

BETWEEN:



**AUSTRALIAN COMMUNICATIONS
AND MEDIA AUTHORITY**
Appellant

and

TODAY FM (SYDNEY) PTY LTD
Respondent

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**INTERVENER'S SUBMISSIONS
COMMERCIAL RADIO AUSTRALIA LIMITED**

Part I: PUBLICATION

- 20 1. These submissions are in a form suitable for publication on the internet.

Part II: BASIS OF INTERVENTION

2. Commercial Radio Australia Ltd (**CRA**) is the representative body of the Australian commercial radio industry. It represents 258 out of a total of 261 commercial radio broadcasting licensees in Australia.
3. CRA seeks leave to intervene in the appeal and relies on the affidavit of Joan Warner affirmed 23 September 2014.
- 30 4. CRA supports the ultimate conclusion of the Full Court of the Federal Court, and seeks to make submissions in support of the respondent (**Today FM**).

Part III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

5. Leave to intervene should be granted in this case, pursuant to the Court's inherent jurisdiction, because important legal interests of CRA's members are likely to be substantially affected by the Court's decision.¹ CRA's members are directly interested in the issue of whether the appellant (**the Authority**) is authorised to make a finding that a licensee has committed a criminal offence prior to a court exercising criminal jurisdiction making any such determination.
- 40 6. Further, the parties' focus on the power of the Authority under the *Broadcasting Services Act* 1992 (Cth) (**BSA**) to make a finding that a

¹ *Levy v Victoria* (1997) 189 CLR 579 at 603.4 per Brennan CJ, citing *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 530.5 per Deane J; *J v Lieschke* (1987) 162 CLR 447 at 462.7 per Brennan J (Mason, Wilson, Deane and Dawson JJ agreeing).

criminal offence has been committed has been on Parts 10 (remedies for breaches of licensing conditions) and 13 (information gathering by the Authority) of the BSA. CRA seeks to assist the Court by providing further context, particularly by reference to Parts 4 to 9B (broadcasting licences and standards) and 11 (complaint-handling) of the BSA.²

Part IV: CITATIONS

7. CRA accepts the Authority's statement of relevant statutory provisions.

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Part V: SUBMISSIONS

Regulation of commercial radio broadcasting services

8. In the ordinary course of events, the Authority's dealings with broadcasting services occur in the performance of its functions under Parts 4 to 9B and 11 of the BSA.

9. To begin with, the Authority allocates and renews commercial radio broadcasting licences (ss 36(1), 40(1), 46(1), 47) under Part 4. More generally, it also regulates the conduct of licence holders under Parts 4 (ss 42, 43, 43B, 43C, 43D, 44) and 5 (where the licence was allocated under s 36(1) – see s 50A). (In a similar manner, the Authority allocates and renews other broadcasting licences, and regulates the licence holders: commercial television broadcasting licences (Parts 4 and 5), community broadcasting licences (Parts 6 and 6A), subscription television broadcasting licences (Part 7), subscription broadcasting and narrowcasting class licences (Parts 8 and 8A) and international broadcasting licences (Part 8B).)

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10. Program content is then regulated under Part 9 for commercial radio broadcasting licences and various other licences. The primary regulatory mechanism is the formulation and adoption of industry-based codes, which the Authority registers under s 124. The Authority may make a program standard in the event of a code failure and there are mandatory program standards governing some limited aspects of television programming (but not commercial radio).

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11. Parts 9A to 9C also deal with standards and industry-based codes covering technical, transmission and equipment-related issues.

12. Consistent with the significance of Parts 4 to 9C in the overall regulatory scheme for broadcasting services under the BSA, the majority of the offence provisions in the BSA (24 of the 41) are found in those Parts. As to the remainder of the offence provisions in the BSA, 8 are found in Part 10. The remaining 9 are contained in the Schedules to the BSA and were inserted after the commencement of the Act in response to new and

² When interpreting a particular statutory provision, the statute must be examined as a whole *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1924) 35 CLR 449, 455 (Isaacs and Rich JJ).

emerging services not otherwise regulated by it. For ease of reference, a schedule identifying the offence provisions, with some degree of particularity, is annexed to these submissions.

13. Some of the BSA offence provisions are strict liability offences: see ss 62, 63, 64, 65 and 139(3A). These relate to notices to be provided to the Authority.
- 10 14. Many of the BSA offence provisions are prescriptive in nature. The Authority's attention is directed to the matters it is to take into account in determining whether an offence has been committed: see, for example, ss 61AL, 61AME, 121FHA, 121FJC and 130BA.
15. The failure to comply with a notice issued by the Authority alone accounts for 14 of the 41 BSA offence provisions. The failure to provide a required notification or return to the Authority accounts for a further 8. Thus 22 of the 41 BSA offence provisions are notice-related.
- 20 16. When a person believes that a broadcasting service has committed an offence under the BSA, breached a civil penalty provision or breached a licence condition, the person may complain to the Authority (s 147) and it must (subject to limited exceptions set out in s 149(2)) investigate the complaint and notify the complainant of the results of its investigation (s 149(3)). Similarly, a person may make a complaint to the Authority relating to program content or code compliance (subject to conformity with and completion of any complaint handling process under the relevant code) (s 148) and the Authority must investigate the matter and notify the person (s 149).
- 30 17. The Authority may also conduct investigations for the purposes of performing its own functions (s 170). The Full Court considered the Authority's power in this respect (at 470-471, [43] - [51]). Their Honours noted the importance of s 178(1) under which the Authority has a discretion whether or not to prepare a report on an investigation (unless it is an investigation carried out at the direction of the Minister), and that s 178(2) provides that if a report relates to conduct that could constitute an offence under the BSA or any other Commonwealth Act, the Authority may provide a copy to the Director of Public Prosecutions (at 470, [44]).
- 40 18. As to the Authority's discretion whether to publish a report (apart from a report prepared at the direction of the Minister) under s 179 of the BSA, the Full Court attached significance to the stipulated basis for exercising the discretion being the likelihood that the publication of a report might prejudice the fair trial of a person (s 179(3)(b)) (at 470, [45]). On the assumption that the discretion applies equally to reports prepared following a direction by the Minister to prepare and publish a report, the Full Court considered the broad discretion as important because "it demonstrates an overarching concern to preserve the due administration of the criminal justice system" (at 471, [46]). Their Honours noted that the discretion in
50 relation to publication under s 179(3) "applies to a trial for any alleged

offence against any Commonwealth, State or Territory law”, in contrast to s 178(2) which empowers the Authority to give to the Director of Public Prosecutions a copy of a report relating to conduct that could constitute an offence under the BSA or any other Commonwealth law (at 471 [49]).

Clause 8(1)(g)

Text

10 19. Clause 8(1)(g) (and its equivalents which apply to other categories of broadcasting licence³) is distinct as a licence condition. It is predicated upon an underlying offence against another law having been committed. The only other licence condition requiring compliance with another Act or law is cl 8(1)(a), which refers to a “contravention of the *Tobacco Advertising Prohibition Act 1991*” (the **TAP Act**); this was noted by the Full Court (at 470, [41]).

20. As the Full Court observed (at 478, [74(c)]), cl 8(1)(g) involves two parts, which logically are to be addressed in the following order:

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(a) An offence must be committed “against another [Commonwealth] Act or a law of a State or Territory”. The relevant offence is not attached to any person, including the licensee (see 484-485, [99]). Furthermore, the potential set of relevant offences is open-ended (see 478, [74(a)]), in contrast to the BSA offences.

(b) The licensee must have used its broadcasting service in the commission of that offence. This element creates a relevant nexus with the BSA. This second part, as the Full Court observed, is “a question of fact which the Authority is well able to determine” (at 478, [75]).

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21. The reference to “the commission of an offence” in cl 8(1)(g) may be contrasted with cl 8(1)(a) which refers to a “contravention” of the TAP Act. Relevantly, under s 13 of the TAP Act it is an offence to broadcast tobacco advertisements. Section 13 provides:

13 Tobacco advertisements not to be broadcast

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(1) A person must not broadcast a tobacco advertisement in Australia or Norfolk Island on or after 1 July 1993 otherwise than as permitted by section 14.

Penalty: 120 penalty units.

³ For example, the same licence condition appears in Schedule 2 at cl 7(1)(h) in relation to commercial television broadcasting licences, cl 9(1)(f) in relation to community broadcasting licences, cl 10(1)(h) in relation to subscription television broadcasting licences and cl 11(1)(c) in relation to class licences is distinct.

Note: A defendant bears an evidential burden in relation to the matters in section 14: see subsection 13.3(3) of the Criminal Code.

(2) This section has effect subject to section 26A.

22. Whether or not a broadcaster has broadcast a tobacco advertisement is a question the Authority is well able to determine. As the Full Court observed, "... in its own terms, that condition [cl 8(1)(a)] relates to criminal offences" (at 485, [103]).
23. A finding of contravention can be contrasted with a finding of the commission of an offence. If a broadcaster contravenes s 13 of the TAP Act it commits an offence under the TAP Act. If cl 8(1)(g) authorises the Authority to make findings in relation to any offence, cl 8(1)(a) becomes otiose. Such a result is contrary to the principle of construction that a court must strive to give meaning to every word in a provision.⁴

Context

24. In so far as the Authority's consideration of other laws is concerned, as noted above, s 178(2) of the BSA provides that the Authority may give a copy of a report to the Director of Public Prosecutions in relation to conduct that "could" constitute an offence under the BSA or "another law of the Commonwealth". As the Full Court reasoned, "the word 'could' serves to underline that the legislation does not contemplate that the Authority will make its own determination on the issue whether or not such a criminal offence has in fact been committed" (at 485, [102]).
25. Further, the reference to "another law of the Commonwealth" is consistent with s 10 of the *Australian Communications and Media Authority Act 2005* (Cth), which provides that the Authority's broadcasting and related functions include functions conferred on the Authority under identified Commonwealth Acts. Absent from s 178 is any reference to conduct that could constitute an offence under a law of a State or Territory.
26. Other elements of the statutory scheme support this conclusion. Sections 123 and 124 provide for the development of codes of practice by industry bodies, with which the industry is to comply. These codes of practice deal with many aspects of program content and thus address subject-matter which overlaps with a wide range of Commonwealth, State and Territory offences that also apply to program content. Consequently, the broad construction of cl 8(1)(g) for which the Authority contends, would create three separate and parallel modes of investigation of program content: the first by the Authority in relation to the codes of practice, the second by the Authority in relation to offences against other laws, and the third by the

⁴ See *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ, cited with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71], per McHugh, Gummow, Kirby and Hayne JJ.

bodies charged with investigating offences under those laws. It is relevant in this context that the Explanatory Memorandum to the Broadcasting Services Bill provided, in relation to the development of codes of practice, that:

A rationale underpinning the codes of practice provisions is that inappropriate regulation can bring with it significant economic costs and productivity losses....

10 *Allowing a certain degree of self-regulation gives broadcasting service industry groups an opportunity to more directly manage the costs associated with regulating program content and administering such regulation. More importantly, it places responsibility directly on the industry.*

Legislative history

27. The predecessor to the BSA was the *Broadcasting Act 1942* (the **1942 Act**). The 1942 Act did not contain any equivalent to cl 8(1)(g). Clause 8(1)(g) was included in the *Broadcasting Services Bill 1991* (that is, it was not a later amendment).

28. The Explanatory Memorandum to that Bill stated that the Bill “implements the Government's decisions on reforms to the broadcasting regulatory regime to establish general rules for the industry that are clear, stable and predictable...”. In relation to the whole of Schedule 2, including cl 8(1)(g), the Explanatory Memorandum was silent as to the introduction, for the first time, of a condition like cl 8(1)(g). It simply provided that:

30 *This Schedule sets out the standard conditions which are to apply to each type of broadcasting service licence. The ABA does not have the power to vary these standard conditions or impose further conditions which are inconsistent with the standard conditions.*

The Schedule also imposes a set of standard conditions, in clauses 3, 4, 5 and 6, which are to apply to all licence types. These conditions relate to the broadcasting of political or controversial material, and the broadcasting of advertisements relating to medicines.

40 29. An Act empowering the Authority to make findings that licensees and other persons have committed offences under any law of the Commonwealth, States or Territories represents a very substantial shift in broadcasting legislation. The extrinsic materials contain no suggestion that this was intended.

50 30. Furthermore, the general differences between the 1942 Act and the BSA are instructive. The BSA streamlined broadcasting regulation, by replacing Tribunal-promulgated program standards with industry-developed codes of practice, abolishing compulsory licence renewal hearings, abolishing the

requirement for the regulator to consider the fitness and propriety of a licensee and creating a class licence regime (rather than individual licences) for categories of services which were considered to be of lower regulatory significance. Within this framework, it is highly unlikely that the legislature intended to introduce an entirely new layer of detailed regulation, by empowering the Authority to investigate an open-ended range of Commonwealth, State and Territory offences, by means of a reference to "commission of an offence" in cl 8(1)(g).

10 **Conclusion**

31. The legislative scheme of the BSA, the wording of cl 8, the underlying legislative purpose and the system established for industry-based codes to become the primary means for regulating program content, suggest that the Authority is not authorised to act in the manner it now proposes.

Part VI: ESTIMATE OF TIME

20 32. If the Court considers it appropriate for CRA to make short supplementary oral submissions to expand on or clarify any matters arising out of CRA's written submissions, then it is estimated that 10 to 15 minutes will be required.

Dated 17 October 2014

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TABLE OF BSA OFFENCES
As at 16 October 2014

Part of Act	Section	Offence	Penalty
Part 5 Control of Commercial Broadcasting Licences and Datacasting Transmitter Licences	61AG	Prohibition on transactions that result in an unacceptable media diversity situation coming into existence	20,000 penalty units
	61AL	Breach of prior approval notice given under s 61AJ for transactions that result in an unacceptable media diversity situation coming into existence	20,000 penalty units
	61AMA	Prohibition of transactions that result in an unacceptable 3-way control situation coming into existence	20,000 penalty units
	61AME	Breach of prior approval notice given under 61AMC for transactions that result in an unacceptable 3-way control situation coming into existence	20,000 penalty units
	61AQ	Breach of remedial direction given under section 61AN or 61ANA	20,000 penalty units
	61BF	Failure by newspaper publisher to disclose cross-media relationship in respect of material published about related television or radio licensee	2,000 penalty units
	62(5)	Annual notification of controllers and directors to ACMA by licensees and newspaper publishers	If the breach relates to a commercial television broadcasting licence, a datacasting transmitter licence or a newspaper 500 penalty units Otherwise 50 penalty units
	63(5)	Failure to disclose changes in control within 5 days after becoming aware of them	If the breach relates to a commercial television broadcasting licence, a datacasting transmitter licence or a newspaper 500 penalty units Otherwise 50 penalty units
	64(5)	Failure by new controller to notify change of	If the breach relates to

		control within 5 days	a commercial television broadcasting licence, a datacasting transmitter licence or a newspaper 500 penalty units Otherwise 50 penalty units
	65(7)	Requirement to notify control and directorships as at 1 February 2007	If the breach relates to a commercial television broadcasting licence or a newspaper 500 penalty units Otherwise 50 penalty units
	66(1)	Breaches of ownership and control rules in Part 5 Division 2 or 3 without temporary approval	If the breach relates to a commercial television broadcasting licence or datacasting transmitter licence—20,000 penalty units; or if the breach relates to a commercial radio broadcasting licence—2,000 penalty units.
	69	Breach of notice given under section 67, which provides for temporary approval of ownership and control breaches	If the breach relates to a commercial television broadcasting licence or datacasting transmitter licence—20,000 penalty units; or if the breach relates to a commercial radio broadcasting licence—2,000 penalty units
	72	Breach of notice under s 70, which provides for notices requiring remedial action	If the breach relates to a commercial television broadcasting licence or datacasting transmitter licence—20,000 penalty units; or of the breach relates to a commercial radio broadcasting licence—2,000 penalty units.
Part 7 Subscription Television Broadcasting Services	103ZA	Failure to lodge annual returns by licensee providing subscription television drama service	1,000 penalty units
	103ZB(2)	Failure to lodge annual returns by channel	1,000 penalty units

)	provider of subscription television drama service	
Part 8B International Broadcasting Services	121FG	Prohibition on providing an international broadcasting service without a licence	20,000 penalty units
	121FHA	Breach of a remedial direction in relation to an unlicensed international broadcasting service	20,000 penalty units
	121FJ	Breach of conditions of an international broadcasting licence	2,000 penalty units
	121FJC	Breach of remedial direction under s 121FJB to remedy breach of international broadcasting licence conditions	2,000 penalty units
	121FLF	Offence for breach of conditions of nominated broadcaster declaration	2,000 penalty units
Part 9A Technical Standards	130B(2)	Supply of non-compliant domestic digital television reception equipment	1,500 penalty units
	130BA(2))	Supply of non-compliant domestic digital radio reception equipment	1,500 penalty units
	130BB(2))	Supply of non-compliant domestic digital satellite television reception equipment	1,500 penalty units
Part 9B Industry Codes and Industry Standards	130V(2)	Non-compliance with industry standards	1,500 penalty units
Part 10 Remedies for Breaches of Licensing Provisions	131	Prohibition on providing a commercial television broadcasting service without a licence	20,000 penalty units
	132	Prohibition on providing a subscription television broadcasting service without a licence	2,000 penalty units
	133	Prohibition on providing a commercial radio broadcasting service without a licence	2,000 penalty units
	134	Prohibition on providing a community television broadcasting service without a licence	500 penalty units
	135	Prohibition on providing a community radio broadcasting service without a licence	50 penalty units
	138	Breach of remedial direction in relation to unlicensed service	Between 20,000 penalty units and 50 penalty units, depending on type of licence
	139	Offence for breach of conditions of licences	Between 2,000

		and class licences	penalty units and 50 penalty units depending on type of licence
	142	Breach of remedial directions given under s 141 for licence conditions, class licences and codes of practice	Between 20,000 penalty units and 50 penalty units depending on type of licence
Schedule 5 Online Services	Cl 82 Sch 5	Contravention of on-line provider rules	50 penalty units
	Cl 83(4) Sch 5	Contravention of remedial directions for breach of online provider rules	50 penalty units
Schedule 6 Datacasting Services	Cl 10(2) Sch 6	Notification of transfer of datacasting licence within 7 days	50 penalty units
	Cl 49(1) Sch 6	Prohibition on intentionally providing a designated datacasting service without a licence	20,000 penalty units
	Cl 50(2) Sch 6	Contravention of requirement in remedial direction regarding unlicensed datacasting service	20,000 penalty units
	Cl 52(1) Sch 6	Breach of datacasting licence conditions	2,000 penalty units
	Cl 53(4) Sch 6	Contravention of remedial directions in relation to breach of datacasting licence conditions	20,000 penalty units
Schedule 7 Content Services	Cl 106(1) Sch 7	Contravention of a designated content/hosting service provider rule	100 penalty units
	Cl 108(4) Sch 7	Contravention of remedial direction in relation to breach of a designated content/hosting service provider rule	100 penalty units