Donald Robertson, ABA Manager Media and PR, takes a look at the closing submissions of the major parties to the 2UE hearing.*

2UE hearing concludes

Closing statements from the hearing

by Michael Gordon-Smith, presiding member:

... that concludes the hearing of the ABA into the conduct of Radio 2UE Sydney Pty Limited except for the preparation of the panel's report.

The panel will report to the full Authority on the hearing and the report will then be published. We propose that the report be published early in the new year. I expect that to be in the first week or two of February. The hearing, as you are aware, is part of a broader inquiry into issues in the commercial radio industry more generally. Those other investigations will continue separately. The course of that broader inquiry will depend on the evidence gathered by those investigations and a report of that inquiry will be issued and, if necessary, public comment sought, following the report of the hearing. That also will take place in the early part of next year but after the report of this hearing.

One of the common themes of submissions, of I think all parties, appears to be that there may be a need for a re-examination of the code particularly with respect to disclosure. That is likely to be an issue taken further in the ABA's inquiry.

The point has been made in a number of different ways by counsel, but it is a point that the panel wishes to make on its own account, that any hearing, and this one has been no exception, costs those involved both money and effort. Those costs are imposed both on those represented and on the ABA and therefore it involves both public expenditure and private expense. It also imposes on witnesses a level of personal scrutiny, public exposure with the attendant risks. The decision, therefore, to hold a hearing was not a decision that the ABA regarded or took lightly, but took because, in the ABA's view, the matters to be canvassed by the hearing involved important public interest considerations in the operation of broadcasting.

In conclusion, I want to express my and the panel's sincere thanks to all those who have assisted us for their work, their assistance and their patience. To the witnesses, counsel for the parties and counsel assisting, the Australian Industrial Relations Commission for the use of their premises and to the ABA staff, thank you all.

The ABA's public hearing into 2UE concluded on 2 and 3 December with closing addresses from counsel to the ABA panel comprising Mr Michael Gordon-Smith, Ms Kerrie Henderson and Mr Ian Robertson.

The 2UE hearing commenced on 20 October 1999 and sat for 17 days, heard evidence from 27 witnesses and generated 1923 pages of transcript.

Mr Julian Burnside, QC, Counsel Assisting the ABA

In his closing submission Counsel Assisting the ABA, Mr Julian Burnside QC, said,

> We invite the panel to find as a fact that the [commercial radio] codes are not operating to provide appropriate community safeguards for a matter of concern in the community, namely, free and open debate undistorted by hidden commercial interests.
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> We invite the panel to find as a fact that personal endorsement agreements, whether they relate to on-air behaviour or not, are a potential source of bias in the presentation of programs by presenters, and must be disclosed whenever the sponsor is mentioned on air.
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> We invite the panel to find that any agreement under which a presenter receives a benefit is a potential source of bias in that presenter's on air conduct.
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> We submit the panel ought to impose conditions on the licence of 2UE to the following effect. First of all, that 2UE require that all of its presenters disclose the existence of all agreements under which they receive payment for their services, whether on-air services or off-air services, and the amounts payable under those agreements.
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> Second, a condition that 2UE require that any of its ▷

** The above article is published to provide readers of ABA Update with a flavour of the closing submissions to the 2UE hearing by Counsel Assisting the ABA and the three major parties to the hearing. The selection of portions of transcript was solely a decision of the author. It should not be construed as representing the views of the hearing panel or the members of the ABA. Readers can read the complete transcript of the hearing on the ABA web site <www.aba.gov.au>, or in hard copy on the public file in the ABA Library, 16th floor, 201 Sussex St, Sydney. Hard copies of final submissions are also on the ABA public file.*

presenters who have relevant agreements should disclose on air the fact of that agreement and the amount and benefits which they receive under that agreement whenever they mention on air the person who makes the payment or, more broadly, any person who has a commercial interest in the making of the payment. For example, if a person, a presenter, has a contract with Foxtel, then a mention of any of Foxtel's associated interests on air should be the subject of disclosure. If they have an agreement with Optus Vision, then reference to Optus on air should be coupled with disclosure of the Optus Vision agreement, because it is clear that you cannot distinguish relevantly the gravitational pull of the financial interests that tie Optus Vision on the one hand and your interests in keeping Optus happy on the other hand, even thorough they are separate entities. Any person who has a relevant interest in the agreement mentioned on air should be coupled with a mention of the agreement.

Third, we submit that there should be a condition that 2UE maintain a register of all of those agreements, available for public inspection, available at 2UE's premises, and available on their web site, with all relevant details when their web site is active.

We also — I know this probably goes beyond what the panel can do — draw attention to the fact that it seems highly unlikely that this phenomenon of endorsement agreements is isolated to 2UE, and it does seem desirable that any such agreements should be treated in a similar way for all other radio stations that are subject to them. There is no reason why 2UE should be singled out, and the obvious conclusion from that is that there must ultimately be a standard which, by operation of law, becomes a licence condition of all radio broadcasters. There should be a standard which has the affect of obliging all radio broadcasters to disclose any sponsorship agreements which might affect the on-air conduct of their presenters. As I say that goes rather beyond what this hearing is able to do, but the matter has been flagged so plainly by the evidence adduced in this hearing that it would be strange to let the moment pass without drawing attention to the need to deal with the wider problem. No doubt that is something which the Authority can do hereafter at the conclusion of its larger inquiry.

Inquiry extended

The ABA has extended the terms of reference for its commercial radio inquiry to include 3AW Melbourne.

The revised terms of reference for the Inquiry now include the terms and circumstances of any arrangements, agreements or understandings entered into by or on behalf of 3AW Southern Cross Radio Pty Limited or Mr Steve Price concerning the content of any program, comment or discussion to be broadcast on Radio 3AW.

On 23 November the ABA issued notices under section 173 of the Broadcasting Services Act to 3AW Southern Cross Radio Pty Ltd to produce any documents that it may have in its possession relevant to the revised terms of reference.

The ABA is primarily interested in agreements between 3AW and advertisers or sponsors that bring with them the opportunity of on-air interviews that are editorial in nature.

Earlier in his closing submission, Mr Burnside made the following observations.

On talkback radio:

> Talkback radio is a powerful medium. It is ubiquitous, it is personal, it is a blend of news, comment, current affairs, talkback, scripted interviews, unscripted interviews — the whole lot. It is powerful because it is listened to by a large number of people and, because of the nature of radio as a medium, it can be listened to whilst the listener is doing other things — driving in the car or doing the washing up.

On the assumption of disinterestedness:

> Most if not all listeners to talkback radio or to radio generally are entitled to make an assumption that the presenters are disinterested, disinterested in the sense that they do not have a financial stake in the matters they discuss unless they declare their hand.

On the experience of humanity:

> It would go against the accumulated experience of humanity to imagine that a person who received, let's say, half a million or a million dollars a year from someone would criticise them publicly in a way which would damage that person's interest. It would be a startling thing if it happened, and the reason it does not happen is obvious: most people are frail enough to think that they would rather preserve their own interests by not damaging the person who pays them. It makes a lot of sense.

On Mr John Laws:

> Loyalty of course is a virtue, and it is clearly a distinguishing characteristic of Mr Laws' personality. He expressed it repeatedly. But although it is a virtue in the abstract, it does not mean that the existence of loyalty to his sponsors is a benign thing, unless sponsorship is identified.
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> He [Mr Laws] said clearly enough in the course of his evidence that it is a natural feature of loyalty to a friend or a sponsor that you will not do anything to hurt them. What follows from that necessarily is that loyalty to a sponsor means that he will withhold adverse comment. Whether or not the agreement provides that he withhold adverse comment makes no difference; his loyalty will see to it. It seems an unhappy thing to have to criticise a person for loyalty, because it is a fine human characteristic, but if the loyalty springs from an agreement which is not declared, then it is a distorting influence upon the presentation of radio material, and that is something in which the listening public is entitled to take an interest.

On Mr Alan Jones' evidence:

> The net effect of the evidence — and I do not mean to trivialise it — in Mr Jones' part of the case seems to be that he signed without looking and they paid without listening; he spoke without knowing and they heard without complaining. It is simply difficult to accept.

On 2UE:

> One of the most important consequences of this hearing, in our submission, is to have exposed the fact that such a successful radio station, with such successful and powerful personalities as it has, had simply no effective system to monitor compliance with the codes. It is failure of regulation or of self-regulation, which almost defies imagining.

Mr Jeffrey Hilton SC, Counsel for John Laws

In his closing submission, Mr Jeffrey Hilton SC, Counsel for John Laws said,

> One could not live in Australia in the last 40 years without knowing that John Laws has been associated with many best

selling products. One only has to think of products like Toyota, Valvoline, Mortein, Rosemount Wines, and more recently Foxtel, RAMS, Optus, Qantas and the like. The reason is that Mr Laws has effectively simultaneously conducted two careers, effectively. The first has been his career as a commercial radio broadcaster and inextricably, and inextricably combined with his career as a commercial radio broadcaster has been his unprecedented success as a marketer and advertiser of goods and services.

Just as broadcasters have flocked to his door, just as the audience has followed him in droves to whatever radio station he goes, so have advertisers flocked to his door to obtain his sponsorship — his personal endorsement — for their goods and services. By personal endorsement John Laws is making a public statement that he is prepared to associate himself with the product or service of a sponsor, by personally recommending and/or supporting it to the exclusion of other competing products and services.

For that endorsement, with the exclusivity it brings, advertisers are prepared to pay substantial sums. That is a very well-known marketing practice in western capitalist societies. We venture to submit it is very well-known to the Australian public, and Mr Laws' business, and he makes no secret of it, and never has.

Of the loyalty of Mr Laws' audience, there can be no doubt. Of the loyalty of his sponsors, there can be no doubt. The evidence adduced before this Authority bears this out, and each of the sponsors' representatives that came to the inquiry came from highly respected and reputable organisations in Australian life, and gave truthful evidence. Their evidence was flattering and supportive of Mr Laws.

Surprisingly, surprisingly, we submit, that there is one voice or one representative of one voice that has not been heard before this inquiry, although people have purported to speak on their behalf: we have heard nothing from Mr Laws' listeners. No listener has been called to give any evidence. There has been no focus group research. We have been speculating about how the listeners would receive Mr Laws' broadcasts. We've had the submission of public interest groups, who have ventured to express what they contend to be expert opinions on this subject. But, we submit one must question the extent to which these groups and their submissions represent the views of listeners to the John Laws Morning Show.

Now, that brings me to a very important submission which Mr Burnside made and with which Mr Laws respectfully agreed. The submission that Mr Burnside made was that it is not so much what might be the specific obligations under the agreement that matter, what really matters, so far as the public is concerned, is whether or not the person has a commercial association with a subject matter or issue upon which he has commented. In other words, the particulars do not matter so much, it is whether or not there is such an association. We agree.

The difference between Mr Laws and Counsel Assisting is simply this: Counsel Assisting put, without a shred of evidence to this effect, that listeners to the John Laws Morning Show, listeners to John Laws, would assume that he was disinterested on every single issue upon which he commented. That is the assumption that his listeners would make listening to his morning show when he spoke, as he does, about the bevy of products and services. Now, we submit that the evidence clearly establishes that the listeners would not make that assumption, because the listeners would know that he was publicly associated with many of the products and services that cropped up in his program. Why would they know it? Because the whole purpose of everything that John Laws and the sponsor did outside his broadcasting activities was to make clear that association.

Now, really, it is to make a false assumption to think that people listening to the John Laws Morning Show think that he is disinterested on everything on which he speaks. Further, so far as his program is concerned, it is peppered with references to his sponsors. He gave evidence that he referred to his sponsors as 'sponsors of mine' and — the references are in the submissions — to 'my friends', and so on and so on.

And his listeners, as Mr Laws has repeatedly said — we haven't heard from them — are not lacking in commonsense, they are not stupid; they are Australians who have emotive intelligence, commonsense and intuition to put such value on his comments knowing where he was coming from. Mr Laws in all his dealings has never hidden where he is coming from and that is perhaps the key submission that is sought to be put, and is put repeatedly, in our submissions.

We would respectfully submit that the Authority should tread with particular care in this case. Why should the Authority tread with particular care? For this reason: ultimately goods and services, including advertising services, are supplied because there is a demand both from the listeners and the advertisers. Commercial radio is built upon advertising. Its whole viability depends upon it. The Authority should be careful about imposing conditions or restrictions on the manner in which advertisements are broadcast which are calculated to make its advertising less attract, because commercial radio competes with other media for advertising revenues. To the extent you make it less attractive, you then devalue it, and you increase the competitive edge of other media, including, obviously, print media. That may or may not be a desirable thing. ▷

photo: Taylor/Fairfax Photo Library

Hearing panel: L-R: Mr Ian Robertson, Mr Michael Gordon-Smith, Ms Kerrie Henderson

Mr Bret Walker SC, Counsel for Mr Alan Jones

In his final submission, Mr Bret Walker SC, Counsel for Mr Alan Jones said,

> Mr Jones, as you know, denied in every case every particular case alleged against him, that there was any effect by reason of the contract; that is, its general existence, the commercial connection, the fact that considerable sums of money were paid, or their specific terms — so the whole way you could look at a contract.
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> He denied that there was any effect on any single one of those broadcasts by reason of the contract in the sense that the selection of the material to be broadcast did not come about because the contract existed or because any of its terms meant what a court of law would hold them to mean, that he did not present any matter of opinion which is not his opinion, and that there was nothing which constituted inoperation and imposition on him expressing his opinion or passing on items of information or making other observations on air by reason of the contract.
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> The main road is: Is this [regulatory system] working in the way that serves the community interests? What, if any, changes ought to be made? Should the changes be made simply in order, as it were, to bring the hygiene of sunlight on the matter, or should in fact behaviour itself change quite apart from disclosure? They are all important issues, and they are the main game. They will not be assisted by the kind of attention that we, alas, do have to pay to the code and the expressions I am about to come to, because this has been turned into an accusatorial exercise.
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> We have an allegation against us. What I am suggesting is that it should be withdrawn. If it is not withdrawn, you [the panel], at least, ought to make it clear that it was never the subject of an attempt to make it out. And thus, should be very clearly rejected. Because, as you know, you cannot control the coverage of any part of your inquiry. And, as you know, the coverage has not always been flattering to my client. There is no obligation of flattering my client. I am sure he has enough of that. There is an obligation, with respect, when one conducts a public hearing which is compulsory, we must respond. We must get into the box. There is an obligation which comes with the privilege against defamation to ensure the things which would otherwise be unfair are not done or, if they have not been done, that they are denounced. That is why it is very important at the outset of your consideration to the questions that have been raised by the terms of reference that you record in emphatic terms there was nothing on-air uttered by Mr Jones which was the attempt of any suggestion, let alone proof, that it was false, inaccurate, untrue or dishonest as to fact or opinion.
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> If we are going to distinguish between formation of opinion and expression of opinion, then we had better get some facts. There are no facts and no evidence about any of the opinions with which we have been attacked suggesting that they were formed after and under the influence of the contract.
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> In some cases we know about temporal sequence. We know his views on the telecommunications market preceded contracts. I think that is the only one where we have attention in cross-examination to the temporal sequence. But you have in Mr Jones' statement material which will provide the temporal context for others. What matters for the present purposes is that you have not explored, and thus you may not feel you can rationally find, that any of his opinions came about in terms of their existence, or their content, or their vehemence because of the contract.
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> So my learned friend's homely little lessons about human nature are, to repeat the word I used, 'impertinent'. In both senses of that word they are irrelevant and they are pretending, to a capacity, to judge, which is not appropriate.

Mr Tom Hughes QC, Counsel for Radio 2UE Pty Ltd

In his final submission, Mr Tom Hughes, QC, Counsel for Radio 2UE Pty Ltd, said,

> It was inappropriate for 2UE to be singled out and made a whipping boy, and that is what has happened, where the problem is industry-wide and where the people who, on one view of the fact, caused all the problem — I am saying that neutrally — namely, the two presenters, are not within the reach of the Code of Practice or any part of the Code of Practice, weak and ineffectual, woolly and unclear as the relevant parts of that Code of Practice are.
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> If there is to be any lasting solution of the problems exposed by this inquiry, it will be achieved only if, as was the case under the *Broadcasting Act 1942*, the Code of Practice is given some sort of legal effectiveness and only if presenters such as Mr Laws and Mr Jones are brought within the reach of such a code.
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> We say at the outset that 2UE would support amendments of the codes or the imposition of industry standards or licence conditions along the lines of those which are recommended in paragraph 101 of my learned friend Mr Burnside's submissions. 2UE has no objection to conditions like (a) and (c) being imposed on broadcasters.
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> There will need to be some debate about the precise terms of condition (b), but if I can use an expression that I took from Mr Burnside yesterday, we would support the spirit of that idea in the context of the industry as a whole. The time has gone — perhaps it should never have arrived — but for 2UE to be treated to be singled out as a target as a whipping boy, if there is going to be any change, it should be industry-wide and it should bring in the presenters who, on any view, however neutral, and I say this without meaning to be pejorative of any one, brought this problem about. They should be in the net too.
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> In view of the particular interpretation of the Codes of Practice for which counsel assisting has contended, and in view of 2UE's acceptance in principle of a regulatory regime with more teeth perhaps than the present toothless tiger, there is no need for the panel to make findings as to the extent, if any, of 2UE's suggested culpability or blameworthiness in the sense contended for by my learned friend Mr Burnside in paragraph 39 of his submission.
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> So the overall approach that we ask this panel to adopt in this inquiry is that it is simply unnecessary to make a judgment favourable or adverse about Mr Conde. We would suggest that if a judgment is to be made it should not be other than a favourable judgment. An honest man, trying in difficult circumstances to institute and operate a policy which, in its essential details, was commendable; an honest man trying to achieve the objectives of that policy, as he concedes, not with sufficient vigour, but not with such lack of attention as to call for him to be criticised in the very stringent terms that the submissions made by counsel assisting suggests.
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> We ask this panel and the Authority to exercise restraint. The purposes of this inquiry can be served, and fully served, without any necessity of making a judgment upon Mr Conde's conduct.