IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S225 of 2014

BETWEEN:

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY (ACMA)
Appellant

and

TODAY FM (SYDNEY) PTY LTD
Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

3. The purpose of the intervention is to make submissions only in relation to the scope and application of the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[1] that under the Constitution, the adjudgment and punishment of criminal guilt is a function exclusively entrusted to the courts.

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[1] (1992) 176 CLR 1 ("*Chu Kheng Lim*").

Intervener's submissions

Filed on behalf of the Attorney-General for Queensland
Form 27c
Dated: 17 October 2014
Per Kate Meredith-Hardy
Ref PL8/ATT110/3206/KME

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III. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the Appellant.

IV. ARGUMENT

Introduction

5. The Attorney-General adopts and supports the submissions of the Appellant. These submissions adopt the abbreviations used in the Appellant's submissions.

6. The Attorney-General makes the following additional submissions in support of the Authority.

The first issue: Construction

7. The Full Court's decision was that cl 8(1)(g) of Sch 2 of the BSA, properly construed, did not authorise the Authority to make a finding that a licensee has committed a criminal offence (at 463 [4]).

8. On that construction, it was not necessary for the Full Court to consider Today FM's alternative argument that, if cl 8(1)(g) did authorise the Authority to make such a finding, it is invalid because it provides for the exercise of judicial power other than by a body authorised to do so under Chapter III of the Constitution. Nevertheless, the Full Court's reasons for its construction drew support from Ch III as explained in *Chu Kheng Lim*.

9. The Attorney-General for Queensland submits that the construction urged by the Authority is correct and should be preferred by this Court.

10. On the construction point, the Full Court reasoned (at 478 [76]):

> As a matter of general principle it is not normally to be expected that an administrative body such as the ACMA will determine whether or not particular conduct constitutes the commission of a relevant offence. It may be open to the legislature, subject to relevant constitutional constraints, to make clear that such a body is empowered to undertake that or a similar task. 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.

11. To that extent, the Full Court was not stating any principle of law, but only what might be seen as a presumption of statutory interpretation. It expressly left open that the legislature may confer such decisions on administrative bodies.

12. The Full Court went on to draw *Chu Kheng Lim* into its construction of clause 8(1)(g) by elevating that presumption of interpretation into a fundamental principle (at 478 [76]). Several points are made below about the effect of *Chu Kheng Lim* in the context of the effect of Chapter III. But so far as the construction of clause 8(1)(g) is concerned,

it is to be emphasised that the legislature may repose decisions about the commission of an offence in an administrative body, subject to constitutional constraints such as those considered next.

13. Today FM relies among other bases on the notion that it is necessary to construe clause 8(1)(g) in a manner consistent with the principle that legislation will not, without language of irresistible clearness, be construed to overthrow fundamental principles [50]. However, its submission goes on to purport to extrapolate the limited constitutional doctrine of separation of Commonwealth judicial power under Chapter III into a fundamental common law principle that an administrative body may not determine for administrative purposes whether an offence has been committed. Nothing in the Authority's submissions requires the overthrowing of any fundamental principle.

14. In terms of the statement of principle in *Chu Kheng Lim*, nothing the BSA requires or permits the Authority to do anything that amounts to 'the adjudgment and punishment of criminal guilt'.

Chapter III

15. If the Authority's submissions as to the construction of clause 8(1)(g) are accepted, the appeal requires consideration of a second issue: whether clause 8(1)(g), to the extent that it authorises the Authority to make findings that a person has committed an offence, is invalid because it is inconsistent with Chapter III.

16. The Full Court's reasons (at 478 [76]) cite the following statement of principle by Brennan, Deane and Dawson JJ in *Chu Kheng Lim*:[2]

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth. That being so, Ch. III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s. 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.

17. Three points must be made about that statement of principle. First, unlike the present case, *Chu Kheng Lim* was concerned with the extra-judicial detention of individuals. It was not concerned with an administrative decision about whether a person had committed an offence.

18. Second, it is well established that the doctrine of separation of powers does not apply to the States. As French CJ held in *Assistant Commissioner Condon v Pompano Pty Ltd*:[3]

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[2] (1992) 176 CLR 1 at 27.

[3] (2013) 87 ALJR 458 at [22].

> ... [T]here is no implication to be drawn from Ch III of the *Constitution* that State courts are subject to the full doctrine of separation of powers. Various attempts to argue in State courts for separation of powers doctrines derived from *State Constitutions* have failed.

19. For that reason, the statement of principle of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* is quite properly limited in terms to:

> ... the adjudgment and punishment of criminal guilt *under a law of the* Commonwealth.[4]

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20. Similarly, in *Fardon v Attorney-General (Qld)*, McHugh J explained:[5]

> Nor is there anything in the Constitution that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law. The Queensland Parliament has power to make laws for "the peace welfare and good government" of that State. That power is preserved by s 107 of the Commonwealth Constitution. Those words give the Queensland Parliament a power as plenary as that of the Imperial Parliament. They would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be
> 20 determined by non-judicial tribunals. The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State. If a State legislates for a tribunal of accountants to hear and determine "white collar" crimes or for a tribunal of psychiatrists to hear and determine cases involving mental health issues, nothing in Ch III of the Constitution prevents the State from doing so. Likewise, nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts. The powers conferred on the Queensland Parliament by s 2 of the *Constitution Act 1867* (Qld) are, of course, preserved subject to the Commonwealth Constitution. However, no process of legal or logical reasoning leads to the conclusion that, because the federal Parliament may invest State
> 30 courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.

21. Thirdly, *Chu Kheng Lim* does not preclude administrative decision-makers from taking into consideration breaches of laws and norms of conduct in the performance of their duties. The Full Court's reasons in that regard, respectfully, misinterpret both the principle in *Chu Kheng Lim* and the power being exercised by the Authority.

22. In exercising its powers under the BSA, the Authority does not make any adjudgment of criminal guilt, but rather determines whether a licensee has complied with a licence
40 condition. Equally, the enforcement actions taken by the Authority under the BSA cannot be characterised as punishment of criminal guilt.

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[4] (1992) 176 CLR 1 at 27 (emphasis added).

[5] (2004) 223 CLR 575 at [40] per McHugh J (footnotes omitted).

Queensland examples

23. The Authority's submissions at [17]-[21] give examples of cases where administrative considerations of contraventions of offence provisions did not amount to findings of guilt or infliction of punishment. Queensland legislation includes similar examples.

24. The parole regime under the *Corrective Services Act 2006* (Qld) imposes a condition of parole orders that requires the prisoner 'not to commit an offence' (ss 200(1)(f)). The chief executive or a parole board has the power to amend or suspend a parole order if the chief executive or board reasonably believes the prisoner has failed to comply with a condition of the parole (ss 201(1)(a) and 205(2)(a)(i)). There is a separate power to amend or suspend a parole order if the prisoner is charged with committing an offence (s 205(2)(c)).

25. Similarly, under the *Liquor Act 1992* (Qld), the Commissioner has the power under s 134(1)(a) to cancel, suspend or vary a permit if the Commissioner is satisfied that the permittee has contravened the Liquor Act or s 321 or 323 of the *Racing Act 2002* (Qld). Disciplinary action can also be taken under s 136(1)(a) if the licensee *has failed* to comply with the Liquor Act. This should be contrasted with disciplinary action that can be taken under s 136(1)(b) where a licensee is *convicted* of an offence under the Liquor Act.

26. Under the *Mineral Resources Act 1989* (Qld) the Minister has the power to reject an application for the grant of a mining lease if the Minister is satisfied that the applicant had not complied with any requirement placed upon the applicant by or under the Act in respect of the application.[6]

27. The appeal should be allowed for the reasons set out by the Appellant.

V. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

28. The Attorney-General estimates that 15 minutes should be sufficient to present his oral argument.

Dated October 2014.

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[6] *Mineral Resources Act 1989* (Qld) s 267(a).

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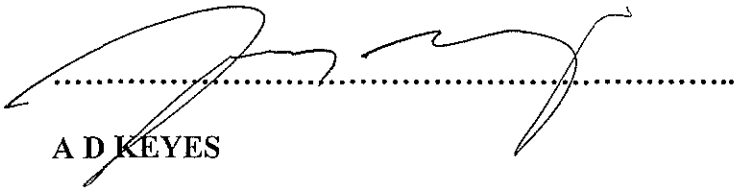

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