

BETWEEN

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY
Appellant

AND

TODAY FM (SYDNEY) PTY LTD
Respondent

FREE TV AUSTRALIA LIMITED
Party seeking leave to intervene



20

INTERVENER'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

- 30
2. Free TV Australia Limited (**Free TV**) seeks to intervene, or alternatively, to appear as amicus curiae, in this proceeding in order to address the proper construction of cl 8(1)(g) of Sch 2 of the *Broadcasting Services Act 1992* (Cth) (**BSA**).
 3. Free TV seeks leave to intervene in support of the Respondent.

Part III: Why leave should be granted

- 40
4. Free TV relies on the affidavit of Julie Flynn sworn on 17 October 2014 in support of its application to intervene or appear as amicus curiae.
 5. With respect to intervention, Free TV is the national representative of commercial television licensees. The co-regulatory scheme under the BSA means that peak industry bodies such as Free TV for commercial television and Commercial Radio Australia Limited for commercial radio, play a material role in developing codes of practice that set standards of conduct to which their respective members must adhere in the provision of their respective broadcasting services. The commercial television licensees are

Filed on behalf of FREE TV AUSTRALIA

Party applying for leave to intervene

Dated: 17 October 2014

Baker & McKenzie, Solicitors
Level 27, AMP Centre
50 Bridge Street
Sydney NSW 2000
Contact: Andrew Stewart

DX: 218 Sydney
Tel: (02) 9225 0200
Fax: (02) 9225 1595
Ref: ASU:85175834

subject to a licence condition (cl 7(1)(h) of Sch 2 of the BSA) which is in substantially the same terms as that considered in the proceeding (cl 8(1)(g)). The commercial television licensees are subject to the exercise of the Appellant's powers in that regard. Accordingly, the outcome of this proceeding directly affects the regulation by the Australian Media and Communications Authority (the **Authority**) of broadcasting services provided by Free TV's members.

- 10 6. In the alternative, Free TV seeks leave to appear as amicus curiae. Free TV has accumulated over 54 years of experience in the broadcasting regulatory environment, which experience includes co-regulation of the television broadcasting industry, and knowledge of the application of the BSA in the practical and day-to-day operation of commercial television licenses. Its interest is more than academic or theoretical; rather, it affords a unique perspective of the operation of the BSA and how the exercise of the Authority's power impacts on the television broadcasting industry as a whole. Ms Flynn's affidavit sets out in some detail the nature and extent of Free TV's participation in, and contribution to, the regulatory environment, including significant consultation with government in relation to the drafting of the BSA, and submissions to the Authority in relation to the cognate licence condition in s 7(1)(h) of Sch 2 of the BSA.
- 20 7. Free TV is not aware of any circumstances that militate against the grant of leave. The Respondent has expressed its support.

Part IV: Applicable legislative provisions

8. Free TV adopts the Appellant's list of applicable legislative provisions (Appellant's Submissions, para 60).

Part V: Submissions

- 30 9. The principal issue is whether, on the proper construction of cl 8(1)(g) of Sch 2 of the BSA, the Authority is required to make a finding that a person has committed a criminal offence. The parties have characterised the issues or questions in different terms (Appellant's Submissions, paras 2 – 4 and Respondent's Submissions paras 2 – 7). However, both parties agree that the starting point is the construction of cl 8(1)(g).

Proper construction of cl 8(1)(g)

- 40 10. The Appellant focuses on the construction of the phrase "*in the commission of an offence against another Act or a law of a State or Territory*" (Appellant's Submissions, para 2), and "*commission of an offence*" (paras 14, 43, 56). The Appellant argues that the focus of the licence condition in cl 8(1)(g) of Sch 2 is the use of the broadcasting service "*in the commission of the offence ...*" (para 36). It argues that the Authority is entitled to form an opinion or make a finding on the "*compound question*" whether the Respondent had used a broadcasting service in the commission of an offence against one of two relevant laws (para 53.1).
- 50 11. The Respondent focuses on the phrase "*commission of an offence*" in a "*two-step*" structure (Respondent's submissions, paras 3, 40, 66), the ordinary meaning of which, it argues, carries with it the connotation that a court exercising criminal jurisdiction has

found that an offence has been committed (para 3). In this respect, it does not depart from the approach taken by the Full Court at [72] – [74] (Appeal Book, p 166).

12. Free TV submits that the proper construction of cl 8(1)(g) may not be predicated on a “*compound question*” or “*two-step*” process, as suggested respectively by the parties, having regard to the ordinary meaning of the words used in cl 8(1)(g). Neither party has addressed the interrelation between the role of the licensee that is the subject of the Authority’s regulatory powers (“*use*” of the broadcasting service) and the condition of that use (“*in the commission of an offence*”).
- 10
13. Free TV submits that the verb “*use*” should be given its ordinary meaning: that is, to “[*m*]ake use of (a thing), esp for a particular end or purpose; utilize, turn to account”.¹ That meaning is also the relevant meaning in the particular statutory context.² The preposition “*in*” before the activity “*the commission of an offence*” expresses an action or manner qualifying the verb.³ Accordingly, it is submitted that the ordinary meaning of the phrase “*used ... in the commission of an offence*” denotes knowing participation (by the licensee) in an offence.
14. On that basis, the proper role of the Authority is to examine the nature of the licensee’s use of a broadcasting service *in* the commission of an offence by it or any other person/s. The inquiry is not directed, or limited, to whether the licensee committed an offence. Unlike cl 8(1)(a) of Sch 2 of the BSA, the inquiry is not directed to whether the licensee contravened a particular law. Clause 8(1)(g) uses the expression ‘*in*’ rather than ‘*for*’ the commission of an offence. Further, cl 8(1)(g) does not impose any restriction on broadcasting services being used to broadcast a report of an offence being committed or a threat of an offence being committed. The condition is not one that requires the licensee to prevent the commission of an offence.
- 20
15. As a condition that operates as a restraint on how a licensee uses a broadcasting service, the sole inquiry is directed to whether the licensee has *used* the broadcasting service for a proscribed purpose (the commission of an offence by it or any other person/s).
- 30
16. The Authority’s mandate to consider whether the licensee has used broadcasting services in the commission of an offence calls upon the Authority to consider that use in the context of an offence that may have been committed by the licensee or another person (who is not subject to the regulatory powers of the Authority). The Appellant’s construction would have the Authority determine whether an offence had been committed by such a person. It is submitted that this would extend the Authority’s role

¹ *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 487-488 [21] (French CJ, Crennan and Bell JJ) (in the context of consideration of, *inter alia*, s 146(1)(a) of the *Criminal Property Confiscation Act 2000 (WA)*: “*the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence ...*”).

² *The Queen v Tarzia* (1991) 5 WAR 222 at 226 (Malcolm CJ, Wallace and Pidgeon JJ) (the ordinary meaning of the word “*use*” was affirmed in the context of construing the statutory expression in s 10(1)(a) of the *Crimes (Confiscation of Profits) Act 1988 (WA)*: “*used in, or in connection with, the commission of an offence*”. See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 303 [62] for the principle that the protean word “*use*” must be construed in its particular statutory context.

³ For the relevant principles of statutory construction, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); and *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

beyond the legislative mandate of monitoring the broadcasting industry (s 5(1)(a), BSA).

17. Free TV submits that, on the proper construction of cl 8(1)(g), the Authority has no role in determining (or even forming an opinion) as to whether an offence was committed. The nature of the condition imposed on the licensee presupposes that another appropriate body (that is, a court) has made the finding that an offence was committed. The so-called first step is not a step in which the Authority has any relevant role.
- 10 18. This construction is supported by a number of factors addressed by the Respondent, including the statutory context in which the Authority exercises its regulatory functions, which context Free TV seeks specifically to address.

Statutory context

19. Recourse to the context and the purpose of regulating commercial radio and television broadcasting will assist the Court in the process of ascribing relevant meaning to the words in clause 8(1)(g) of Sch 2 of the BSA, and consequentially the mirror provisions for commercial television licences, community broadcasting licences, subscription television broadcasting licences, broadcasting services provided under class licences, and datacasting services (see Appellant's Submissions, para 36).
- 20 20. First, the context here is important because as far as Free TV's researches have indicated, the licence condition in question is unique in the sense that it is not replicated in any other Commonwealth regulatory context.
21. Secondly, the Appellant has submitted that the scope of offences that might fall within the terms of the prohibition is necessarily limited by the fact that the broadcasting service must be used in its commission (Appellant's Submissions, para 37). Free TV submits that the ordinary meaning of the words read in context cannot support such a limitation. Free TV agrees with the Respondent's submission that, rather, the effect of the Appellant's construction of cl 8(1)(g) means that there is a vast field in respect of which the Authority would be authorised to make a finding regarding the commission of a criminal offence (Respondent's Submissions, para 70).
- 30 22. Thirdly, the use of broadcasting services is not a limitation on which offences the Authority may consider (notwithstanding that the Authority's determination must be referable to use of broadcasting services); it is simply a description of the context in which the licensee participates in the commission of an offence.
- 40 23. Given that context, the range of possible offences that may be committed with, or by means of, the use of a broadcasting service remains very wide. For example, a commercial television network may undertake a live broadcast. In the course of that broadcast, a person (A) commits an offence, which in turn is broadcast live. If "A" is found guilty of the offence, then the Authority may inquire whether the licensee permitted, contributed to or facilitated the commission of the offence by the broadcast. The Authority makes no inquiry as to whether "A" committed an offence but can only act in circumstances where there is such a finding. The Authority makes no inquiry as to whether the licensee committed an offence. The inquiry is confined to whether the licensee used its broadcasting services in the commission of "A"'s offending conduct.
- 50

24. Fourthly, the point is not simply the breadth or scope of power, but the fact that, on the Appellant's construction, the Authority is called upon to consider matters that intrude into other regulatory regimes. Free TV submits that such a construction should be avoided.
25. This intrusion is demonstrated by example of the following offences implicated in the provision of broadcasting services:

- 10 a. Clause 151(1)(i) of Sch 2 of the *Competition and Consumer Act 2010* (Cth) provides: "*A person commits an offence if the person, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services makes a false or misleading representation with respect to the price of goods or services.*" The Australian Competition and Consumer Commission is charged with the responsibility of forming a view regarding breaches of the Act (see, for example, ss 77 and 155 of the Act).
- 20 b. Section 15(1) of the *Legal Profession Act 2004* (NSW) provides that "[a] person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner". The Legal Services Commission, appointed under the *Legal Profession Act*, is the relevant body (along with the relevant Law Society and Bar Association) to investigate any complaint under the Act.
- 30 c. Sections 42DL of the *Therapeutic Goods Act 1989* (Cth) provides a number of prohibitions and conditions on the publication or broadcast of advertisements about therapeutic goods, which publication or broadcast constitutes an offence if the advertisement does not comply with the Therapeutic Goods Advertising Code (s 42DM(1)). The Complaints Resolution Panel, established under s 42R of the *Therapeutic Goods Regulations 1990*, is the relevant body to consider any complaint under the Act.
- 40 d. Section 35P(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth) provides that "[a] person commits an offence if: (a) the person discloses information; and (b) the information relates to a special intelligence operation". Special intelligence operations are not listed. A special intelligence operation is deemed so by an authorising officer of the Australian Security Intelligence Organisation.
- e. Common law *sub judice* contempt, which is provided for by a superior court's inherent power to control its own administration. A person who publishes "*material in circumstances where the clear tendency of the publication is, as a matter of practical reality, to interfere with the due course of justice in a particular case, constitutes the crime of contempt of court*": *Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 379F. The Attorney-General investigates the allegation, and the court in question determines the commission of the offence.

26. The Authority does not possess the relevant legislative mandate (or regulatory experience) to determine the litany of offences associated with, facilitated by or even occurring opportunistically by the use of broadcasting services.

27. The fact of overlap with other regulatory regimes and the work of other statutory bodies charged with investigating offences under relevant laws, and the potential for contradiction with the outcome of those investigations, tells against a construction that affords the Authority such a wide ambit of power to make any determination or form an opinion about the commission of an offence.

10

Part VI: Oral submissions

28. Free TV relies on its written submissions, subject to the Court seeking further assistance by way of oral submissions.

Dated: 17 October 2014

20



.....

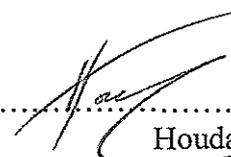
Kate Eastman SC

Telephone: (02) 9236 8677

Facsimile: (02) 9237 0894

Email: kate.eastman@stjames.net.au

30



.....

Houda Younan

Telephone: (02) 9231 6546

Facsimile: (02) 9232 1069

Email: hyounan@sixthfloor.com.au