

**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

**ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL
FOR WESTERN AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

**PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND
LEGISLATION**

4. See Part VII of the Appellant's submissions, and Part V of the Respondent's submissions.

PART V: SUBMISSIONS

- 30 5. The Attorney General for Western Australia intervenes to address the issue raised by the Respondent's Notice of Contention. Although it is one of constitutional limitation of legislative power, the issue coincides with the proper construction of

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the relevant legislation. In the Full Court of the Federal Court, meaning was determined by what was found to be the underlying restriction on legislative power.

6. The Full Court approached construction of (the principally relevant) cl.8(1)(g) of Schedule 2 to the *Broadcasting Services Act 1992* (Cth) from the premise that; "an important principle in the Australian legal system [is] to the effect that the determination of whether or not a person has committed a criminal offence is vested in courts exercising criminal jurisdiction"¹. By vested, their Honours meant vested exclusively. From this premise, the Full Court construed the words of cl.8(1)(g) as not requiring the Australian Communications and Media Authority to determine whether a criminal offence had been committed, and so the constitutional issue did not arise².
7. Western Australia submits that the principle expressed by the Full Court as underlying and determining construction, is erroneous, being too broadly expressed. This error resulted in an incorrect construction of cl.8(1)(g) of the *Broadcasting Services Act 1992* (Cth).
8. The Respondent's contention, and the Full Court's decision, did not pay sufficient regard to the nature of the powers exercisable by ACMA, to which cl.8(1)(g) relates. The purpose of ACMA in considering the cl.8(1)(g) question is central to validity.
9. The literal meaning of the words in cl.8(1)(g) are clear enough and addressed in the submissions of the Appellant³. The matter to be added to (or perhaps emphasised from) the Appellant's submission in this respect is the importance, to construction of cl.8(1)(g) and to the matter the subject of Respondent's Notice of Contention, of the different ways that cl.8(1)(g) is engaged in the legislative scheme of which it is part.
10. Section 10(1)⁴ of the *Australian Communications and Media Authority Act 2005* (Cth) makes plain that ACMA's functions are regulatory and include; allocation, renewal, suspension and cancellation of licences and the taking of other enforcement action under the *Broadcasting Services Act 1992* (Cth)⁵ and the conduct of investigations⁶ and investigation of complaints concerning broadcasting services⁷. These powers are to be understood having regard to Part 10 of the *Broadcasting Services Act 1992* (Cth)⁸.

¹ *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 22 at 35 [114] ('*Today FM*') (Appeal Book at 180 ('AB')).

² *Today FM* [2014] FCAFC 22 at 36 [116] (AB at 181).

³ See Appellant's written submissions at [36]–[43].

⁴ Section 10 of the *Australian Communications and Media Authority Act 2005* (Cth) ('*ACMA Act*') is relevant, and ss.8, 9 and 11 are not, because the powers being exercised by ACMA in this matter are part of ACMA's broadcasting, content and datacasting functions, and not its telecommunications functions, spectrum management functions or additional functions.

⁵ *ACMA Act* s.10(1)(c).

⁶ *ACMA Act* s.10(1)(e).

⁷ *ACMA Act* s.10(1)(m).

⁸ The relevant operation of Part 10 is summarised by the Full Court; *Today FM* [2014] FCAFC 22 at 9–11 [38]–[42] (AB at 154–156).

11. Contravention by a licensee of the condition imposed by cl.8(1)(g) of the *Broadcasting Services Act 1992* (Cth) can have one or some (though unlikely all) of the following consequences. *First*, the issuing by ACMA of a remedial direction, in effect an administrative order to remedy the contravention⁹. *Second*, it could give rise to suspension or cancellation of the holder's license by ACMA¹⁰. Plainly enough, both of these powers involve an administrative decision by ACMA. *Third* (and relevantly), s.139(3) creates a criminal offence of a licensee breaching the condition of its license imposed by cl.8(1)(g). Any such prosecution must be brought and prosecuted by the Commonwealth DPP. ACMA has undoubted power to refer a complaint to the DPP¹¹, but ACMA is not a prosecutor. Obviously enough, the trial of any such prosecution is before a Court. *Fourth*, breach of the condition in cl.8(1)(g) is a contravention of a civil penalty provision¹². An application for civil penalty orders can only be brought by ACMA¹³, and the Federal Court has exclusive jurisdiction to make civil penalty orders¹⁴.
12. Plainly enough, in the third noted exercise of power—to refer an alleged breach of the cl.8(1)(g) license condition to the DPP—ACMA is not "determining whether or not a person has committed a criminal offence" and it is not exercising judicial power. Equally plain is it that in the fourth noted exercise of power—to proceed against a licensee for a civil penalty order for an alleged breach of the cl.8(1)(g) license condition—ACMA is not exercising judicial power. ACMA is not "determining whether or not a person has committed a criminal offence".
13. In this matter, the purpose of the inquiry by ACMA into whether the cl.8(1)(g) license condition had been contravened is dealt with in the evidence¹⁵. The description at [12] of the Appellant's submissions suggests that the purpose of the inquiry was, and is, as an aspect of ACMA considering the issuing of a remedial direction or suspension or cancellation of the Respondent's license.
14. In respect of the first and second exercises of power involving cl.8(1)(g) referred to above¹⁶, the decision as to whether the licensee used the broadcasting service in the commission of an offence, is "a step along the way"¹⁷ to a valid exercise of such powers; "the statute requires or authorizes the decision-maker to determine an issue ... as an essential preliminary to the taking of ultimate action or the making of an ultimate order"¹⁸.
15. Statutory processes by which administrative bodies find or make decisions that a statutory license holder has acted illegally or contrary to law are commonplace

⁹ *Broadcasting Services Act 1992* (Cth) s.141.

¹⁰ *Broadcasting Services Act 1992* (Cth) s.143.

¹¹ The power is at least impliedly recognised in ss.178(2) and 215(3) of the *Broadcasting Services Act 1992* (Cth).

¹² *Broadcasting Services Act 1992* (Cth) s.140A.

¹³ *Broadcasting Services Act 1992* (Cth) s.205G.

¹⁴ See generally, *Broadcasting Services Act 1992* (Cth) Part 14B Division 2, and in particular s.205F.

¹⁵ See Affidavit of Ian Lyall Robertson, 17 June 2013, at [9] (AB at 10).

¹⁶ That is; issuing by ACMA of a remedial direction, or suspension or cancellation of a holder's license because of breach of the cl.8(1)(g) license condition.

¹⁷ In the sense described in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340–341 (Mason CJ) ('*Bond*').

¹⁸ *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340 (Mason CJ).

where the administrative body is empowered to grant, condition, suspend or cancel such licenses.

16. To contend, as the Respondent does here, and as the Full Court held, that making such decisions, for such purposes, constitutes "determination of whether or not a person has committed a criminal offence", which power of determination is "[exclusively] vested in courts exercising criminal jurisdiction"¹⁹, misconceives the administrative power being exercised or ignores the purpose of the inquiry.
17. This confusion is illustrated by the way in which the Respondent, at [101] of its submissions²⁰, construes [81] of the Full Court judgment. At [81], their Honours abjure the distinction between "expressing an opinion" and "stating a finding"²¹. This is re-stated by the Respondent as rejection of the distinction between the "expression of an opinion" by ACMA and "the adjudication of criminal guilt". ACMA cannot adjudicate criminal guilt and in stating a finding of the prescribed *factum* in cl.8(1)(g) for the purpose of issuing a remedial direction or suspending or cancelling a license, ACMA is not "adjudicating" criminal guilt – it is making an administrative finding. Even though the administrative finding is as to whether a broadcasting service has been used in the commission of an offence, the sanctions of the criminal law do not attach to any such finding.
18. The "important principle"²² stated by the Full Court is too expansive. Uncontroversial would be a basal principle in the following terms; "... the determination of whether or not a person has committed a criminal offence, and the ordering of penalty for such offence, is vested [exclusively] in courts exercising criminal jurisdiction"²³. In issuing a remedial direction or suspending or cancelling a license, ACMA is not ordering a penalty in this sense.
19. The error of the Full Court can be demonstrated, and the basis of the error explained by, the following genera. *First*, matters dealing with the power of administrative bodies required to determine whether applicants for (usually) licenses are 'fit and proper'. *Second*, cases concerning restrictions (if any) on the power of Royal Commissions to inquire into illegal conduct. *Third*, the consequence of illegality to the existence of a duty of care or its breach in actions in negligence.

Administrative bodies determining whether licensees are fit and proper

20. It is common for legislation to require administrative bodies to determine whether applicants for, or holders of, licenses are 'fit and proper'. Whether a person has committed a crime is inevitably relevant to whether they are fit and proper. As such, whether a person has committed a crime, and the relevance of this to a

¹⁹ *Today FM* [2014] FCAFC 22 at 35 [114] (AB at 180).

²⁰ "There is in this respect, no meaningful distinction between the expression of an opinion by the Authority that an offence has been committed and the adjudication of criminal guilt. The Full Court properly treated the difference between the forming of opinions and the making of findings for an administrative purpose: Full Court 480, [81]-[83], and cf AS [22]. No error emerges from the Full Court's reasoning at 479, [78]: cf AS [27]-[28]."

²¹ *Today FM* [2014] FCAFC 22 at 24 [81] (AB at 169).

²² *Today FM* [2014] FCAFC 22 at 35 [114] (AB at 180).

²³ *Today FM* [2014] FCAFC 22 at 35 [114] (AB at 180) (underlined text added).

person's 'fitness', often arises and must be determined even though the person has not been convicted of a crime.

21. The legislative scheme considered in *Bond*²⁴ is illustrative. In that matter, the Australian Broadcasting Tribunal²⁵ conducted an inquiry to consider whether to suspend or revoke broadcasting licences held by companies associated with Alan Bond. The inquiry was as to whether Mr Bond was a fit and proper person and if not, whether this 'infected' companies with which he was associated that held broadcasting licenses. The Tribunal inquired into the circumstances of a payment of \$400,000 by a company associated with Mr Bond, to Sir Joh Bjelke-Petersen, in purported settlement of a defamation action²⁶. As part of this inquiry, the Tribunal also considered whether, in earlier hearings before it, Mr Bond "deliberately gave misleading evidence" or "deliberately gave false evidence"²⁷.
22. In coming to its finding about whether Mr Bond was fit and proper, and the effect of such finding upon its power to suspend or revoke licenses held by companies associated with him, the Tribunal found (*inter alia*) that Mr Bond had "deliberately given misleading evidence" and "deliberately given false evidence" to the earlier hearing²⁸. Obviously each constituted crimes, of various kinds.
23. No issue arose as to the Tribunal's power to make these findings, for this purpose. Indeed, Mason CJ²⁹ concluded that the Tribunal had erred in failing to exercise its power to determine whether the \$400,000 payment to Sir Joh was extorted or solicited by him³⁰. Such findings—of extortion and soliciting bribes—were open to the Tribunal to make, if sustained and sought, and subject of course to such findings not being vitiated by error.
24. Determination by the Tribunal of whether such extremely serious criminal conduct had occurred was uncontroversially merely "a step along the way"³¹ to a valid exercise of power where "the statute requires or authorizes the decision-maker to determine an issue ... as an essential preliminary to the taking of ultimate action or the making of an ultimate order"³².
25. Where, as here, the ultimate power being exercised by an administrative body is not judicial, it would be odd if decisions or findings along the way involved exercise of

²⁴ [1990] HCA 33; (1990) 170 CLR 321.

²⁵ Exercising power under s.17C(1) of the (then) *Broadcasting Act 1942* (Cth).

²⁶ *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 329–330 (Mason CJ).

²⁷ See *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 344, 'Finding 3'; 360 'Findings 3 and 4' (Mason CJ).

²⁸ *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 331 (Mason CJ).

²⁹ With whom Brennan and Deane JJ agreed; *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 365, 369.

³⁰ See *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 352–353 (Mason CJ).

³¹ *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340–341 (Mason CJ).

³² *Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340 (Mason CJ). A similar, though not identical issue is exposed by the reasoning of the Full Court of the Federal Court in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2006] FCAFC 69; (2006) 151 FCR 466 at 477–478; approved by Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350 at 361–362 [29]. There the power was that of the Companies Auditors and Liquidators Disciplinary Board to suspend or terminate a license, and the determination was as to whether a license holder had "failed ... to carry out or perform adequately and properly" functions required by Australian law to be carried out or performed by a registered liquidator.

judicial power. This oddity is not counteracted by the circumstance that the ultimate power being exercised by an administrative body could have been exercised by a court; such as in (say) *Albarran*³³. This is simply a standard chameleon-type power.

- 10 26. Of course, findings as to commission of offences can be publicly damaging to reputation, but this is not a unique indicia of the exercise of judicial, executive or legislative power. An administrative finding as to commission of an offence may lead to prosecution; but determining guilt or otherwise at a subsequent trial is an exercise of judicial power wholly separate from the administrative process in which an administrative finding is made.
27. It might be thought that the central issue in such matters is not that ventilated in this appeal, but one that might be thought to arise from decisions such as *X7*³⁴ and *Lee*³⁵. No such issue arises here.

Royal Commission inquiries into illegality

28. A body of authority of relevance to this matter is that concerning the power of Royal Commissions to inquire into illegal conduct, and the contention of invalidity of commissions for such purposes. There is a steady line of authority in this Court, commencing with *Clough v Leahy*³⁶, then *McGuinness*³⁷ and then the *Builders Labourers' Federation Case*³⁸ addressing the issue³⁹.
- 20 29. The *Builders Labourers' Federation Case* considered the validity of Letters Patent issued pursuant to the *Royal Commissions Act 1902* (Cth) and Victorian prerogative power⁴⁰ to inquire into whether the Respondent union, or any of its officers, "engaged in any illegal, improper or corrupt activities"⁴¹. Each of Gibbs CJ, Stephen, Mason, Aickin, Wilson and Brennan JJ⁴² confirmed, in response to the contention of invalidity of commissions of inquiry for such purposes, the validity of the "long-standing practice in England and Australia to hold commissions of inquiry into criminal conduct"⁴³.

³³ *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350 at 361–362 [29].

³⁴ *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92.

³⁵ *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 87 ALJR 1082.

³⁶ *Clough v Leahy* [1904] HCA 38; (1904) 2 CLR 139.

³⁷ *McGuinness v Attorney-General (Vic)* [1940] HCA 6; (1940) 63 CLR 73 (*McGuinness*).

³⁸ *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* [1982] HCA 31; (1982) 152 CLR 25 (*Builders Labourers' Federation Case*).

³⁹ See *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 87 ALJR 1082 at 1094 [18] (French CJ).

⁴⁰ See *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 47 (Gibbs CJ).

⁴¹ See *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 37 (Gibbs CJ). Indeed, also at 37, Gibbs CJ noted the commissions issued required that; "any finding that the [Respondent] or any officer or member of the [Respondent] has engaged in conduct amounting to a criminal offence be made only on evidence, admissible in a Court of Law, sufficient to place the [Respondent], officer or member on trial for that offence".

⁴² Murphy J dissented.

⁴³ *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 52 (Gibbs CJ). See also 63–68 (Stephen J), 86–89 (Mason J), 120 (Aickin J), 123–126 (Wilson J), 148–158 (Brennan J).

30. Mason J dealt at length with the rationale underlying this long standing practice⁴⁴, though his Honour's reasoning was not confined to Royal Commissions and statutory commissions of inquiry. His Honour commenced with the basal prohibition in 42 Edw III c 3, "...that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land"⁴⁵. In the course of addressing a proposition as to the validity of an inquiry into alleged criminal conduct of a public officer, where the purpose of the inquiry was to determine whether the officer should be disciplined or dismissed, Mason J agreed with the conclusion in *Cock v Attorney General* that such an inquiry would be valid "because it would be merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry"⁴⁶.

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31. Mason J's articulation of the "theory underlying" this conclusion is relevant to this matter⁴⁷:

... an individual is not "put to answer" [in the sense of 42 Edw. III c. 3], if he is compelled to answer a charge that he has or may have committed a criminal offence, in the course of an inquiry the object of which is to assist the executive government in deciding what action it should take on a matter of legitimate government concern, the finding of guilt or innocence being merely incidental to the attainment of that object. This is only consistent with the prohibition contained in the statute of Edward III if that prohibition is directed against commissions of inquiry into the guilt or innocence of an individual having no object of assisting the executive government beyond establishing the guilt or innocence of the individual.

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32. The purpose for which ACMA inquires into whether the license condition in cl.8(1)(g) has been contravened is central to validity. If ACMA's purpose is bare, or for "no object ... beyond establishing the guilt or innocence of the individual",

⁴⁴ See, in particular, *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 87–90.

⁴⁵ *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 87 (emphasis added). His Honour also referred at 87 to the reliance upon 42 Edw III c 3 by the New Zealand Court of Appeal in *Cock v Attorney General* (1909) 28 NZLR 405 at 423–424.

⁴⁶ *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 89, citing *Cock v Attorney General* (1909) 28 NZLR 405 at 425.

⁴⁷ *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 89. Dixon J put the matter in *McGuinness* [1940] HCA 6; (1940) 63 CLR 73 at 101–102 as follows:

.. the appellant's argument [objecting to the validity of a commission] reproduces what may almost be described as a traditional contention which for over three centuries has found from time to time a place in objections raised to some exercise of the Crown's power to appoint commissions of inquiry. The objection has seldom been brought before a court of law and, except in New Zealand [his Honour referred earlier to *Cock*], has not the support of a judicial decision. The colour which it receives from the course of constitutional development will not survive close examination. For while the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of right and into supposed offences, the principle does not affect commissions of mere inquiry and report involving no compulsion, except under the authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*.

This passage from Dixon J's judgment in *McGuinness* was cited with approval in *Builders Labourers' Federation Case* [1982] HCA 31; (1982) 152 CLR 25 at 51 (Gibbs CJ), 66 (Stephen J), 88 (Mason J), 125–126 (Wilson J), 154 (Brennan J).

such inquiry may be invalid. But, invalidity would derive from ACMA acting beyond its powers conferred by the Act. The constitutional issue raised by the Notice of Contention in this matter would not arise. ACMA's deficit of power would not result from a purported exercise of judicial power but from simple absence of power.

Civil courts making findings of participation in criminal enterprises

- 10 33. This is not particularly central, but demonstrates the inaccuracy of the Full Court's articulation of the "important principle in the Australian legal system... that the determination of whether or not a person has committed a criminal offence is vested [exclusively] in courts exercising criminal jurisdiction"⁴⁸. That this contention is erroneous is evidenced by cases such as *Miller v Miller*⁴⁹. The only issue in *Miller* was whether the driver of the stolen car owed a duty of care⁵⁰ to the passenger/other thief, it being contended that he did not because the passenger had engaged with him in a joint illegal enterprise⁵¹. At trial, both driver and passenger were found to be engaged in a joint criminal enterprise, and this finding was never challenged⁵².
34. It is impossible to reconcile this body of law with the Full Court's "important principle".
- 20 35. This demonstrates that what is (relevantly) uniquely judicial power is the determination of whether or not a person has committed a criminal offence for the purpose of the criminal law; which in turn means commission of an offence for the purpose of determining criminal sanction or penalty for such offence.

Conclusion

36. The power being exercised by ACMA in this matter⁵³ as an aspect of considering the issuing of a remedial direction or suspension or cancellation of Respondent's license is not bare, or for "no object ... beyond establishing the guilt or innocence of the individual". It is not contended by the Respondent that, other than for the reason articulated in its Notice of Contention, or as a matter of construction, ACMA lacks power to conduct the inquiry that it has.

⁴⁸ *Today FM* [2014] FCAFC 22 at 35 [114] (AB at 180).

⁴⁹ [2011] HCA 9; (2011) 242 CLR 446. The facts of the case were that the defendant, Maurin Miller, recklessly drove a car stolen by the plaintiff passenger, Danelle Miller, while drunk. Maurin lost control of the car. It struck a pole. One passenger was killed. Danelle was seriously injured. She sued Maurin claiming damages for negligence.

⁵⁰ See *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 at 452 [7] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵¹ Of using a motor vehicle without the consent of the owner, contrary to s.371A of the *Criminal Code* (WA).

⁵² See *Miller v Miller* [2009] WASCA 199; (2009) 54 MVR 367 at 384 [78] (Buss JA). See also generally, *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 at 464 [47] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) where they were stated to be "joint participants in an illegal act", and their Honours' conclusion at 483 [106] rested upon Danelle's withdrawal from that joint criminal enterprise.

⁵³ See above at [13].

PART VI: LENGTH OF ORAL ARGUMENT

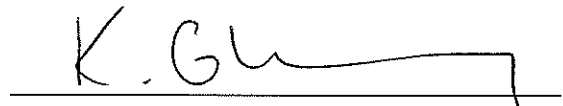
36. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

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