

Legislative Instruments Act 2003

Section 26 - Explanatory Statement

Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 made under the Broadcasting Services Act 1992

Issued by the Australian Communications and Media Authority

On 14th March 2012, the Australian Communications and Media Authority (the **ACMA**) determined the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012* (the **Standard**). The Standard replaces the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (the **2000 Disclosure Standard**).

The ACMA determined the Standard under subsection 125(1) of the *Broadcasting Services Act 1992* (the **BSA**).

Subsection 125 (1) of the BSA provides that if:

- (a) the ACMA is satisfied that there is convincing evidence that a code of practice registered under section 123 of the BSA is not operating to provide appropriate community safeguards for a matter referred to in subsection 123(2); and
- (b) the ACMA is satisfied that it should determine a standard in relation to that matter;

the ACMA must determine a program standard in relation to that matter.

Background

As part of the *Commercial Radio Inquiry 2000*, one of the ACMA's predecessor agencies, the Australian Broadcasting Authority (the **ABA**), formed the view that the commercial radio industry codes of practice were not operating to provide appropriate community safeguards in relation to accuracy and fairness in news and current affairs programs and the presentation of advertisements. In response, the ABA determined three program standards, including the 2000 Disclosure Standard, to deal with advertising, commercial influence and compliance programs across the commercial radio industry (the **commercial radio standards**).

The 2000 Disclosure Standard was determined to encourage commercial radio broadcasting licensees to be responsive to the need for fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements that had the potential to affect the content of current affairs programs.

In 2008, the ACMA announced a review of the commercial radio standards to consider the effectiveness, efficiency and appropriateness of the regulatory arrangements under the three standards.

Research and submissions provided as part of the review demonstrated that Australian citizens continue to place importance on the fair and accurate coverage of matters of public interest. In examining the continued appropriateness of the provisions of the 2000 Disclosure Standard, the review found that it was ineffective to the extent that it did not work to capture all instances where commercial agreements have the potential to influence the content of current affairs programs. The review found that these gaps were, in particular, due to the limited definitions of 'consideration' and 'commercial agreement' in the 2000 Disclosure Standard. Accordingly, the ACMA decided on a set of reforms which strengthen regulation where it is most critical to address the relevant policy problems, but which also lessen the burden on industry where appropriate.

Intended impact and effect of the Standard

The ACMA intends that the Standard will improve community safeguards by imposing additional obligations on licensees in relation to the types of commercial agreements which they must disclose. The Standard does not significantly change the requirements for commercial radio licensees under the 2000 Disclosure Standard. The Standard does, however, expand the definition of 'commercial

agreement' to include agreements between sponsors and licensees in prescribed circumstances. It does this to ensure that the existence of a commercial agreement between a sponsor and a licensee is also disclosed when the agreement has the potential to affect the content of material relating to the sponsor, which is broadcast by a presenter who has a prescribed financial interest that could result in the presenter benefitting financially through increased earnings of the licensee.

The financial and administrative burden on licensees has been reduced. Unlike the 2000 Disclosure Standard, the Standard does not prescribe the form of on-air disclosure announcements. Instead, licensees must make a sponsorship disclosure announcement that is clearly identifiable as such to a reasonable listener, at the time of, and as part of, the broadcast of the relevant content that attracts the disclosure obligation. The Standard also contains different register and notification requirements. It requires licensees to keep a publicly available online register of commercial agreements for the information of citizens and the ACMA. Licensees may be required to provide further information to the ACMA upon request.

Consultation

On 25 November 2011, the ACMA released a draft of the Standard, seeking stakeholder and public comment on the proposed changes to regulation. Consultation on the draft closed on 16 December 2011 (with the ACMA granting extensions to industry submitters).

The ACMA is satisfied that this consultation meets the requirements of section 126 of the BSA, and the requirements of section 17 of the *Legislative Instruments Act 2003*.

Regulatory Impact

A regulation impact statement (**RIS**) titled *Regulation Impact Statement – Review of the Commercial Radio Standards* was prepared by the ACMA for the review of the commercial radio standards and the associated reforms. The Office of Best Practice Regulation (**the OBPR**) reviewed the RIS and assessed it as adequate under the Australian Government best practice regulation requirements – OBPR reference number 12308.

As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, a human rights compatibility statement has been prepared and is attached.

NOTES ON INSTRUMENT

Section 1 – Name of Standard

Section 1 provides that the name of the Standard is the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012*.

Section 2 – Commencement

This section provides that the Standard commences on 1 May 2012.

Section 3 – Revocation

This section revokes the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*.

Section 4 – Definitions

Section 4 defines terms used throughout the Standard. The key terms used are set out below.

'advertisement'

The definition of 'advertisement' applies to all material that is broadcast:

- which draws public attention to, or promotes, a product or service, an organisation, a belief, or a course of action; and
- for which consideration has been provided to a licensee, related body corporate of a licensee, presenter or associate of a presenter.

This means that if consideration has not been provided for the material to be broadcast, the material will not fall within the definition of advertisement. Accordingly, promotional public awareness material

in the form of community service announcements which are broadcast for free will not be advertisements for the purposes of the Standard.

'associate of a presenter'

The definition of 'associate of a presenter' sets out persons who are considered to act for, or on behalf of, a presenter for the purposes of the Standard.

Persons covered by the definition include those who have authority to enter into agreements relating to the provision of the presenter's services. This is likely to include a presenter's manager or agent.

Other legal entities covered by this definition include:

- companies and trusts in which a presenter has a more than 50% company or beneficial interest; and
- companies of which a presenter is a director.

The definition provides that the licensee of the presenter (that is, the licensee referred to in paragraph (a) of the definition of 'presenter') is not an associate of the presenter for the purposes of the Standard.

'consideration'

The definition of 'consideration' covers any form of valuable consideration, including money, services and benefits, paid promised or charged, directly or indirectly, for the broadcast of material. Consideration covered by the Standard will include a promise by an organisation or supplier of products or services to make a payment in the future, benefits provided by an organisation or supplier of products or services (or their agent) to a licensee, related body corporate of a licensee, presenter or associate of a presenter such as discounts on products or services, and instances where a product or service is provided for a presenter's use. It will also capture situations where an organisation or supplier of products or services has a cause of action against a licensee or presenter but agrees to drop it in exchange for the broadcast of material.

Intangible benefits which are not capable of being valued in monetary terms are not intended to be captured by the definition of consideration in the Standard.

Exception – provided free solely for review

Products or services provided for free solely for the purposes of review are excluded from the definition. These may include:

- movie or theatre tickets provided to a presenter for free solely for the purpose of the presenter reviewing that movie or theatre performance,
- samples of new products or services provided to a licensee for free solely for the purpose of an employee of the licensee broadcasting a review of that product or service, or
- music recordings or books provided to a presenter for free solely for the purpose of the presenter reviewing that music recording or book.

Products or services which are provided to licensees or presenters for free for a purpose other than review, or for more than one purpose, would fall within the definition of consideration.

'current affairs program'

A 'current affairs program' is defined as a program, a substantial purpose of which is to provide material about matters of public interest including a spectrum of current events, world affairs, domestic politics and business. A program will be a 'current affairs program' for the purposes of the Standard if it provides content in relation to current social, economic or political issues, even if the program fulfils other purposes. The definition covers programs with a variety of programming formats, including talk-back based programs.

'disclosure announcement'

In order to be considered a 'disclosure announcement' for the purposes of the Standard, an announcement must be broadcast by a presenter, and must include a statement that discloses the existence of a relevant commercial agreement.

'licensee'

A licensee is a person who holds a 'commercial radio broadcasting licence', a term which is defined in section 6 of the BSA. The definition covers all commercial radio licensees irrespective of the size of the operation, its location or the predominant program type.

'presenter'

A 'presenter' means a person who is an on-air presenter of a current affairs program broadcast by a licensee. The definition excludes commentators or guests invited to appear on a current affairs program, even if they appear on the program regularly.

'register'

The term 'register' means the online register of commercial agreements and other information which licensees are required to maintain under Part 3 of the Standard.

'related body corporate'

This definition incorporates the definition of 'related body corporate' from section 50 of the *Corporations Act 2001*. Under section 50 of the *Corporations Act 2001*, bodies corporate will be considered to be related where one body corporate is a holding company or subsidiary of the other body corporate or one body corporate is a subsidiary of a holding company of the other body corporate.

'related broadcast'

A broadcast will be captured by this definition where it is a current affairs program broadcast by a licensee that has been produced or commissioned by another licensee, and the program has been broadcast, or will be broadcast, by that other licensee. Programs which are produced or commissioned by a licensee, but are not broadcast or intended to be broadcast by that licensee, will not be covered by the definition. For example, a program that is specifically produced to be sold to other licensees and is never broadcast or intended to be broadcast by the licensee which produced the program, would not be a 'related broadcast'.

'sponsor'

A 'sponsor' means a person who directly benefits from the things provided by a licensee, presenter or associate of a presenter under a commercial agreement. The definition excludes licensees and presenters from being sponsors for the purposes of the Standard.

Section 5 – Meaning of commercial agreement

The section defines two types of commercial agreement which are covered by the Standard.

Subsection 5(1) captures agreements, arrangements or understandings (whether in writing or not) to which a sponsor (or an agent of a sponsor) and a presenter (or an associate of a presenter) are parties (whether or not there are also other parties to the agreement). In order to fall within the definition, the agreement, arrangement or understanding must either:

- provide for the presenter, in exchange for consideration, to promote the sponsor or the sponsor's products, services or interests, or refrain from making negative comments about the sponsor, or provide publicity, promotions or public relations services for the sponsor; or
- impose an obligation on a presenter or associate of a presenter to provide other services for the sponsor, in exchange for consideration of more than \$25,000 a year. There is an exclusion if the obligation imposed is solely for the presenter to provide writing services for a publication, perform or appear in a film, television program or theatrical production, or provide voice-over services for an advertisement.

Subsection 5(2) captures agreements, arrangements or understandings (whether in writing or not) to which a sponsor (or an agent of a sponsor) and a licensee or a related body corporate of a licensee are parties (whether or not there are also other parties to the agreement), where:

- (a) the agreement provides for the licensee, in exchange for consideration provided to the licensee or a related body corporate of the licensee, to promote the sponsor or its products services or interests, or refrain from broadcasting a negative comment about the sponsor;
- (b) a presenter of the licensee does a thing required under the agreement; and
- (c) the presenter, or an associate of the presenter, has a prescribed financial interest that may result in the presenter obtaining a financial benefit from the earnings of the licensee, or related body corporate of the licensee, under the agreement.

The prescribed financial interests of a presenter or associate of a presenter are:

- (a) a beneficial or legal interest in shares in the licensee or a related body corporate of the licensee;
- (b) a beneficial entitlement to be paid or credited a dividend, if a dividend were declared by the licensee or a related body corporate of the licensee; or
- (c) a contractual entitlement to a share of the licensee's income or profits.

Beneficial or legal interest in shares

This covers a range of interests including legal interests, such as ownership, future or contingent interests (such as an option to purchase shares), equitable interests, and the interest which a beneficiary of a trust has in shares owned by the trust.

Beneficial entitlement to be paid or credited a dividend

A dividend refers to a payment which is made by a company to its shareholders. The payment is part of a distribution of profits of the company, and is usually based on the number or class of shares a shareholder holds.

The term 'beneficial entitlement' encompasses entitlements not dependent on direct legal ownership. For example, a presenter will have a 'beneficial entitlement to be paid or credited a dividend' if the presenter is so entitled as a beneficiary of a trust, which receives dividends through the trust's ownership of shares in a licensee or a related body corporate of a licensee.

Contractual interest in profits or income

The third kind of prescribed financial interest will apply where a presenter (or an associate of a presenter) is contractually entitled to a share of a licensee's income or profits.

Section 6 – Object of this Standard

The object of the Standard is to encourage licensees to be responsive to the need for a fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements or other arrangements that have the potential to affect the content of current affairs programs.

This object is unchanged from the 2000 Disclosure Standard.

Section 7 – Outline of what this Standard does

This section outlines in broad terms the requirements of the Standard. A note to the section refers to paragraph 8(1)(b) of Schedule 2 to the BSA which makes it a requirement of a commercial radio broadcasting licence that the licensee will comply with program standards applicable to the licence under Part 9 of the BSA. The Standard is made under Part 9 of the BSA.

Section 8 – On-air disclosure of commercial agreements

If a sponsor (or an agent of a sponsor) has a commercial agreement with a licensee, a related body corporate of the licensee, a presenter of the licensee or an associate of the presenter of the licensee section 8 imposes an obligation on a licensee to broadcast a disclosure announcement whenever the licensee broadcasts prescribed material relating to that sponsor in a current affairs program.

The situations in which a disclosure announcement must be broadcast include interviews with employees of sponsors about issues that concern a sponsor, as well as direct promotion of sponsors or their products or services. However, the section is not intended to apply in circumstances where a

presenter only mentions or refers to a sponsor or sponsor's product in passing, as distinct from promoting the name, products or services of the sponsor, or doing one of the other things specified in paragraph 8(1)(b)).

Subsection 8(2) provides that a licensee must ensure that a disclosure announcement is clearly identifiable to a reasonable listener as a disclosure announcement, and must be broadcast on-air during the current affairs program. Section 8 does not prescribe any particular form of words which must be used by a presenter in making a disclosure announcement. Whether a disclosure announcement is clearly identifiable to a reasonable listener will be assessed according to a range of factors including content, style, tone, scripting and placement of the disclosure.

Subsection 8(2) also provides that a relevant disclosure announcement must be made 'at the time of, and as part of' the broadcast of the material relating to a sponsor which triggers the obligation to make a disclosure announcement. In line with judicial authority, the ACMA will have regard to whether the announcement has been sufficiently close in time to have the necessary palliative effect.¹

In the same case, the Federal Court held² that, where a disclosure announcement was made 90 seconds after a sponsor was mentioned on-air by a presenter, this constituted a contravention of the requirement to make an on-air disclosure at the time of and as part of the broadcast of material relating to the sponsor. This indicates that in assessing whether a disclosure announcement was made 'at the time of and as part of' the broadcast of relevant material, the impact of the timing of the disclosure announcement on its relationship with the types of activities in paragraph 8(1)(b) must be considered, and generally, the announcement must be made at, or a very short time after, a sponsor, or sponsor's product or service, is mentioned.

Exception – News bulletins and advertisements

Subsection 8(3) provides that a disclosure announcement does not need to be made for material that would otherwise require one if that material forms part of a news broadcast or bulletin, or is an advertisement that is clearly identifiable to a reasonable listener as an advertisement. Section 7 of the *Broadcasting Services (Commercial Radio Advertising) Standard 2012* also requires that an advertisement be presented in such a manner that the reasonable listener is able to distinguish it, at the time of broadcast, from other program material.

Section 9 – On-air statement disclosing payment of production costs

This section applies where an advertiser or sponsor pays for, or contributes to, the production costs associated with a current affairs programs which the licensee broadcasts. In such cases, the licensee must ensure that an on-air disclosure statement is made at least once per hour throughout the program, which makes clear to a reasonable listener that the production costs associated with the program have been paid for, or contributed to, by the sponsor.

The intention of this section is to ensure that a reasonable listener of a current affairs program on a commercial radio broadcasting service is made aware of any contributions or payments which have been made towards the production costs of that program which may, potentially, influence the content of that current affairs program.

Section 10 – Publicly available online register

Section 10 imposes an obligation on licensees to create and maintain a register which contains the information specified in section 11. The register must be published on a website operated by, or on behalf of, the licensee which is accessible online to the public and the licensee must provide a link from the homepage of the website to the webpage where the register can be accessed.

¹ *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754 at 81. The case was decided under the 2000 Disclosure Standard.

² *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754 at 77. The case was decided under the 2000 Disclosure Standard.

Section 11 – Contents of register

Section 11 sets out the information which licensees must include in the online register referred to in section 10 about each current commercial agreement. Where a presenter of a licensee is the presenter of a related broadcast (see section 4) the register must contain information including the name of the licensee which produced or commissioned the program and where the public can find information about the current commercial agreements of that licensee.

Exception – part-time or casual presenters

The effect of subsection 11(3) is that the obligations imposed by section 11 do not apply to a presenter who is a presenter of a current affairs program for less than an average of 3 hours per week over any 4 week period. It should be noted, however, that the obligations imposed by section 8 and section 12 still apply in relation to presenters of that kind.

Section 12 – Licensee to require presenters to disclose commercial agreements to licensee

Section 12 imposes an obligation on licensees to require their presenters to provide information or documents (as relevant) about the commercial agreements with a sponsor (or agent of the sponsor) to which the presenter, or their associate is a party. The section also specifies the timeframe in which the information or documents must be provided to the licensee by the presenter, and the nature of the information which presenters must provide to licensees.

Where the presenter is a presenter of a related broadcast, the obligation applies to the licensee which produced or commissioned the current affairs program.

Section 13 – Licensee must keep commercial agreements

Section 13 imposes an obligation on licensees to keep specified information and documents about each commercial agreement to which the licensee, related body corporate of the licensee, presenter of the licensee or an associate of a presenter of a licensee, is a party, for 12 months after the agreement has expired.

Section 14 – Information or documents to be provided to the ACMA

Section 14 permits the ACMA, by request in writing to a licensee, to require the licensee to provide any of the documents or information (relating to commercial agreements) that are specified in subsection 14(1). Subsections 14(3) and (4) also impose an obligation on licensees to inform the ACMA about any mistakes, changes or omissions relating to information or documents previously provided to the ACMA.

Section 15 – Licensee must not engage or continue to engage presenters that do not assist the licensee to comply with obligations

This section restricts licensees from engaging, or continuing to engage, the services of a presenter, unless it is a condition of the presenter's engagement that the presenter will comply with the requirements of section 12 of the Standard.

Section 16 - Licensee to require presenters to comply with certain obligations

Under this section, licensees must require that presenters of current affairs programs assist the licensee to comply with its obligations under the BSA, the code and the Standard, in relation to the broadcast of programs by the licensee.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012* (the **Instrument**) replaces the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (the **Disclosure Standard**). Under the Disclosure Standard, each commercial radio service licensee that broadcasts a current affairs program must ensure that the existence of any commercial agreements between a presenter and a sponsor is disclosed on-air when that agreement has the potential to affect the content of material being broadcast that relates to the sponsor.

The Instrument does not significantly change the current requirements for commercial radio licensees under the Disclosure Standard. The Instrument does, however, expand the definition of 'commercial agreement' to include agreements between sponsors and licensees in prescribed circumstances. Its purpose is to ensure that the existence of a commercial agreement between a sponsor and a licensee is also disclosed on-air when the agreement has the potential to affect the content of material relating to the sponsor, and material is broadcast by a presenter who has a prescribed financial interest that could result in the presenter benefitting financially through increased earnings of the licensee.

The Instrument also requires that certain details about relevant commercial agreements must be placed on a register, available to be viewed by the public online.

Other changes to the Disclosure Standard effected by the Instrument are of a minor nature and are largely directed at reducing the compliance burden on licensees.

Human Rights Implications

The Instrument engages the following human rights:

Freedom of expression

Under the International Covenant on Civil and Political Rights (the **ICCPR**), any measures that restrict freedom of expression must be necessary and proportionate to the legitimate aims being sought.

The Instrument engages the right to freedom of expression in only a limited way. It does not interfere with the ability of commercial radio presenters, licensees or sponsors to hold opinions and does not operate to prevent those parties seeking, receiving or imparting information or ideas through radio communications.

The Instrument imposes responsibilities on commercial radio licensees and presenters to make disclosure announcements about commercial agreements that have the potential to influence the content of current affairs programs.

Imposing these responsibilities on commercial radio licensees is proportionate and reasonable as it does not place restrictions on the information or ideas licensees disseminate. It is intended to ensure that listeners are made aware of the potential for commercial interests to influence current affairs information.

The Instrument is therefore consistent with Article 19 of the ICCPR, in that the responsibilities imposed by the Instrument are still only required when those responsibilities are necessary to ensure that the rights of others are respected.

Right to privacy

A person's right not to be subjected to unlawful interference with her or his privacy is protected in Article 17 of the ICCPR. The right to privacy protects against the unwarranted intrusion by society into an individual's private sphere.

The Instrument engages the right to privacy in only a limited way and is directed towards the publication (on-air and in a publicly available online register) of prescribed information relating to commercial agreements entered into by licensees and presenters, including the disclosure of a limited amount of personal information.

Section 12 of the Instrument is crucial to ensuring that commercial radio licensees are responsive to the need for fair and accurate coverage of matters of public interest. The Instrument requires current affairs presenters to disclose certain information about relevant commercial agreements with sponsors which have the potential to affect the content of the current affairs program. These disclosure requirements affect the right to privacy but serve the legitimate aim of ensuring the fair and accurate coverage of matters of public interest. Both the on-air and register disclosure requirements apply only to documents and information that are necessary to inform commercial radio listeners of potential commercial influence on current affairs programs. The application of the Instrument is limited to information concerning commercial agreements between sponsors and either licensees or their current affairs presenters.

Conclusion

The Instrument is compatible with human rights and to the extent that it may limit human rights those limitations are reasonable, necessary and proportionate.