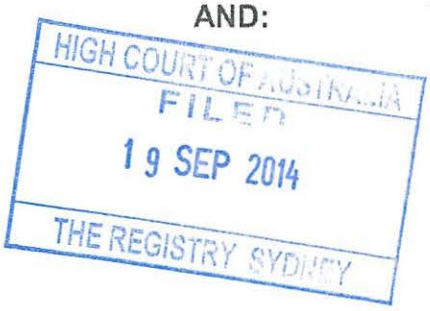
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S225 OF 2014

BETWEEN: AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY
Appellant

AND: TODAY FM (SYDNEY) PTY LTD
Respondent



APPELLANT'S SUBMISSIONS

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PART I PUBLICATION

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

PART II THE ISSUES

2. Is a determination of guilt by a court exercising criminal jurisdiction a necessary precondition to the appellant (the **Authority**) making an administrative finding that the holder of a commercial radio broadcasting licence has used the broadcasting service "in the commission of an offence against another Act or a law of a State or Territory", contrary to cl 8(1)(g) of Sch 2 to the *Broadcasting Services Act 1992* (Cth) (the **BSA**), and taking enforcement action in respect of such breach?

3. Is the Authority bound conclusively by the outcome of the criminal process, whether it be guilt or acquittal, irrespective of the evidence and submissions that may incline the Authority to a contrary view?

4. Does the reference to "commission of an offence" in c 8(1)(g) of Sch 2 to the BSA extend to the commission of offences by persons other than the commercial radio broadcasting licensee?

PART III SECTION 78B OF THE JUDICIARY ACT 1903

5. The respondent (**Today FM**) gave notice under s 78B of the *Judiciary Act 1903* (Cth) on 8 September 2014. No further notice is required.

PART IV CITATIONS

6. The citation for the decision of the Federal Court is: *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2013) 218 FCR 447. The citation for the decision of the Full Court of the Federal Court is: *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2014) 218 FCR 461.

PART V THE FACTS

7. Today FM holds a commercial radio broadcasting licence under the BSA. Pursuant to s 42(2)(a) of the BSA, the licence is subject to the conditions set out in Part 4 of Sch 2, including, in cl 8(1)(g):

> (g) the licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory.

8. On 4 December 2012, Today FM broadcast a prank phone call in which two of its presenters telephoned King Edward VII Hospital in London, where the Duchess of Cambridge was an inpatient (the **Segment**). The Segment was repeated in a broadcast on 5 December 2012.

9. By letter dated 13 December 2012, the Authority notified Today FM that it was conducting an investigation into the broadcast of the Segment. The subject

matter of the Authority's investigation included whether Today FM had breached the licence condition in cl 8(1)(g) of Sch 2. The offences in respect of which the Authority invited Today FM to provide submissions included the offence in s 11(1) of the *Surveillance Devices Act 2007* (NSW) (the **SDA**).[1]

10. As reproduced in the Authority's final report, to which reference is made below, Today FM acknowledged in its submissions that it had not obtained the consent of either of the persons at the Hospital, who can be heard on the call, before it broadcast the Segment (Report pp 9, 11).

11. On 4 June 2013, the Authority provided Today FM with a copy of its Preliminary Investigation Report No 2928. In the Report, the Authority stated that it was of the view that the private conversation which was broadcast during the Segment was recorded in contravention of s 7(1) of the SDA,[2] and that in broadcasting the conversation Today FM had contravened s 11 of the SDA. The Authority further stated that because Today FM had used its broadcasting service in the commission of that offence, it had breached the licence condition in cl 8(1)(g) of Sch 2 to the BSA (p 20).

12. By letter dated 20 February 2014, subsequent to the decision of the primary judge in this matter and before the hearing of the appeal, the Authority notified Today FM that it had finalised its investigation and determined, relevantly, that Today FM had breached the licence condition in cl 8(1)(g) of Sch 2. In the letter, the Authority stated that it would "consider the compliance issues raised by the investigation, as well as any appropriate remedial measures, in due course". The Authority enclosed with the letter a copy of the finalised Investigation Report No 2928, in which the Authority made the same findings as it had foreshadowed in the preliminary report in relation to Today FM's compliance with the licence condition in cl 8(1)(g) of Sch 2.

PART VI ARGUMENT

Summary

13. In allowing Today FM's appeal, the Full Court based its construction of cl 8(1)(g) of Sch 2 on a central premise of a constitutional character: namely, that the determination of whether or not a person has committed an offence is one that "can generally only be determined by a court exercising criminal jurisdiction" (at 478 [76]). Its fundamental error was in reasoning from that general proposition – one that is necessarily subject to significant qualifications – to a conclusion of statutory construction that the Authority can never find, under cl 8(1)(g) of Sch 2, that a licensee has breached the relevant

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1 Section 11(1) of the SDA provides that a person "must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part". The maximum penalty for a corporation is 500 penalty units.

2 Section 7(1) of the SDA provides that a person must not "knowingly install, use or cause to be used or maintain a listening device (a) to overhear, record, monitor or listen to a private conversation to which a person is or is not a party or (b) to record a private conversation to which the person is a party".

licence condition unless and until a court exercising criminal jurisdiction has determined that the offence was committed, whether by the licensee or by anyone else (at 479-480 [80], 489 [114]).

14. In taking that course, the Full Court elided the "*commission* of an offence" with a "*conviction* for an offence". Its conclusion in this regard was contrary to the plain meaning of the terms of the licence condition, read contextually and purposively, and subverted the enforcement regime for which the statute makes provision (marginalising in the process the Authority's pivotal role in the regime's administration for the benefit and protection of the community). It also involved a misapplication of the separation of powers.

Permissible findings of an administrative decision-maker

15. The erroneous general proposition upon which the reasoning of the Full Court is premised is found at 478 [76]:

> But under our legal system the determination of whether or not a person has committed a criminal offence can generally only be determined by a court exercising criminal jurisdiction.

16. The only source that the Court cited for this proposition was the decision of this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[3] The passage quoted from *Lim*, however, was concerned with the *adjudgment and punishment* of criminal guilt. It does not support a proposition of the breadth which the Full Court derived from it. Indeed, both earlier and subsequent authority of this Court indicates that the delineation, in *Lim*, of judicial functions that under Ch III are exclusively vested in federal courts does not prevent the conferral on administrative bodies of the function of forming opinions as to the existence of legal rights – under the civil or criminal law – where that is no more than a step in the administrative body arriving at its ultimate decision.[4]

17. In *Attorney-General (Cth) v Alinta Limited*,[5] s 657A of the *Corporations Act 2001* (Cth) (**Corporations Act**), which empowered the Takeovers Panel to make a declaration of unacceptable circumstances, entitled the Panel in the first instance to make findings as to whether there was a relevant contravention of certain Chapters of the Corporations Act. However, there was then a second stage of considering a variety of matters, including policy considerations, before the Panel would make a declaration, and then make any remedial orders.[6] As Hayne J observed, in dismissing the argument that the Panel was exercising judicial power, its task was wider than simply considering a controversy about a contravention of the Act, with an order

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3 (1992) 176 CLR 1 (***Lim***) at 27.

4 *Re Cram; Ex parte Newcastle Wallsend Co Pty Ltd* (1987) 163 CLR 140 at 149 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189 (the Court); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (***Brandy***) at 258 (Mason CJ, Brennan and Toohey JJ) and 268 (Deane, Dawson, Gaudron and McHugh JJ).

5 (2008) 233 CLR 542 (***Alinta***).

6 *Alinta* (2008) 233 CLR 542 at 573-574 [82] (Hayne J).

under s 657D ultimately creating a charter for new rights and obligations.[7] Justices Crennan and Kiefel drew a similar distinction, stating:[8]

> The finding of, and conviction for, an offence together with the imposition of penalties are matters regarded as exclusively pertaining to the judicial power. So too is the grant of an injunction on the finding of a contravention of a statute. On the other hand, it is not uncommon for a tribunal to find it necessary to form an opinion as to the existence of legal rights of the parties as a step in arriving at its ultimate decisions.

18. A finding of the latter type did not constitute "an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist".[9] As Crennan and Kiefel JJ further observed in *Alinta*, "[w]here a body is given power, conditionally upon being satisfied as to a state of facts, a determination that it is satisfied rarely has the binding effect spoken of".[10]

19. Similarly, in *Albarran v Companies Auditors and Liquidators Disciplinary Board*,[11] s 1292(2) of the Corporations Act empowered the Board to suspend the registration of a liquidator if it was satisfied of stated matters, including that the person had contravened s 1288 of the Corporations Act (s 1292(2)(a)(i)) or had failed to perform the duties of a registered liquidator adequately and properly (s 1292(2)(d)(ii)). These criteria could include consideration of matters going to compliance with the law. In dismissing the appellant's challenge to the decision of the Board under s 1292(2)(d)(ii) to suspend his registration on the basis that it involved an impermissible exercise of judicial power, the plurality observed that the Board did not make any determination as to whether he had committed an offence, under the Corporations Act or otherwise.[12] The Board "[did] not adjudicate guilt or inflict punishment when acting under s 1292(2)".[13] To the extent the Board was required to form any opinion on the existing rights in respect of the appellant, it was no more than a step towards its ultimate conclusion and consequent remedial actions.[14]

20. These authorities are consistent with earlier illustrations in broader contexts, such as *General Medical Council v Spackman*.[15] This case concerned an administrative body charged by statute with taking licence action against

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7 *Alinta* (2008) 233 CLR 542 at 576 [90], 578-579 [96].

8 *Alinta* (2008) 233 CLR 542 at 594-595 [160].

9 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (***Tasmanian Breweries***) at 374 (Kitto J), cited inter alia in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 (***Breckler***) at 109-110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Alinta* (2008) 233 CLR 542 at 577 [94] (Hayne J). See also *Brandy* (1995) 183 CLR 245 at 268-269 (Deane, Dawson, Gaudron and McHugh JJ).

10 *Alinta* (2008) 233 CLR 542 at 598 [171].

11 (2007) 231 CLR 350 (***Albarran***).

12 *Albarran* (2007) 231 CLR 350 at 358-359 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

13 *Albarran* (2007) 231 CLR 350 at 356 [8] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

14 *Albarran* (2007) 231 CLR 350 at 361 [28] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

15 [1943] AC 627 (***Spackman***).

medical practitioners for "infamous conduct". The House of Lords held that no difficulty arose in the administrative body reaching its own view, for its own purposes, on the question of "infamous conduct"; it was not bound by an earlier finding of "adultery" by the Divorce Court.[16]

21. *Smith v NSW Bar Association* is a further illustration of a State court sitting as a disciplinary body making a finding of fact on a question which otherwise could come before a criminal court, namely of perjury.[17] No difficulty arose in the disciplinary proceedings occurring without a separate finding, on the criminal standard, by a criminal court.

10 **The role and functions of the Authority**

22. It is necessary to focus upon the manner in which, and the subject matter upon which, the body operates and the purposes and the consequences of the decisions it makes.[18] An examination of the Authority's functions and powers supports the primary judge's conclusion (with which the Full Court did not disagree) that making findings as to the conduct of licensees is a necessary element of the investigative functions of the Authority, and does not have any legal consequences independent of any regulatory action that it may take, so as to trench impermissibly into an area reserved for courts exercising judicial power.

20 23. The Authority is established pursuant to s 6 of the *Australian Communications and Media Authority Act 2005* (Cth) (the **ACMA Act**). Its statutory functions include "to regulate broadcasting services ... in accordance with the [BSA]", "to ... suspend and cancel licences and to take other enforcement action under the [BSA]" and "to monitor and investigate complaints concerning broadcasting services" (ACMA Act s 10(1)(a), (c) and (m)).[19] At all relevant times, s 12 of the ACMA Act conferred a power on the Authority to "do all things necessary or convenient to be done for or in connection with the performance of its functions", other than the power to acquire, hold and dispose of real and personal property, to enter into contracts or to lease any
30 land or buildings.

24. The BSA establishes a licensing scheme for the delivery of broadcasting services. Section 12(1) of the BSA provides that commercial broadcasting services (defined in s 14) require individual licences. Section 42 stipulates the

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16 In *Spackman*, the House of Lords distinguished between two categories: see, in particular, 634-635 (Viscount Simon LC); see also 639 and 645 (Lord Wright). In the first category, an administrative body's powers are conferred on what may be described as a "conviction basis"; that is, the decision of the administrative body is properly based on the fact of conviction, and the body cannot "go behind" or "second guess" the conviction. In the second category, the administrative body is not so restricted; it may treat a conviction (or other finding of a court) as *prima facie* evidence, but it is not required to treat it is conclusive proof. *Spackman* was considered to be applicable in the Australian context by the Full Court of the Federal Court in *Saffron v Commissioner of Taxation* (1991) 30 FCR 578 (***Saffron***).

17 (1992) 176 CLR 256 at 268.

18 *Albarran* (2007) 231 CLR 350 at 363 [35] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

19 The term "broadcasting service" is defined in s 6 of the BSA to mean, relevantly, "a service that delivers ... radio programs to persons having equipment appropriate for receiving that service".

conditions which attach to commercial broadcasting licences; in the case of commercial radio broadcasting licences, s 42(2) provides that each licence is subject to the conditions set out in Part 4 of Sch 2 to the Act, along with such additional conditions as the Authority may impose under s 43.

25. Pursuant to s 170 of the BSA, the Authority "may conduct investigations for the purposes of the performance or exercise of any of its broadcasting, content or datacasting functions ... and related powers". The Authority may also take action in response to breaches of licence conditions without conducting a formal investigation; or, alternatively, it may conduct an investigation and decide to take no action, whether it finds a breach established or not.

26. In the present case, the Authority conducted an investigation under s 170 of the BSA. Section 178 of the BSA conferred on the Authority the power to prepare a report; it had prepared an interim report, given only to Today FM for the purposes of ensuring procedural fairness, which report had then become final. That report contained the Authority's findings as to Today FM's compliance with, relevantly, the licence condition in cl 8(1)(g) of Sch 2. However, it in no sense constituted a binding determination of rights or obligations, and the BSA does not give it binding force. Rather, the report, and the findings made therein, were steps along the way to the Authority's consideration of possible enforcement action. Specifically, the Authority's report prepared under s 178 represented the conclusion of the first stage of its processes (the investigation), and the potential initiation of the second stage (enforcement action, including under s 141 or s 143).

27. Under s 179(1) of the BSA, the Authority has a discretion to publish a report on an investigation; in the case of an investigation directed by the Minister, the Authority may be directed to publish such a report (s 179(2)).[20] As is the case with preparing a report, the act of its publication, whether mandatory or discretionary, has no legal effect. It will involve the public generally coming to learn of the findings the Authority has made as an administrative body in relation to the questions before it, which in the present type of case would include a finding as to whether a licensee used its services in the commission of an offence contrary to cl 8(1)(g) of Sch 2. However, the act of publishing the report, and with it the expression of any opinion as to whether an offence has been committed, does not amount to an adjudgment of criminal guilt in the manner in which the decision of a court exercising criminal jurisdiction would operate (as the report in the instant case made clear, at p 21).

28. Section 179(3) of the BSA is significant in this context. It provides that the Authority is not required to publish a report or part thereof "if the publication would be likely to prejudice the fair trial of a person". The inclusion of that provision indicates contemplation on the part of the legislature that the Authority's consideration of matters which may involve the commission of an offence could proceed, on an administrative level, before, or at the same time

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[20] In either case, if the publication of a report would or would be likely to adversely affect the interests of a person, the Authority must not publish the report until it has given the person prior notice and a reasonable opportunity to make submissions: see s 180.

as, such matters are before a court. Section 199(3) makes similar provision where the Authority proceeds to the conduct of a hearing.

29. The regulatory consequences of breaching a licence condition may take one or more of three broad forms under Division 3 of Part 10 of the BSA. The decision as to which option to take is one in which the Authority is centrally involved:

    29.1. administrative action by the Authority, in the form of remedial directions under s 141 and/or licence suspension or cancellation under s 143;

    29.2. proceedings for a civil penalty order under s 140A – for which only the Authority may apply (see s 205G); and/or

    29.3. criminal prosecution under s 139 – in respect of which the Authority may refer possible offences to the Commonwealth Director of Public Prosecutions (**DPP**).

30. Apart from the options available in Division 3 of Part 10, the Authority may also impose an additional licence condition under s 43 of the BSA, with s 44(2)(b) specifically acknowledging that an additional licence condition may be "designed to ensure that a breach of a condition by the licensee does not recur". However, s 43(2)(a) requires the Authority to give the licensee written notice of its intention to impose an additional licence condition, while s 43(2)(c) requires publication of the proposed changes in the *Gazette*. The Authority's power to issue a remedial direction under s 141 is not similarly constrained.

31. The BSA contains no express limitation upon the regulatory course that the Authority is to adopt in any given case. To the contrary:

    31.1. s 5(1)(b)(ii) of the BSA provides that in discharging its functions under the Act, the Authority is to use its powers in "a manner that, in the opinion of the [Authority], will ... deal effectively with breaches of the rules established by [the BSA]"; and

    31.2. s 5(2) of the BSA provides that in dealing with breaches of the BSA, the Parliament intends that the Authority use the powers available to it in a manner that, "in the opinion of the [Authority]", is commensurate with the seriousness of the breach concerned.

32. The level of regulatory discretion conferred on the Authority is consistent with the statement of regulatory policy in s 4 of the BSA. In relation to broadcasting services, s 4(2) provides that the Parliament intended those services to be regulated in a manner that, "in the opinion of the [Authority]":

    (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services ...; and

    (b) will readily accommodate technological change; and

    (c) encourages:

        (i) the development of broadcasting technologies..., and their application; and

(ii) the provision of services made practicable by those technologies to the Australian community.

33. The Authority's discretion is also consistent with the broader purpose of the licensing regime under the BSA, pursuant to which the Act "creates the right to hold a licence but regulates the licensee's exploitation of that right for its own benefit, by imposing limitations crafted in, and to secure, the public interest".[21]

34. In the event that the Authority decides to take administrative action against a licensee, that action is reviewable, pursuant to judicial review, and in some cases on the merits:

34.1. The imposition of an additional licence condition pursuant to s 43 of the BSA is reviewable in the Administrative Appeals Tribunal (**AAT**): see s 204.

34.2. The issuing of a remedial direction pursuant to s 141 of the BSA is judicially reviewable, the jurisdictional fact being whether the Authority had lawfully satisfied itself on the compound question of whether there was a use of a broadcasting service in the commission of an offence. Further, in the event that a licensee subject to such a direction were to be charged under s 142 of the BSA with contravening a remedial direction, the lawfulness of the direction could be the subject of collateral challenge.

34.3. Cancellation of a licence pursuant to s 143 of the BSA is reviewable in the AAT, on which review the AAT forms its own view as to the correct and preferable decision: see s 204. If judicial review were sought instead, the jurisdictional fact has objective content and the court would determine, on the civil standard, whether there was a use of a broadcasting service in the commission of an offence.

35. In the event that the matter becomes the subject of a prosecution, or the subject of an application for a civil penalty, such findings as the Authority has made in a report are of no binding effect:

35.1. If a prosecution were brought pursuant to s 139(3) of the BSA, the questions in the trial, for resolution to the criminal standard, would include whether the licensee had breached the relevant licence condition.

35.2. In civil penalty proceedings pursuant to s 140A(3) of the BSA, a court would determine whether a licensee had breached the relevant licence condition on a balance of probabilities basis. Proof in the civil context of facts which amount to the commission of a crime need only be undertaken to the civil standard; that is, upon the balance of probabilities, albeit bearing in mind the statement of Dixon J in *Briginshaw v Briginshaw*.[22]

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21 *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* (2009) 178 FCR 199 at 211-212 [42] (Rares J).

22 (1938) 60 CLR 336 at 368. See *Rejfek v McElroy* (1965) 112 CLR 517.

Errors in the Full Court's approach

Text

36. The focus of the licence condition in cl 8(1)(g) of Sch 2 – which condition is common to the other licences which are available under the BSA[23] – is the use of the broadcasting service; specifically, the use of the service "in the commission of an offence against another Act or a law of a State or Territory".

37. Although the Full Court described the range of potential offences to which the licence condition might apply as "very wide" (at 478 [74(a)]), the scope of offences which might fall within the terms of the prohibition is necessarily limited by the fact that the broadcasting service (as defined) must be used in its commission. The perpetrator of the offending conduct is also limited, specifically, to the licensee. The Full Court's conclusion to the contrary (at 484-485 [99]) is at odds with the ordinary meaning of the clause[24] taking proper account of its context and purpose. This error is the subject of paragraph 3 of the notice of appeal.

38. Examination of whether a licensee has breached cl 8(1)(g) of Sch 2 will involve a finding on the part of the Authority that the licensee has committed an offence. That finding is, however, a step in the Authority:

    38.1. first, making a finding as to whether the licensee has used its broadcasting service in the commission of that offence – use of the service being the focus of the licence condition; and

    38.2. next, deciding what (if any) regulatory action it should take in the event that it finds the broadcasting service has been so used.

39. Neither the wording of cl 8(1)(g) of Sch 2, nor the text of s 141 or s 143, nor any other provision of the BSA, states expressly or impliedly that a conviction by a criminal court (or other relevant result of a criminal process) is a precondition for the Authority to exercise the administrative powers under s 141 or s 143. Had those powers been intended to be conferred solely on a "conviction basis", this could easily have been said.

40. However, on the Full Court's construction of cl 8(1)(g) of Sch 2 – reflected in its reasons at 479-480 [80], 480-481 [84] and 489 [115] – the clause must be read as though it said, "the licensee will not use the broadcasting service, a matter of fact to be found by the Authority, in the commission of an offence, a matter to be evidenced by, and only by, any of the following processes within the criminal law: (1) admission of guilt; (2) finding of guilt by a criminal court, but no conviction recorded; or (3) conviction". The Full Court's construction was the product of:

    40.1. bifurcating the single composite licence condition into two supposedly separate elements; and

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[23] See, for example, Sch 2, Part 3, cl 7(1)(h); Sch 2, Part 5, cl 9(1)(f); Sch 2, Part 6, cl 10(1)(h); Sch 2, Part 7, cl 11(1)(c); and Sch 6, Part 3, cl 24(1)(d).

[24] As noted above, cl 8(1)(g) of Sch 2 stipulates that "the **licensee** will not use the broadcasting service" in the proscribed manner (emphasis added).

40.2. construing the phrase "commission of an offence" as if it read "conviction for an offence", and then altering, without any real basis or explanation, the ordinary meaning of "conviction".

41. The Full Court justified the latter elision on the premise that "[t]he ordinary meaning of the phrase 'the commission of an offence' carries with it, in our legal system, the connotation that a court exercising criminal jurisdiction has found that an offence has been committed" (at 479-480 [80]). That premise – which ignores the judicially recognised distinction between the two phrases,[25] and the differential use of the phrases in the BSA[26] – harks back to the Court's earlier assertion that "under our legal system the determination of whether or not a person has committed a criminal offence can generally only be determined by a court exercising criminal jurisdiction" (at 478 [76]) and to its later statement that there is an "important principle in the Australian legal system to the effect that the determination of whether or not a person has committed a criminal offence is vested in courts exercising criminal jurisdiction, and not persons or bodies exercising executive power" (at 489 [114]).

42. For the reasons outlined above, the Court's formulation of the proposition was overly broad, and does not recognise the significant qualifications to it.[27] It also involved a misapplication of the principle of legality (at 489 [114]). For a statute to authorise an administrative body to act on its opinion or finding as to commission of an offence as a step in an exercise of its administrative powers does not "derogate" from any important or fundamental principle of the Australian legal system. Rather, it *illustrates* the workings of equally important principles of the Australian legal system; namely, that it is for the Parliament (within limits) to decide what functions it confers upon the executive government (and the bodies it creates), and it is for the executive government (and those bodies) to execute and maintain the laws enacted by the Parliament. The separation of powers does not preclude the executive government from forming opinions or making findings (including as to the

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25 *Nassoor v Nette* (1937) 58 CLR 446 at 454 (Latham CJ, in dissent but for reasons not presently relevant): "There is a plain distinction between committing an offence and being convicted of committing an offence. A conviction is the act of a court which follows upon proof of the acts or omissions of the accused person which constitute the offence. Many offences are committed in respect of which no persons are convicted. ... [T]he words 'has committed any offence' do not in themselves mean 'has been convicted of any offence.'" See also *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318, where Heydon J made various observations about the difference between "conviction" and "guilt" (or "guilt in fact") (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ agreeing).

26 See, for example, s 41(3)(e) of the BSA.

27 The error is that identified in *McGinty v Western Australia* (1996) 186 CLR 140 at 232 (McHugh J): one of top-down reasoning. As McHugh J explained, quoting E Posner, "Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 *University of Chicago Law Review* 433 at 434, "In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law ... and uses it to organise, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory. ... In bottom-up reasoning, which encompasses such familiar lawyers' techniques as 'plain meaning' and 'reasoning by analogy', one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there – but doesn't move far ... ."

commission of an offence) *for the administrative purpose* of executing and maintaining the law.

43. If a statute intends an administrative power to be exercised on a "non-conviction basis", it is ample enough to use language such as is found in cl 8(1)(g) of Sch 2 of "commission of an offence", or the like language in cl 8(1)(a) of "contravention of [a specified Act]". There is no principle of construction that requires the statutory language to be any "clearer" than this.

Context

44. As noted above, the Authority's administrative powers under ss 141 and 143 of the BSA exist as part of a suite of enforcement mechanisms, including a prosecution under s 139 (potentially via a referral by the Authority to the DPP) or civil penalty proceedings under s 140A (initiated by the Authority). The Full Court's concern that administrative bodies should not be "pronouncing on" the criminal law induced it to misconstrue the meaning of the licence condition. The licence condition must have the same meaning whichever enforcement mechanism is chosen. Although the Full Court did not suggest otherwise, the result of its construction, which is not clearly spelt out in its reasons, is that:

44.1. In a criminal prosecution under s 139 for breach of the licence condition, the prosecution fails unless a criminal court has *already and separately* reached a conviction or other relevant result, on the criminal standard.

44.2. In a civil penalty proceeding under s 140A for breach of the licence condition, the Authority fails unless a criminal court has *already and separately* reached a conviction or other relevant result, on the criminal standard.

45. The former consequence involves a constriction of the role of the criminal court under s 139.

46. The tension in the latter consequence is particularly marked. Whether a person has committed an offence is a question of fact. The role of the criminal court, once moved by the prosecution (but not otherwise), is to adjudicate whether there is criminal guilt and, if so, to determine punishment. A civil court may also have to decide if conduct has occurred that amounts to an offence: see, for example, the legislative scheme considered in *White v Director of Public Prosecutions (WA)*;[28] see also *Olbers Co Ltd v Commonwealth*;[29] and *Habib v Commonwealth*.[30] The result before one court does not determine the result before the other, for the standards of proof and the relevant fact-finding processes are different (and it matters not which case is tried first).

47. A court applying the civil standard under s 140A, however, is required on the Full Court's construction to dismiss the action unless and until another court,

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28 (2011) 243 CLR 478 (***White***), which considered the *Criminal Property Confiscation Act 2000* (WA) (see especially ss 5(2)(c), 16(1)(b), 145, 146 and 148).

29 (2004) 136 FCR 67 (***Olbers***) at 90-91 [79] and 91-94 [84]-[94], which considered the *Fisheries Management Act 1991* (Cth) (see especially s 106A). *Olbers* was upheld on appeal: (2004) 143 FCR 449.

30 (2010) 183 FCR 62 (***Habib***) at 66 [3] (Black CJ) and 70-71 [21]-[22] (Perram J).

on the criminal standard, has reached a particular result. But it is well accepted that a court can exercise a civil penalty or forfeiture jurisdiction and determine whether an offence has occurred on the civil standard without disturbing the proposition that a criminal court on the criminal standard determines criminal guilt.[31] A finding of the commission of an offence in civil penalty proceedings for a declaration of contravention, or by the Authority in the exercise of its administrative powers, might be wholly justified on the relevant standard and in accordance with the relevant fact-finding processes, while the same question could be determined differently in a criminal proceeding according to the standard and processes there applicable. The Full Court was wrong in this respect to suggest that there is some kind of anomaly in the fact that the Authority might take regulatory action in respect of an offence of which the licensee is later acquitted (at 485-486 [104]) (or, it might be added, an offence of which the licensee has already been acquitted).

48. The whole purpose of s 140A is that a court on the civil and not the criminal standard, and under the different rules applicable to civil proof, can determine if an offence has been committed for the purposes of that provision. The Full Court's concern to construe the licence condition so that the administrative body cannot be seen to pronounce in any fashion, or for any reason, on a matter which, for the purposes of the criminal law, is vested in the criminal court, has produced a construction of cl 8(1)(g) of Sch 2 that fails to accommodate the parallel enforcement processes available under ss 139 and 140A.

49. This also highlights the error of the Full Court at 479 [78]. The Full Court regarded the Authority's argument as impermissibly calling for the reading into cl 8(1)(g) of Sch 2 of a power for the Authority to form an opinion or make a finding as to whether an offence had been committed, and to do so on the civil standard. The Full Court said that, if that was what was intended, those words should have been included in the licence condition. Yet since the licence condition can be enforced criminally, civilly or administratively, one would hardly expect to find any such language there. The criminal offence under s 139 would hardly be expected to be worded on the basis of the court finding on the *criminal* standard that the licensee had used a broadcasting service in a manner which *the Authority*, in its opinion formed on the *civil* standard, considered involved the commission of an offence. The source of the Authority's power to form an opinion or make a finding lies in the more general provisions of the BSA and the ACMA Act (including, but not limited to, ss 5, 141, 143, 170 and 178 of the BSA and ss 10 and 12 of the ACMA Act).

Statutory purpose

50. As noted above, the purposes of the BSA include the protection of the community and the upholding of its standards.[32] The Authority's capacity to vindicate these purposes, and to administer the legislation more generally, would be significantly curtailed if, notwithstanding evidence that the licensee

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31 See again *White* (2011) 243 CLR 478; *Olbers* (2004) 136 FCR 67; and *Habib* (2010) 183 FCR 62.

32 See, for example, s 3(1)(b), (f), (h) and (i) of the BSA; see also ss 10(1)(a), (c), (i), (j), (k), (l) and (m) of the ACMA Act.

has breached or is breaching a licence condition, it can do nothing unless and until the jurisdiction of a criminal court is successfully invoked.

51. The frustration of the "protective" purposes of the BSA and related legislation is evident most starkly in the context of continuing breaches. Many examples could be conjured up of a licensee using a broadcasting service, on a continuing basis, to allow messages to be broadcast that breach the criminal law. The message might incite violence against a minority, promote terrorism, broadcast election advertisements in a black-out period, avail itself of phone hacking, or – closer to the present facts – disobey laws governing surveillance of communications and the privacy of individual citizens. On the Full Court's view, none of the enforcement mechanisms of the BSA – not the administrative ones of ss 141 and 143, and not the judicial ones of ss 139 and 140A – can be activated unless and until a criminal court has been successfully moved in a prosecution. Needless to say, by the time this occurs – *if it occurs* – immense and irreparable damage may already have been done to the community or individual citizens. This cannot have been what Parliament intended in creating a licensing and regulatory system of the sort embodied in the BSA.

52. That the decision to take criminal proceedings for offences in the commission of which a broadcasting service may be used lies beyond the control of the Authority highlights the difficulty. To take an example germane to the present case, offences against the SDA may be prosecuted only with the consent of the New South Wales Attorney-General (s 56). The Authority has been created to perform a special and primary role in respect of broadcast media outlets. Prosecuting authorities may have different imperatives or priorities, especially where the Attorney-General's consent is involved, when it comes to prosecuting such outlets.

The correct construction of cl 8(1)(g) of Sch 2 of the BSA

53. The Authority's submission, which the primary judge substantially accepted (at 454-457 [25]-[39]), is that, in exercising its administrative powers in the present case:

53.1. The Authority was entitled, as a step towards the possible exercise of administrative power under ss 141 or 143, to form an opinion or make a finding on the compound question whether Today FM had used a broadcasting service in the commission of an offence against one of two relevant laws (being the SDA or, alternatively, the *Telecommunications (Interception and Access) Act 1979* (Cth)).

53.2. The range of evidentiary materials to which the Authority could refer in forming its opinion or making its finding *included but was not limited to* any conviction or other relevant result of a criminal process (if such had arisen at the time).

53.3. If no conviction or other relevant result of a criminal process had arisen at the time, the Authority was entitled to look to such other materials as were available in forming its opinion or making its finding whether Today FM had used a broadcasting service in the commission of an offence.

53.4. If a conviction or other relevant result of a criminal process had arisen at the time, the Authority could take that matter into account, but would not be bound by it. Thus, if there was a conviction, on the criminal standard, the licensee would be entitled to put material to the Authority to dispute that it had used a broadcasting service in the commission of an offence.[33] Conversely, if there had been an acquittal, again on the criminal standard, the Authority would be entitled to reach its own conclusion, on the civil standard and in accordance with administrative fact finding processes, as to whether Today FM had used a broadcasting service in the commission of an offence.[34]

53.5. In short, the Authority's administrative powers are not conferred on a "conviction basis", being the first of the two categories referred to in *Spackman*, but rather are conferred on the second *Spackman* basis, where the administrative body must form its own view on whatever materials are available.[35]

53.6. The formation of an opinion or the making of a finding by the Authority are amenable to judicial review.

54. Today FM's position, which the Full Court accepted, treats the Authority's administrative powers as being conferred on, and solely on, a "conviction basis". For the reasons set out above that is a construction that does violence to the language of cl 8(1)(g) of Sch 2, is contrary to the legislative context and undercuts the legislative purpose.

55. The Full Court has broadened the concept of "conviction" slightly, in so far as it regards a discharge without conviction after a finding of guilt, or an admission of guilt (after charge but before conviction), as being as good as a conviction (at 480-481 [84]). But this does not alter the substance of the point. On the Full Court's approach, the Authority is powerless to regulate breaches of the relevant licence condition, *including those that may be continuing*, unless and until a criminal court is moved successfully by a prosecution (or, at the very least, there has been an admission of guilt and a criminal court is yet to proceed to conviction).

56. Further, on the Full Court's approach, even if such stage is reached (and it may never be, for reasons particular to the criminal process), the Authority is rendered powerless to act other than in accordance with the result of the criminal process. It must treat a conviction or other relevant result as conclusive of the commission of the offence and resulting non-compliance with the licence condition, whatever may be the material the licensee may wish to put before it. Conversely, it must treat an acquittal (on the criminal standard and in accordance with criminal processes) as conclusive of the non-commission of the offence and resulting compliance with the licence condition,

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33 *Saffron* (1991) 30 FCR 578 at 581-582 (Davies J), 590-592 (Lockhart J) and 600-601 (Beaumont J, dissenting on the application of the principles to that case).

34 To the extent *Tran v Commonwealth* (2010) 187 FCR 54 suggests otherwise, it is incorrect and should be overruled: see at 59 [7] (Lander J), 79 [96]-[98], 80-81 [105] (Rares J) and 102 [214]-[215] (Besanko J).

35 See [20] above.

even if there is material to satisfy the Authority (on the civil standard and in accordance with administrative fact finding processes) that the offence has been committed.

Today FM's Notice of Contention

57. The Authority will respond in further detail to Today FM's Notice of Contention upon receipt of Today FM's submissions. However, it is apparent from the above analysis of the statutory scheme that a construction of cl 8(1)(g) of Sch 2 which permits the Authority to find that a licensee has breached that licence condition, before or whether a court exercising criminal jurisdiction determines that an offence has been committed, does not lead to a conclusion that the Authority is impermissibly exercising Ch III judicial power.

58. The features identified by the primary judge as telling against that conclusion were as follows (at 458-459 [42]-[49]):

58.1. The Authority has broad regulatory functions, which it is to discharge in accordance with the objects of the BSA and the regulatory intentions and directives expressed by Parliament in ss 4 and 5 (see also s 3).[36]

58.2. The Authority can embark upon an investigation of its own motion, exercising the power in s 170 of the BSA.[37]

58.3. An investigation by the Authority under the BSA does not involve resolution of a legal controversy as between the Authority and the licensee. Rather, and consistently with the Authority's regulatory functions, the purpose of an investigation is to uncover facts, matters and circumstances which may or may not support a conclusion adverse to a licensee on the regulatory issues being investigated.

58.4. The Authority conducts an investigation in a non-adversarial context.[38]

58.5. The conclusion that the Authority reaches after conducting an investigation may or may not be communicated by the Authority and/or relied upon for action in some relevant way under the BSA.[39]

58.6. The immediate end product of the investigation is no more or less than the Authority, as an administrative body, forming an opinion on a matter within its remit. Any remedial action that the Authority may take pursuant to s 141 or s 143 (noting that it is open to the Authority to take no such action) is consequential upon the formation of that opinion and of itself non-judicial in character: it creates a charter of new rights rather than adjudicating existing ones.

58.7. The inclusion in a report of a statement as to the Authority's conclusion as to whether a licensee has used its broadcasting service in the commission

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36 *Alinta* (2008) 233 CLR 542 at 551-552 [6] (Gleeson CJ).

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

38 *Tasmanian Breweries* (1970) 123 CLR 361 at 374 (Kitto J).

39 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 420 [28] (French CJ and Gageler J).

of an offence does not amount to a determination of legal rights for or against the licensee in the manner in which a court's decision would operate.

58.8. Division 3 of Part 10 of the BSA in part makes provision for proceedings which will be decided by a court exercising judicial power, and additionally creates administrative powers for the Authority. To the extent that a court is seized with determining whether a licensee has breached cl 8(1)(g) of Sch 2, it will not be constrained by any opinion the Authority may have reached as the result of an investigation. If, alternatively, the Authority takes administrative action, there are available avenues by which a person may seek review of findings made by the Authority.[40]

59. In summary, the general role of the Authority in conducting an investigation under s 170 of the BSA and making findings as to the result of the investigation does not involve the exercise of judicial power. An investigation involving consideration of cl 8(1)(g) of Sch 2 does not alter that characterisation.

PART VII APPLICABLE LEGISLATIVE PROVISIONS

60. The following legislative provisions are applicable and will be supplied in a volume served together with these submissions:

60.1. BSA, ss 3, 4, 5, 6 (definition of "broadcasting service"), 12, 14, 41, 42, 43, 44, Div 3 of Part 10, Div 2 of Part 13, 199, 204, 205G, cl 7(1)(h) of Part 3 of Sch 2, cl 8 of Pt 4 of Sch 2, cl 9(1)(f) of Part 5 of Sch 2, cl 10(1)(h) of Part 6 of Sch 2, cl 11(1)(c) of Part 7 of Sch 2 and cl 24(1)(d) of Part 3 of Sch 6;

60.2. ACMA Act, ss 6, 10 and 12; and

60.3. SDA, ss 7 and 11.

PART VIII ORDERS SOUGHT

61. The Authority seeks the following orders:

1. Appeal allowed with costs.

2. Set aside paragraphs 1 to 3 of the order of the Full Court of the Federal Court of Australia made on 14 March 2014 and, in their place, order that the appeal be dismissed with costs.

PART IX ESTIMATE OF TIME

62. It is estimated that 2.5 hours will be required for the presentation of the Authority's oral argument.

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[40] *Breckler* (1999) 197 CLR 83 at 111-112 [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gurnrnow, Hayne and Callinan JJ); *Alinta* (2008) 233 CLR 542 at 599 [175] (Crennan and Kiefel JJ).

Date: 19 September 2014

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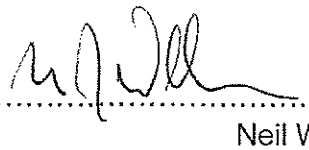

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