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

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

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

(b) the ACMA is satisfied that it should determine a standard in relation to that matter;

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

Background

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

The 2000 Advertising Standard was determined to encourage commercial radio broadcasting licensees to ensure that advertisements broadcast by licensees were distinguishable from other program material. The ABA wanted to ensure advertising was not presented as other program material, so that commercial radio listeners would not be misled into believing promotional material had greater credibility because it had not been distinguished as an advertisement. In 2008, the ACMA announced a review of the commercial radio standards to consider the effectiveness, efficiency and appropriateness of the regulatory arrangements under the three standards.

In examining the continuing appropriateness of the 2000 Advertising Standard, the ACMA concluded that the regulation could be improved through expanded definitions of ‘advertising’ and ‘consideration’ to capture all instances of advertising. The ACMA therefore decided to expand these definitions and also make explicit that the time at which advertisements must be distinguishable from other program material is the time at which the advertisement is broadcast.

Intended impact and effect of the Standard

The Standard operates to impose obligations on licensees in relation to advertisements.

In particular, revised definitions in the Standard require licensees to distinguish, from other program material, promotional material for the broadcast of which direct or indirect payments, benefits, services or other forms of consideration have been received. In addition, licensees are now also
required to ensure that advertising is distinguishable from other program material at the time of broadcast.

Consultation

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

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

Regulatory Impact

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

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

NOTES ON INSTRUMENT

Section 1 – Name of standard

Section 1 provides that the name of the Standard is the Broadcasting Services (Commercial Radio Advertising) Standard 2012.

Section 2 – Commencement

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

Section 3 – Revocation


Section 4 – Object of standard

The object of the Standard is to encourage licensees to respect community standards by ensuring advertising is clearly distinguishable from all other programs. This object is unchanged from the 2000 Advertising Standard.

Section 5 – What this standard does

This section states that the Standard requires licensees to ensure that advertisements are distinguishable from other programs.

Section 6 – Definitions

Section 6 defines terms used in the Standard. The key terms are set out below.

‘advertisement’

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

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

This means that if consideration has not been provided for the material to be broadcast, the material will not fall within the definition of advertisement. Accordingly, promotional public awareness material in the form of community service announcements which are broadcast for free will not be advertisements for the purposes of the Standard.
'associate of a presenter'

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

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

Other legal entities covered by this definition include:

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

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

'consideration'

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

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

Exception – provided free solely for review

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

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

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

'licensee'

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

'presenter'

A ‘presenter’ means a person who is an on-air presenter of a program broadcast by a licensee.

Section 7 – Distinguishing Advertisements

Section 7 is the operative section of the Standard.

Section 7 requires commercial radio broadcasting licensees to ensure that advertisements which they broadcast are presented in such a manner that a reasonable listener is able to distinguish them from other program material, at the time they are broadcast.
The manner of presentation is left to the choice of the licensee, but it must meet the standard prescribed in section 7.

A determination of whether an advertisement is distinguishable, to a reasonable listener, from other program material would be assessed according to a range of factors including content, style, tone, scripting and the placement of the advertisement.

An assessment of whether an advertisement was sufficiently distinguishable from other program material ‘at the time of’ the broadcast of the advertisement may include consideration of the timing of any distinguishing features that were sufficient to allow a reasonable listener to identify that program content as an advertisement.
Statement of Compatibility with Human Rights

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


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

Overview of the Legislative Instrument

The Broadcasting Services (Commercial Radio Advertising) Standard 2012 (the Instrument) replaces the Broadcasting Services (Commercial Radio Advertising) Standard 2000 (the 2000 Standard). The Instrument requires licensees to ensure that any advertisement broadcast by a licensee is distinguishable, at the time the advertisement is broadcast, from other program material.

The effect of the Instrument is to clarify the obligation under the 2000 Standard by including a reference to the time at which compliance with the obligation will be assessed.

The Instrument is not intended to change the scope or general intent of the obligation which applied to commercial radio licensees under the 2000 Standard.

Human Rights Implications

Freedom of expression

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

The Instrument engages the right to freedom of expression in only a limited way. It does not interfere with the ability of commercial radio presenters, licensees or sponsors to impart information or ideas through radio advertising. In particular, the Instrument does not limit or restrict the right of commercial radio licensees or advertisers to broadcast commercial advertising.

However, the Instrument does impose responsibilities on commercial radio licensees which broadcast advertising to ensure that the advertising material is distinguishable from other program material ‘at the time of’ broadcast of the advertisement. Imposing these responsibilities on commercial radio licensees is proportionate and reasonable as it does not restrict the form or content of the information licensees disseminate. The Instrument is intended to ensure that there are sufficient safeguards in place to prevent the public being misled into believing that paid advertising material is program material.

The Instrument is therefore consistent with Article 19 of the ICCPR in that the obligation imposed by the Instrument does not specifically restrict the right to freedom of expression, except to the extent reasonably necessary to serve the legitimate aim of ensuring the open dissemination of ideas.

Conclusion

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