

**POLITICAL PAYOLA: THE ‘CASH FOR COMMENT’ SCANDAL AND AUSTRALIA’S  
PROTECTION OF POLITICAL SPEECH**

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ABSTRACT

[27] This article concerns ‘political payola’, the practice of paying radio presenters to express favourable political comments on air. Australia, along with the USA, seeks to strengthen political debate by requiring disclosure of payola. I argue that whether or not it is disclosed, the commercialisation of speech represented by payola is undemocratic and corrupting, narrowing political discourse. I advocate its prohibition in current affairs radio, as in the UK and Germany. Mindful, however, of the protection the Australian constitution affords the right to paid political advertising (*Australian Capital Television v Commonwealth*), I ask how such a ban might be introduced into Australian commercial radio regulation.

‘If you educate John Laws, you educate Australia.’ Thus is quoted former Prime Minister Paul Keating, speaking of the man whose voice, Keating also claimed, carries more authority than any other in radio.<sup>2</sup> As one of the country’s top ranking commercial radio talkback hosts, John Laws is a national institution. For four decades he has regularly been rated first in his field and his program has been syndicated throughout Australia to a potential audience of over 10 million.<sup>3</sup>

When in July 1999 media allegations emerged that Laws was accepting kickbacks for views he [28] expressed on air, a public scandal was inevitable.<sup>4</sup> Even Keating’s successor John Howard expressed surprise and disappointment.<sup>5</sup> The story that first broke was that Laws was in the pay of the organisation representing Australia’s major banks.<sup>6</sup> At last his listeners had an explanation for the mysterious transformation that had overcome him, from scourge of banking to their virtual PR agent.

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<sup>2</sup> Australian Broadcasting Authority, *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into 2UE Sydney* (Feb 2000) (hereinafter ‘ABA 2UE Report’) 9.

<sup>3</sup> *Ibid.*

<sup>4</sup> The allegations became widespread after appearing on *Media Watch*, ABC Television, 12 July 1999.

<sup>5</sup> Anne Davies and Bernard Lagan, ‘Heat Turned Up On Laws’, *Sydney Morning Herald*, 16 July 1999,

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<sup>6</sup> The Bankers’ Association.

Within days the Australian Broadcasting Authority (ABA) announced an inquiry. Then, as the weeks passed, new allegations came to light. First they concerned other organisations that had Laws in their pay.<sup>7</sup> Then, it transpired, similar agreements had been entered into by Alan Jones, a colleague of Laws with an almost equally high profile, whose program had consistently rated number one in Sydney over eight years.<sup>8</sup> Finally, the allegations spread to presenters from a further three commercial radio stations across the country.<sup>9</sup>

At its conclusion, the ABA 'cash for comment' inquiry, as it popularly came to be known, found that for several years numerous organisations had been paying radio talkback hosts to express favourable on-air comments. These went over and above 'live reads', where advertisers pay presenters to read out their copy, paying extra for the message to be thus vested with the presenters' credibility. 'Live reads' are transparently commercial, their aims and motives understood by an audience well versed in the culture of advertising. But sponsors keen for radio celebrity endorsement had gone further. Everything the presenter said was a potential for a plug. As the ABA Commercial Radio Inquiry concluded, it became difficult to determine where 'personal support ends and paid advertisement begins'.<sup>10</sup>

What gives Laws and his ilk the credibility advertisers are so keen to buy, what draws an audience for their messages, is that these presenters are seen as above salesmen. They and their callers debate the great public issues of the time. Prime Ministers use their shows to communicate with the electorate. John Howard says he values an appearance on talkback radio above any other media contact.<sup>11</sup> The presenters are political commentators, but more than that. To their listeners they are crusaders, their champions against dark forces, usually of government. Now the question arose: whose interests do they represent, exactly? As a journalist observed at the time:

[I]t is one thing to take money for spruiking mango juice, or chickens, or bottles of wine, it is quite another to be running a campaign against the banks, then offer to stop,

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<sup>7</sup> It transpired that Laws had agreements to give favourable on-air coverage for at least nine organisations, including Qantas, Foxtel, Star City and Optus: *ABA 2UE Report*, above n 2, 2.

<sup>8</sup> *Ibid* 9.

<sup>9</sup> 6PR Perth, 5DN Adelaide and 3AW Melbourne.

<sup>10</sup> *ABA 2UE Report*, above n 2, 65.

<sup>11</sup> *Ibid* 9.

for money. Similarly, it is one thing to have a sponsorship deal with Toyota, but it is another to do so while attacking cuts to tariffs on motor vehicles, or to be urging voters to put an end to Telstra's telecommunications monopoly while being paid by Optus.<sup>12</sup>

The ABA's investigation into John Laws found that his commercial arrangements, whereby he accepted reward for favourable treatment, resulted in 17 instances of comments being made by him that the ABA deemed political. The importance of identifying when political speech is sponsored is so apparent that government had long since mandated on-air disclosure of the sponsorship.<sup>13</sup> In five of these [29] 17 instances, the ABA found a breach of that requirement.<sup>14</sup> Overall, the authority deemed there had been a substantial failure by Radio 2UE Sydney (Laws' and Jones' station) to comply with the conditions of its broadcasting licence and with the standards of conduct required of it.

The seriousness with which the ABA viewed its findings was such that the Authority directly imposed new requirements on all commercial radio licence holders, which is at variance from Australia's general policy of co-regulation for broadcasters, with industry devising and administering codes of practice, subject to government supervision. In future, there was to be disclosure not just of sponsored political speech. There was to be on-air and off-air disclosure of all agreements that buy favourable treatment from presenters of current affairs programs, with a compliance training program for staff.<sup>15</sup>

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<sup>12</sup> Caroline Overington with Theresa Ambrose, 'John Laws Show Me The Money', *The Age* (Melbourne), 17 July 1999, 1.

<sup>13</sup> *Broadcasting Services Act 1992* (Cth) s 42(2) requires compliance by all commercial radio broadcasting licence holders with conditions set out in sch 2, Pt 4 of that Act. Sch 2 Pt 4, cl 8(1)(i) makes each such licence subject to sch 2, cl 4. Clause 4(2) requires that if a broadcaster broadcasts political matter at the request of another person, the broadcaster must, immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved in writing by the ABA. Effectively, the required particulars involve disclosure of who requested the broadcast.

<sup>14</sup> *ABA 2UE Report*, above n 2, 80–9 and sch 15, 414–44. In the remaining 12 instances, the ABA felt there was insufficient evidence as to what had been broadcast to ensure that the 'required particulars' had not been broadcast.

<sup>15</sup> *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*, Pt 3; *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000*, Pt 3.

By introducing these measures, Australia adopted the same basic approach as that in the USA,<sup>16</sup> where the practice of being paid cash for favourable comment is known as 'payola', a convenient term I shall adopt.<sup>17</sup> 'Payola comment' — matter broadcast pursuant to a payola deal — is not prohibited, but must be disclosed as such.

### **Perspectives in Freedom of Speech Theory**

Clearly payola comment is akin to advertisement. In both cases, a person or organisation exterior to the broadcaster has bought the means, including airtime and so on, for a message favourable to that person or organisation to be broadcast. While I shall explore below how payola comment is understood as not entirely analogous to advertisement, this basic similarity holds.

Put simply, what the ABA was seeking was to reinforce the distinction between advertisement and editorial, commercial and non-commercial speech.<sup>18</sup> Indeed this was the express purpose of another enforced stipulation accompanying the payola disclosure rules — that advertisements be distinguishable from other programs.<sup>19</sup>

Australia, it might generally be agreed, had bolstered political discourse by requiring disclosure of commercial interests that might motivate its participants. In doing so, issues of freedom of expression are inevitably confronted. Mandated speech, such as the disclosure of payola, is itself a limitation on the [30] freedom. Furthermore, Australia had denied commercial expression the opportunity to gain authority through disguise as disinterested comment.

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<sup>16</sup> For a detailed account of the USA's policy on payola in commercial radio, see Australian Broadcasting Authority, *Commercial Radio Inquiry: Final Report of the Australian Broadcasting Authority* (hereinafter '*ABA Final Report*') (Aug 2000) sch 4. Mandated disclosure of payola was upheld under the US Constitution by the Supreme Court in *Buckley v Valeo* 424 US 1 (1976). For an analysis of that case and the US approach to political advertising as it compares to that of Australia, see David Tucker, 'Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States' (1994) 16 *Sydney Law Review* 274.

<sup>17</sup> The *ABA Final Report*, above n 16 defines 'payola' as 'the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming'. This definition is based on that given by the US Federal Communications Commission. Since my topic is political expression, I refer in particular to those incidents when the material presenters are being rewarded to broadcast may be deemed 'political' in nature. This generally excludes simple endorsements of products or services.

<sup>18</sup> I use the term 'editorial' to refer to any speech on current affairs radio that is neither advertisement nor payola comment.

<sup>19</sup> *Broadcasting Services (Commercial Radio Advertising) Standard 2000*, Pt 3.

On the other hand, by strengthening political discourse at the expense of commercial expression, the country had been entirely consistent with its constitution, which only protects political forms of expression.<sup>20</sup> What is more, it might be said that political discourse, the most valued form of free speech, had been strengthened with minimal abridgment of other forms of expression. In particular this might be the view of those with a classic libertarian understanding of freedom of expression, whereby government should intervene as little as possible in the marketplace of ideas. It is no surprise that Australia's approach to payola is also found in the USA, the bastion of constitutional protection for expression and the paradigm of a democracy that understands speech rights in this way.<sup>21</sup>

From another perspective on the right to free speech, what Australia and the USA have done is far from adequate. An egalitarian approach to freedom of expression recognises the narrowing effect certain speech can have on discourse. Put simply, the powerful silence the powerless, the loud voice drowns out the quiet. Commercial expression, being speech that must be paid for, is clearly the domain primarily of the rich and powerful. From this standpoint, it can be argued that Government must do more than simply distinguish commercial and non-commercial expression. What government must do is create exclusive and prominent platforms for non-commercial expression so that it can be heard in tandem with forms of speech more easily accessed by those with money to buy it. This argument holds even if the effect is to quieten the latter so as to amplify the former.<sup>22</sup>

In broadcasting, this can be done in various ways. Australia, along with many democracies like the UK and Germany, maintains public sector broadcasting. Many, including Australia to a very limited extent, also limit the commercialisation of the private sector, by restricting the proportion of airtime that can be sold to advertisers.<sup>23</sup>

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<sup>20</sup> Established in a number of cases, the landmark cases being *Nationwide News Pty Ltd v Wills* (1992) 175 CLR 1 and *Australia Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 175 CLR 106 (hereinafter 'ACTV'). For fuller discussion on ACTV see Tucker, above n 16.

<sup>21</sup> For further analysis of the US approach as it compares with that of Australia, see above n 16.

<sup>22</sup> For further discussion on this theoretical approach in the context of Australia's attempt to limit political advertising, see Tucker, above n 16, and Deborah Cass, 'Through the Looking Glass: The High Court and the Right to Free Speech' (1993) 4 *Public Law Review* 229.

<sup>23</sup> See, for instance, Federation of Australian Radio Broadcasters Ltd (FARB), *Commercial Radio Codes of Practice and Guidelines* (July 1993), *Code of Practice 3* (hereinafter 'FARB Code of Practice 3'), cl 3.2, which sets limits for commercial radio stations in areas with little competition. However, the

But out of the countries mentioned, only the UK and Germany mandate that broadcast current affairs editorial remain free from commercial influence.<sup>24</sup> They order not the disclosure of payola in current affairs radio, but its prohibition. The fact that this route was not chosen by the ABA means there is nothing to prevent increasing encroachment of payola into editorial.

I believe the prohibition of payola, rather than simply requiring its disclosure, is the correct course. To those who retort that new broadcasting technologies, by removing scarcity in the means of transmission, justify less rather than more government regulation, I concede that ultimately I envisage different tiers in commercial broadcasting. Some will voluntarily submit to an exacting regulatory regime, using this to market themselves to an audience requiring such standards. Others will cater to audiences less demanding of editorial integrity. For some years to come, however, spectrum scarcity will remain an issue. The experience of Australia and the USA suggests that tight state regulation remains an essential component to ensuring that when the marketplace eventually opens up, there will be a culture of high editorial standards to be handed on to those who seek them.

[31] This article asks whether Australia's Constitution would have permitted a prohibition on payola in current affairs radio, if the ABA had chosen that route. I ask this question in the light of one of the few established facets of the country's constitutional protection of political speech.<sup>25</sup> *Australia Capital Television Pty Ltd v Commonwealth of Australia*, one of the landmark cases that read such protection into the constitution, struck down a law prohibiting the purchase of airtime for political advertising in the period preceding elections.<sup>26</sup> To what extent, therefore, is there a right to buy the means to have one's political message broadcast? A subsequent, narrower prohibition on political advertisements immediately prior to elections has

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vast majority of Australian commercial radio stations remain unaffected by this restriction: Productivity Commission, *Broadcasting: Inquiry Report* (2000). FARB is the industry body representing Australia's commercial radio broadcasters.

<sup>24</sup> For a discussion on how this is done, see below.

<sup>25</sup> For an explanation and analysis of how a guarantee of the right to a freedom of expression on political and government matters came to be read into the Constitution, see Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37 and Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000), especially ch 2 and 3. Note that the leading authority on the guarantee is now *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

<sup>26</sup> *ACTV* (1992) 175 CLR 106.

not faced similar challenge. This demonstrates something that was already clear: the right to political advertising is not absolute.<sup>27</sup> All the same, *ACTV* suggests there is considerable constitutional protection afforded the right. To what extent would this curtail an Australian ban on payola?

### **UK Ban on Payola**

Rather than hypothesise in a vacuum about such a ban, I examine the payola prohibition that exists in another Commonwealth country with a broadly similar political climate, the UK. Later I shall also look at Germany, which is of particular interest since that country, while banning payola comment, permits political advertising.

Government regulation of Britain's commercial radio is via the Radio Authority,<sup>28</sup> which requires adherence to several of its codes. None refer directly to payola. Even so, the *News and Current Affairs Code* (N&CA Code)<sup>29</sup> sets the tone by requiring that all news programs must be accurate and impartial,<sup>30</sup> the latter requirement being absent from Australian commercial radio regulation.<sup>31</sup> In the case of UK National Licence holders, each current affairs or documentary program or series<sup>32</sup> dealing with matters of political or industrial controversy must also be impartial.<sup>33</sup> For other licence holders, a less stringent requirement is imposed: a particular view may be expressed in a current affairs or documentary program or series. However, where alternative views exist, they must be reflected within a reasonable period, and at most three months, following the broadcasts concerned.<sup>34</sup> No licence holder of any kind

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<sup>27</sup> *Broadcasting Services Act 1992* (Cth), sch 2, pt 2, cl 3A and *Special Broadcasting Service Act 1991* (Cth) s 70C as regards the SBS. The judgments in *ACTV* (1992) 175 CLR 106 also indicate constitutional tolerance of some abridgement of the right: see, for example, 145 (Mason, CJ), 234–5 (McHugh J), 175 (Deane and Toohey JJ).

<sup>28</sup> *Broadcasting Act 1990* (UK) c 42, Pt III, c 1, ss 83–97.

<sup>29</sup> The current edition was published in September 1992, although it bears the date 1994.

<sup>30</sup> Radio Authority (UK), *N&CA Code*, cl 1.2.

<sup>31</sup> The industry drafted code of practice relating to news and current affairs programs states its purpose as the promotion of accuracy and fairness in news and current affairs programs. No reference is made to impartiality or balance (except for certain requirements of balance as regards depiction of Aboriginal groups, Torres Strait Islanders and the genders): FARB, *Commercial Radio Codes of Practice and Guidelines* (July 1993), *Code of Practice 2: News and Current Affairs Programs* (hereinafter 'FARB Code of Practice 2'). There are certain requirements concerning the separation of news and fact from comment and analysis, but I suggest this is a shade apart from impartiality and balance.

<sup>32</sup> For the definition of a series and the special rules that apply to them, see Radio Authority (UK), *N&CA Code*, above n 30, cl 1.3(a).

<sup>33</sup> *Ibid* cl 1.3(a).

<sup>34</sup> *Ibid* cl 1.3(b).

may express [32] their own political views on their service, unless broadcasting policy or developments are directly involved.<sup>35</sup>

The N&CA Code allows for 'personal view' programs, where presenters express their own opinions on matters of political or industrial controversy, or on current public policy.<sup>36</sup> They are, however, subject to stringent safeguards. In billing and promotion, as well as within the program itself, it must be clear that it is the expression of one person's view, and that others exist. The subject matter of such programs must cover a broad range of relevant issues. They must include either a wide variation of views, or a 'response mechanism' (for example a phone-in), broadcast within two hours, so that alternative views are exposed. A licence holder offering 'personal view' programs must be able to demonstrate that an appropriate range of views on any relevant topic has been aired within each identifiable series of such programs at the end of each calendar year. 'Personal view' programs on political matters must not be scheduled at times when elections are pending.<sup>37</sup>

The N&CA Code has specific rules for a phone-in host, a British term for talkback presenters such as those in Australia's cash for comment scandal, as well as an interviewer or chair of a discussion:

He must not express his own views unless those of opposing views are given the opportunity of expressing them with equivalent force within his programme or the Licence Holder also broadcasts a programme at a similar time of day (in terms of available audience) and of equivalent frequency and duration which features a phone-in host of opposing views.<sup>38</sup>

Therefore, the British regulations cater for opinionated presenters such as John Laws. Indeed, opinionated presenters are no strangers to British broadcasting.

By these rules, the expression of views presenters do not genuinely subscribe to, but voice for reward, is prohibited. This in itself does not preclude payola. Presenters

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<sup>35</sup> Ibid cl 2.

<sup>36</sup> Ibid cl 1.4.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid cl 1.6.

might be paid to express opinions that are their own. But any doubt about payola for phone-in hosts, interviewers and discussion chairs is removed by the requirement that such a broadcaster 'should avoid discussion of issues where his connection or involvement away from the programme is such as to call into question his fairness or impartiality.'<sup>39</sup> This must exclude payola, for who will doubt that such deals call into question fairness and impartiality? It is hard to deny a possibility, at the very least, that broadcasters, rewarded for expressing certain opinions as their own, will be tempted to benefit their sponsors further by giving that opinion favourable treatment over others.<sup>40</sup>

The Radio Authority's *Advertising and Sponsorship Code* (A&S Code) reinforces the payola ban. As part of their enquiry the ABA asked the Radio Authority how they might deal with a similar cash for comment scandal. The Radio Authority informed the ABA that it would likely treat a payment to a presenter as product placement,<sup>41</sup> which is dealt with by the A&S Code.<sup>42</sup> Subsequent to the ABA [33] enquiry, the A&S Code has been redrafted.<sup>43</sup> At the time of their consulting the Radio Authority, product placement was subject to the same rules as program sponsorship, and so permitted, but tightly regulated.<sup>44</sup> Now it is subject to a total ban.<sup>45</sup>

As for program sponsorship, defined to include a promotion broadcast in return for valuable consideration to a Licensee,<sup>46</sup> there has been some relaxation of the rules. Even so, sponsorship of news bulletins and 'news desk presentations' remains

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<sup>39</sup> Ibid. The reference to 'impartiality' is anomalous, given the passage quoted above that allows for opinionated talkback hosts and so on, provided their views are balanced, either in the station's schedule or within the program, most likely in the form of callers or studio guests putting forward alternative opinions (see n 37). However the implied requirement of fairness is nowhere challenged.

<sup>40</sup> Note that all of these latter requirements apply to all licence holders, not just those of national licences.

<sup>41</sup> This is an industry term, normally understood to refer to the promotion of a product through its inclusion in program content (for example, its appearance in drama productions) rather than through a separate commercial.

<sup>42</sup> ABA *Final Report*, above n 16, 82 and 128.

<sup>43</sup> The new Radio Authority (UK) *A&S Code* is dated December 2000. The amendments were not prompted by Australia's 'cash for comment' scandal or concerns about similar problems in the UK.

<sup>44</sup> The definition of 'product placement' has been reworded since the time of the ABA's enquiry (for reasons unrelated to Australia's 'cash for comment' scandal or similar problems in the UK) but I see no material change: Radio Authority (UK) *A&S Code* (2000 edition), above n 43, s 1, r 2.

<sup>45</sup> Ibid.

<sup>46</sup> The full definition used in the Radio Authority (UK) *A&S Code* (2000 edition), above n 43, is thus: 'A programme or promotion is sponsored if it is broadcast in return for payment or other valuable consideration (which includes the provision of the programme itself to a Licensee)': s 1, r 3.1.

prohibited.<sup>47</sup> In relation to what the rules now refer to as 'speech programming and features with a current affairs background rather than news desk presentation' and 'business financial news or comment (but not commercially specific financial advice)',<sup>48</sup> which for shorthand might be termed current affairs radio, sponsors are able to pay for, but may not 'contribute' to, programming content, provided the sponsor's business interests neither prejudice, nor appear to prejudice, its impartiality.<sup>49</sup> Payola surely breaches these conditions. Certainly this was the indication given to the ABA by the Radio Authority.

The British N&CA Code concerns programs on 'matters of political or industrial controversy' or current public policy.<sup>50</sup> As part of their enquiry, the ABA had to determine whether the phone-ins where there had been payola constituted current affairs programs.<sup>51</sup> In the absence of a definition of this term in the relevant broadcasting code,<sup>52</sup> the ABA adopted a definition in the superseded radio program standard of its predecessor, the Australian Broadcasting Tribunal, which defined them as programs 'focussing on social, economic or political issues of immediate relevance to the community, including interviews and commentaries dealing in depth with news items.'<sup>53</sup> The ABA decided that the programs they were investigating met this definition. These terms are sufficiently close to those employed by the British code to reasonably conclude that if the British codes were introduced into Australia, incidents of payola similar to those investigated by the ABA would breach those codes.

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<sup>47</sup> Ibid s 1, r 3.8(a).

<sup>48</sup> Ibid s 1, r 3.8(b). The Radio Authority (UK)'s old *A&S Code* rule on sponsorship allowed it for 'soft news features, retrospectives or news magazines', 'current affairs and/or programming about matters of political or industrial controversy or relating to current public policy' and 'business/financial news or comment (but not financial advice)': s 1, r 3.8(b).

<sup>49</sup> Radio Authority (UK) *A&S Code* (2000 edition), above n 43, s 1, r 3.8(b). The reference to 'impartiality' is once again anomalous, given that there is only a duty of impartiality for current affairs commercial radio as regards national licence holders: Radio Authority (UK) *N&CA Code*, above n 30, cl 1.3.

<sup>50</sup> Cl 1.3, 1.4 and 1.5.

<sup>51</sup> This was in relation to determining whether there were breaches of *FARB Code of Practice 2*, above n 31, which requires that in the preparation and presentation of current affairs programs (for which no definition is given), a licensee must ensure that material is not presented in a misleading manner by giving wrong or improper emphasis or by withholding relevant available facts: Rule 2.2(d). Failing to disclose payola was deemed by the ABA a withholding of a relevant available fact.

<sup>52</sup> *FARB Code of Practice 2*, above n 31.

<sup>53</sup> Australian Broadcasting Tribunal (ABT), *Standard RPS 8* (defunct), quoted at *ABA Final Report*, above n 16, 17. The ABT had clarified that this may include talkback radio: *ibid*.

[34] **The British codes and the Australian Constitution**

The particular issue I wish to explore is the validity the Australian Constitution would give the British codes if imported into Australia. The Constitution protects political expression only against limitations imposed by government.<sup>54</sup> I shall assume that the Radio Authority codes would be introduced into the country in such a way as to constitute law, either because of their direct incorporation into the *Broadcasting Services Act 1992* or more likely because adherence would become a condition of broadcasting licences. If the latter, I also assume that the enforcement of such rules falls within the powers of the ABA, or that the ABA's powers are extended to permit their enforcement.<sup>55</sup>

Britain is chosen for comparison because its broadcasting codes have the weight of law. Canada has a broadcasting code of ethics prohibiting payola in current affairs broadcasting and would otherwise be an interesting comparison because the laws tolerate paid broadcast political advertisements.<sup>56</sup> However, like Australia, Canada operates a system for program content that could loosely be termed co-regulation. While the government licenses commercial radio stations,<sup>57</sup> government regulation on program content is scarce and gives no real indication of the degree of tolerance of payola.<sup>58</sup>

The debate I am embarking on only makes sense if the British payola ban is considered to be a limit on freedom of expression at all. It might be argued that such a prohibition does not limit freedom of expression, but simply restricts profit from the exercise of that freedom. I find this wholly unpersuasive. First, the wording of the British ban precludes such an understanding. The codes deal with the effect of payola on program content, rather than the payola deal itself. Secondly, such an argument focuses only on the rights of the presenter and broadcast licensee. Banning payola

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<sup>54</sup> *ACTV* (1992) 175 CLR 106.

<sup>55</sup> In fact no extension of power would seem necessary: *Broadcasting Services Act 1992* (Cth), see especially ss 43, 44, 143, 158 and 164.

<sup>56</sup> This *Code of Ethics* is prepared by the Canadian Broadcasting Standards Council (CBSC) in co-operation with the industry body, the Canadian Association of Broadcasters. The CBSC *Code of Ethics* states: 'Broadcasters should ensure that there is no influence by advertisers, or the perception of such influence, on the reporting of news or public affairs, which must be accurate, balanced, and objective, with fairness and integrity being the paramount considerations governing its reporting': cl 10(f).

<sup>57</sup> This is done through the Canadian Radio-television and Telecommunications Commission (CRTC).

<sup>58</sup> See, for instance, the CRTC's *Radio Regulations* 1986.

also deprives those who would pay presenters of a means to communicate their messages and restricts the freedom of the audience to hear those messages in that form.<sup>59</sup> Returning to presenters, it is acknowledged that there would only be a limit on their freedom of political expression if the views they are paid to express coincide with their own.<sup>60</sup> Finally, and most obviously, the messages must of course be deemed political in nature.<sup>61</sup>

The major objection to the notion that a payola ban might be deemed unconstitutional in Australia is that the freedom of political expression is not absolute. It is open to abridgement, provided two tests are met:

- the abridgment must be for an object compatible with maintenance of the constitutionally prescribed system of representative and responsible government that gives rise to the implication of the freedom, (the objects test) and [35]
- it must be reasonably appropriate and adapted to achieving that legitimate object or end (the proportionality test).<sup>62</sup>

The ban on political advertising considered in *ACTV* failed the second test. Even so, the High Court indicated tolerance for some restriction on the broadcasting of political advertisements and messages, if justified by the need for integrity in the political process.<sup>63</sup> Indeed a much narrower ban on pre-election political advertisements now seems to have been accepted, albeit untried by the courts.<sup>64</sup>

While there is no absolute freedom of paid political advertising in broadcasting, clearly there is considerable protection given to the right. At first blush, it might be thought that *ACTV* does not bode well for a payola ban, assuming, that is, an acceptance of a nexus between payola and advertising. Not least this is because the

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<sup>59</sup> I acknowledge that these restrictions are relatively minor, since there remains recourse to advertising.

<sup>60</sup> It would be naïve to argue that they almost always will not be, otherwise the presenter would not require payment to express them. It is quite conceivable that avaricious presenters might refuse to voice their political views unless paid to do so.

<sup>61</sup> Problems with distinguishing political and non-political expression are, as one might expect, legionary: see *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 as the current leading authority on the issue and for excellent further analysis, Chesterman, above n 25, especially ch 2 and 3.

<sup>62</sup> *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

<sup>63</sup> See especially 145 (Mason CJ)

<sup>64</sup> *Broadcasting Services Act 1992* (Cth) sch 2, pt 2, cl 3A and *Special Broadcasting Service Act 1991* (Cth) s 70C as regards the SBS.

political advertising ban considered in *ACTV* only had application prior to elections, while the British payola ban would have general application.

The obvious challenge to the conundrum posited by this paper (how to ban political payola comment while permitting paid political advertising) is that it confuses separate entities. Payola, even disclosed payola, and advertising are not the same. Disclosed payola comment is advertisement presented in the form of editorial, albeit with a disclosure tacked on. Advertisement, on the other hand, is just that: advertisement. At the very least, advertisement might be distinguished from editorial by a 'look and feel' test, drawing on mores of broadcasting culture for guidance.

The ABA Commercial Radio Inquiry suggests that such a task is not so easy to apply. Among the issues being investigated by the ABA were breaches of the FARB *Code of Practice* 2 cl 2.2(d),<sup>65</sup> which requires that in current affairs programs, material is not presented in a misleading manner by withholding relevant available facts (for example payola). Also investigated were breaches of FARB *Code of Practice* 3 cl 3.1, which proscribes advertisements presented as news or other programs. Out of the numerous instances of payola that were found by the ABA to breach cl 2.2(d), only some breached cl 3.1. Since in no case was there deemed sufficient disclosure of payola, the inevitable conclusion is that sometimes payola comment in current affairs programming constitutes an advertisement, and sometimes it does not.

Yet nowhere can I find any rationale, nor indeed any direct explanation, as to how the ABA distinguished payola advertisements from payola non-advertisements. The case is well illustrated by two instances of payola held by the ABA to breach cl 2.2(d). I have chosen these because in both instances the payola comment was considered by the ABA to be political, thus also giving rise to a breach of the requirement of on-air disclosure of political matter transmitted at the request of another person.<sup>66</sup> Both instances involved comments broadcast by John Laws pursuant to an agreement he had with the Registered Clubs Association of New South Wales (RCA). The following is a summary, as monitored by the Rehome Australia Monitoring Service on behalf of the RCA, of a brief segment broadcast by Laws:

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<sup>65</sup> FARB is the industry body representing the commercial sector in Australian radio broadcasting.

<sup>66</sup> *Broadcasting Services Act 1992* (Cth) s 42(2)(a).

[W]hen Fairfield Hospital needed \$56,000 for new cardiac monitors it wasn't the NSW Government that came to the rescue it was the local bowling club ... when the NSW Government announced a one-third increase on club gaming it put community contracts at risk ... this tax will take money away from your communities.<sup>67</sup>

This, along with two similar segments, was deemed an advertisement, because it was calculated [36] or designed to promote registered clubs and the RCA, by emphasising the good work clubs do and the detrimental effect of the proposed tax increase.

Compare this with the following, broadcast by Laws one day previously, but which was apparently not deemed an advertisement:<sup>68</sup>

an increase in taxes is never popular so you can understand the clubs being upset at the massive slug by the NSW Government ... the clubs are all non-profit ... million a year gone from the clubs into sporting facilities to sponsorships for camps for children with cancer ... more tax means less money for the local community.<sup>69</sup>

It is equally difficult to differentiate the other two instances of political payola that the ABA considered advertisements from the other five political payola comments they apparently did not.

The simplest way out of the difficulty is to have advertisements distinguish themselves. In the British printed press, when advertising copy might be mistaken for editorial, the word 'advertisement' appears over it. The radio equivalent is to force disclosure. But this, I have already argued, is not enough to protect editorial.

The task of distinguishing advertisements from editorial had confronted Pt IIID of the *Broadcasting Act 1942* (Cth), the legislative ban on pre-election paid political advertising, which was struck down by the High Court in *ACTV*. Part IIID sought to exclude from the ban 'item(s) of news or current affairs, or a comment on any such

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<sup>67</sup> John Laws, *The John Laws Morning Show*, Radio 2UE, 30 May 1997, 11.08 am, as quoted at *ABA 2UE Report*, above n 2, 422.

<sup>68</sup> At least there was no complaint by the ABA that there was a breach of *FARB Code of Practice 3*, above n 23, cl 3.1. No other explanation is apparent.

<sup>69</sup> John Laws, *The John Laws Morning Show*, Radio 2UE, 29 May 1997, 10.26 am, as quoted at *ABA 2UE Report*, above n 2, 422–3.

item, or a talkback radio program'.<sup>70</sup> No embellishment was offered for any of these terms and difficulties with defining them were pointed out by the court.<sup>71</sup>

Part IIID defined 'political advertisement', but did so rather circularly, as an advertisement that contains 'political matter'.<sup>72</sup> 'Political matter' was elaborately (and very broadly) defined,<sup>73</sup> but no definition of advertisement was given.

The Senate Select Committee (the Committee) that considered the legislation prior to enactment expressed itself satisfied that no definition of 'advertisement' was necessary.<sup>74</sup> Instead the Committee thought that a working definition of the ABA's precursor, the Australian Broadcasting Tribunal (ABT) 'clearly provides guidance to the industry'.<sup>75</sup> This definition was in the ABT policy statement dealing with the ban on television tobacco advertising. An advertisement is:

matter which draws the attention of the public, or a segment thereof, to a product, service, person, organisation, or line of conduct in a manner calculated to promote or oppose, directly or indirectly, that product, service, [37] person, organisation or line of conduct.<sup>76</sup>

Reference to this definition had been made in two High Court cases concerning attempts to circumvent that ban.<sup>77</sup> When the ABA 'cash for comment' inquiry panel sought to distinguish advertisement from editorial for the purposes of determining

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<sup>70</sup> *Broadcasting Act 1942* (Cth) (repealed) Pt IIID, s 95A

<sup>71</sup> *ACTV* (1992) 175 CLR 106, 236 (McHugh J).

<sup>72</sup> The term is defined to include material containing an express or implicit reference to, or comment on, any of the following:

- (a) the election or referendum concerned;
- (b) a candidate or group of candidates in that election;
- (c) an issue submitted or otherwise before electors in that election;
- (d) the government, the opposition, or a previous government or opposition, of the Commonwealth;
- (e) a member of the Parliament of the Commonwealth;
- (f) a political party, or a branch or division of a political party.

*Broadcasting Act 1942* (Cth) (repealed), Pt IIID, s 95B(6).

<sup>73</sup> *Broadcasting Act 1942* (Cth) (repealed), Pt IIID, s 95B(6).

<sup>74</sup> Commonwealth, *Report of the Senate Select Committee on Political Broadcasts and Political Disclosures* (1991) 30.

<sup>75</sup> *Ibid.*

<sup>76</sup> ABT, *Policy Statement No. 7 — Advertising Matter Relating to Cigarettes, Cigarette Tobacco or Other Tobacco Products*, originally issued December 1983. The ban on television advertising of tobacco was contained in the *Broadcasting and Television Act 1942* (Cth) (repealed) s 100(5A).

<sup>77</sup> *Rothmans of Pall Mall (Aust) Ltd v ABT* (1985) 58 ALR 675; *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594.

breaches of cl 3.1 of FARB *Code of Practice 3*, in the absence of any definition of 'advertisement' in the *Broadcasting Services Act* and the broadcasting codes, the Panel relied on the understanding of 'advertisement' that had developed in those cases, namely material that, on its face, is calculated or designed to draw attention to or promote the use of a product.<sup>78</sup> The ABA also referred to *ACTV*, where Deane and Toohey JJ cited one of the tobacco cases as authority for the proposition that

'advertisement' ... would seem to be used in a broad general sense which would encompass any broadcast or telecast of material 'designed or calculated to draw public attention' to something regardless of whether the broadcast or telecast 'serves a purpose other than that of advertising'.<sup>79</sup>

However, the ABA understood the use of the word 'product' includes a service, person or organisation.<sup>80</sup>

One obvious shortcoming of all the above definitions, and one that was identified by the ABA, is that none of them require that the material deemed to constitute an advertisement be paid for.<sup>81</sup> Following the panel's recommendations, the new ABA code on advertising, which requires that it be distinct from 'other program material',<sup>82</sup> defines 'advertisement' as:

- material broadcast a substantial purpose of which is to draw public attention to, or to promote, directly or indirectly, an organisation, a product, service, belief or course of action; and
- consideration has been provided by or on behalf of an organisation or a supplier of the product or service to a licensee, or to a presenter, or an associate of a presenter for the broadcast of that material.<sup>83</sup>

It is hard to see how the above definition assists in distinguishing advertisements from payola. Indeed it seems little more than a repeat of FARB *Code of Practice 3*.

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<sup>78</sup> *Rothmans of Pall Mall (Aust) Ltd v ABT* (1985) 58 ALR 675.

<sup>79</sup> *ACTV* (1992) 175 CLR 106, 171, citing *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, 600 and 605. A similar definition for 'advertisement' is given in James McLachlan and Paul Mallam, *Media Law and Practice* (1995).

<sup>80</sup> *ABA 2UE Report*, above n 2, 28.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Broadcasting Services (Commercial Radio Advertising) Standard 2000* cl 6.

<sup>83</sup> *Broadcasting Services (Commercial Radio Advertising) Standard 2000*. The same definition is found in *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*, which requires the disclosure of payola.

Faced with the difficulty of defining ‘advertisement’ to distinguish declared payola, one option is to make no distinction and instead permit both, but simply cap the amount of airtime that can be sold as either. Indeed FARB *Code of Practice 3* already limits advertising time on commercial stations with unsubstantial competition.<sup>84</sup>

[38] I consider this approach as inferior to one that mandates the separation of editorial and commercial material. The problem with permitting disclosed payola is that editorial remains diluted and contaminated by commercialisation. The disclosure of payola has revealed its prevalence in Australian commercial radio current affairs output. Far from the disclosure detracting from the extent to which the message is vested with the presenter’s credibility, John Laws’ program<sup>85</sup> illustrates how the disclosure can be used to reinforce the presenter’s approval. For instance, it is common to hear Laws use disclosures that communicate subtexts along the lines of ‘X is a sponsor of mine, and has been for many years, so I know what I’m saying when I praise them’; ‘Y is a sponsor of mine, so they must be good’. Sponsors might almost pay extra for such endorsement.

Capping advertising and disclosed payola might be a workable solution if government were also prepared to require a minimum quantity of current affairs editorial (payola free, of course). Better than capping disclosed payola, however, is to enforce the distinction between advertisement and editorial. While difficulties exist with defining ‘advertisement’, models as to how to exclude payola from editorial exist in the British codes, or the German, which might be particularly apt since that country forbids payola while admitting political advertisements. Thus the German *State Broadcasting Treaty*<sup>86</sup> states: ‘advertisers may not exert an influence upon the content and editorial activities of a program’.<sup>87</sup> It is also required that ‘advertising must be recognised as such’ and there is a ban on ‘camouflaged advertising’, defined as the mentioning or portrayal of goods and so on, ‘if same is intended for advertising purposes and can

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<sup>84</sup> ‘Where a commercial radio station is the only commercial station in a licence area in which 30 per cent or less of the licence is attributed to overlap, the licensee of that station must not broadcast more than 18 minutes of advertisements in a period of an hour’: FARB *Code of Practice 3*, above n 23, cl 3.2.

<sup>85</sup> *The John Laws Morning Show*, Radio 2UE Sydney

<sup>86</sup> *Rundfunkstaatsvertrag*

<sup>87</sup> Pt 7, s 2.

mislead the general public with regard to the actual purpose of such mentioning or portrayal'.<sup>88</sup>

Left unresolved is the issue of whether the High Court would tolerate a ban on disclosed payola. Is the right to paid political advertising such that this form of expression can be excluded? What is certain is that there is judicial toleration of curbing the right to paid political advertising. Protecting the editorial of current affairs radio would easily be argued to be compatible with maintenance of the constitutionally prescribed system of representative and responsible government, thus passing the objects test. The greater challenge would be meeting the proportionality criteria.<sup>89</sup> A High Court imbued with a libertarian understanding of free speech theory, and thus keen to minimise government interference in broadcasting, might well think that political expression is less drastically curtailed by simply requiring disclosure of payola. While such a conclusion is in my view undoubtedly wrong, for the reasons I have given concerning the need to provide sufficient platforms for non-commercialised political speech, the striking down of a payola ban is not unforeseeable.

No clear indication is given in *ACTV* as to which way the High Court would decide the issue. In that case, as well as *Nationwide News Pty Ltd v Wills*, the High Court indicated willingness, in the right circumstances, to regulate the means of political communication.<sup>90</sup> The majority of the Court seemed sympathetic with government attempts to create a 'level playing field' between rich and poor parties by providing free airtime for both to promote their messages.<sup>91</sup> The law that was held invalid in *ACTV* was [39] struck down not because of this aim, but because of its failure to deliver.<sup>92</sup> It was, for instance, severely criticised for overly favouring established

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<sup>88</sup> Pt 7, s 3.

<sup>89</sup> *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

<sup>90</sup> 145 (Mason CJ), 234–5 (McHugh J), 175 (Deane and Toohey JJ); *Nationwide News Pty Ltd v Wills* (1992) 175 CLR 1 at 76–7 (Deane and Toohey JJ). Compare their attitude to laws that target communications on grounds relating to their content: see *ACTV* (1992) 175 CLR 106, 143 (Mason CJ), 234–5 (McHugh J).

<sup>91</sup> See, eg, the dissenting judgment of Brennan J who thought it could 'hardly be doubted that reduction in the cost of effective participation in an election campaign reduces one of the chief impediments to political democracy': *ACTV* (1992) 175 CLR 106, 155.

<sup>92</sup> See, eg, Mason CJ, who spoke of the new law as discriminatory because it 'fails to preserve or enhance fair access to the mode of communication which is the subject of the restriction.' *ACTV* (1992) 175 CLR 106, 146.

parties in the allocation of free political advertising airtime. There have been suggestions that if the ‘playing field’ had in fact been made ‘level’, the Court might have held the legislation valid.<sup>93</sup> Certainly Deane and Toohey JJ said ‘some degree of regulation’ of political communication might be justified by the need to ‘ensure some balance in the presentation of different points of view.’<sup>94</sup>

While I cannot predict with certainty how the High Court would approach a ban on disclosed payola, some indication might be given by what follows. I argued at the start of this paper that a ban on disclosed payola can be understood as an attempt to strengthen current affairs radio editorial independence and integrity against encroaching commercialisation. A desire to do so must be rooted in confidence that those with command over radio editorial possess the independence and integrity sought. There must be faith that they will adequately perform the democratic task of reflecting diverse political opinions. Only this can justify the resulting abridgment of freedom of expression that comes from forbidding presenters from expressing political views once reward has been accepted.

The High Court in *ACTV* evinced little such faith, nor much eagerness for the enterprise of bolstering the power of commercial radio current affairs editorial. As already mentioned, Pt IIID of the *Broadcasting Act 1942* (Cth), the part of that Act struck down in *ACTV*, contained in s 95A an exemption from the ban on pre-election political advertising. This exemption covered items of news or current affairs, comments on such items and talkback radio. In his dissenting judgment Brennan J, who would have upheld Pt IIID’s restriction on political advertising as regards Commonwealth elections,<sup>95</sup> appeared swayed by s 95A’s exemption, clearly distinguishing current affairs radio from the supposedly emotive and trivialising effect of television political advertising. Believing that TV advertising ‘cannot deal in any depth with the complex issues of government’ he set store by expert evidence to the effect that banning televised advertising by political parties and pressure groups

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<sup>93</sup> Chesterman, above n 25, 33.

<sup>94</sup> *ACTV* (1992) 175 CLR 106, 175.

<sup>95</sup> But not as regards elections to State parliaments, for reasons not related to the issues under discussion here: *ACTV* (1992) 175 CLR 106, 162–4.

'might well safeguard aspects of Australian democracy which televised political advertising itself has put at risk'.<sup>96</sup>

But the majority of the Court were not persuaded that a ban on political advertising would further political discourse, and certain among them regarded s 95A as being no remedy at all to Pt IIID's shortcomings. Mason CJ observed that the effect of s 95A would be to elevate the exempted elements of the media, such as current affairs radio and talkback programs, to 'a position of very considerable importance during an election period'.<sup>97</sup>

He seemed singularly unenthusiastic about this. Far from preferring political discourse through broadcast editorial rather than through paid advertising, Mason CJ seemed to view the former's promotion as a central platform for debate as one of the legislation's serious demerits:

If Pt IIID were valid, talkback and current affairs programmes would unquestionably become, if they are not [40] already, the principal vehicle for political discussion during an election period. And the prohibitions may make it more difficult for a political party, person or group to make an effective response to information or comment contained in such a programme which is adverse to the interests of that party, person or group. The consequence is that Pt IIID severely impairs the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticize federal institutions.<sup>98</sup>

And later:

It is also said that the protection given by s 95A to items of news, current affairs and comments on such items, and talkback radio programmes will preserve communication on the electronic media about public and political affairs during election periods. But access on the part of those excluded is not preserved, except possibly at the invitation of the powerful interests which control and conduct the electronic media. Those who

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<sup>96</sup> *ACTV* (1992) 175 CLR 106, 160 (Brennan J quoting the report of the Senate Select Committee on Political Broadcasts and Political Disclosures (November 1991) on evidence given it by political scientists Drs Ward and Cook: p 28, para 4.6.5) This argument is developed in a framework of a liberal-functionalist critique of *ACTV* (1992) 175 CLR 106 in Cass, above n 22.

<sup>97</sup> *ACTV* (1992) 175 CLR 106, 129.

<sup>98</sup> *Ibid.*

are excluded are exposed to the risk that the protection given by s 95A may result in the broadcasting of material damaging to the cause or causes they support without their being afforded an opportunity to reply.<sup>99</sup>

In his concurring judgment, McHugh J is equally dismissive of the protection lent by s 95A in protecting political debate:

S 95A ... is a matter of no relevance. Leaving aside the difficulty of interpreting the phrase “an item of news or current affairs” in the context of this legislation, s 95A restores only part of the freedom of expression and communication which other sections in Pt IIID take away. Worse still, it permits discrimination among those who are prohibited by Pt IIID from putting their views to the electorate through political advertisements on radio and television. While the effect of the section is that some members of the electorate will be able to get their ideas, policies, arguments and comments before radio and television audiences, it does not follow that those wishing to put the opposite point of view will necessarily be able to do so. Whether or not they are able to do so in time provided by the licensees of radio and television stations will depend entirely upon the decisions of the licensees and those who control the content of the relevant programs.<sup>100</sup>

Such sentiments overlook one of the key purposes of broadcasting regulation in Australia, or at least express no confidence in the regulators to achieve that objective. The *Broadcasting Services Act* gives as one of its objects the encouragement of commercial broadcasters ‘to be responsive to the need for a fair and accurate coverage of matters of public interest’.<sup>101</sup>

The FARB code dealing with news and current affairs gives its purpose as the promotion of accuracy and fairness.<sup>102</sup> One of the primary functions of the ABA is to monitor compliance with the industry codes<sup>103</sup> and ultimately they can make retention of a broadcasting licence conditional on compliance with the codes.<sup>104</sup> While a duty of fairness is distinct from that of impartiality, it nevertheless should involve affording a

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<sup>99</sup> Ibid, 146.

<sup>100</sup> Ibid, 236–7.

<sup>101</sup> *Broadcasting Services Act 1992* (Cth) s 3(h).

<sup>102</sup> FARB *Code of Practice 2*, above n 31.

<sup>103</sup> *Broadcasting Services Act 1992* (Cth) s 158(i).

<sup>104</sup> Ibid ss 44, 143.

platform for a wide range of views.<sup>105</sup> The concerns of the High Court should be met [41] by the regulatory regime already in place.

The freedom of political expression guaranteed by the Australian constitution is intended to serve the realisation of representative government as envisaged in that document. I want to urge an understanding of representative government that does not see the right to buy airplay of messages as the mainstay of freedom of political speech. I believe *ACTV* illustrates the greatest paradox in freedom of expression discourse: striking down a restriction on political expression can silence political expression. The saddest observation, however, is that given the behaviour of the commercial radio sector as portrayed in the 'cash for comment' scandal, together with their ineffectual regulation, the High Court's reluctance to promote independent commercial radio current affairs coverage as a major arena for political debate starts to look entirely understandable.

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<sup>105</sup> Indeed *FARB Code of Practice 2*, above n 31, cl 2.2(c) requires that reasonable efforts be made or reasonable opportunities given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community.