Commercial Agreements - Cash for Comment Round 2

Another 'behind the pot plant' scoop for Media Watch, *John laws as star witness on the* 7.30 Report *and* Denton, *comments from the Prime Minister on his association with Alan Jones, and the resignation of Professor David Flint ... the ABA investigation into 2GB, Alan Jones and Telstra was anything but routine. The Authority's April 2004 report on the commercial agreement between 2GB and Telstra largely took the form of a response to the CLC's complaints of October 2002 but the debate that followed took broadcasting standards to the centre of political debate in Australia. After all the media attention, what remains of the original complaint?*

In April this year the Australian Broadcasting Authority (ABA) delivered its third and final report in a series of investigations into the commercial arrangements of presenters, licensees and sponsors of commercial radio.

A bystander could be expected to ask, 'didn't all this happen in 1999?'. Of course it did and in fact the main players are the same: Alan Jones, John Laws, and the licensees of 2GB and 2UE. And just as in 1999, *Media Watch* broke the story about undisclosed commercial arrangements and the Communications Law Centre (CLC) put the case to the ABA for better regulation.

But there are differences between the Commercial Radio Inquiry (widely known as the *Cash for Comment* inquiry) and the three later investigations covering the period November 2002 to April 2004.

In the period between the two sets of investigations the ABA has found continuing non-compliance with rules established to cover commercial arrangements. But it has also flagged that apart from some recommendations for changes to the Commercial Radio Codes of Practice it does not intend to further regulate the field.

Real progress was made in the regulatory measures implemented after Cash for Comment Round 1. And the moves by the ABA to enforce the penalties for breach of the new Standards in the case involving 2UE, John Laws, Telstra and NRMA demonstrated that – at least in some cases – the rules themselves are sound and the ABA is committed to their effective operation.

But the case of Alan Jones, 2GB and Telstra has led the CLC to express grave reservations about the overall effectiveness of the current regulatory arrangements.

Round 2 Investigations

There were three investigations into 2UE and 2GB launched in 2002:

- The investigation into ownership and control of 2GB and 2CH (via Macquarie Radio Network or MRN, the parent company of the licensee Harbour Radio Pty Ltd) and specifically, the interests of Alan Jones (Report #1, June 2002)
- The investigation into the commercial arrangements of John Laws and 2UE (via Southern Cross Broadcasting, the parent company of the licensee Radio 2UE Sydney P/L) and specifically, the sponsorship arrangements involving Telstra and NRMA (Report #2, November 2002)
- The investigation into the commercial arrangements of Alan Jones and 2GB (via MRN) and specifically, the sponsorship arrangements involving Telstra (Report #3, April 2004).

The investigations produced the following principal results.

Findings in relation to the commercial arrangements of John Laws and Alan Jones

The two investigations into commercial arrangements found that both Laws and Jones were personally involved in securing these deals. In the case of Laws, the benefits flowed directly to him. This resulted in the arrangements qualifying as a 'commercial agreement' within the meaning of the Disclosure Standard. The fact that Laws did not make the required disclosure statements meant that the licensee breached the Standards. Accordingly, the ABA referred the matter to the DPP for prosecution. The ABA also found that 2UE breached a corresponding licence condition and some provisions of the Codes of Practice.

But with Jones, the ABA found that the agreement was made with the licensee and the money was paid to the licensee. This meant that there was no 'commercial agreement' in place. Accordingly, Jones was not required to disclose the arrangement when he engaged in editorial discussion of issues involving Telstra. The ABA did find that there was an 'arguable case' that 2GB (not Jones) would need to make announcements that the station's sponsors include Telstra, but there is no requirement for Jones to make any qualifying statements at the time that he is promoting that sponsor.

Findings on the effectiveness of current regulations

These investigations led the ABA to question whether the existing regulations concerning disclosure of commercial agreements need review and amendment. The ABA concluded that the Standards have operated effectively, that is they have met their objectives for distinguishing between advertising and editorial comment and for disclosing commercial agreements between presenters and sponsors. In the third report on Alan Jones, the ABA notes that the Disclosure Standard was never intended to cover the situation of arrangements between sponsors and licensees – it is only designed to cover arrangements between sponsors and presenters.

However the ABA did question the effectiveness of the provisions in the Codes of Practice that deal with opportunities for the presentation of different views and the distinctions between advertising and editorial. The ABA expressed the view that these provisions might need improving and signalled its intentions to discuss this with Commercial Radio Australia.

Are there any regulatory gaps?

The Telstra–2GB agreement is excluded from the disclosure requirements despite numerous personal messages and contacts between Alan Jones and Telstra executives. It should be remembered that in April 2002 Jones was recorded on six separate occasions continuing his long-standing practice of making critical comments on a national communications carrier. However, the ABA report reveals that he then personally involved himself in negotiating a lucrative sponsorship deal between that carrier and the radio station. That agreement was signed

ABA Investigations into Alan Jones/2GB and John Laws/2UE November 2002 to April 2004		
Report #1	Alan Jones, 2GB Ownership and control	No breach of the *Broadcasting Services Act 1992* (BSA). Jones did not acquire an equity interest in MRN as widely reported in April 2002; Jones and associated companies were in a position to exercise control as at 24 October 2002 by virtue of an entitlement to a dividend interest exceeding 15%. This was reported to the ABA consistent with the requirements in the BSA.
Report #2	John Laws, 2UE Commercial agreements	Several breaches of the Commercial Radio Standards and the relevant licence condition in relation to agreements between Laws and NRMA and Laws and Telstra. Matters to be referred to the Director of Public Prosecutions (DPP).
Report #3	Alan Jones, 2GB Commercial agreements	No breach of the BSA, the Commercial Radio Standards, or the Codes of Practice.

on 17 July 2002 and from this point on his critical comments cease; instead they become favourable comments on matters that include current political matters such as the privatisation of Telstra. In fact from this point, Telstra gains opportunities for favourable comments.

The 2GB arrangement is a clever one. In the Commercial Radio Inquiry Jones was found to have breached the Commercial Radio Codes of Practice on a number of occasions. His conduct when at 2UE, as well as that of John Laws, led to the implementation of the Commercial Radio Standards. John Singleton, when enticing Alan Jones to 2GB in 2002, decided to avoid these complications. Instead of agreements that would be between Jones and sponsors such as Telstra, the new agreements would be direct with 2GB.

But Jones' role was clear: in addition to his salary as a paid employee, he would be leveraged into the company itself, as its growth was based on his own popularity and the potential growth in influence. The deal for Jones was expressly based on his potential to increase the value of the company: he is not entitled to a proportion of the current shares, but he would be entitled to buy into this private company as it grows by way of an expansion in the number of shares. By 2007 he will be entitled to own 15% of the total shares in the company (thereby reaching the benchmark of company interests, the same line that kept Kerry Packer's share in Fairfax to 14.9% before selling out in 2001). Thus the ABA concludes, "This arrangement gave Mr Jones an incentive to contribute to the growth of the network over the period of his contract" (Report #3, p. 19).

In the CLC's view, the ABA's findings of breaches by Southern Cross (in relation to the agreements between John Laws and NRMA and John Laws and Telstra) and the Authority's act of referring the matters to the DPP do demonstrate that the Standards are effective in relation to those matters they set out to regulate. In this respect, despite claims made against the ABA about delays and disinterest, the CLC considers that the ABA has taken important regulatory steps in making the Standards and in enforcing them.

However, it is our view that the investigations reveal gaps in the regulatory framework that have been exploited by commercial radio broadcasters. While the ABA has indicated that the Disclosure Standard was not designed to apply to agreements between sponsors and the licensee company of the radio station, the Alan Jones case is one where a presenter was recruited to a competing station for a very attractive salary package plus an entitlement to buy into the company, based on the increase in the value of that company that would flow from his new role as presenter.

Is this 'cash for comment'?

In one respect little has changed since 1999: the ABA report demonstrates that Telstra *purchased* favourable comments by Alan Jones on service standards, privatisation, and the acquisition of naming rights to sports stadiums.

Some say that the difference between 1999 and 2004 is that we are now quibbling over who is the purchaser and who is the seller. Telstra and the ABA have commented that the deal was known to the public. Telstra, of course, had no interest in keeping the deal quiet – it wanted its name mentioned as often as possible – as long as the comments were favourable. In this way, the hourly sponsorship announcements imposed in some cases by the Disclosure Standard are a bonus for an advertiser such as Telstra. But the ABA report reveals that Macquarie wanted to keep the deal under wraps. If Telstra had not wanted the arrangement made public, is there anything in the current regulations that would require any disclosure?

In fact we do not know whether there are any other deals between sponsors and licensees that exist and of which the public is unaware. The ABA has not asked anyone that question.

Recommendations

In a letter to the ABA on 8 April this year, the CLC set out its comments as follows:

> *In our view, the fact that Alan Jones and 2GB did not breach any of these provisions does not mean that their conduct was suitable conduct for a highly influential presenter and the licensee of a commercial radio broadcasting service. Instead, it reveals that the regulatory framework governing sponsorship deals in commercial radio is incomplete.*
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> *In these circumstances, the distinction between agreements between a sponsor and a presenter (as in the case of John Laws and Telstra) and agreements between a sponsor and a licensee (as in the case of MRN and Telstra) is artificial: the same culture of commercial promotion is generated, threatening a perception of editorial integrity.*

Accordingly, the CLC has proposed the following options for reform:

- The Disclosure Standard could be amended to cover arrangements between sponsors and licensees (as in the case of Telstra and MRN).
- A new 'Political Matter' Standard could be developed to deal with the most important cases of threats to editorial integrity (that is, cases where the comment concerns a political matter and the independence of either the presenter or the licensee could be affected by an agreement with a sponsor).
- The status of agreements to contribute to production costs could be clarified. The ABA report stated that there is only an 'arguable case' that Telstra needed to disclose its agreement with 2GB. This needs to be corrected. The definition of 'production costs' needs to be expanded to cover any commercial arrangements.

We understand that the ABA is prepared to discuss the matters more broadly with industry and interested parties. In view of the continuing failure of at least some sections of the industry to self-regulate to an appropriate standard, we have expressed a lack of faith in any industry-based initiatives, including any amendments to the Codes of Practice.

The CLC will continue to push for improvements to the Commercial Radio Standards.

Derek Wilding

Stop press:

On 28 June 2004 the ABA announced that the DPP has declined to pursue the prosecution of Radio 2UE in relation to the breaches of the Disclosure Standard by John Laws. Acting ABA Chair Lyn Maddock said, 'The burden of proof in criminal cases is much higher than in civil cases and for a successful prosecution in this case it would have to be proven that Radio 2UE engaged in the conduct with the requisite criminal intention' (MR66/2004).

This result leaves the ABA with no effective enforcement powers, other than the revocation of a licence. The ABA has itself raised this problem and sought additional administrative remedies under the BSA. The result in the 2UE case demonstrates the rise of self-regulatory remedies. It also raises the prospect of a regulator forced to rely largely on good intentions.

Parts of this article appeared in an opinion piece in the Sydney Morning Herald, *30.06.04, p.13.*

> *"I will continue to pursue that matter with the Prime Minister of watering Australia with Telstra money. We have reached the point of no return. If we don't win this time, there may be no farmers left next time. It's critical stuff. Enough's enough, isn't it?"*
>
> Alan Jones, 2GB, 22 July 2002

Telstra's sponsorship of the 'Telstra Stadiums'

15 July 2002

Ziggy Switkowski realises the PR problems of Telstra paying millions of dollars for the naming rights to two sports stadiums – he suggests to Telstra people to get John Singleton and Alan Jones involved

23 July 2002

Alan Jones defends Telstra's actions in his 2GB radio program

Later that same day ...

George Buschmann at 2GB sends a tape to Alan Pretty at Telstra:

"Alan made comment in relation to your exciting new sponsorship of key stadiums in Australia".

How this is regulated

'Arguable case' that Telstra is contributing to the production costs of the Alan Jones program:

- if so, hourly sponsorship announcements (i.e. de facto advertisements) required;
- if not, no 'commercial agreement' in existence and no need for disclosure.

Source: ABA Report #3, Chapter 7