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

APPELLANT'S REPLY

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Construction of clause 8(1)(g)

The "general principle" that drove the Full Court's construction

1. The Respondent never grapples squarely with the erroneous principle that drove the Full Court to its wrong statutory construction: namely, (1) that as a matter of "general principle", it is not normally to be expected that a body other than a criminal court will determine whether conduct constitutes the commission of an offence; and so (2) there needs to be express language clearly indicating that Parliament has chosen to depart from this "fundamental point" before another body will be permitted to do so (see [76], [80] and [114]). Instead, the Respondent variously endorses the Full Court's preference for an interpretation "consonant with the common law", attempting to characterise its approach as an orthodox application of the principle of legality (Respondent's submissions (**RS**) [50]); passes the application of the principle off on the basis that the Full Court was just dealing with the "ordinary usage" of an undefined phrase (RS [55]); and contends that the words "commission of an offence" have no settled meaning (RS [66]) and need words to be read in (RS [62]). Ultimately, however, the Respondent adopts the erroneous premise, in seeking to justify the Full Court's construction (see eg RS [42]-[45], [60]) and in support of its Notice of Contention (RS [100]).[1]

2. The Respondent also adopts the Full Court's erroneous bifurcation of cl 8(1)(g) of Sch 2 to the *Broadcasting Services Act 1992* (Cth) (**BSA**) ("the licensee will not use the broadcasting service ... in the commission of an offence") as comprising two separate and quite different types of inquiry: (1) does the Authority, using its administrative powers, conclude that the service was as a matter of fact used in the course of a "something"; and if so (2) has the "something", being the commission of an offence, been separately established by or before a court (RS [40])?[2] However, nowhere does the Respondent satisfactorily explain why the single composite inquiry by an administrative body would be broken down into these two radically different, though factually overlapping, types of inquiry (cf RS [38], [41]-[42]). The only explanation for this bifurcation can be that the Full Court hinges everything off its starting point about bodies other than criminal courts generally not trespassing on questions which, for different purposes, lie in the domain of such courts.

The importance of the statutory context

3. As noted in chief, the Full Court's approach not only erroneously breaks down the relevant statutory expression as per the previous point, but erroneously divorces it from its statutory context – in particular, from the statutory powers, some exercisable by an administrative body and some by a court, to which it is attached. These include the powers of the Authority to form an opinion or make a finding on the compound question as a step towards a possible exercise of

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1 The submissions of Free TV Australia Limited proceed on the same premise (at [16]).

2 The submissions of Commercial Radio Australia Limited (at [20]) also endorse that bifurcation. Free TV Australia submits that the clause should neither be bifurcated nor read as a compound (at [12]), but its construction (at [16]) requires bifurcation as a matter of implication.

power under ss 141 and 143 of the BSA, and the powers of a criminal or civil court under ss 139 and 140A of the BSA to make a judicial finding, applying the relevant standard (whether criminal or civil), on the same question. The Respondent acknowledges the problem but has no satisfactory answer, saying only that the specific interaction of the condition and the provisions is to be resolved by its proper construction (RS [62]). The result is the intractable difficulty outlined in the Authority's submissions in chief (**AS**) (at [44]-[49]).

4. The Respondent also misses the key point which follows from that difficulty in the Full Court's construction; namely, that the absence of a "conviction" (on the expanded meaning the Full Court gives to that term at [84]) may stymie both civil penalty proceedings under s 140A for breach of cl 8(1)(g), and criminal proceedings under s 139 (see AS [51]). Its assertion that there is nothing anomalous in the Authority treating an acquittal as determinative of the question of breach of cl 8(1)(g) (RS [64]) overlooks that the same result will follow in judicial proceedings for breach, irrespective of the applicable standard of proof.

5. In the end, then, the Respondent's submissions leave unaddressed the problems that attend the Full Court's construction:

   5.1. Does the condition in cl 8(1)(g) have the same meaning irrespective of which enforcement route is in play?

   5.2. If yes, did the Full Court proceed down a false path by focussing on perceived quasi-constitutional difficulties with a Ch II body pronouncing on breach of the condition, rather than giving the condition a singular meaning applicable whether the condition is enforced judicially (in criminal or civil proceedings) or administratively – a singular meaning of commission *of* an offence, not conviction *for* an offence?

   5.3. If no, how is the odd result that this condition has a variable meaning to be reconciled with the role that conditions as a whole play in the BSA? Further, what principle governs the distinction between those conditions that have variable meanings and those that do not? Does any condition which may have a legal element to it – most obviously, cl 8(1)(a), which speaks of contravention of a given Act, but also potentially conditions such as cll 8(1)(ha) and (i) (dealing with a licensee's compliance with s 205B, and with cll 3, 3A, 4, 5 and 6, respectively) – have a variable meaning depending on which body enforces it? Does variable meaning arise only where an element of the criminal law is involved? Do not these difficulties simply demonstrate the lack of warrant in the statutory scheme for importing such a distinction?

6. Finally, the Respondent's theory of the BSA's differential use of the language of "commission" of an offence vis-à-vis other language (see RS [47]) ignores s 41(3)(e) – an example of the point that, when the BSA intends the Authority to act on the basis of there being a *conviction* for an offence, it says so. Where, as in the licence condition in cl 8(1)(g), it intends the Authority to form its own opinion on whether an offence has been committed, it does not use the language of conviction.

Suggested alternatives to the Authority's use of cl 8(1)(g) in enforcement action

7. In response to the Authority's contention that the Full Court's construction destroys the ability of the Authority to act in response to continuing breaches of this important licence condition (AS [50]-[52]), the Respondent embarks upon a convoluted attempt to rely on the totally separate powers of different regulatory bodies (RS [65], [70]) and suggests that the Authority must confine itself to taking a different regulatory route (RS [79]). These suggestions, nowhere to be found in the reasons of the Full Court, deprive the powers in ss 141 and 143 of work to do in this context. Of course, they also render cl 8(1)(g) itself largely otiose.

8. To elaborate upon the first argument described in [7] above, it is of no assistance to posit the existence of "other regulatory bodies" which "can take steps immediately to prevent the continuation of any conduct apprehended to be criminal" (cf RS [65], [70]).[3] That is so for at least three reasons:

   8.1. Whether any other regulatory body has the power to act in a given case will depend on the text of its governing statute, which would not necessarily, or even usually, be directed to the purpose of enforcing cl 8(1)(g).

   8.2. If the Authority were forced to rely on other Ch II bodies in relation to the enforcement of one (but only one) licence condition (being cl 8(1)(g)), the consequence would be the undermining of its integrated, overarching regulatory role, including its mandate under s 5(1) of the BSA to "deal effectively with breaches of the rules established by the Act" (see AS [50], [52]).

   8.3. The only "regulatory body" referred to by the Respondent in this context is the Australian Federal Police (**AFP**) (RS [65], [70]). Yet the AFP's principal function is to provide "police services" (as defined in s 4) in relation to, inter alia, laws of the Commonwealth, all Commonwealth property and the safeguarding of Commonwealth interests: see *Australian Federal Police Act 1979* (Cth), s 8(1). The AFP has no duty in respect of State offences,[4] and even in relation to federal laws its regulatory focus in the course of its policing services will not be on whether broadcasting services have been used in the commission of an offence.

9. As to the second point in [7], the further regulatory option which the Respondent primarily proffers is convoluted in the extreme. The Authority cannot, on the Respondent's argument, act under s 141 of the BSA to give a direction based on satisfaction that the licensee is breaching the condition that it (the licensee) not use the service in the commission of an offence. However, what it *can* do,

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[3] Free TV Australia Limited takes matters a step further and contends that the existence of separate powers of different regulatory bodies, pursuant to independent regulatory regimes, supports a construction of the condition which limits the powers which Parliament has separately conferred, through the BSA, on the Authority (at [24]-[25]).

[4] Other than State offences with a federal aspect: see ss 8(1)(baa) and 4AA(1) of the *Australian Federal Police Act 1979* (Cth).

the Respondent says, is give a direction based on satisfaction that the licensee is breaching a different condition that it remain a suitable licensee; and in the latter respect it can form an opinion as to unsuitability under s 41(2) on satisfaction of a "significant risk that criminal conduct was occurring on the part of the licensee, meriting a conviction" (RS [79]).

10. That is, the exercise comes back to the very same core condition (not to use the service in the commission of an offence), and while the Authority cannot form a direct opinion on the question, it can indirectly address the question at the level of "risk" not "conclusion", with the added rider that it somehow has to assess whether the risk is one "meriting a conviction". This seems to require the Authority, as its primary means of dealing with continuing breaches of the core condition, to form opinions on prosecuting practices – will a prosecution ever be brought so as to open up the possibility of a conviction? – and on conclusions which might be reached by the tribunal of fact within a criminal process, on the criminal standard. That would seem to involve all of the difficulties – and more – which drove the Full Court (at [105]) to the view that the Authority should not be permitted to stray into matters the proper preserve of the criminal process.

11. The other regulatory alternative suggested is that the Authority impose an additional licence condition under s 43(1) of the BSA to prevent any repetition of precisely specified conduct (RS [79]-[80]). However, if the reason for the additional licence condition is because the Authority considers the licensee has breached cl 8(1)(g), there is no reason why the underlying basis for taking action under s 43 of the BSA would not be subject to the same constraint identified by the Full Court.

12. Neither suggested alternative solves the difficulty. The proper conclusion to draw is far more straightforward. The Authority directs its mind to whatever material is properly before it and, assuring procedural fairness, forms its opinion on whether the service was used in the commission of an offence. That does not involve adjudicating criminal guilt or administering punishment; at most, it operates as a step in the possible exercise of an administrative power of a protective nature.

The BSA as originally enacted

13. Whatever the precise point that the Respondent seeks to draw from the text of the BSA as originally enacted (RS [53]), it appears to involve:

    13.1. reading the words "is guilty of an offence" – contained in provisions which are quite plainly offence provisions requiring adjudication by a competent court – as doing no more than connoting the facts and matters that would constitute a person being so guilty; and then

    13.2. contrasting that phrase with the notion of "commission of an offence or its cognates", which is said to connote a matter "only capable of being adjudicated by a competent court".

14. In light of the plain purpose of the provisions which used the former collocation of words, the Court would not accept the distinction the Respondent appears to be drawing. The difference in the use of language could equally indicate a

legislative intention that an opinion or finding as to the commission of an offence did not require judicial adjudication, noting the distinction that Latham CJ drew in *Nassoor v Nette* (1937) 58 CLR 446 between committing an offence and being convicted of an offence (AS [19]). Further, one of the provisions to which the Respondent draws attention (at RS [53]) to support its distinction is s 147(a) of the BSA, which provided (and still provides) that a person may make a complaint if the person believes that another person providing a broadcasting service has "committed an offence under this Act or the regulations". To construe this provision as only permitting a person to make a complaint once a competent court has adjudicated the matter would render the complaint-making process largely futile.

The universe of criminal laws in play

15. In so far as the Respondent, in seeking to contend that the Authority is not equipped to deal with the question of commission of an offence, relies heavily upon a "universe of Commonwealth and State and Territory criminal laws" to which cl 8(1)(g) could refer (at RS [51], [61]), that reliance is misplaced in light of the confined nature of the definition of "broadcasting service" in s 6 of the BSA, the terms of which focus on the service that is delivered pursuant to the licence.[5] Enforcing the negative stipulation on *use of that service* in the commission of an offence will not involve the Authority potentially having to investigate every conceivable Commonwealth, State and Territory offence. Nor will such investigations jeopardise the development of stable and predictable regulatory arrangements *under the BSA*.

The Notice of Contention

16. The Authority made preliminary submissions on the Notice of Contention in advance of its receipt of the Respondent's submissions (AS [57]-[58]). By way of response to those submissions (RS [82]-[102]), the Authority adopts the submissions of the Commonwealth Attorney-General.

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[5] The similar submissions of Free TV Australia (at [21]-[23]) and Commercial Radio Australia (at [30]) should be rejected on the same basis.