

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022

Authority

The Australian Communications and Media Authority (ACMA) has determined the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022 (the Standard)* under subsection 125(1) of the *Broadcasting Services Act 1992 (the BSA)* and section 33(3) of the *Acts Interpretation Act 1901 (the AIA)*.

The Standard replaces the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 (the 2012 Standard)*. The variations to the 2012 Standard are minor.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Intended impact and effect of the Standard

The ACMA intends the Standard to maintain community safeguards by encouraging 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 have the potential to affect the content of current affairs programs.

The Standard applies to all commercial radio broadcasting licensees that broadcast current affairs programs (as defined in the Standard). Under the Standard, commercial radio licensees must ensure that a disclosure announcement is made on air during a current affairs program if there is any commercial agreement or payment of production costs by an advertiser or sponsor that may affect the content of that program. Licensees must also fulfil other obligations including placing certain details about relevant commercial agreements on a register, available to be viewed by the public online.

A provision-by-provision description of the Standard is set out in the notes at **Attachment A**.

The Standard is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

The Standard incorporates by reference the following Acts:

- the BSA;
- the *Australian Charities and Not-for-profits Commission Act 2012*;
- the *Corporations Act 2001*.

The Standard incorporates those Acts as in force from time to time.

The Acts listed above can be accessed, free of charge, from the Federal Register of Legislation: <http://www.legislation.gov.au>.

Consultation

Before the Standard was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA and section 126 of the BSA.

On 15 December 2021, the ACMA published a copy of the Standard (on its website) and an accompanying consultation paper. The consultation period ran for 8 weeks and concluded on 9 February 2022. Three submissions were received. After reviewing the submissions, the ACMA did not consider any changes were required to be made to the draft instrument before it was made.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Standard was conducted by the Office of Best Practice Regulation (OBPR), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (RIS) would be required. OBPR advised that the preliminary assessment shows the regulation is operating effectively and efficiently and since the Standard will be made without significant amendments, it may be certified without a RIS (OBPR reference number: OBPR21-01321).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022*

Part 1 Preliminary

Section 1 Name of standard

Section 1 provides that the name of the instrument is the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022*.

Section 2 Commencement

Section 2 provides that the Standard will commence on the day after the day it is registered.

Section 3 Authority

This section identifies the provision that authorises the making of the Standard, namely subsection 125(1) of the *Broadcasting Services Act 1992*.

Section 4 Repeal

Section 4 provides that the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012* is repealed.

Section 5 Definitions

Section 5 defines key terms used throughout the Standard. The only change from the definitions in the 2012 Disclosure Standard is the addition of the definition for **registered entity**.

Section 6 Meaning of commercial agreement

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

Subsection 6(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, provide voice-over services for an advertisement or provide non-commercial services where the sponsor is a registered entity. A registered entity is defined in section 5 as an entity that is registered under the *Australian Charities and Not-for-profits Commission Act 2012*.

The explicit exclusion of agreements between licensees and sponsors for non-commercial services, where those sponsors are registered entities, was not included in the 2012 Disclosure Standard. This new exclusion in the Standard seeks to provide additional clarification that the definition of commercial agreements in section 6 is not intended to capture agreements between presenters and sponsors for services that are not provided in a commercial context, where the relevant sponsor is a registered entity. An example of an agreement for non-commercial services might include an agreement for a presenter to perform duties as an ordained minister for a registered entity.

Subsection 6(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 benefit 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 7 References to other instruments

Section 7 clarifies that unless the contrary intention appears, a reference to any other legislative instrument is a reference to that other legislative instrument as in force from

time to time and a reference to any other kind of instrument is a reference to that instrument as in force at the commencement of the Standard.

Part 2 Introduction

Section 8 – 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 2012 Disclosure Standard.

Section 9 – 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 condition 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.

Part 3 Disclosure of commercial agreements and other arrangements

Section 10 – 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 10 imposes an obligation on the 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 10(1)(b).

Subsection 10(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 10 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 10(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 (see *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd* [2009] FCA 754 at 81¹ (**Radio 2UE**)).

In *Radio 2UE*, the Federal Court held 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 10(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 10(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 4 of the Commercial Radio Code of Practice 2017 also requires that advertisements broadcast by a licensee must be presented in such a manner that a reasonable listener is able to identify them, at the time of the broadcast, as advertising material.

Section 11 – 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.

Part 4 Register of commercial agreements and other information

Section 12 – Publicly available online register

Section 12 imposes an obligation on licensees to create and maintain a register which contains the information specified in section 13. The register must be published on a website operated by, or on behalf of, the licensee which is accessible online to the public

¹ This case was decided under the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*

and the licensee must provide a link from the homepage of the website to the webpage where the register can be accessed.

Section 13 – Contents of register

Section 13 sets out the information which licensees must include in the online register referred to in section 12 about each current commercial agreement. Where a presenter of a licensee is the presenter of a related broadcast (see section 5) 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 13(3) is that the obligations imposed by section 13 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 10 and section 14 still apply in relation to presenters of that kind.

Part 5 Licensee requirements in relation to presenters

Section 14 – Licensee to require presenters to disclose commercial agreements to licensee

Section 14 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 15 – Licensee must keep commercial agreements

Section 15 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 16 – Information or documents to be provided to the ACMA

Section 16 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 16(1). Subsections 16(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 17 – 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 14 of the Standard.

Section 18 - 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 2022

This disallowable 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 Instrument

The *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022* (**the Standard**) is made under subsection 125(1) of the *Broadcasting Services Act 1992* (**the BSA**). The Standard repeals the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012* (**the 2012 Standard**), which was due to sunset on 1 April 2022.

The Standard does not significantly change the current requirements for commercial radio licensees under the 2012 Standard.

The Standard aims to ensure that each commercial radio service licensee that broadcasts a current affairs program discloses the existence of any commercial agreements between a presenter and a sponsor on-air when that agreement has the potential to affect the content of material being broadcast that relates to the sponsor. The purpose of the Standard is also to ensure that the existence of a commercial agreement between a sponsor and a licensee is 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 from the agreement.

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

Under the BSA, compliance with the Standard is a licence condition for a commercial radio broadcasting licensee (see paragraph 8(1)(b) of Schedule 2 to the BSA).

Human rights implications

The Standard 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 Standard 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 Standard 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 Standard is therefore consistent with Article 19 of the ICCPR, in that the requirements imposed by it are designed to ensure that the legitimate rights of others to receive relevant information 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 Standard 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 14 of the Standard is crucial to ensuring that commercial radio licensees are responsive to the need for fair and accurate coverage of matters of public interest. The Standard 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 Standard is limited to information concerning commercial agreements between sponsors and either licensees or their current affairs presenters.

Conclusion

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