

AUSTRALIAN MEDIA LAW UPDATE

TV AND RADIO STANDARDS

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VARYING THE AUSTRALIAN CONTENT STANDARD: 2003

[127] The Australian Broadcasting Authority (ABA) has made a number of significant changes to the *Broadcasting Services (Australian Content Standard) 1999*, with effect from 1 January 2003, through the *Broadcasting Services (Australian Content) Standard Variation 2002 (No 1)*.² The Australian content standard imposes an obligation on the licences of commercial television broadcasters to broadcast a certain amount and type of programming that concerns the 'Australian content of programs',³ and was last revised in 1999.⁴

The change to the standard is driven by a re-statement of the policy objective underlying the Australian content standard, namely:

To promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the [128] community's access to television programs produced by Australian creative control.⁵

The ABA has indicated that this 'aim' gives expression to objects 3(1)(e) and (f) of the *Broadcasting Services Act 1992 (Cth)*,⁶ though it appears that the latter object has

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² The Variation was made on 19 December 2002, and the detail of the changes to the Standard is set out in Sch 1. See <http://www.aba.gov.au/tv/content/ozcont/review_2001/index.htm#fi_var>. The ABA has also varied the Children's Television Standards as part of its review of the Australian Content Standard. The variations will also take effect on 1 January 2003, through the *Children's Television Standards Variation 2002 (No. 1)*. The Variation was made on 19 December 2002, and the detail of the changes to the Standard is set out in Sch 1. See <<http://www.aba.gov.au/tv/content/childtv/index.htm>>.

³ As provided for in s 122(2)(b) of the *Broadcasting Services Act 1992 (Cth)*. The ABA is required to determine standards s 122(1)(a), which must not be inconsistent with the Act or regulations: s 122(4). Compliance with program standards is a licence condition: s 42(1)(a), cl 7(1)(b). The licensee will be guilty of an offence: s 139(1), with the concomitant triggering of a range of enforcement provisions. Other remedies can include imposing a further condition to ensure breaches do not recur: s 44(2)(b).

⁴ Marett Leiboff 'Australian Media Law Update: New Australian content standard' (1999) 4 *Media and Arts Law Review* 120.

⁵ Australian Broadcasting Authority, *Review of the Australian content standard: Final draft standard* (November 2002) 4

<http://www.aba.gov.au/tv/content/ozcont/review_2001/pdfs/draft_stds/Finaldraftstandard.pdf>.

⁶ The document omits the reference to the sub-s (1): *Ibid*.

been read rather broadly to mean programs produced by Australian creative control as a device to support high quality and innovative programming.⁷ The variations to the standard seek to enhance the access by Australian audiences to a diverse range of quality Australian programs that was not being met by the 1999 standard.⁸ The ABA did not seek to change the transmission quota, which constructs the mix of the different types of Australian programs.

The focus of the change to the standard were the 'high-end' or quality programs, which are characterised by high costs associated with their production, that is, adult Australian drama, C drama,⁹ and documentary programs.¹⁰ In imposing the new requirements, the ABA has emphasised the role of the independent production sector to be the agents for the creation of a diverse range of quality programming.¹¹ The ABA was guided by the principle that aimed to create a standard that minimised the cost impacts on licensees and the ABA, in favour of regulatory incentives.¹² This overview of the varied standard will look at the key changes made to put this regulatory policy into effect.

Section 6 is the definitions provision of the standard, and these are the key changes to definitions.

Australian Drama Programs

The definition of Australian drama program has set out a new expansive 'content' of programs, with express reference to the creative personnel involved in the creation of

⁷ Section 3(1)(e) states that this object is 'to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity. Section 3(1)(f) states that this object is 'to promote the provision of high quality and innovative content by providers of broadcasting services'.

⁸ Australian Broadcasting Authority, above n 5, 4–5.

⁹ 'C' drama, or children's drama, is a sub-set of the Australian content rules, and forms part of the mix of the Children's Television Standards, which seek to provide quality programming directed at the child audience. As high cost programming with little commensurate advertising revenue, 'C' programs aim for a community interest component by both commercial and community television broadcasters, both of whom are subject to these standard obligations: s 122 (generally). As yet, the obligation on community broadcasters is still to be tested.

C programs can be and are pre-approved by the ABA: s 129(2). C programs are distinct from 'G' programs, which do not need to meet these requirements.

¹⁰ Australian Broadcasting Authority, above n 5, 5.

¹¹ Ibid.

¹² Ibid, and as required by s 4(2)(a).

that content.¹³ An Australian drama program is therefore an Australian program that has:

- a fully scripted ‘narrative’ screenplay, with the ‘dramatic elements of character, theme and plot’. The same definition applies to the meaning of a narrative comedy program
- a partially scripted ‘narrative’ screenplay, with the same dramatic elements, that has actors delivering ‘improvised dialogue’ based on a script outline or outlines developed by a writer or writers,
- actors delivering this type of improvised dialogue, in which the dramatic elements are introduced to form a narrative structure.

[129] The definition of ‘*writer*’ has been amended to accommodate this change, and is now defined as a person who writes either the script for a program or an outline for improvisation, but as was provided for previously, excludes a person who adapts the screenplay or a teleplay of an existing program.

Independent Producer

A new definition of independent producer has been inserted into the definitions provision of the standard. An independent producer is a body corporate that is not a licensee,¹⁴ a program supplier,¹⁵ a holder of a subscription television broadcasting licence,¹⁶ or a related body corporate of any of these, within the meaning of the *Corporations Act 2001* (Cth).¹⁷

The other core changes to the standard are set out as follows:

Part 4 of the standard relates to first release programs, as set out in s 8, which has been completely replaced. The new s 8 now provides that:

¹³ Subsections (b) and (c) of the definition of Australian drama program are unchanged.

¹⁴ Section 6(a).

¹⁵ Section 6(b).

¹⁶ Section 6(c).

¹⁷ Section 6(d).

- a program other than telemovies or feature films is a first release program when it is first broadcast in the licence area if it has been acquired within 2 years of the completion of its production.¹⁸
- a telemovie is a first release program when it is first broadcast by a licensee in the licence area, if it has been acquired within 2 years of the completion of its production. The provision disregards a previous broadcast by a subscription television broadcasting service (pay TV).¹⁹
- a feature film is a first release program when it is first broadcast by a licensee in the licence area, if it has been acquired within 5 years of the completion of its production. The provision disregards a previous broadcast by a subscription television broadcasting service (pay TV).²⁰

Part 6 of the standard sets out the drama requirements. Section 10(1) and (2) has been amended to increase the 'points' that a broadcaster must meet for first release Australian drama programs, in prime time.²¹ The detail of the program types which make up the quota in s 10(4)–(7) have been amended to catch programs with late finishing times into prime time.²²

A revised scoring method for Australian drama programs has been inserted into s 11, which is calculated by multiplying the 'format factor' with the duration of the program in hours.²³ Sections 11(2)(b) and 11(2)(c), which contain the 'format factor' have been replaced, and a new s 11(d) added.²⁴ The new s 11(2)(b) illustrates the effect of the independent producer changes: a serial or series produced at the rate of 1 hour or less per week will get a format factor of '3' if acquired from an [130] independent producer for a licence fee of at least \$300 000 per hour, while other sources will get '2.5'.²⁵ A new s 11(3) provides for clarification where a program is

¹⁸ Section 8(1).

¹⁹ Section 8(2).

²⁰ Section 8(2).

²¹ The score has increased from 'at least 775', to 830 points in the three year period commencing 1 January 2002, to increase to 860 in the succeeding three years: s 10(1). In any year, this must meet 250 — increased from 225: s 10(2).

²² These detailed provisions relate to the type of program and the time of commencement, among other things.

²³ Section 11(1).

²⁴ Section 11(2)(a) remains unchanged.

²⁵ Feature films are set out in s 11(2)(c), if acquired prior to 11 July 2002, they will get a score of 3.2, if acquired for a licence fee of at least \$150 000, they will get 4, and in other cases will get 2.5. Telemovies, mini-series or self-contained drama of less than 90 minutes will score 4: s 11(d).

described in more than one subparagraph; in these cases, the highest format factor applies. The definition of licence fees in s 17 has been replaced.

Part 7 contains the rules for Australian children's drama, which has replaced s 12 relating to first release children's drama, and inserted a new s 12A, concerning the deferment of quota hours of Australian children's drama. The detail of these changes will not be set out here.

Part 9 of the standard concerns the broadcasting of Australian documentaries, as set out in s 16. The provision has been replaced, and now requires at least 20 hours of first release documentary programs each year, of at least 30 minutes' duration. The other provisions of the standard remain unchanged, though the note appended to Pt 11, concerning Australia's international obligations, have been updated to take into account new and revised co-production agreements.

The Future of the Australian Content Standard?

These rules, however, may become irrelevant. Australia is in the process of negotiating a free trade agreement with the USA. Included for negotiation in trade liberalisation talks is the continuation of the Australia content rules. The Americans have had a long-standing dislike of the Australian content rules, as the rules limit the access of the US market in these 'products'. In the words of a US free trade lobbyist: 'what Australia is indicating is that there's a limit on what we can sell'.²⁶ From an Australian viewpoint, a cultural imperative drives the Australian content rules. The rules were initially introduced to ensure some Australian programming on commercial television, to counter the cheaper pre-produced content that could be sourced outside Australia.

If the Australian government agrees to open 'the market' to Australian television, through a bi-lateral trade agreement along the lines of the CER between Australia and New Zealand, any continuation of the Australian content rules becomes meaningless. As was seen in *Project Blue Sky v ABA*, a trade agreement will override any cultural imperative, and any US content would have to be 'counted' in transmission quotas,

²⁶ Roy Eccleston 'All the way with FTA' *The Weekend Australian* (Sydney), 15–16 March 2002, 28.

which now occurs with New Zealand content. That US programs form the cheapest program content source for commercial television, unlike high cost Australian content, as can be seen in the imperatives driving the change to the Australian content standard outlined above, is not an issue in a free market context. The impact on the Australian cultural sectors and Australian audiences will be profound, returning to the 1960s when virtually no Australian content was available on Australian commercial television.

Commercial Radio Standards: Extending the Cash for Comment Provisions

The Australian Broadcasting Authority has varied the three commercial radio standards.²⁷ The standards, imposed in the wake of the 'cash for comment' investigations, were due to end on 2 April 2003, and have been extended 'indefinitely'. The ABA had sought comments on this proposal in February 2003.²⁸

The three standards are the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000, the Broadcasting Services (Commercial Radio Advertising) Standard 2000 and the [131] Broadcasting Services (Commercial Radio Compliance Program) Standard 2000. These standards were imposed on the commercial radio broadcasting sector by the ABA, relying on the 'failure' provisions set out in s 125, which enables the ABA to impose standards for code failure, or where codes do not cover a particular issue. They therefore augment the self-regulatory regime, where broadcasters are responsible for the rules by which they operate, created by the legislation.

The ABA had indicated that a code of practice, established through s 123, would be developed by the industry, for registration by the ABA. The ABA, in its proposal to extend the standards, appeared to suggest that the commercial radio industry had not taken steps necessary to meet the time frame needed to put a new code into effect to meet the 2 April 2003 deadline. The ABA has now indicated that current investigations into matters in relation to compliance with the commercial radio standards need to be concluded, and their implications (if any) for the standards

²⁷ ABA 'Extension of commercial radio standards' (Press Release, 17 March 2003) <http://www.aba.gov.au/abanews/news_releases/2003/15nr03.htm>.

²⁸ ABA 'Extension of commercial radio standards' (Press Release, 3 February 2003) <http://www.aba.gov.au/abanews/news_releases/2003/3nr03.htm>.

determined, after which time the ABA will consult with the industry body, Commercial Radio Australia, on the future of the standards. However, the ABA intends the standards be replaced by codes of practice that provide the same level of community safeguards at the appropriate time and after wide community consultation.

However, it appears the standard will be maintained in the long rather than the short-term. It is clearly more palatable for the commercial radio sector to be 'regulated' on this issue rather than attempt to 'self' regulate.

Commercial Arrangements and the Commercial Radio Standards and Control Issues

The ABA is in the process of conducting two investigations, which are related to or connected with the imposition of the commercial radio standards discussed above. One investigation concerns commercial agreements between Telstra and 2UE and Telstra and 2GB. The other concerns an investigation into the control of 2GB and 2CH. The latter investigation relates to an arrangement established to by-pass the disclosure requirements of the commercial radio standards.

The investigations are based in reports that Telstra was paying a large sum in sponsorship to Alan Jones at 2GB and John Laws at 2UE. Through a series of programs in late October 2002, the ABC *Media Watch* program reported, among other things, that Alan Jones called the journalist responsible for the reports a liar, because the Telstra deal was not with him, but with 2GB.²⁹ This led to an associated issue: whether Alan Jones, through a set of arrangements, was actually in a position to exercise control of 2GB, and whether the licensee had failed to notify the ABA of this fact,³⁰ and whether there had been a breach of the control provisions of the *Broadcasting Services Act 1992* (Cth).³¹

²⁹ ABC Television, 'Telstra and Jones Water Australia', *Media Watch*, 7 October 2002, <http://www.abc.net.au/mediawatch/transcripts/071002_s2.htm>.

³⁰ ABC Television, 'ABA "Active Monitoring"' *Media Watch*, 28 October 2002, <http://www.abc.net.au/mediawatch/transcripts/281002_s2.htm>; ABC Television 'Alan Jones' Equity Mystery' *Media Watch*, 28 October 2002, <http://www.abc.net.au/mediawatch/transcripts/281002_s4.htm>; ABC Television 'Alan Jones' 'Trust and Candour' *Media Watch*, 28 October 2002, <http://www.abc.net.au/mediawatch/transcripts/281002_s5.htm>.

³¹ ABC Television, 'Late News: Jones Controls 2GB!' *Media Watch*, 4 November 2002, <http://www.abc.net.au/mediawatch/transcripts/041102_s3.htm>.

Control

The ABA was notified on 29 and 31 October 2002 that Alan Jones was in a position to exercise control of the licences of 2GB and 2CH from 24 October [132] 2002,³² within the 7 days required by ss 63 and 64. However, an arrangement by which Alan Jones and/or associated entities were in a position to exercise control could have occurred some months earlier, though it had been asserted that no report was necessary. The ABA was only now notified because dividend interest to be paid to the trustee of the Jones Family Trust, which exceeded 15 per cent, the amount by which control is deemed to have occurred.³³

On 1 November 2002, the ABA announced that it would investigate the relevant ownership and control issues. The ABA published the terms of reference into the investigation on 13 November 2002, after an application by Macquarie Radio Network Pty Ltd, Harbour Radio Pty Ltd (the licensee of 2GB) and Radio 2CH Pty Ltd (the licensee of 2CH) to prevent the publication was discontinued.³⁴

The ABA is investigating:

- the date on and circumstances by which one or more of Alan Jones, Belford Productions Pty Limited, Hadiac Pty Ltd and Nadarci Pty Ltd came to be in a position to exercise control of the 2GB licence and the 2CH licence. It is also investigating whether any such control could be exercised by that person or company.
- whether Harbour Radio Pty limited, 2CH Radio Pty Limited, Mr Jones, Belford Productions Pty Limited, Hadiac Pty Ltd and Nadarci Pty Ltd and any others who are obliged to do so have notified the ABA in accordance with the requirements of ss 62, 63 and 64 of the Act.

³² Australian Broadcasting Authority, 'ABA to investigate the ownership and control of 2GB and 2CH Sydney' (Press Release, 1 November 2002) <http://www.aba.gov.au/abanews/news_releases/2002/127nr02.htm>.

³³ Sch 1, Pt 3.

³⁴ Australian Broadcasting Authority, 'ABA investigation into control of 2GB and 2CH' (Press Release, 13 November 2002) <http://www.aba.gov.au/abanews/news_releases/2002/137nr02.htm>; <http://www.aba.gov.au/radio/investigations/projects/control_2CH_2GB/terms_ref.htm>.

- whether any offences may have been committed under the Act in connection with those notifications or in other communications or dealings with the ABA in relation to changes in control of the 2GB and 2CH licences.
- whether any findings of, or information gathered by, the ABA in any other investigation, *including the investigation into the disclosure of commercial agreements involving Telstra Corporation Limited*, (to be considered below) affect any of the matters to be investigated in this investigation.
- whether the 2GB licensee and the 2CH licensee remain suitable licensees as required by the licence condition set out at para (b) of subclause 8(2) of Sch 2 to the Act.
- what action, if any, should be taken as a result of the ABA's findings in relation to the matters identified above.

As at mid-March 2003, the ABA has yet to publish any further issues or matters associated with the investigation.

Telstra's Commercial Arrangements

The Telstra arrangements also prompted the ABA to investigate whether there had been any breach of the commercial radio standards concerning the disclosure of commercial arrangements involving Telstra Corporation Limited, as well as any other provisions of the *Broadcasting Services Act 1992* (Cth). The ABA noted that the first stage of the investigation will involve collecting documents relevant to the terms of reference from the licensees of 2GB and 2UE, Telstra and other parties, after which the ABA will consider whether any further steps need to be taken in the investigation.³⁵ This investigation is relevant to the continuation of the commercial radio standards, discussed above. As at mid-March 2003, the investigation has not been completed.

[133] The ABA is investigating 'commercial agreements', as defined in the commercial radio standards, between Telstra and/or any related person/s, servants, agents, representatives of, or contractors to Telstra and the relevant licensees and

³⁵ Australian Broadcasting Authority, 'ABA investigation into Telstra commercial arrangements' (Press Release, 11 November 2002) <http://www.aba.gov.au/abanews/news_releases/2002/131nr02.htm>.

broadcasters (Telstra commercial agreements). The matters to be investigated are set out separately in the terms of reference, but are combined and paraphrased for the purpose of this update:

- whether any Telstra commercial agreements were made with the 2UE/2GB licensee and/or any related person, and Mr John Laws/*Mr Alan Belford Jones* and/or any related person/s, since 1 January 2002.
- whether there has been any failure to comply with the obligations set out in the Disclosure Standard in relation to a Telstra commercial agreement.
- whether any advertisements, as defined in the Advertising Standard, broadcast by the 2UE/2GB licensee, as a consequence of any Telstra commercial agreement, have been presented such that a reasonable listener would not have been able to distinguish them from other program material.
- whether any program matter has been broadcast by the 2UE/2GB licensee, as a consequence of any Telstra commercial agreement, that is political matter as defined in Sch 2 to the Act. If it were, whether that political matter was broadcast at the request of a person other than the broadcaster, and whether the broadcaster required the announcement of the particulars set out in cl 4(2) of Sch 2 of the Act.
- whether since 1 January 2002 the 2UE/2GB licensee:
 - has complied with the requirements of the Compliance Standard to formulate, implement and maintain compliance programs to ensure compliance with the requirements of the Act, the standards and the codes.
 - breached the condition of its licence set out at cl 8(1)(b) of Sch 2 to the Act by failing to comply with any program standard.
 - has, in relation to conduct relating to Telstra commercial agreements, complied with the Commercial Radio Codes of Practice registered by the ABA under the Act.
- whether the 2UE licensee has, in relation to conduct relating to Telstra commercial agreements, complied with the conditions placed on its licence that commenced operation on 3 April 2000.

- what action, if any, should be taken as a result of the ABA's findings in relation to the matters identified above.