

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No. S225 of 2014

BETWEEN:

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY  
Appellant

10

and



TODAY FM (SYDNEY) PTY LTD  
Respondent

20

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL  
FOR SOUTH AUSTRALIA**

**Part I: Certification**

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

**Part II: Basis for intervention**

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

**Part III: Leave to intervene**

3. Not applicable.

**Part IV: Applicable legislative provisions**

- 10 4. South Australia adopts the Appellant's statement of the applicable legislative provisions.

**Part V: Submissions****A: Summary**

5. South Australia confines its submissions to the issue raised by the Respondent's Notice of Contention. That issue may be stated as follows:

After conducting an investigation under Part 13 Division 2 of the *Broadcasting Services Act 1992* (Cth) (**BSA**), the Appellant determined that the Respondent had used its licensed broadcasting service in the commission of an offence. The offence was the publishing or communicating of a private conversation that came to the Respondent's knowledge as a result of the use of a listening device, contrary to s11(1) of the *Surveillance Devices Act 2007* (NSW). No court had been called upon to make such determination. Having made that

20 (NSW). No court had been called upon to make such determination. Having made that determination, the Appellant further determined that the Respondent had breached the condition on its commercial radio broadcasting licence imposed by schedule 2 clause 8(1)(g) BSA. In doing so, did the Appellant exercise the judicial power of the Commonwealth?

6. South Australia contends that the answer to the question posed is "No". A conclusion that a broadcasting service has been used in the commission of an offence against a law of a State arrived at by an administrative body for regulatory purposes, but not after the conduct of a proceeding in the nature of the common law system of trial, does not merge in judgment and attract the pleas in bar and rules of preclusion. It is not an exercise of judicial power.

**30 B: The Factual Background**

7. The factual background is summarised in the Appellant's outline of submissions<sup>1</sup> and by the trial

---

<sup>1</sup> Appellant's Submissions, 19 September 2014, [7]-[12].

Judge.<sup>2</sup>

### C: The Constitutional Question

8. By its notice of contention, the Respondent argues that schedule 2 clause 8(1)(g) of the BSA, construed as the Appellant would have this Court construe it, confers judicial power on the Appellant, contrary to the separation of powers and to this Court's decisions in *Waterside Workers' Federation of Australia v JW Alexander Ltd*,<sup>3</sup> and *Attorney-General of the Commonwealth of Australia v the Queen*.<sup>4</sup>

9. In *TCL Air Conditioner v Judges of the Federal Court*,<sup>5</sup> French CJ and Gageler J said:<sup>6</sup>

10 The judicial power of the Commonwealth has defied precise definition. One dimension concerns the nature of the function conferred: involving the determination of a question of legal right or legal obligation by the application of law as ascertained to facts as found "so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons". Another dimension concerns the process by which the function is exercised: involving an open and public enquiry (unless the subject-matter necessitates an exception), and observance of the rules of procedural fairness. Yet another dimension concerns the overriding necessity for the function always to be compatible with the essential character of a court as an institution that is, and is seen to be, both impartial between the parties and independent of the parties and of other branches of government in the exercise of the decision-making functions conferred on it.

20 Underlying each of those dimensions of the judicial power of the Commonwealth is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects", the exercise of which "does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action". Judicial power "is conferred and exercised by law and coercively", "its decisions are made against the will of at least one side, and are enforced upon that side in invitum", and it "is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved".  
30 (footnotes omitted).

10. Absent a clear and exhaustive definition, any determination of whether there has been a conferral of the judicial power of the Commonwealth becomes an evaluative exercise where various indicia, present and absent, fall to be considered.

11. In this case, the following indicia are significant:

- a. ACMA is not a Court;
- b. ACMA finds facts and applies legal principles to the facts found, but that is not a function exclusive to the judicial power;
- c. ACMA's finding does not quell any controversy;

<sup>2</sup> *Australian Communications and Media Authority v Today FM Sydney Pty Ltd* [2013] FCA 1157, [1]-[6] (AB70-1).

<sup>3</sup> *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

<sup>4</sup> *Attorney-General of the Commonwealth of Australia v the Queen* (1957) 95 CLR 529.

<sup>5</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410.

<sup>6</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [27]-[28] (French CJ and Gageler J).

- d. ACMA is incapable of enforcing its own decision;
- e. ACMA's functions are not exercised in accordance with the judicial process;
- f. ACMA does not adjudicate or punish guilt; and
- g. ACMA's finding does not constitute a final and conclusive decision.

(a) *ACMA's character and function – it is not a Court*

12. The character of the entity upon which a power is conferred is relevant to determining whether the power conferred is judicial.<sup>7</sup> Moreover, it is important to understand the function conferred on ACMA and the manner of its performance to provide the necessary context.
- 10 13. ACMA is a body established by the *Australian Communications and Media Authority Act 2005* (Cth) (the ACMA Act).<sup>8</sup> It does not have a legal identity separate from the Commonwealth.<sup>9</sup> ACMA consists of a Chair, Deputy Chair and between 1 and 7 other members.<sup>10</sup> ACMA's members are not required to be legally trained.<sup>11</sup> Members are appointed for a term not exceeding five years<sup>12</sup> which is able to be renewed,<sup>13</sup> and are subject to dismissal by the executive for unsatisfactory performance,<sup>14</sup> indicating a lack of independence.
14. The ACMA Act confers a number of functions upon ACMA, including, relevantly, regulating broadcasting services under the BSA, and allocating, renewing, suspending and cancelling licences and taking other enforcement action under the BSA.<sup>15</sup> ACMA must perform its functions and exercise its powers in accordance with any general direction given by the Minister.<sup>16</sup>
- 20 15. The BSA charges ACMA with the responsibility for monitoring the broadcasting industry,<sup>17</sup> and requires the powers and functions vested in ACMA to be exercised so as to produce stable and

<sup>7</sup> See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey); *R v Spicer; Ex parte Australian Builders Labourers Federation* (1957) 100 CLR 277, 306 (Kitto J); *R v Spicer; Ex Parte Waterside Workers Federation* (1957) 100 CLR 312, 322 (Webb J); *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542, [6] (Gleeson CJ).

<sup>8</sup> ACMA Act s6.

<sup>9</sup> ACMA Act s6.

<sup>10</sup> ACMA Act s19.

<sup>11</sup> ACMA Act, Pt 3, Div 2, Subdiv A governs the appointment of members and imposes no qualification requirements.

<sup>12</sup> ACMA Act s21(1).

<sup>13</sup> ACMA Act s21(2), to a maximum of ten years.

<sup>14</sup> The appointer is obliged to terminate the appointment of a member if the Minister forms the view that the performance of the member has been unsatisfactory for a significant period of time: s34(1) ACMA Act. The appointment of all members must be terminated should a similar determination be made in relation to ACMA's performance: s34(2) ACMA Act.

<sup>15</sup> ACMA Act s10(1)(a),(c).

<sup>16</sup> ACMA Act s14.

<sup>17</sup> ACMA Act s5(1)(a).

predictable regulatory arrangements and deal effectively with breaches of the BSA.<sup>18</sup> ACMA's regulatory role involves the balancing of competing objectives in the pursuit of the public interest.<sup>19</sup>

16. A commercial radio broadcasting licensee must maintain a licence,<sup>20</sup> which is subject to conditions set out in schedule 2 of the BSA.<sup>21</sup> Failure to comply with a licence condition is a criminal offence,<sup>22</sup> and renders the licensee liable to civil penalty proceedings.<sup>23</sup> Where ACMA is reasonably satisfied<sup>24</sup> that a licensee has not complied with a licence condition, ACMA is empowered to cancel the licence,<sup>25</sup> or issue a remedial direction requiring the licensee to take action to prevent future breaches.<sup>26</sup> ACMA is also able to refer the breach to the Director of Public Prosecutions for criminal prosecution,<sup>27</sup> or itself bring civil penalty proceedings in a court.<sup>28</sup>
17. ACMA's investigatory powers facilitate the exercise of these regulatory powers: they are conferred for the purposes of ACMA '*informing itself on any matter relevant*' to its functions.<sup>29</sup> ACMA may inform itself in any manner it thinks fit,<sup>30</sup> including through the knowledge and experience of its members and by reference to matters not discovered through the formal exercise of its powers.<sup>31</sup> ACMA has various information-gathering powers at its disposal, including the conduct of compulsory examinations on oath, in private,<sup>32</sup> during which the privilege against self-incrimination may be denied.<sup>33</sup>
18. Investigations into whether a licence condition has been breached by a licensee may commence following ACMA receiving a complaint<sup>34</sup> or Ministerial direction,<sup>35</sup> or on ACMA's own motion.<sup>36</sup> ACMA is empowered to create a report on an investigation,<sup>37</sup> although there is no obligation on

---

<sup>18</sup> BSA s5(1)(b); Such regulatory powers are to be exercised in a manner commensurate with the seriousness of any breach: BSA s5(2).

<sup>19</sup> BSA s4(1),(2)(a).

<sup>20</sup> BSA s12(1).

<sup>21</sup> BSA s42(2).

<sup>22</sup> BSA s139(3).

<sup>23</sup> BSA s140A(3).

<sup>24</sup> *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, [73] (Gleeson CJ and Gummow J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 652-654 [133]-[137] (Gummow J).

<sup>25</sup> BSA s143.

<sup>26</sup> BSA s142.

<sup>27</sup> BSA s139.

<sup>28</sup> BSA s205G.

<sup>29</sup> BSA s168.

<sup>30</sup> BSA s168(1)(c).

<sup>31</sup> BSA s169.

<sup>32</sup> BSA s175.

<sup>33</sup> BSA s174(3).

<sup>34</sup> BSA s147.

<sup>35</sup> BSA s171(1),(2)(a).

<sup>36</sup> BSA s170.

<sup>37</sup> BSA s178.

it to do so unless its investigation is conducted at the direction of the Minister.<sup>38</sup> There is no provision directed towards the content of the report or the form it must take, although it is envisaged that a report may contain findings of conduct that could constitute an offence.<sup>39</sup> ACMA is also empowered to cause a copy of a report created on an investigation to be published.<sup>40</sup> However, ACMA may not publish a report resulting from an investigation which would be likely to adversely affect the interests of a person without giving the person an opportunity to be heard.<sup>41</sup>

19. The difference between the characteristics of ACMA in the exercise of its functions and the characteristics of a court in the exercise of judicial functions is obvious and stark.

10 (b) *Finding facts and applying the law to facts found is not a function exclusive to the judicial power*

20. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries*<sup>42</sup> McTiernan J confirmed that adjudication was not exclusive to judicial power,

But it is commonplace in the field of administrative law that adjudication is not distinctive of judicial power exclusively: and it is not necessarily inconsistent with true executive or administrative action. "The power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action. That is an attribute common to administrative bodies, to subordinate bodies that are adjuncts to legislation, and to judicial bodies": *Federal Commissioner of Taxation v Munro*, per Isaacs J (1926) 38 CLR 153, at p 176.<sup>43</sup>

21. Justice Kitto came to the same conclusion:

20 The fact that an official is given a power conditionally upon being satisfied of a particular state of facts — and so is authorized to determine unexaminably "the jurisdictional fact" upon which his power depends (if the expression be thought appropriate) — is no indication that in deciding whether he is so satisfied he is exercising judicial power.<sup>44</sup>

22. Administrative tribunals and disciplinary bodies<sup>45</sup> have been required to make similar findings - necessitating the formation of an opinion or finding facts amounting to the commission of an offence, not for the purpose of punishment, but rather, for administrative, regulatory and other public purposes.

23. In this case, with the assistance of its investigatory powers, ACMA is charged with the responsibility of determining whether the licence condition in schedule 2 clause 8(1)(g) has been  
30 breached. That ACMA is required to determine whether a condition is breached by applying a process of reasoning involving construction and application of law to facts found is consistent

<sup>38</sup> BSA s178(1).

<sup>39</sup> BSA s178(2); upon which ACMA may refer the report or part of the report to the Director of Public Prosecutions.

<sup>40</sup> BSA s179(1).

<sup>41</sup> BSA s180.

<sup>42</sup> (1970) 123 CLR 361.

<sup>43</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361, 371 (McTiernan J).

<sup>44</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361, 375 (Kitto J).

<sup>45</sup> See, for example: *Veterinary Practice Act 2003* (SA) s61; *Firearms Act 1977* (SA) s20; *Mining Act 1971* (SA) s33; *Legal Practitioners Act 1981* (SA) s70 and s82.

with an exercise of administrative power and its role under BSA to monitor broadcasting services and to take regulatory action.<sup>46</sup>

(c) *Judicial power quells a controversy*

24. The functions performed by ACMA are not the ascertainment or enforcement of any existing liability in respect of an offence or the punishment of an offence. As outlined above,<sup>47</sup> ACMA is permitted to make findings of fact relevant to whether there has been a breach of a licence condition in order to come to determine that a licence condition has been breached. Then it may either refer the matter for criminal prosecution<sup>48</sup>, take steps to issue civil penalty proceedings in a court,<sup>49</sup> issue a remedial direction,<sup>50</sup> or cancel the licence.<sup>51</sup>
- 10 25. In reaching a state of satisfaction as to whether a licence condition has been breached ACMA does not resolve a controversy.<sup>52</sup> Even if ACMA chooses to put its finding in a report, and to publish that report, it does not constitute “*a new charter by reference to which*” the question of whether an offence has been committed will “*in future ... be decided as between*” the Crown and the licensee.<sup>53</sup>
26. If, for example, ACMA’s findings lead it to refer the breach of license condition for criminal prosecution, the relevant court will determine the question of whether an offence has been committed unaffected by ACMA’s view. Such court will necessarily have to determine the question to the requisite standard of proof on the evidence before it. ACMA’s opinion would be irrelevant and inadmissible. Conversely, ACMA’s powers to investigate and make findings in  
20 relation to an alleged breach of licence conditions are not conditioned on the outcome of civil or criminal proceedings for the breach.

(d) *ACMA’s own findings are not binding and are not enforceable by ACMA itself*

27. The BSA establishes a regime by which enforcement action is not carried out by ACMA itself.<sup>54</sup> ACMA has no contempt power.
28. Further, unlike the status of orders of a court, ACMA’s findings have no binding quality.

---

<sup>46</sup> s4 and 5 of BSA.

<sup>47</sup> See above at [13]-[18].

<sup>48</sup> S139 BSA.

<sup>49</sup> S140A BSA.

<sup>50</sup> S142 BSA, the non-compliance with which is independent grounds for cancellation of the licence: s143 BSA.

<sup>51</sup> S143 BSA.

<sup>52</sup> *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007) 231 CLR 350, [21], [25]-[29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

<sup>53</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007) 231 CLR 350, [21], [25]-[29] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

<sup>54</sup> Other than in the case of cancellation or revocation of a licence pursuant to s143 which enforcement is for a protective purpose.

29. As discussed above,<sup>55</sup> there is, absent Ministerial direction, no requirement on ACMA to report its findings or cause a copy of its findings to be published. ACMA does not have to prepare a report before it exercises its enforcement powers. Any findings are reached for ACMA's own purposes in determining whether to take enforcement action. There is no decision or order in respect of which a licensee could be in contempt. A report does not have legal effect and does not constitute a judgment which has the quality of the record.

30. In circumstances of cancellation or suspension of a licence by ACMA where a licensee fails to comply with a licence condition or a remedial written direction, that cancellation is reviewable by the AAT which may form its own view as to whether there should be a cancellation of the licence.<sup>56</sup> Thus, not only does ACMA lack the power to enforce its own decisions, but its decisions are not conclusive in the sense described in *Attorney-General (Cth) v Breckler*<sup>57</sup> and *Luton v Lessels*.<sup>58</sup>

(e) *The absence of judicial process*

31. The exercise of a function in accordance with the judicial process may indicate judicial power.<sup>59</sup> The outline of ACMA's character and function at paragraphs [13] to [18] above indicates that ACMA's function in forming an independent opinion, following an investigation, as to whether there has been a breach of a licence condition is not exercised in accordance with the judicial process. The matters to which ACMA may have regard in determining in what way it should exercise its powers, which include matters of policy and weighing the public interest, and the manner in which it informs itself about those matters, demonstrate a different process than one in which a litigant seeks from a court an injunction to restrain a contravention of an Act, or where a court is asked to penalise a contravention, and point against a conclusion that ACMA exercises judicial power in the manner of a court.<sup>60</sup>

32. Notwithstanding the inquisitorial nature of ACMA's process, insofar as it exercises statutory powers which are capable of affecting a licensee's rights and interests, it will afford procedural fairness.<sup>61</sup> Its function is comparable to the disciplinary or regulatory functions undertaken by boards and tribunals.

<sup>55</sup> See above at [13] to [18].

<sup>56</sup> See s204 BSA.

<sup>57</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>58</sup> *Luton v Lessels* (2002) 210 CLR 333, [24] (Gleeson CJ), [76] (Gaudron and Hayne JJ), [127]-[128] (Kirby J); See *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, [6] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

<sup>59</sup> *Nicholas v the Queen* (1998) 193 CLR 173; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

<sup>60</sup> *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542, [6] (Gleeson CJ).

<sup>61</sup> *Kioa v West* (1985) 159 CLR 550, 583-585 (Mason J), 633 (Deane J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).



33. The nature and purpose of disciplinary proceedings is distinct from criminal proceedings.<sup>62</sup> The standard of proof – on the balance of probabilities,<sup>63</sup> rather than beyond reasonable doubt - exemplifies that difference. Further, the parties and the nature of the inquiry is different as between the two sets of proceedings and the overriding purpose of the administrative body or tribunal is not punishment of an individual as a result of the finding/s but the protection of the public and to uphold the standards of the profession or industry.
34. ACMA does not go as far as a disciplinary tribunal. There are no parties, nor is there an onus of proof. Having found the breach of a licence condition, ACMA is faced with at least three options in dealing with a breach or stopping an ongoing breach of a licence. It may issue a written remedial direction pursuant to s141(1), institute civil proceedings pursuant to s140A(3) or refer a report/findings for criminal prosecution to the DPP pursuant to s139. At the point of referral, there is no punitive purpose, but rather the fulfilment of ACMA’s regulatory role pursuant to s5 of the BSA and s10 of the ACMA Act in regulating and monitoring the broadcasting industry and dealing with regulatory breaches by appropriate enforcement action.
35. To suggest that clauses such as schedule 2 clause 8(1)(g) BSA involve more than the exercise of administrative power will have wide-reaching consequences for disciplinary tribunals and administrative bodies asked to make findings or form views as to “fitness and propriety”,<sup>64</sup> or “unprofessional conduct”,<sup>65</sup> where the allegation is of the commission of a criminal offence.<sup>66</sup>

(f) *The adjudication and punishment of guilt*

36. A central feature of the judicial power for the purposes of the present case is the process leading to and the actual adjudication and punishment of criminal guilt. The exercise of judicial power with respect to the common law system of trial for a criminal offence is spent upon the imposition of sentence on a convicted person, subject to any right of appeal, with the result that the controversy previously presented by the plea of not guilty has been quelled.<sup>67</sup>
37. In *Albarran*<sup>68</sup> the majority said of the Companies, Auditors and Liquidators Disciplinary Board:<sup>69</sup>

“The function of the Board is not, as was submitted, to find ...whether an offence has been committed, and if so, to inflict a punishment thereof. It is, as we have said, to assess whether someone should continue

<sup>62</sup> See *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630.

<sup>63</sup> Subject to the application of *Briginshaw v Briginshaw* (1938) 60 CLR 336; see also *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

<sup>64</sup> See, for example, *Firearms Act 1977* (SA) s20.

<sup>65</sup> See, for example, *Legal Practitioners Act 1981* (SA) s70 and s82; *Veterinary Practice Act 2003* (SA) s61.

<sup>66</sup> See *Teachers Registration and Standards Act 2004* (SA), s24 and s25.

<sup>67</sup> *Eastman v Director of Public Prosecutions* [2014] ACTSC 1, [26] (Rares, Wigney JJ and Cowdroy AJ); *Elliott v The Queen* (2007) 234 CLR 38, 41-42 [5] (Gummow, Hayne, Heydon, Crennan, Kiefel JJ).

<sup>68</sup> *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

<sup>69</sup> *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, [35] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

to occupy a statutory position involving skill and probity, in circumstances where (not merely because) the Board is satisfied that the person has failed in the performance of his or her professional duties in the past.”

38. Similarly, ACMA’s function is not to determine whether an offence has been committed and to inflict punishment on the licensee for its finding. Rather, in pursuance of its statutory obligation to regulate the broadcasting industry and the licence scheme, ACMA’s function is to determine the existence or not of a relevant fact necessary to assess whether a licensee has breached a licence condition and to determine what remedial or enforcement action should follow.

*(g) A final and conclusive decision forming part of the record*

10 39. A significant characteristic of the adjudgment and punishment of criminal guilt by a court is the quality of conclusiveness afforded the decision and its authoritative nature.<sup>70</sup> Once there is a final and conclusive judgment by a court, the matter merges from accusation into judgment.

... a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature. Thus, in respect of an alleged criminal liability, conviction brings about the substitution of a new liability. ...<sup>71</sup>

The judgment itself forms part of the record which is incontrovertible.<sup>72</sup>

20 40. Unlike a court, ACMA’s finding that a licensee has committed an offence, thereby causing ACMA to be satisfied that the licensee has breached a condition of its licence, lacks any conclusive quality characteristic of a judgment reached in the exercise of judicial power. In a descriptive sense, it is not a decision signifying an end in the process. As much is made plain by the fact that in any subsequent criminal proceeding ACMA’s finding that an offence had been committed could not be relied upon by the licensee to raise a plea of *autrefois convict*. The necessary quality of conclusiveness by the merging of an accusation into judgment is lacking.

*Conclusion*

41. ACMA is an administrative body vested with a regulatory function the exercise of which does not result in a binding and authoritative decision in the nature of a judgment. It exercises administrative power.

30

<sup>70</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v the Judges of the Federal Court of Australia* (2013) 87 ALJR 410, [27]-[28] (French CJ and Gageler J).

<sup>71</sup> *Pearce v The Queen* (1998) 194 CLR 610, 625-6 (Gummow J); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 606 (Gummow J).

<sup>72</sup> *R v Carroll* (2002) 213 CLR 635, [48] (Gleeson CJ and Hayne J).

*Part VI: Estimate of time for oral argument*

42. South Australia estimates that 10 minutes will be required for the presentation of oral argument.

Dated 20 October 2014



10 M G Hinton QC  
Solicitor-General for South Australia  
T: 08 8207 1536  
F: 08 8207 2013  
E: solicitor-general'schambers@agd.sa.gov.au



A C Wells  
Counsel  
T: 08 8207 1746  
F: 08 8207 2013  
E: wells.anna@agd.sa.gov.au