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25 September 2006

Ms Roxane Le Guen
The Committee Secretary
Senate Environment, Communications,
Information Technology and the Arts
References Committee
Parliament House
CANBERRA ACT 2600

By email and by facsimile: 02 6277 5818

Dear Ms LeGuen

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 – Imposition of Additional Content and Operational Regulation on Regional Commerical Radio Stations

Commercial Radio Australia is the peak industry body for commercial radio broadcasting stations in Australia. Commercial Radio Australia has [260] members and represents approximately 98% of the commercial radio broadcasting industry in Australia. Commercial Radio Australia understands that many of its members will make their own submissions to the Committee about the *Broadcasting Services Amendment (Media Ownership) Bill* 2006 (**Bill**), particularly in relation to the proposed changes to the operation of the cross-media ownership rules.

For clarification, Commercial Radio Australia limits its comments *in this letter* to the proposals to impose additional content and operational regulation upon commercial radio licensees in regional Australia.

Summary of Submission

Commercial Radio Australia's members already serve their local communities well, by providing listeners with programs that are relevant to those communities, and which keep listeners informed and entertained.

In this context, Commercial Radio Australia is concerned that the Bill proposes to impose an additional layer of unnecessary regulation, which will have potentially significant cost consequences for regional commercial radio operators. It needs to be recognised that every dollar that needs to be spent to meet the requirements of unnecessary regulation is a dollar less that regional radio licensees have available to spend on programming.

Commercial Radio Australia's key concerns about the Bill include that:

additional regulatory requirements relating to local content and local presence are unnecessary, and the current definition of "trigger event" is unreasonably broad;

local content plans should not be required. This is direct Government intervention in the day to day running of a commercial business and is not required of regional newspapers nor, to the same extent, from regional television. This section should be deleted form the Bill

should it remain, the Minister's discretion to increase "minimum service standards", and the ACMA's discretion about what should be included in "Local Content Plans" should both be constrained; and

even if additional regulation is considered necessary (which Commercial Radio Australia does not accept), the proposed approach under the Bill is inconsistent with the principle of co-regulation. It is not clear to Commercial Radio Australia why additional regulation is to be imposed through licence conditions, rather than through codes of practice.

These issues are discussed in more detail below.

<u>"Trigger events"</u>

It is understood that additional local content obligations and operational obligations will apply to regional commercial radio licensees in circumstances where a "trigger event" occurs. Under clause 61CB of the Bill, a "trigger event" will occur when:

- a regional commercial radio broadcasting licence is transferred from one person to another person;
- a new "registrable media group" comes into existence, and such group contains a regional commercial radio broadcasting licence; or
- there is a change in control in a "registrable media group".

Commercial Radio Australia understands that a regional commercial radio licensee company that operates two commercial radio licences in a licence area will count as a single "registrable media group" for the purposes of clause 61AC in the Bill and the definition of "registrable media group" in clause 61AA.

In this context, Commercial Radio Australia is concerned that the effect of the definition of "trigger event" is that a corporate restructure within an existing commercial radio business would result in a "trigger event", even though there was no change in control in the ultimate ownership and control of the licensee.

For instance, this could occur if commercial radio licences were transferred into a single licensee company (instead of sitting in separate companies) or if a new company was interposed above the licensee companies (but before the "ultimate" controllers in the company ownership structure).

It could also occur if an individual ceases to be in control of an existing commercial radio licensee that is listed on the Register as a "media group" (eg because that individual passes away or sells their shares in the relevant "controlling" company).

Commercial Radio Australia's understanding is that the local content and operational provisions in the Bill were intended to apply in circumstances where a cross-media merger had taken place. However, the definition of "trigger event" means that in practice, such provisions will have much broader application. Commercial Radio Australia requests that this be considered by the Committee.

<u>Local content and operational proposals</u>

Under the Bill, after a "trigger event" occurs, it is understood that licence conditions will require the regional commercial radio licensee affected by the trigger event to:

- meet "minimum service standards" for local news and weather bulletins, local community service announcements and emergency warnings. While the Bill sets out what such minimum service standards for local news and weather bulletins, local community service announcements and emergency warnings are, these can be increased by Ministerial determination;
- develop a Local Content Plan (**LCP**) for the relevant licence area, which must be approved and registered by the ACMA; and
- maintain at least the "existing level of local presence" that existed before the "trigger event".

Commercial Radio Australia has a number of serious concerns about these proposals.

Codes, not conditions

At the outset, Commercial Radio Australia considers that if such regulation is considered necessary (which can be challenged, as discussed below), the relevant local content and operational proposals would be more appropriately addressed under the *Commercial Radio Australia Codes of Practice and Guidelines* (**Code**), rather than in conditions of licence.

As the Committee will be aware, the Code forms an essential part of the "co-regulatory scheme" under the *Broadcasting Services Act* 1992 (**BSA**).

The term "co-regulation" refers to the industry developing and administering its own regulation, with the regulator being able to take enforcement action if such regulation is not complied with.

Adopting a co-regulatory approach was one of the key advances made when the BSA was enacted in 1992, and was intended to ensure that the ABA (now the ACMA) was less interventionist than its predecessor, and that unnecessary regulation was avoided. Members of the commercial radio industry developed and registered the Code under the BSA.

It is not clear to Commercial Radio Australia why the Bill proposes to address local content and operational provisions in licence conditions, rather than providing that these be addressed in the Codes (eg through an amendment to section 123 of the BSA). Commercial Radio Australia considers that the Bill's approach represents **an unwarranted level of regulatory intervention**, and contrary to the spirit of co-regulation.

Further, it should be noted that the Code already contains provisions relating to the broadcast of emergency announcements (which are included among the regulated forms of "local content" under the Bill), and these operate well in practice.

Local content - minimum service standards

Commercial Radio Australia does not accept that it is necessary to impose "minimum service standards" in relation to local content. It is insulting to regional commercial radio licensees to be directed to provide content that they are already providing without regulation (**particularly relating to community service announcements, for example, where millions of dollars in airtime each year is allocated voluntarily by regional radio stations to community service announcements and fundraising**).

Further, Commercial Radio Australia is particularly concerned about the fact that the Minister has a very wide discretion to increase the "minimum service standards" that are specified in the Bill, and potentially to require other types of local content to be provided.

Commercial Radio Australia's view is that the Bill should make it clear that the Minister's determination powers:

- must be used sparingly, and only in relation to the types of content already specified in the Bill; and
- must not be exercised prior to the completion of a public inquiry (including consultation with the commercial radio industry) and completion of independent analysis into the effect of such requirements on the future viability of the relevant regional commercial radio stations. Such a public inquiry should also consider the impact that additional regulatory requirements are likely to have on the quality of programming that is offered by the regulated regional radio stations.

In the absence of such restrictions, the Minister would not be constrained from using such determination-making powers as a "penalty", including for reasons unrelated to the provision of local content.

Local Content Plans

Commercial Radio Australia understands that following a "trigger event", a regional commercial radio licensee must prepare a Local Content Plan (**LCP**), and submit this to the ACMA for approval and registration.

It is unclear from the drafting of the Bill exactly what LCPs must contain, although it is understood from the Explanatory Memorandum that LCPs will be expected to address how the licensee will meet its local content obligations, and what resources it will use to do so.

However, it is **not** clear to Commercial Radio Australia why LCPs are necessary.

In this context, it needs to be acknowledged that the cost of preparing an LCP on a licence area by licence area basis could be very significant, particularly for the larger regional radio groups (where many licence areas may be involved).

Further, Commercial Radio Australia is concerned about the statutory discretions of both the ACMA and the Minister in this area. The ACMA will be able to exercise a very broad and subjective discretion when it considers whether or not to approve (and register) an LCP (under clause 61CH), and the Minister also has a broad power to direct the ACMA about the exercise of its LCP powers (under clause 61CQ).

Commercial Radio Australia's submission is that the requirements for LCPs should be removed from the Bill

If this submission is not accepted, Commercial Radio Australia suggests that both the Minister and the ACMA be required to exercise the relevant powers reasonably, having regard to the regulatory policy in section 4(2) of the BSA.[1]

The Bill should also limit the ACMA's discretion about what it can require to be included in LCPs (by reference to stated objectives), and include only narrow grounds as the basis upon which LCPs can be rejected. This would increase regulatory certainty, and also address licensees' concerns about the ACMA rejecting LCPs on spurious grounds.

It is imperative that the operators have the right to appeal any decisions made, particularly given that the matters will be business related and operational in nature, if the section was to remain.

Local Presence

The Bill also provides that the ACMA must impose licence conditions that require regional commercial radio licensees to maintain the "existing level of local presence" following a "trigger event".

The Bill indicates that what is meant by "existing level of local presence" will be a matter for the ACMA to address in the licence condition, and the Bill states that this must include "staffing levels" and "studios and other production facilities.

Commercial Radio Australia does not accept that these are matters which should be regulated, as they go to the heart of a commercial radio licensee's ability to make commercial decisions about the operation of its business. It is unacceptable Government intervention in the running of a commercial enterprise

Further, it is not clear that ACMA has the commercial expertise that is required to assess these obligations. Commercial Radio Australia does not understand ACMA to have expertise in the day to day operation of commercial radio stations, and questions how it will be able to assess what level of local presence is appropriate from a regulatory perspective. This is a completely unwarranted regulatory intervention, and should be reconsidered.

Assessment of Compliance

Finally, it is understood that the ACMA will review LCPs, should this section remain, and compliance with relevant licence conditions every three years.

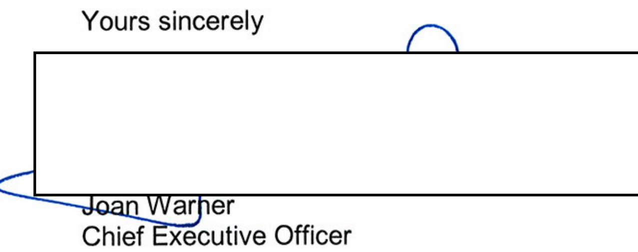
In this context, Commercial Radio Australia's firm view is that such reviews should not impose yet further administrative and compliance costs upon regional commercial radio broadcasters and revert to the pre Broadcasting Service Act days of a type of "beauty pageant"

It is not feasible for commercial radio broadcasters to keep records for 3 years, as at present, relevant records are kept for only 6 weeks and then the relevant storage devices are reused.

Given this, if monitoring of compliance is considered essential (which is also questionable), it is more appropriate for the ACMA to undertake its own review of material broadcast (by tuning into the relevant stations itself) rather than imposing additional administrative burden upon licensees.

[We are available to appear before the Senate Committee to discuss these issues.]

Yours sincerely



Joan Warner
Chief Executive Officer

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[1] "The Parliament also intends that broadcasting services ... in Australia be regulated in a manner that, in the opinion of the ACMA:
(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services..."

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Dear Ms LeGuen

Inquiry into Broadcasting Services Amendment (Media Reform) Bill 2006
Datacasting and Increased powers for ACMA

Commercial Radio Australia is the peak industry body for commercial radio broadcasting stations in Australia. Commercial Radio Australia has 260 members and represents approximately 98% of the commercial radio broadcasting industry in Australia.

Commercial Radio Australia seeks to make specific comment on issues in relation to the Media Reform paper including on the future use of the two unallocated channels of digital spectrum in the broadcasting services bands (**BSB**) – datacasting - and proposals to increase the powers of the Australian Media and Communications Authority (ACMA).

Unallocated BSB Channels – Datacasting

These unallocated channels were originally reserved for the provision of digital "datacasting" services, which were proposed to be provided in accordance with the scheme in Schedule 6 of the *Broadcasting Services Act* 1992 (**BSA**).

Commercial Radio Australia has some significant concerns about the proposed uses of the unallocated BSB channels.

Audio content condition must continue

Commercial Radio Australia is concerned that any "relaxation" of the datacasting content restrictions *not involve* any changes to the audio content condition that applies to datacasting licensees under clause 21 of Schedule 6 of the BSA (**audio content condition**).

The audio content condition prevents datacasting licensees from transmitting matter that would be a radio program if it were broadcast on a commercial radio service.

The Minister has gone on record as noting that the datacasting channels can not be used as a way to provide a 4th TV channel.

We are seeking the same prohibition on the channels being used as a backdoor entry to commercial radio broadcasting – particularly given the crowded nature of the radio sector.

The retention of the audio content condition in its present form will ensure that datacasting licensees are not able to become commercial radio broadcasters by stealth.

The Government's decision to impose a moratorium on additional digital licences, and the former Australian Broadcasting Authority's decision to impose a moratorium on the issue of additional analog commercial radio licences, illustrates that the Australian radio sector is a highly competitive and crowded place.

The retention of the audio content condition is crucial to ensuring that neither of these moratoriums is undermined. In addition, there is no demonstrated need for the audio content condition to be removed.

As a separate matter, Commercial Radio Australia's strong view is that if the unallocated BSB channels are allocated for purposes other than datacasting (under a different licensing regime), a condition that is consistent with the audio content condition should be imposed.

Again, the key point is that the unallocated BSB channels must not be used in a way that would undermine the existing moratoriums nor allow back door entry to free to air commercial radio broadcasting.

ACMA Powers

Commercial Radio Australia seeks to reiterate its previous submissions in response to the proposed changes to the Australian Communications and Media Authority's regulatory powers and the regulation of narrowcasting.

Radio Australia's key submissions on the proposed increase in ACMA powers include that:

- the ACMA **already** has a wide range of effective regulatory powers at its disposal and the current regulatory system is effective. In this context, it is unclear why additional powers are needed;
- **many of the proposals in the Bill are regressive**, in that they are a shift away from "co-regulation" and are a return to the highly litigious environment that was administered by the former ABT – particularly when considered with the proposed new powers to dictate local content for regional radio stations – commented upon on a different letter;
- there is absolutely no evidence that the current ACMA powers are not sufficient to regulate the commercial broadcasting sector, and, no evidence has been provided in relation, in particular, to commercial radio stations; and
- only a few of the proposals appear practical and useful. For instance, Commercial Radio Australia would support the ACMA having the power to seek injunctive relief to enforce section 137 (which relates to the provision of broadcasting services without a licence), but it cannot see why the proposals relating to enforceable undertakings or civil monetary penalties are needed.

(We would be happy to appear before the Enquiry to expand on these positions)

Yours sincerely

Joan Warner
Chief Executive Officer