2UE to show and tell

At the end of the first leg of its Commercial Radio Inquiry, the Australian Broadcasting Authority has issued its report on 2UE and imposed novel conditions on its licence. But are they enough?

On the eve of 2UE getting a new set of licence conditions one sponsor called to give evidence to the Australian Broadcasting Authority's Commercial Radio Inquiry hosted a glamorous event to honour of one the men who caused 2UE's troubles.

The party for John Laws' third year at Foxtel was reportedly attended by political leaders and social luminaries. It featured glowing endorsements of Laws and videotaped testimonials from others who couldn't make it.

The resurrection and public adulation of "disgraced" 2UE presenters seems to be de rigeur these days. Alan Jones hosted an event for the Prime Minister only weeks after having been described by Counsel Assisting the ABA Inquiry, Julian Burnside QC, as having given evidence which "defies belief." The public seems unfussed: ratings figures remain strong for both presenters, although there have been suggestions that advertisers have dropped off.

In its February 2000 report, the ABA found that the presenters' on-air behaviour had led to 90 breaches of the Federation of Australian Broadcasters (FARB) Codes of Conduct and 5 breaches of 2UE's licence conditions, all of which involved misleading listeners in one form or another.

In contrast to the outrage which precipitated the Inquiry, there is a sense that the presenters have got away with their misconduct. The co-regulatory structure of the *Broadcasting Services Act 1992* means that Laws' and Jones' employer has a new disclosure and compliance regime to work with, while the individual presenters will escape direct punishment for their misbehaviour. But this is just the first step in the ABA's continuing Commercial Radio Inquiry and the long term outcome may be a more stringent regime.

What the ABA said about 2UE

2UE's Code breaches related to its failure to effectively disclose conflicts of interest and advertising without identifying it as such. The licence breaches occurred when political material was not adequately tagged.

Recognising the power and influence of talkback radio, the ABA found that while talkback hosts commonly and forcefully express opinions in their programs, listeners "cannot be expected to know that a particular talkback host has a direct commercial interest in a subject being commented on or discussed." Listeners were entitled to be told about direct commercial interests and, if not told, "to assume that no direct commercial interest exists". Jones' and Laws' portrayal of themselves as "broadcasters of integrity and independence whose opinions could not be bought" increased rather than decreased the assumption that the presenter was disinterested in what they were discussing. Non-disclosure was misleading, whether or not the presenter had actually been influenced by a particular deal (although the ABA also found the existence of Laws' and Jones' commercial agreements could affect presentation of broadcasts).

Listeners could only make up their minds about whether presenters were influenced if they knew about those arrangements: withholding this information breached FARB Code 2.2(d).

The ABA found the current FARB Code 3 on advertising ambiguous and recommended that FARB consider introducing a definition of "advertising".

It also made a number of findings about individual commercial agreements.

For example, it rejected Jones' evidence that his decision to broadcast material was not influenced by his relationship with Optus. Also contrary to his evidence, the ABA found Jones was aware of obligations under contracts with Walker Corporation and Optus encompassing on-air editorial conduct and that his broadcast of editorial comments based on material given to him by sponsors was "a matter of contract rather than coincidence."

Laws was also found to have misled his listeners on numerous occasions, including failing to mention an unflattering incident at Star City casino because of his contract with it. Listeners were entitled to assume public appearances and involvement with the Trucking Association were "undertaken due to personal conviction rather than financial obligations". His involvement with that Association was not sufficient to alert listeners to the commercial arrangement. Laws' failure to disclose his commercial agreement with the Australian Bankers

continued on page 11 >

Extracts from the new 2UE licence conditions

What presenters have to say on-air

3.1 A Specific Disclosure Announcement is a statement broadcast by a Presenter or a Part-Time Presenter that a relevant Commercial Agreement exists and must include at least one of the following phrases:

(a) [name of Sponsor] is a sponsor of mine; or

(b) I have a commercial agreement with [name of Sponsor];

or if the relevant Commercial Agreement is a Major Commercial Agreement, must include at least one of the following phrases:

(c) [name of Sponsor] is a major sponsor of mine; or

(d) I have major commercial agreement with [name of Sponsor];

3.2 A General Disclosure Announcement is a statement broadcast by a Presenter or other person that lists every current Commercial Agreement concerning a Presenter and must include at least one of the following phrases:

(a) the following persons are sponsors of mine [names of Sponsors]; or

(b) I have a commercial agreement with the following persons [names of Sponsors]; or

(c) [name of Presenter] has commercial agreements with the following persons [names of Sponsors].

What they have to say it about

"Commercial Agreement" means an agreement, arrangement or understanding, whether committed to writing or not:

(a) one of the purposes is that a Presenter or Part-Time Presenter:

(i) promote a third party and/or its products or services or interests or;

(ii) provide consultancy services in respect of publicity, promotion or public relations;

in exchange for any benefit or valuable consideration; or

(b) which imposes obligations on a Presenter or Part-Time Presenter to provide services and pursuant to which the Presenter or Part-Time Presenter or an Associate of a Presenter or Part-Time Presenter receives, from a person other than the Licensee, any benefit or consideration of $25,000 or more per annum; and

(c) which is not an agreement, arrangement or understand ing between only the Presenter or Part-Time Presenter and an Associate of the Presenter or Part-Time Presenter.

"Major Commercial Agreement" means any Commercial Agreement where the value of the benefit or consideration to be received by the Presenter or Part-Time Presenter or an Associate of a Presenter or Part-Time Presenter pursuant to the agreement is greater than $100,000 per annum.

When they have to say it on air

3.3 (a) The Licensee must broadcast a General Disclosure Announcement on each occasion that a program presented by a Presenter is broadcast.

(b) Each General Disclosure Announcement must be broadcast, in any one week, at different times in the program with each announcement to occur approximately one hour from the time the announcement is broadcast in the previous program.

3.4 Subject to Clause 3.5, the Licensee must broadcast a Specific Disclosure Announcement at the time of and as part of:

(a) a broadcast by a Presenter or a Part-Time Presenter of any material in which the name, products or services of a Sponsor are mentioned by the Presenter or Part-Time Presenter;

(b) a broadcast of any material by a Presenter or a Part-Time Presenter in which an agent, employee or officer of a Sponsor is interviewed in relation to any matter that concerns the Sponsor, its products, services or interests; or

(c) any broadcast requested by a Sponsor or which is based on or similar to any material which is provided by a Sponsor.

When they don't have to say it on air

3.5 A Specific Disclosure Announcement need not be broadcast :

(a) if the material broadcast is a verbatim broadcast of a news item or bulletin prepared by the newsroom staff of

the Licensee; or

(b) if the material broadcast is an advertisement broadcast pursuant to an agreement between the Licensee and the advertiser provided that the advertisement is not presented in a manner whereby a reasonable listener would be entitled to assume that the advertisement is:

(i) the reporting of news; or

(ii) the expression of opinion or editorial comment by the Presenter or Part-Time Presenter or the Licensee; or

(c) if the relevant Commercial Agreement is solely an agreement for the Presenter or Part-Time Presenter to provide writing services for a magazine or newspaper, to perform or appear in a film, television program or theatrical production, or to provide voice-over services for an advertisement.

What the physical register has to say

4.1 The Licensee must keep a Register of current Commercial Agreements concerning Presenters and Part-Time Presenters which records the following particulars of each Commercial Agreement concerning Presenters:

(a) the date of the Commercial Agreement;

(b) the parties to the Commercial Agreement;

(c) the duration of the Commercial Agreement;

(d) a brief description of the obligations of the Presenter under the Commercial Agreement;

(e) the identity of each person providing a benefit or consideration under the Commercial Agreement; and

(f) subject to Clause 4.2, the amount or value of the benefit or consideration to be provided under the Agreement

and which records the following particulars in relation to Commercial Agreements concerning Part-Time Presenters:

(g) the parties to the Commercial Agreement;

(h) a brief description of the obligations of the Part-Time Presenter under the Commercial Agreement.

4.2 The Register need only record the amount or value of the benefit or consideration to be provided under a Commercial Agreement as:

(a) $10,000 or less per annum;

(b) more than $10,000 but not more than $100,000 per annum;

(c) more than $100,000 but not more than $500,000 per annum; or

(d) $500,000 or more per annum.

4.3 The Licensee must keep the Register at the station premises and must make it available for inspection free of charge upon request by any member of the public during business hours.

4.4 The Licensee must publish the Register on any website operated by or on behalf of the Licensee and must link the Register directly to the home page of that website.

Extracts from *2UE Licence Conditions – 27 March 2000* available at <http://www.aba.gov.au>

2UE to show and tell

... continued from page 9

Association was similarly and repeatedly misleading.

Both Jones and Laws were found to have presented what was really advertising as their own editorial comment.

The ABA also found that 2UE should have been aware as early as April 1998 that Laws' contracts could generate Code breaches, that it took no effective action to deal with the issues raised in the March 1998 *Media Watch* program and that its management systems were inadequate to ensure compliance with its sponsorship policy.

What the ABA did

Following these findings, the ABA imposed several new conditions on 2UE's licence requiring:

- on-air and off-air disclosure arrangements;
- implementation of a compliance training program;
- paid advertisements to be readily distinguishable from program material.

The new licence conditions run for three years from 3 April 2000.

While draft conditions were issued at the same time as the report, a "fine tuned" version was issued after consultation with 2UE. The first draft fairly broadly defined what types of arrangements had to be disclosed. The final version limits disclosure to "Commercial Agreements". These are all publicity/promotional arrangements and other contracts worth $25,000 or more per year. (Anti-avoidance provisions mean that the value of different contracts with the same sponsor will be aggregated and arrangements to evade the licence conditions will be treated as void).

Presenters must make a once-per-show "General Disclosure Announcement" mentioning all Commercial Agreements and using a specified form of words. A "Specific Disclosure Announcement" must also be made during the program,

continued on page 12

2UE to show and tell

... continued from page 11

whenever a presenter names a sponsor or its product, interviews a sponsor or broadcasts material based on or similar to material provided by a sponsor.

2UE must maintain a physical register at its office and a website register, setting out presenters' Commercial Agreements, disclosing (within broad dollar ranges) their value and the presenter's obligations. It also has to notify the ABA of these interests. 2UE's employment contracts must require presenters (and part-time presenters) to notify 2UE of their commercial arrangements.

Slightly less stringent rules will apply to part-time presenters, who are on-air for less than three hours a week. Guests and commentators won't have to comply at all, even if they appear regularly on the same show, nor will producers or other staff involved in shaping the editorial content of programs.

All production staff and presenters will have to attend courses each year covering Code and licence conditions. Courses are to be run by a specialist law firm, which has to report back to the ABA on who was there and what was covered.

The ABA has not imposed any further condition specifically dealing with tagging of political broadcasts (this is already a licence condition under the Act), but this will presumably be covered in the training program.

The new licence condition about advertising departs from the FARB Code language and includes a new definition of "advertisement".

What 2UE has done

The new procedures began on 3 April, with the appearance on 2UE's website of a register of interests linked through the "Presenter's Interests" heading on the home page of www.2UE.com.au. One presenter, Suzy Yates, reportedly cut back her hours to become a "Part-Time Presenter", so that she would not have to disclose the dollar ranges of her PR contracts.

So where did it all get us?

While the 2UE licence conditions are a significant improvement on what was there before about misleading conduct – a vague voluntary code – their format is far from an ideal template for the future conduct of the commercial radio industry. The difficulty with overly prescriptive conditions comprising tightly drafted, lawyerly definitions and clauses is that they automatically generate exemptions, leaving listeners in the dark about issues which may be significant but which escape the specificity of guidelines.

For example, the February draft version of the licence conditions required presenters to make a disclosure where they were expressing an opinion or commenting on issues directly affecting a sponsor's business or in which a sponsor had a financial interest. This does not appear in the final version – the new "Specific Disclosure Announcement" requirements are narrower than this.

As a consequence, a presenter who talks about, say, a tax affecting the fruit growing industry, doesn't have to disclose sponsorship by an industry body *during the on-air discussion* as long as that sponsor isn't mentioned, interviewed or having its publicity material regurgitated. Presumably, listeners are meant to remember the relevant name from the potentially long list of sponsors which may have been read out several hours earlier as part of that program's "General Disclosure Announcement" (if they were listening at the time). This is a significant watering down of the original proposed condition and one which seems to undermine the ABA's intention of ensuring that listeners aren't misled.

The spontaneous nature of talkback radio demands simple, clear disclosure rules that are easy to apply on the spot when a conflict of interest arises. They need to become a natural part of the on-air banter. Meaningful disclosure should be part of the culture – not an irritation to be avoided where possible by resorting to clever legal advice. The ABA has had the tough task of coming up with a broad guideline in a short period of time, then having to do a relatively hasty redraft in response to a particular radio station's commercial and legal objections. If and when it decides to apply a guideline across other parts of the broadcasting industry, it will need to balance the need for legal precision against the benefits of straightforward principles for disclosure.

Another continuing problem is that the licensee remains the only one directly accountable to the ABA. 2UE's presenters must now disclose commercial arrangements to 2UE and their employment contract must require them to comply with 2UE's disclosure obligations (although it does not automatically follow that they will be sacked if they don't comply). Despite hugely letting down 2UE last year, Jones and Laws stayed with the station and remain highly marketable commodities. For star presenters, this provision means the worst punishment for misconduct is being dropped by their station and picked up by a rival.

The government needs to reconsider the Broadcasting Services Act scheme, so that everyone involved in a deception of the public – whether presenters or sponsors – is accountable for their actions. As far as presenters are concerned, until the scheme is changed, incentives for presenters to disclose conflicts and punishment for non-disclosure will remain primarily in the hands of their revenue-driven employers. The more popular and influential the presenter, the more likely the licensee will be prepared to wear the consequences of their misbehaviour, for as long as the licence conditions allow.

After all the effort and expense invested in this Inquiry by the ABA, it would be a pity if this framework was not improved on. The public certainly deserves better.

The ABA is continuing investigations into other radio stations. Following that, it will review whether new licence conditions should apply across the commercial radio industry and perhaps beyond. <

Julie Eisenberg