

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S225 OF 2014

BETWEEN: AUSTRALIAN COMMUNICATIONS
AND MEDIA AUTHORITY

Appellant

AND: TODAY FM (SYDNEY) PTY LTD

Respondent

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**



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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth).

PART III LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the appellant's statement of applicable legislative provisions.

PART IV ISSUES PRESENTED BY THE APPEAL

- 10 4. The issues are accurately stated by the appellant (the **Authority**). The Commonwealth intervenes to make submissions in support of the Authority on the issue raised in the Notice of Contention filed by the respondent on 1 September 2014.

PART VI STATEMENT OF THE ARGUMENT

Summary

- 20 5. The constitutional question is reached on the assumption that the Authority's construction of the relevant licence condition – cl 8(1)(g) of Schedule 2 to the *Broadcasting Services Act 1992* (Cth) (**BSA**) – is correct. On that assumption, the question thrown up by that licence condition – being the same question whether the condition is considered by the Authority within its powers under the BSA, or a by court at the stage of civil penalty or criminal proceedings – is whether the condition has in fact been breached by the respondent using the licensed service in the commission of an offence. To emphasise the point, under this construction, “commission” means commission of the offence in fact, not that a court has curially determined guilt on the criminal standard. Put more simply still, commission means, as Latham CJ recognised in *Nassoor v Nette*,¹ commission of the offence, not conviction for the offence.

¹ (1937) 58 CLR 446 at 454.

6. Making that assumption, the short answer to the respondent's central Chapter III contention at [96]-[101] is that the empowering provisions of the BSA in question – chiefly, ss 170, 178 and 179 and, potentially, ss 43, 44(2)(b), 141, 143, 205G and 205W – do not authorise the Authority when reaching its determination, whether affirmative or negative, in respect of breach of this condition, to determine conclusively any form of legal rights, let alone adjudge criminal guilt in any way that would be binding and conclusive between the Commonwealth and the respondent. Nor do they impose any form of punishment for guilt of a criminal offence.
- 10 7. Instead, making that same assumption, the empowering provisions of the BSA do no more than authorise the Authority to form a view or make a finding on the question whether the licence condition has been breached as a step in its administration of the BSA, just as the Companies Auditors and Liquidators Disciplinary Board was lawfully authorised to do in *Albarran v Companies Auditors and Liquidators Disciplinary Board*.²
8. In the present case, that administration of the BSA is currently proceeding within what can be described as “stage 1” of the process: the Authority's investigation under s 170 and reporting under ss 178 and 179. The findings or views reached at the conclusion of stage 1 may provide the foundation for action by the Authority to further condition the respondent's licence (under ss 43 and 44(2)(b)); to take enforcement action in response to the breach of the licence condition (under ss 141 and 143); to institute civil penalty proceedings in respect to breach of the condition (under s 205G, in conjunction with s 140A); or to accept an enforceable undertaking from a licensee (s 205W).
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9. That administration of the BSA – as has occurred to date or as may occur in the future – does not involve any step that determines the existing rights or liabilities of the respondent. Rather, it involves an exercise of power that is quintessentially regulatory in nature, and operates at most as an adjustment of rights rather than a binding determination of existing rights.
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10. Other steps that the Authority may take under the BSA, such as referral of potential offences against a Commonwealth law to the Commonwealth Director of Public Prosecutions,³ also do not determine a licensee's rights; rather, any such impact would ultimately flow, if at all, from an exercise of judicial power.

² *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (*Albarran*) at 358-359 [17]. See also *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 (*Alinta*) at 576 [90], 578-579 [96], 598 [171], 594-595 [160] and *Visnic v ASIC* (2007) 231 CLR 381 (*Visnic*) at 386 [16] and 395 [46].

³ See ss 178(2) and 215(3) of the BSA.

11. The character of the Authority's exercise of its powers under the BSA does not change according to whether the Authority is investigating a breach of the condition that the licensee "comply with program standards applicable to the licence", the condition that it "remain a suitable licensee" or the condition that it "not use the broadcasting service or services in the commission of an offence".⁴ Each such investigation might involve complex questions of fact and law.
- 10 12. That the questions might involve "the congeries of events and mental states capable of constituting a crime, as they occur, and prior to their curial characterisation as such" involves no additional difficulty, just as it involves no such difficulty for a civil court in determining, in the absence of a determination "by a court exercising criminal jurisdiction", that an offence has been committed when the court is exercising powers in respect of proceeds of crime (cf RS [58]; Full Court AB 167 [76]).⁵

Judicial power: general principles

13. The respondent's statement of principle at RS [82]-[89] is largely unexceptional. The Commonwealth would however offer the following statement and exposition of the relevant principles.
- 20 14. It is well-accepted that there is no exhaustive definition of judicial power, nor is there any single combination of necessary or sufficient factors identifying what is judicial power.⁶ The difficulty "arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it".⁷
15. As a general rule, judicial power has been said to involve "a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be

⁴ Schedule 2 Part 4 cl 8(1)(b); 8(2)(b); 8(1)(g).

⁵ *Criminal Property Confiscation Act 2000* (WA) ss 145, 146, 148. The Act applies "whether or not anyone has been charged with, or convicted of, the relevant confiscation offence" (s 5(2)(c)), and the determination whether "the respondent is or was involved in the commission of a confiscation offence" is made by a civil court, on the balance of probabilities: s 16(1)(b). See *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478. The *Proceeds of Crime Act 2002* (Cth) also applies to an offence committed "whether or not any person is convicted of the offence" (s 14), and a court exercising civil jurisdiction determines, for example, whether or not it is satisfied that the person has committed an offence, whether or not that person has been convicted (eg s 152); see *DPP (Cth) v Xu* (2010) 202 A Crim R 279. See also *Criminal Assets Confiscation Act 2005* (SA) s 10(b); *Criminal Proceeds Confiscation Act 2002* (Qld) s 13(1). In a different context see *Oibers Co Ltd v Commonwealth* (2004) 136 FCR 67 (upheld on appeal: (2004) 143 FCR 449).

⁶ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (*Brandy*) at 257 (referring to *R v Davison* (1954) 90 CLR 353 (*Davison*) at 368, 267; *Alinta* at 577 [93]).

⁷ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (*Precision Data*) at 188-189; *Luton v Lessels* (2002) 210 CLR 333 (*Luton*) at 345 [21] (Gleeson CJ).

decided as between those persons or classes of persons”.⁸ A trial for the determination and punishment of criminal guilt has been described as a classic example of a matter for determination by a judiciary independent of the Parliament and the Executive.⁹ Apart from history and precedent, the validity of that proposition rests “on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties”, that determination being made by reference to the application of principles and standards “supposed already to exist”.¹⁰ The trial of actions for breach of contract and for wrongs has been similarly described.¹¹

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16. At the same time, however, aspects of the judicial process, such as the finding of facts, the making of value judgments, “even the formation of an opinion as to the legal rights and obligations of parties”, may also be features of the exercise of administrative or legislative power.¹² The creation of new rights and obligations for the future, enforcement of which depends upon the intervention of a court or is otherwise judicially reviewable (collaterally or otherwise), has been held not to involve an exercise of judicial power, notwithstanding that making the decision may involve the application of legal criteria to the facts and circumstances of a particular case.¹³

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17. The Commonwealth adopts in this regard the Authority’s analysis of the decisions of this Court in *Albarran* and *Alinta* (at AS [16]-[21]). To those cases might be added, by way of further example, the Court’s earlier decisions in *Attorney-General (Cth) v Breckler*,¹⁴ *Luton v Lessels*,¹⁵ and *R v Trade Practices Commission; Ex parte Tasmanian Breweries Pty Ltd*.¹⁶

18. In *Breckler*, the statutory regime at issue conferred on the Superannuation Complaints Tribunal (**Tribunal**) the power to resolve a complaint in relation to certain decisions of the trustee of a superannuation fund. The aspects of

⁸ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (*Tasmanian Breweries*) at 374 (Kitto J).

⁹ *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11; *Brandy* at 258; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 (*Breckler*) at 109 [40].

¹⁰ *Brandy* at 258-259, citing *Davison* (1954) 90 CLR 353 at 368-370 and *Prentis v Atlantic Coast Line* (1908) 211 US 210 at 226.

¹¹ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *Brandy* at 258-259 (Mason CJ, Brennan and Toohey JJ).

¹² *Precision Data* at 188-189; *Luton v Lessels* (2002) 210 CLR 333 at 345 [21] (Gleeson CJ).

¹³ See, for example, *Breckler* at 110-112 [43]-[46]; *Luton* at 345-346 [21]-[24] (Gleeson CJ, with whom McHugh J agreed (at 361 [79])), at 360 [76] (Gaudron and Hayne JJ), 374-376 [126]-[132] (Kirby J), 389 [201] (Callinan J); *Albarran* (2007) 231 CLR 350; *Alinta* (2008) 233 CLR 542; cf *Brandy* at 269-271.

¹⁴ (1999) 197 CLR 83.

¹⁵ (2002) 210 CLR 333.

¹⁶ (1970) 123 CLR 361.

that regime which were of significance to the Court's conclusion included the following:

- 10 18.1. The terms of the trust deed required the trustees to observe requirements which had their source in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**Supervision Act**) and accompanying regulations, and included obligations to observe determinations of the Tribunal under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (**Complaints Act**). Against this backdrop, "the determination by the Tribunal involved not the exercise of the sovereign power referred to by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* but the arbitration of a dispute using procedures and criteria adopted by the constituent trust instrument, the existing charter, for the resolution of certain disputes arising thereunder".¹⁷
- 18.2. Apart from the terms of the trust deed, the plan in issue had the status of a regulated superannuation fund, as a result of an election that was available to the trustees under the Supervision Act; the availability of that election was a decisive pointer in favour of validity.¹⁸
- 20 18.3. Both the Supervision Act and the Complaints Act took the existence of a determination of the Tribunal "as a criterion by reference to which legal norms are imposed and remedies provided for their enforcement ... A determination which 'constitutes the factum by reference to which' legislation operates to confer curially enforceable rights and liabilities does not necessarily involve the exercise of judicial power".¹⁹
- 18.4. The Complaints Act did not purport to give determinations of the Tribunal "that conclusive character which would prevent collateral challenge in proceedings to compel observance of those determinations".²⁰ Although "not necessarily decisive, [this consideration] strengthen[ed] the case for validity".²¹
- 30 19. Similar features of the powers conferred on the Child Support Registrar by the *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth), to make determinations of child

¹⁷ At 110-111 [43] (citations omitted).

¹⁸ At 111 [44].

¹⁹ At 111 [45]; see also at 130 [91] (Kirby J).

²⁰ At 111 [46]; see also at 130 [93]-131 [94] (Kirby J).

²¹ At 111 [46].

support, were decisive in *Luton*. Justices Gaudron and Hayne summarised those features as follows:²²

10 First...the Registrar's assessment, whether as an administrative assessment or as a departure determination, is the factum by reference to which the statute *creates* rights for the future which then are to be enforced by resort to the courts; the assessment does not adjudge existing rights. Secondly, the Registrar's assessment, again whether as an administrative assessment or as a departure determination, is not final. It is open to the processes of objection and then 'appeal' to a court. Thirdly, so far as administrative assessments are concerned, the statutory processes are wholly administrative. So far as departure determinations are concerned, the Registrar may make such a determination, but need not if the issues are 'too complex'. If the Registrar does make a departure determination, the party dissatisfied can object and if still dissatisfied go to a court; if the Registrar does not make such a determination, again the party dissatisfied can object and then go to court. In either event the Court will decide the question afresh, without regard to what the Registrar has done.

20 20. *Tasmanian Breweries* was itself a case in which the Court held, on an analysis of the applicable legislative context, that the Trade Practices Tribunal (**TPT**) was not exercising judicial power. As the plurality in *Breckler* said of that case,²³ the effect of a determination by the TPT concerning a restriction in an agreement was that the agreement thereafter became unenforceable as regards the observance of the restriction. Section 102(1) of the *Trade Practices Act 1965* (Cth) stipulated the validity of the determination could not be challenged, reviewed or called into question in any proceedings, but s 102(2) provided that this did not limit the High Court's exercise of its jurisdiction to issue a writ of prohibition, mandamus or certiorari or an injunction.²⁴ Justice Kitto stated in that context (emphasis added):²⁵

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We are here concerned with a power which depends upon nothing but the Tribunal's own satisfaction that certain conditions exist. The determination of the Tribunal that it is so satisfied – the making of its 'findings' (as s.49 calls them) – does not bind in the sense in which Palles C.B. used the expression; that is to say, *it does not conclude for all purposes any question as to which the Tribunal declares itself satisfied*. It answers only the question whether

²² (2002) 210 CLR 333 at 360 [76] (emphasis in original). See also at 345-346 [21]-[24] (Gleeson CJ, with whom McHugh J agreed (at 361 [79])), 374-376 [126]-[132] (Kirby J), 389 [201] (Callinan J).

²³ At 112 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

²⁴ *Tasmanian Breweries* at 380, 382.

²⁵ *Tasmanian Breweries* at 376.

the Tribunal is in fact so satisfied – and does not answer even that question conclusively, for if the Tribunal were to record that it was so satisfied when in fact it was not, the next step, which the Tribunal is authorized to take only if it is so satisfied, could be set aside by this Court in exercise of the jurisdictions which s.102(2) acknowledges.

- 10 21. These cases help to demonstrate that, in exclusively entrusting to Ch III courts the function of the adjudgment and punishment of criminal guilt, “the Constitution’s concern is with substance and not mere form”.²⁶ Ultimately, the focus of any analysis of whether a statute has impermissibly authorised an administrative body to exercise judicial power contrary to Ch III has to be upon what the statute has provided as to the manner in which and the subject matter upon which the body operates and the purposes and consequences of any decisions it makes.²⁷

A basic error in the respondent’s application of principle

22. A basic error in the respondent’s application of the largely agreed principles arises at RS [90]-[92].
23. The respondent here starts by an alleged identification in *fact* of what the Authority stated and did in its Investigation Report. This is the wrong entry point for the Chapter III question.
- 20 24. The correct entry point is: (a) to identify what it is that the relevant empowering provisions of the BSA have purported to authorise the Authority to do in the particular case; and then (b) to ask whether those provisions have thereby conferred power which is properly characterised as part of the judicial power of the Commonwealth.
25. This problem in the respondent’s approach is also evident from the elusiveness of the Notice of Contention. It fails to identify which provisions of the BSA are sought to be impugned.
26. Trying to make sense of the respondent’s case, but through the correct prism described above, the respondent may be taken to be arguing that:
- 30 (a) to the extent that ss 170, 178 and 179 purport to authorise the Authority to investigate, find and report on a breach of the condition in cl 8(1)(g) (such condition properly construed as per the Authority’s submissions), they impermissibly confer on the Authority part of the judicial power of the Commonwealth; and

²⁶ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

²⁷ *Albarran* at 363 [35]; *Alinta* at 551 [5]-552 [7], cf 553 [14]; *Brandy* at 258.

(b) to the further extent that ss 43, 44(2)(b), 141, 143, 205G or 205W purport to authorise the Authority to rely on the findings in the Investigation Report to take action in respect of the conditions of a licence, for enforcement of a breach of condition, to seek civil penalty orders from a court, or to accept an enforceable undertaking from a licensee, they impermissibly confer on the Authority part of the judicial power of the Commonwealth.

10 27. (It would also seem to follow from the respondent's case, although this is not expressly recognised by it, that if the Authority were to take enforcement action under s 143 on the basis of its findings on breach of cl 8(1)(g), then to the extent that s 204 would purport to authorise the Administrative Appeals Tribunal (**AAT**) to conduct a merits review of the Authority's decision, it would impermissibly confer part of the judicial power of the Commonwealth on the AAT.)

28. So stated, the respondent's constitutional argument should be summarily rejected. None of the impugned empowering provisions purport to authorise an exercise of power which has any of the hallmarks of the judicial power of the Commonwealth in accordance with the accepted principles.

20 **The correct application of principles to the provisions of the BSA authorising the Authority's findings of breach of cl 8(1)(g) of Schedule 2 to the BSA**

Construction of the impugned provisions

30 29. Again, whilst the respondent has not articulated the provisions of the BSA that it says impermissibly authorise the Authority to exercise judicial power contrary to Ch III, the Commonwealth has identified ss 170, 178 and 179 of the BSA, and possibly also ss 43, 44(2)(b), 141, 143 and 205G or 205W, as the most likely source of its challenge (for convenience, "**the impugned provisions**"). Properly construed in the context of the BSA (and the *Australian Communications and Media Authority Act 2005* (Cth) (**ACMA Act**)) as a whole, do these provisions authorise the Authority to investigate and make a finding that a licence condition under the BSA – including that contained in cl 8(1)(g) of Schedule 2 – has been breached?

40 30. In the Commonwealth's submission, the answer is clearly "yes". The Authority's statutory process may pursue a number of different paths under these provisions, and it is useful to examine them in turn. The first path, most clearly mirroring the facts of the present case, simply involves the Authority's conduct of an investigation under s 170 "for the purposes of the performance or exercise of any of its broadcasting ... functions", and preparation and publication of a report on the investigation under ss 178 and 179 respectively. As stated in the Authority's submissions (at [23]), the Authority's functions include regulating broadcasting services and taking action to suspend and cancel licences, and other enforcement action, in accordance with the BSA, and monitoring and investigating complaints concerning

broadcasting services (ACMA Act s 10(1)(a), (c) and (m); see also s 5 of the BSA). Further, at all material times, s 12 of the ACMA Act has empowered the Authority to “do all things necessary or convenient to be done for or in connection with the performance of its functions” (with certain exceptions not relevant here). In this context, an investigation to determine whether a licence condition has been breached is clearly an investigation for the purposes of the performance of the Authority’s functions. Forming a view concerning breach and including that view in the subsequent report is, at the very least, “convenient” to be done in connection with this investigation. The most natural reading of ss 170, 178 and 179, then, must be that the Authority may form a view in the course of that investigation on whether the condition has been breached, and may express that view in its report.

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31. A second path, not yet reached in the present case, involves the Authority’s use of a report prepared under s 178 and, where applicable, published under s 179 as the foundation for subsequent remedial action. Specifically, this could trigger the exercise of its powers under ss 43 (varying or revoking licence conditions, or imposing new conditions), 44(2)(b) (imposing a licence condition to ensure that a breach does not recur), 141 (issuing remedial directions), 143 (suspending or cancelling a licence), 205W (accepting an undertaking), or 205G in conjunction with 140A (applying for a civil penalty order for a breach of a licence). To focus on ss 141 and 143 as examples: the Authority’s reported finding concerning breach of a licence condition could form the ground on which it is “satisfied” under s 141, or could constitute material to be taken into account in making the objective determination required under s 143. Again, properly construed in context, these statutory permissions contemplate that the Authority may use a finding of breach of a licence condition, recorded in its report, as a basis for taking certain remedial actions.²⁸

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32. A third path, less relevant to the present case but mentioned here for completeness, involves situations where the Authority does not engage in the investigation and reporting process under ss 170, 178 and 179 but simply proceeds directly to the consideration of remedial action – for example, under ss 141 or 143. As is the case under the second path, the natural construction is that the remedial powers themselves permit the Authority to form a view that a licence condition has been breached, as a means of fulfilling the relevant statutory preconditions (for example, the factual assessment giving rise to the Authority’s imposition of a condition under s 44(2)(b)).

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²⁸ It is unnecessary in this case to tease out the precise level at which the finding could or must be made in order to activate each of these various powers.

The impugned provisions do not authorise an exercise of judicial power

33. If the above submission is correct, and the impugned provisions authorise the Authority to find that a licence condition under the BSA – including that contained in cl 8(1)(g) of Schedule 2 – has been breached, does this entail an exercise of judicial power contrary to Ch III?
34. The primary judge adopted the submissions of the Authority in finding that the Authority was not exercising judicial power in determining whether a licensee has breached cl 8(1)(g) of Schedule 2 of the BSA. His Honour identified six factors which, in combination, grounded his conclusion (AB 82-83 [42]-[49]), which factors the Authority has summarised in [58] of its submissions. The Commonwealth adopts that summary and makes the following further observations by way of amplification of that summary.

The constitution of the Authority and its functions in relation to broadcasting

35. Although the composition and character of the body alleged to be exercising judicial power is not determinative, it has, along with other matters, been taken into account in cases involving an allegation of the nature levelled at Authority in the present case.²⁹ Further, the Authority's core role of monitoring and maintaining regulatory standards provides essential context for understanding the nature of its statutory powers.

36. In relation to the Authority, there is no requirement that the Chairperson, Deputy Chairperson or the members be legally qualified, and it is presently comprised of both lawyers and non-lawyers.

37. The functions of the Authority (see the Authority's submissions at [23]) are accompanied by the conferral of a broad measure of regulatory discretion as to their exercise (see s 5 of the BSA and the Authority's submissions at [31] and [49]). The breadth of that discretion is consistent with the legislature's express statement, in s 4 of the BSA, that:

37.1. different levels of regulatory control be applied across the range of broadcasting, datacasting and internet services according to the degree of influence that different types of those services are able to exert in shaping community views in Australia (s 4(1)); and

37.2. broadcasting services be regulated in a manner that, "in the opinion of ACMA", enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of those services (s 4(2)).

²⁹ See, for example, *Alinta* at 552 [6] (Gleeson CJ).

38. That the Authority's role is primarily one of monitoring and enforcement, carried out in the interests of establishing and maintaining standards for the provision of broadcasting services, is of significance for the purposes of characterising any of its functions as involving the exercise of judicial power. As the Full Court of the Federal Court observed of the Companies Auditors and Liquidators Disciplinary Board in *Albarran*, in a passage approved by the plurality in the High Court, the function of the Authority is not to find (as an exercise of deciding present rights and obligations) whether an offence has been committed and, if so, to inflict a punishment therefor.³⁰ Any action taken against a licensee is of a regulatory character in respect of which it is not readily to be assumed, "however much it may hurt the entity concerned, [that it] is personal and retributive rather than corporate and self-respecting".³¹

The nature of an investigation under the BSA

39. The Authority has dealt in its written submissions with the power to conduct an investigation under s 170 of the BSA, the process of any investigation, and the potential outcomes to which it may lead (at AS [25]-[30], [34]-[35]). As is apparent from those submissions, which the Commonwealth adopts, the BSA confers broad permission on the Authority not only to conduct an investigation for the purpose of the performance or exercise of any of its broadcasting functions (as outlined in s 10 of the ACMA Act) and related powers, but also to take action following its conduct of an investigation.³² The centrality of considerations of policy in that exercise does not support the characterisation of the Authority's exercise of its functions as judicial.³³

40. In so far as the actual investigation is concerned, the Authority neither conducts an investigation, nor makes findings consequential thereon, in an adversarial context. The licensee is ordinarily invited to make submissions in relation to an investigation as a matter of procedural fairness, but the licensee is not the contradictor to the Authority.³⁴ So to describe the licensee would mischaracterise the purpose of an investigation under s 170 of the BSA, which, as the Authority submitted and the primary judge accepted, is "to uncover facts, matters and circumstances which may or may not support a conclusion adverse to the licensee on the regulatory issues being investigated, which conclusion may or may not be communicated by the Authority or relied upon for action in some relevant way under the BSA" (AB 82 [43]). The Authority conducts its investigation independently of any court

³⁰ *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466 at 478 [50], quoted with approval in (2007) 231 CLR 350 at 359-360 [21].

³¹ *Kariapper v Wijesinha* [1968] AC 717 at 737, quoted with approval in *Albarran* at 358-359 [17].

³² *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 287 (Dixon CJ).

³³ See for example *Alinta* at 551-552 [5]-[7], 573-574 [82]-[83], cf 553 [14].

³⁴ *Tasmanian Breweries* at 374 (Kitto J).

processes, but mindful that it takes steps not to prejudice the fair trial of any person.³⁵

41. Nor is the Authority determining “an existing controversy”, for the same reasons. It is investigating whether there has been a breach of a licence condition: cf RS [85]. Although the Authority may take what the respondent calls “consequential enforcement steps” (RS [99]; discussed separately below), it has no power to enforce against the respondent (who, for the reasons given in the previous paragraph, cannot properly be described as a party to a controversy resolved by the Authority: cf RS [96]) the “decision” which the respondent impugns, namely, the finding that the respondent had breached cl 8(1)(g): cf RS [87], [61].
42. The Authority’s finding in that regard does not involve a bifurcated process: first, determination that an offence has been committed, then investigation of whether the service has been used in the commission of an offence, the latter being a task the Authority is, according to the respondent, “well-equipped” to perform: RS [42]. The respondent’s submission to the contrary overlooks the nature of jury verdicts, which are inscrutable as to all but the essential elements of the offence charged. The Authority has to address the composite issue of use in the commission of an offence, which may in some cases involve the determination of complex and disputed factual questions not answered explicitly by the jury’s verdict.
43. A finding by the Authority as to whether a licensee has committed an offence is a necessary element in a conclusion as to whether the licensee used the broadcasting service in the commission of an offence, contrary to cl 8(1)(g). However, it has no direct legal effect. As the respondent acknowledges, the “immediate end product” of the Authority’s investigation under s 170 is “no more or no less than the Authority forming an opinion on a matter within its remit” (RS [93]; see also AS [58.6]). In so far as the Authority might incorporate its conclusions into a report, pursuant to s 178 of the BSA, the report has no immediate or necessary legal consequence. No doubt, the publication of adverse findings (s 179) can have adverse reputational consequences for a licensee. This is dealt with by the requirement in s 180 to give the licensee a chance to make representations before adverse findings are published. Equally, the publication of a report that, after investigation, the Authority is not satisfied that the licensee was involved in the commission of an offence may have *favourable* reputational consequences for the licensee. Such consequences flow from the statutory permission, or duty, as the case may be, to communicate publically the opinion formed by the administrative body; it does not convert that communication into an adjudication of criminal guilt that subverts the constitutional separation of powers.

³⁵ See ss 179(3)(b) and 199(3)(b) of the BSA.

Enforcement consequences

44. To the extent that the Authority's conclusions as to breach of licence conditions may form the basis for the Authority taking steps to invoke one of the avenues in Division 3 of Part 10 of the BSA, the taking of such action by reference, in part, to past conduct is not inherently judicial.³⁶ The Commonwealth adopts the Authority's submissions, at paragraphs AS [34]-[35] and [44]ff, as to the avenues which are available to it under that Division – irrespective of whether it has conducted an investigation.
- 10 45. In so far as the Authority may take action directly in the form of a remedial direction pursuant to s 141 of the BSA, the remedial focus, and content, of the direction pertaining to future conduct is of significance, consistently with the reasoning of the Court in *Alinta*.³⁷ On the former point, it is relevant to note the requirement in ss 215(1) and (5) that, when the Authority exercises its relevant enforcement powers, it must have regard to the guidelines which must be in force under s 215(4). The Authority formulates such guidelines by legislative instrument. In this case, the relevant instrument was the *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act 1992* (dated 26 August 2011). Clause 6.4 of the Guidelines lists the factors which the Authority may consider in determining the appropriate enforcement response – including, for example, “whether the conduct involved indicates systemic issues which may pose ongoing compliance or enforcement issues”, and “the specific and general educative/deterrent effect of taking action”. The importing of policy considerations of this nature into the Authority's task, whilst not itself definitive, is a factor indicative of a non-judicial process.³⁸
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46. A finding of breach of a licence condition which is dependent on finding the commission of an offence in this context operates as “the factum by reference to which the Act operates to alter the law in relation to the particular case”.³⁹ If a person breaches a direction which the Authority has issued under s 141, the person commits an offence (s 142(3) for commercial radio broadcasting licensees), or is liable to a civil penalty (s 142A(1)).
- 30 Judicial power would then be exercised by the court in a criminal trial (in the former case) or a civil proceeding (in the latter). In the course of those proceedings, the underlying breach findings made by the Authority could be collaterally challenged. The availability of collateral challenge – which

³⁶ *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466 at 477-478 [48], quoted with approval in (2007) 231 CLR 350 at 361 [29]; see also *Tasmanian Breweries* at 374 (Kitto J), cited inter alia in *Breckler* at 109-110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) and *Alinta* at 577 [94] (Hayne J). See also *Visnic* at 386 [16], *Precision Data* at 191 and *Brandy* at 268-269 (Deane, Dawson, Gaudron and McHugh JJ).

³⁷ *Alinta* at 561-562 [41]-[44], 594-597 [160]-[169].

³⁸ *Alinta* at 550 [2], 576 [88], 597 [168].

³⁹ *Tasmanian Breweries Pty Ltd* at 378 (Kitto J).

availability the respondent has denied (RS [87]) – would further support a contention that the anterior finding of breach by the Authority was not judicial in character.⁴⁰

47. Overall, it is evident from this scheme that Parliament has carefully divided the enforcement options available under the BSA between those reserved to the judicial branch, and those granted to the Authority, part of the Executive branch. In areas where the responsibilities of these Ch III and Ch II bodies overlap, the BSA properly confines the Authority's role so as to avoid trenching on judicial processes.

10 48. The additional matters to which reference has been made above support the submission that, having accepted the Authority's analysis of cl 8(1)(g) of Schedule 2 to the BSA, the impugned provisions do not empower the Authority impermissibly to exercise judicial power. As the Full Court acknowledged (AB 167 [77]), the primary judge gave "careful" reasons for rejecting the respondent's argument that its investigation and findings of a breach of that condition involved an impermissible exercise of judicial power. On the proper construction of cl 8(1)(g) of Schedule 2 to the BSA (as set out in the Authority's submissions at [53]), this Court should accept those reasons.

20 **PART VII ESTIMATED HOURS**

49. It is estimated that 45 minutes will be required for the presentation of the Commonwealth's oral argument.

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⁴⁰ *Breckler* at 111-112 [46]; *Alinta* at 579 [100], 599 [175].

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