



HIGH COURT OF AUSTRALIA

4 March 2015

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY v TODAY FM (SYDNEY) PTY LTD

[2015] HCA 7

Today the High Court unanimously held that the Australian Communications and Media Authority has power to make an administrative finding or express an opinion that a person has committed a criminal offence for the purpose of determining whether the holder of a commercial radio broadcasting licence ("a licensee") has breached the licence condition prescribed by cl 8(1)(g) of Sched 2 to the *Broadcasting Services Act 1992* (Cth) ("the BSA"). That condition requires that a licensee not use its broadcasting service in the commission of an offence against a Commonwealth Act (other than the BSA) or a law of a State or Territory.

In December 2012, Today FM (Sydney) Pty Ltd, a licensee, recorded a telephone call between two presenters of one of its radio programs and two members of the staff of the King Edward VII Hospital in London, at which the Duchess of Cambridge was an in-patient. Today FM did not obtain the consent of either of the hospital staff to the recording. The recording was broadcast during the program some hours later and re-broadcast the following day.

The Authority initiated an investigation into the broadcast under the BSA and produced a preliminary investigation report, a copy of which was provided to Today FM. The report contained a preliminary finding that, in broadcasting the recording, Today FM had committed an offence under s 11 of the *Surveillance Devices Act 2007* (NSW) ("the SDA") (which, relevantly, prohibits the communication of a private conversation obtained, without the consent of the principal parties to that conversation, through the use of a listening device) and, consequently, had breached the cl 8(1)(g) licence condition. The Authority later finalised its report and determined that Today FM had breached the cl 8(1)(g) licence condition.

In June 2013, Today FM commenced proceedings in the Federal Court of Australia seeking declaratory and injunctive relief. It contended, first, that the Authority was not authorised to find that it had breached the cl 8(1)(g) licence condition unless and until a competent court adjudicated that it had committed the SDA offence. In the alternative, Today FM argued that, if the Authority was so authorised, the authorising legislative provisions are invalid because they are inconsistent with the separation of executive and judicial power under the Constitution.

At first instance, the Federal Court rejected both of Today FM's arguments and dismissed the proceedings but, on appeal, the Full Court of the Federal Court accepted Today FM's first argument and set aside the Authority's determination. By grant of special leave, the Authority appealed to the High Court. In allowing the appeal, the Court held that the Authority does have power to make an administrative determination that a licensee has committed a criminal offence as a preliminary to taking enforcement action under the BSA, notwithstanding that there has been no finding by a court exercising criminal jurisdiction that the offence has been proven. This is because, in making such a determination, the Authority is not adjudging and punishing criminal guilt. The Court also held that, in making a determination, the Authority is not exercising judicial power.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*