responsibility for its part of the co-regulatory system, namely the handling of complaints and possible code breaches. It should also be noted that in 2000, the Senate Select Committee expressed the concern about regulation of media industries and recommended the establishment of a 'Media Complaints Commission':

> "This Committee has found substantial evidence to question the efficiency and effectiveness of self-regulation and co-regulation in Australia's information and communications industries. Self-regulation in the print media industry appears to be failing the community. In the television and radio industries, co-regulation has attracted widespread criticism. …"[5]

Since it is the responsibility of the industry to ensure maintenance of community standards, then industry owes a heavy responsibility to the public in the operation of the co-regulatory system. If the system is to have credibility and to be effective, then, there needs to be a comprehensive investigation into the design and operation of the current co-regulatory arrangements. I would suggest that the current arrangements certainly give rise to concerns about independence and transparency[6]:

- Independence: Despite the presence of industry associations – in the case of the commercial broadcasting sector, *Free TV Australia* (FTVA) and *Commercial Radio Australia* (CRA) – these associations take no direct responsibility for handling complaints about code breaches. A curious feature of the current system is that complaints are handled by the very person – namely the radio or television station – which is being complained about. This runs counter to most self-regulatory models which set up some form of independent body to deal with complaints, for example the Advertising Standards Board which has been established by the Australian Association of National Advertisers. The concern is not just with whether or not there is independence in the determination of complaints; it is important that the system appears to be independent. The current structure also excludes the possibility of wider stakeholder

involvement, which is important in an area where there is a significant public interest as will be the case for broadcasting.

- Transparency: The perception of lack of independence is exacerbated by the lack of transparency in the process. This occurs at a number of levels:
    - There appears to be almost no information about how complaints are handled. Most of the websites of the commercial broadcasters give very little information about the complaints process, apart from the provision of a complaints form.[7] Even this is often difficult to locate. The websites of FTVA and CRA provide information about the overall complaints process. However, there appears to be no information about what structures/processes the individual licensees have established for dealing with complaints.
    - Under their respective codes, radio and television licensees report to FTVA and CRA, as appropriate, on complaints made and outcomes. However, no information is provided directly to the public by the licensees on the nature of the complaints, determination, outcomes etc. Even though a specific complainant may be satisfied with the outcome, this may not necessarily answer the question of whether there has been a breach of the code. Complaints can only be forwarded to ACMA if there has been a delay in the response of the broadcaster, or the complainant is not satisfied with the response. However, in the absence of any public information, there is little scope for review.
    - The FTVA and CRA report to ACMA on the complaints received. FTVA makes these reports publicly available on its website[8], but this does not appear to be the practice of CRA. The reports are limited in the amount of information provided, and mainly amount to a collection of statistics.

The *Cash for Comment* matter raised serious concerns about the way in which information and opinion being made available to the public was distorted for private gain. In a democratic society, media has a fundamental role in providing information to the public. *Cash for Comment* revealed that many broadcasters take lightly their public responsibilities, whilst the co-regulatory system has failed to provide an effective means of ensuring that those public responsibilities will be met. There is little to indicate that the attitude and practices of broadcasters in Australia have undergone any radical change. For this reason, a comprehensive investigation of the co-regulatory system remains necessary. It is unfortunate that this Inquiry has chosen to concentrate on the relatively trivial matter of coarse language, when there are much more significant issues at stake with regard to how the media in Australia serve the public interest.

Whilst, this submission has concentrated on item c of the terms of reference, I would comment in passing that the Committee should resist any proposals to regulate “coarse and foul language” by attempting to draw up lists of unacceptable words. As a practical matter, this sort of approach is likely to be unworkable as language and community standards change, often over a

relatively short period of time. Further, language must always be seen in context. More importantly, however, one should be wary of moves to restrict freedom of expression, particularly, when control, to meet personal or family tastes, can so easily be exercised by individuals at home, switching off the programme.

Yours faithfully,

Lesley Hitchens

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[1] Explanatory Memorandum, Broadcasting Services Bill 1992 (Cth).

[2] Productivity Commission, *Broadcasting* (Report No 11 (2000), 453.

[3] C Chapman, 'The Legal Challenges facing ACMA as Regulator' (2007) 13(1) *UNSWLJ Forum* 11 at 13.

[4] Australian Broadcasting Authority, *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority* (August 2000), 99-100.

[5] Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media* (April 2000), para. 6.1.

[6] More detailed discussion can be found at L Hitchens, 'Commercial Broadcasting – Preserving the Public Interest' (2004) 32(1) *Federal Law Review* 79-106.

[7] Licensees broadcast information to the public telling them of their right to complain.

[8] See, http://www.freetv.com.au/Content_Common/pg-Code-Complaints-Report.seo