

**AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY v TODAY FM
(SYDNEY) PTY LTD (S225/2014)**

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 22

Date of judgment: 14 March 2014

Special leave granted: 15 August 2014

During a radio program on 4 December 2012 the Respondent broadcast a recording of a telephone call made by the program's presenters in Sydney to a hospital in London ("the Call"). During the Call, the presenters posed as Queen Elizabeth II and Prince Charles. One of the hospital staff, apparently believing that the presenters were indeed the Queen and Prince Charles, gave details on the condition of a patient at the hospital, the Duchess of Cambridge.

The Appellant investigated the broadcasting of the Call ("the Investigation"), taking into account submissions made to it by the Respondent. In a preliminary report on the Investigation ("the Preliminary Report"), the Appellant opined that in broadcasting the Call the Respondent had breached a particular condition of its radio broadcasting licence ("the Condition"). The Condition was contained in clause 8(1)(g) of Schedule 2 of the *Broadcasting Services Act 1992* (Cth) ("BSA"), which provided that the holder of a commercial radio broadcasting licence "*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*". The Preliminary Report stated that the Appellant was of the view that the Respondent had, on the balance of probabilities, committed an offence by communicating to third persons a private conversation in breach of s 11(1) of the *Surveillance Devices Act 2007* (NSW).

The Respondent applied to the Federal Court for orders restraining the Appellant from making any determination that an offence had been committed. On 7 November 2013 Justice Edmonds dismissed the Respondent's application. His Honour held that the Appellant, in making a determination as to whether the Condition had been breached, was entitled to express an opinion that an offence had been committed. Such an opinion did not amount to a determination of criminal guilt. Justice Edmonds held that the Appellant was entitled to rely on that opinion, rather than on a judicial determination of guilt, to impose regulatory sanctions under the BSA. The Respondent appealed.

The Appellant meanwhile issued its final report on the Investigation, in which it found that the Respondent had breached the Condition ("the Finding"). The Appellant also informed the Respondent that it would later consider remedial measures that it might take.

The Full Federal Court (Allsop CJ, Robertson & Griffiths JJ) unanimously allowed the Respondent's appeal and set aside the Finding. Their Honours held that the text of the Condition did not authorise the Appellant, as a body exercising executive power for the purpose of imposing sanctions under the BSA, to make a finding that an offence had been committed under another Act or law. The Full Federal Court found that the phrase "the commission of an offence" in the Condition required a determination of guilt by a court, which the Appellant could then take into account when investigating whether the holder of a licence had used a broadcasting service in breach of the Condition.

A "Section 78B notice" has been filed in this matter, with the Attorneys-General of the Commonwealth, Queensland, South Australia and Western Australia all giving notice to the Court that they intend to intervene in support of the Appellant.

Summonses for intervention have also been filed on behalf of Commercial Radio Australia Limited and Free TV Australia Limited.

The grounds of appeal include:

- The Full Federal Court, generally at [73]-[115], erred in construing cl 8(1)(g) of Sch 2 to the BSA, pursuant to which commercial radio broadcasting licensees "*will not use the broadcasting service or services in the commission of an offence*", as requiring that, for the purposes of enforcement action by the Appellant under s 141 or s 143 of the BSA:
 - a) the only permissible method for the Appellant to make an administrative finding of the commission of an offence is the recording of a conviction by a criminal court (or a like outcome of the criminal process, being an admission of guilt or discharge after finding the offence proved);
 - b) the Appellant is required to defer enforcement action until after (if at all) a criminal process has reached its relevant conclusion, and if there is such a criminal process, the Appellant is bound conclusively in its administrative findings by the outcome of such criminal process, whether it be guilt or acquittal, irrespective of the evidence and submissions that may incline the Appellant to a contrary view.

On 1 September 2014 a notice of contention was filed, the ground of which is:

- If, upon its proper construction, clause 8(1)(g) of Schedule 2 to the BSA authorises the Appellant to:
 - a) find that the holder of a commercial radio broadcasting licence has breached the Condition; and
 - b) take any action, pursuant to Part 10, Division 3 of the BSA, including for the purposes of enforcement action under ss 141 or 143,
prior to a competent court adjudicating that the licensee has used the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory, to the extent that any provision of the BSA, construed within the statutory scheme, purports to authorise such conduct, it is invalid, because it is, to that extent, inconsistent with the separation of executive and judicial power mandated by Chs II and III of the Commonwealth Constitution.