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

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: THE ISSUES

2. *First*, whether, upon its proper construction, clause 8(1)(g) of the *Broadcasting Services Act 1992* (Cth) (the **BSA**) and the *Australian Communications and Media Authority Act 2005* (Cth) (the **ACMA Act**), authorise the Australian Communications and Media Authority (the **Authority**) to make findings that a licensee has committed a criminal offence, as a step in determining that a licensee has used the broadcasting service or services in the commission of an offence against a Commonwealth Act, other than the BSA, or a law of a State or Territory.

3. As to the first question, the respondent (**TodayFM**) contends that, upon its proper construction, and as concluded by the Full Court (478, [76]), the ordinary meaning of the phrase "commission of an offence" carries with it the connotation that a Court exercising criminal jurisdiction has found that an offence has been committed. The text of clause 8(1)(g), construed in context, carries this ordinary meaning. Consequently, the germane provisions of the BSA and the ACMA Act do not authorise the Authority to make findings that a licensee has committed a criminal offence.

4. *Secondly*, if (and only if) the first question is answered affirmatively, whether the provisions of the BSA and the ACMA Act that authorise the Authority to make such findings are invalid, in providing for the exercise of judicial power otherwise than in conformity with Ch III of the Constitution.

5. If the second question arises, TodayFM contends that - having regard to the statutory scheme of the ACMA Act and the BSA, commencing with an investigation under s 170 and culminating in enforcement action under s 143 - if clause 8(1)(g) of the BSA empowers the Authority to make findings that a licensee has committed a criminal

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offence, that provision is invalid to that extent, because to that extent, the provisions provide for an exercise of judicial power contrary to Ch III of the Constitution, in that the power is exercised by the Authority, which is not a Court established pursuant to s 71, and constituted in accordance with s 72, of the Constitution.

6. TodayFM does not consider that, on the facts of this appeal, the issue identified at Appellant's Submissions (**AS**) [4] arises as a discrete issue. It instead arises only as a contextual matter that supports TodayFM's proposed construction of clause 8(1)(g). In this respect, the reasoning of the Full Court at 484-5, [99] is correct, and supports a narrow construction of clause 8(1)(g).

10 7. As to the issue identified at AS [3], to the extent that the issue arises discretely on the appeal, the Full Court's conclusion on the matter was correct for the reasons provided at 483-3, [89]-[90].

PART III: SECTION 78B OF THE JUDICIARY ACT 1903

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

PART IV: MATERIAL FACTS

9. TodayFM agrees with the statement of facts provided by the Authority.

10. The Full Court set out the factual background at (2014) 218 FCR 461, [6]-[19]. The primary judge set out the factual background at (2013) 218 FCR 447, [1]-[7].

20 ## PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

11. TodayFM accepts the Authority's statement of statutory provisions applicable to the appeal.

12. The notice of contention raises issues under Chapter III of the Constitution. Sections 1, 61 and 71 of the Constitution, which give effect to the doctrine of the separation of powers, by separately vesting legislative, executive and judicial powers of the Commonwealth, fall for consideration on that notice of contention.

PART VI: ARGUMENT

(1) The Statutory Scheme

30 #### *(a) The ACMA Act*

13. The Authority is an independent Commonwealth statutory authority established by s 6 of the ACMA Act, with powers and functions prescribed, *inter alia*, by ss 7, 10, and 11 of that Act and Parts 10 and 13 of the BSA, read with ss 3, 4 and 5 thereof.

14. Part 2, Division 2, describes the functions of the Authority. Section 10(1) sets out the Authority's broadcasting, content and datacasting functions. Of current relevance are the powers and functions identified at sub-sections (a), (c), (i), (j), (k), (l) and (m).

15. Part 3 governs the Authority's constitution and membership. Division 2 (ss 19 – 27) prescribes matters concerning membership. There is no requirement that members of the Authority have any legal or other prescribed qualifications in order to be eligible for appointment.

(b) The BSA

16. Section 3 of the BSA identifies the objects of the Act. Those include, by subsection 3(1)(b), to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs.

10 17. Section 4 articulates the statute's regulatory policy. Subsection 4(2) expressly states one aspect of the legislative intention informing the BSA:

> The Parliament also intends that broadcasting services[1] and datacasting services in Australia be regulated in a manner that, in the opinion of the ACMA:
>
> > (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 datacasting services…

18. Section 5 concerns the role of the Authority. Subsection 5(1) provides that, in order to achieve the objects of the BSA in a way that is consistent with the regulatory policy referred to in s 4, the Parliament:

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> (b) confers on the ACMA a range of functions and powers that are to be used in a manner that, in the opinion of the ACMA, will:
>
> > (i) produce regulatory arrangements that are stable and predictable; and
> >
> > (ii) deal effectively with breaches of the rules established by this Act.

19. Section 5(2) in turn provides for a norm of proportional regulation, such that the Authority will use its powers, or a combination thereof, in a manner that, in its opinion, is commensurate with the seriousness of the breach concerned. The Explanatory Memorandum to the BSA said this of clause 5:

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> It promotes the ABA's role as an oversighting body akin to the TPC rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities and legalism as has been the experience with the ABT. It is intended that the ABA monitor the broadcasting industry's performance against clear, established rules, intervene only when it has real cause for concern, and has effective redressive powers to act to correct breaches.

20. The BSA relates, *inter alia*, to commercial broadcasting services: s 11(b). Commercial broadcasting services require individual licences: s 12(1). The meaning of "commercial broadcasting services" is affected by s 14. Section 41D identifies the services authorised by commercial radio broadcasting licences.

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[1] "Broadcasting services" is defined at s 6 of the BSA.

21. Each commercial radio broadcasting licence is subject to the conditions set out in Sch 2, Part 4 to the BSA and such other conditions as are imposed under s 43: s 42(2)(a) and (b). Section 43(1) permits the Authority to give written notice to a commercial radio broadcasting licensee, to vary or revoke a condition of the licence, or to impose an additional condition on the licence (save for those set out in Sch 2, Part 4 to the BSA).

22. Part 10 of the BSA concerns remedies for breaches of licensing provisions. Division 3 of that Part concerns actions in relation to breaches by licensees. Section 139(3) states the conditions under which a person is guilty of an offence by reason of a breach. Section 140A(3) provides that a commercial radio broadcasting licensee must not breach a condition of the licence set out in sub-clause 8(1) of Schedule 2. Any such breach is a continuing breach: s 140A(7) and (8). Section 141(1)(b) empowers the Authority to give remedial directions to a person who is a commercial radio broadcasting licensee, where satisfied that the person has breached, or is breaching, a condition of the licence. Such breach may constitute an offence (s 142((3)) and contravention of a civil penalty provision: s 142A.

23. Sections 143(1)(b), (c) and (d) authorise the Authority to suspend a commercial radio broadcasting licence for a period not exceeding 3 months or to cancel the licence, where the licensee breaches a condition of the licence. If the Authority proposes to take action under s 143(1), it must notify the licensee of this intention and provide a reasonable opportunity to make representations to the Authority in relation to the proposed action: s 143(2).

24. The Second Reading Speech to the BSA (Senate Hansard, 4 June 1992, Senator Collins) said this in respect of the breaches of licence conditions:

> The ABA has the following range of remedies available to it:
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> (a) discussions with the service provider with a view to rectifying the problem;
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> (b) imposition of a licence condition such as requiring compliance with a code of practice;
>
> (c) briefing the DPP on the breach, with the possibility of Court imposed fines;
>
> (d) issuing a notice to take a specified action to remedy a breach in a specified time or to cease providing a service;
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> (e) briefing the DPP on breach of the notice, with the possibility of Court imposed fines;
>
> (f) for licensed services, suspension or cancellation of the licence;
>
> ...
>
> To avoid double jeopardy the ABA is limited to undertaking action under only one of (c) and (d) at a time.

25. Part 13 of the BSA concerns information gathering. Part 13, Div 2 (ss 170 – 180) governs investigations. Section 172 permits the Authority, in conducting an investigation, to call for written submissions from members of the public. Section 173 permits the Authority to summons a person to attend or provide other information to the Authority.

26. By the operation of s 4(4) of the ACMA Act, an investigation under s 170 ends either: (a) if the Authority decides to prepare a report about the investigation under s 178 of that Act, at the end of the day the Authority completes the report; or (b) otherwise, at the end of the day the Authority completes the investigation.

27. Section 178(1) provides that the Authority may prepare a report on an investigation, and must do so in respect of an investigation conducted at the direction of the Minster. Section 178(2) provides:

> If a report on an investigation relates to conduct that could constitute an offence under this Act or another law of the Commonwealth, the ACMA may give a copy of the report or of a part of the report to the Director of Public Prosecutions.

28. By s 215(3), in deciding whether to refer a matter to the Director of Public Prosecutions (**CDPP**) for action in relation to a possible offence against this Act, the Authority must have regard to any relevant guidelines in force under s 215(4).

29. Part 13, Division 3 concerns hearings. There is a marked contrast between the procedures and substantive protections conferred upon a person under Div 2 and Div 3. Examinations under Div 2 are private (s 175), while those under Div 3 are presumptively public (s 187). Division 3, unlike Div 2, imposes mandatory requirements on the matters the Authority must take into account: s 197 (read with s 196), and imposes more stringent criteria in respect of representation: cf s 175 and s 198(1) and (2). Cf also s 174(2) and 195(2). The general provisions of Division 4 complement these protections in respect of hearings (but not Div 2 investigations): s 200(3). See Full Court 486, [105]

30. Part 14 provides for appeals to the Administrative Appeals Tribunal (**AAT**) in respect of certain decisions the Authority is authorised to make by the BSA. An appeal authorised by s 204(1) of the BSA is to be brought in accordance with ss 27(1) and 29 of the *Administrative Appeals Tribunal Act 1975* (Cth).

31. Section 209(1) of the BSA provides that an offence against the BSA may be prosecuted at any time. Section 209(4) provides that the Federal Court has jurisdiction to hear and determine matters arising under the Act. The Explanatory Memorandum to the BSA said this in respect of clause 208 (now s 209):

> Clause 208(4) confers jurisdiction on the Federal Court to hear any matter arising under the Act. The aim of this clause is to allow serious matters to be heard by the Federal Court. Because decisions by the courts could fundamentally effect [*sic*] the operation of the Act, it is intended that the DPP could take cases that are likely to set precedents to the Federal Court to assist in consistency in judicial decisions on the operation of the Act.

(c) The 2007 Act

32. The long title to the *Surveillance Devices Act 2007* (NSW) (the **2007 Act**) describes it, *inter alia*, as an Act to "regulate the installation, use, maintenance and retrieval of surveillance devices." Section 4(1) defines "surveillance device" in terms that include a listening device. A listening device, in turn, is any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation: s 4.

33. Part 2 of the 2007 Act provides for matters relating to the regulation of installation, use and maintenance of surveillance devices. A note to the Part states that offences in the Part must be dealt with on indictment,[2] save in respect of those offences listed in Part 10 of Table 2 of Schedule 1, which may be dealt with summarily.

34. Section 7(1)(b) provides that a person must not knowingly install, use or cause to be used or maintain a listening device to record a private conversation to which the person is a party. The meaning of "private conversation" is affected by s 4. Section 11(1) 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.

35. Part 6 concerns miscellaneous matters. Section 55 provides that proceedings for an offence against the 2007 Act (other than proceedings that are to be dealt with on indictment) must be commenced within 2 years after the date on which the offence is alleged to have been committed. Proceedings for an offence against the Act or the regulations must not be instituted without the written consent of the Attorney General: s 56(1).

(2) The Proper Construction of Clause 8(1)(g)

36. Below, we *first* identify salient aspects of the text. *Secondly*, we set out TodayFM's proposed construction of the clause 8(1)(g) condition and textual matters that support it. *Thirdly*, we outline the Authority's apparent proposed construction and its criticisms of the Full Court, and identify difficulties in each. *Fourthly*, we identify matters of context that favour the narrower construction for which TodayFM contends.

(a) The Text

37. It is necessary to begin with the process of construing the language used.

38. The phrase "commission of an offence" has various peculiar features. *First*, it is silent as to the person(s) whose commission of an offence may attract the operation of the condition. *Secondly*, it omits a form of language, frequently found in cognate provisions, requiring that the Authority suspects or believes on reasonable grounds that an offence has been committed.[3] Subject to generic references in ss 5(1)(b) and (2) and s 141(1)(b), nothing within Sch 2, Part 4 or the relevant empowering provisions of the BSA speaks of the Authority being satisfied of,[4] forming an opinion,[5] or making a determination[6] in respect of, the relevant matters. *Thirdly*, it uses the compound concept "use the

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[2] See s 5 *Criminal Procedure Act 1986* (NSW)

[3] *Australian Passports Act 2005* (Cth), s 23(1)(b); *Liquor Act 1992* (Qld), s 175(1); *Fisheries Act 1994* (Qld), s 146(2); *Crimes Act 1900* (NSW), s 357(2), considered in *Hardman v Minehan and Another* (2003) 57 NSWLR 390 at 392-393, [11] (Meagher JA); 394, [20]-[22] (Tobias JA); 406-407, [106] – [110], (McColl JA); *Kendall v Telstra Corporation Ltd* (1994) 35 ALD 53 at 61 (Spender J)

[4] Cf s 65 *Migration Act 1958* (Cth) discussed in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [127]-[137]

[5] *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-277; *Bruce v Cole* (1998) 45 NSWLR 163 at 184; *Jabetin Pty Ltd v Liquor Administration Board* (2005) 63 NSWLR 602 at 617 [37]-[38]

[6] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 264 (Brennan CJ, Toohey, McHugh and Gummow JJ)

broadcasting service…in the commission of an offence", the preposition "in" connecting the two components of the phrase.[7] It thereby posits two enquiries, the first concerning whether an underlying offence has been committed and the second, whether, in committing that offence, the broadcasting service was used.[8] In respect of certain statutes, the commission of an offence may, given its character, necessarily entail the use of the broadcasting service. In others, this will not be so. *Fourthly*, the phrase "the commission of an offence" is not defined, and is one of uncertain content, amenable to having different meaning in different statutory contexts: *Wiltshire v Barrett* [1966] 1 Q.B. 312 at 328-9 (Davies LJ). However, the basal notion of the commission of an offence denotes a factual and legal conclusion, capable of being reached only once a competent decision-maker has considered whether the physical and fault elements of the underlying offence are satisfied, and that no available defence or exception applies.

(i) TodayFM's proposed construction

39. To give operation to the clause 8(1)(g) licence condition, it is necessary to give some amplified content to the phrase "the commission of an offence".

40. Properly understood within the context of the BSA, clause 8(1)(g) predicates a two-step structure. Under that structure, it is only in cases where the underlying offence has been inarguably established as being committed that there will be the possibility of a breach of the licence condition, *if* the licensee uses its broadcasting service to commit the offence.

41. AS [40.1] suggests that the Full Court erroneously bifurcated the "single composite" licence condition into two supposedly separate elements. However, the Full Court did no more than the Authority expressly does in AS [36] and [38.1]. It understood use of the service as being the "focus" of the licence condition from the perspective of the Authority, and determined that whether an offence has been committed was an issue not properly determined by the Authority. It is artificial to suggest otherwise. The broadcasting service is the means by which an offence is committed. These two components, while compound, can be uncoupled. Both the reasoning of the Full Court at 478, [74(c)] – [75], and the primary judge's observations at 453-454, [24] reflect this approach:

> The focus of the condition, and thus the ACMA's inquiry, is the use of the broadcasting service in the commission of the underlying offence, not the licensee's liability for any underlying offence.

42. The notion of the "underlying offence" is significant. The task, if any, to which the Authority's attention is directed in respect of clause 8(1)(g), is whether the broadcasting service has been used in a certain respect; that is, in the commission of an offence. A licensee may commit a criminal offence other than by use of its broadcasting service. It may misuse the broadcasting service in ways falling short of the commission of an offence. The task to which the Authority's attention is directed in respect of clause 8(1)(g), is whether the broadcasting service has been used in a certain respect. Once the premise that an offence has been committed is established, the Authority, if required, is well equipped to investigate and determine whether the broadcasting service has been used in the commission of an offence. The Authority's role is not to determine whether

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[7] *DPP v Milienon* (1991) 22 NSWLR 489 at 494 (Lee CJ at CL)

[8] The latter enquiry may involve questions as to the role the broadcasting service plays in the commission of the offence and the extent of use: *DPP v George* (2008) 102 SASR 246 at [65], [177] (Doyle CJ, White J agreeing).

the underlying offence has, in fact, been committed. Having regard to its composition, nature and role, it could not properly do so:[9] Full Court 466, [23] and 486, [105]. That is a matter that should be investigated and determined by others. That this is so emerges from the regime created by the BSA.

43. *First*, in performing its powers and functions, the Authority, as an administrative agency, cannot accommodate notions of onus otherwise applicable in respect of findings of criminal guilt, the operation of defences (including the allocation of proof in respect thereof) or the application of exceptions.[10]

44. *Secondly*, while, in certain administrative contexts, the practical situation will remain that it is in the interests of a party to adduce particular evidence: *East v Repatriation Commission* (1987) 16 FCR 517 at 534; the BSA does not afford any means by which findings might be tested, evidence might be adduced, or proof of matters relevant to a defence might be advanced. This is strikingly so within the context of Part 13, Div 2.

45. *Thirdly*, the BSA lacks any of the rights and protections one would naturally expect where a body is vested with power to make findings concerning the commission of an offence. In an investigation under Part 13, Div 2, the licensee is afforded the opportunity to make submissions to the Authority, but this does not amount to an ability to conduct a defence, for example, by testing evidence ostensibly inculpating the licensee. The somewhat one-sided structure of Part 13, Div 2, which operates primarily in favour of the Authority in the conduct of investigations, indicates that the Parliament did not intend the Authority to be given the ability to investigate and determine whether a criminal offence has been committed.

46. Against this background, the substantive presumption of construction that the Parliament does not intend to achieve a result that is manifestly unfair or unreasonable, further militates against a broad construction of clause 8(1)(g): Full Court 486, [105].[11]

47. The statutory text supports TodayFM's proposed construction. There is an important textual contrast between the operative language of s 178(2) – "conduct that could constitute an offence" – and that of the clause 8(1)(g) licence condition – "in the commission of an offence". Where a legislature could have used the same word or phrase, but elected to use a different word or phrase, the presumed intention is to change the meaning of the language.[12] Clause 8(1)(g) uses the noun "commission" to denote the

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[9] The opinion expressed in the Report supports this concern. Even if the 2007 Act applies, there is a real issue as to whether sections 7 and 11 thereof have been contravened. It does not appear to be the case that the recording of the telephone conversation was done by a "listening device" for the purposes of the 2007 Act. Further, if a listening device was used, it is not clear how TodayFM used its broadcasting service to commit the offence (within the meaning of the clause 8(1)(g) licence condition). Having regard to s 11 of the 2007 Act, TodayFM has arguably not breached the provision, because it has not used the record of the conversation to obtain the relevant knowledge.

[10] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH OF 2004 and Another* (2006) 231 CLR 1 at 17, [40] (Gummow ACJ, Callinan, Heydon and Crennan JJ); *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356 (Woodward J), 366 (Northrop J), 369 (Jenkinson J).

[11] See further: *DPP v Leys* (2012) 296 ALR 96, [48] (Redlich and Tate JJA and Forrest AJA); *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ) (approved by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]); *Inland Revenue Commissioners v Hinchy* [1960] AC 748 at 768; D Greenberg (ed) *Craies on Legislation* (10th edn) (London: Sweet & Maxwell, 2012) at 742

[12] *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 25 (Irvine CJ); *O'Sullivan v Barton* [1974] SASR 4 (Mayo J); *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 (Lander and Buchanan JJ, North J dissenting). Similarly, the Court will narrowly construe penal provisions attended by any ambiguity: *Beckwith v R* (1976) 135 CLR 569 at 576 (Gibbs J); *R v Adams* (1935) 53 CLR 563 at 567-8 (Rich, Dixon, Evatt and McTiernan JJ)

committing or perpetrating of a crime.[13] This differs from the notion of conduct that could constitute an offence.

48. As recognised by the Full Court at 485, [100]-[103], the use of "could" is significant, but for reasons contrary to those identified by the primary judge. "Could" is a modal verb which denotes a potential event or situation, indicates an inclination, or expresses uncertainty.[14] Its use indicates that the only matter upon which the Authority is authorised to form an opinion, while conducting an investigation under Part 13, Div 2, is the provisional matter of whether certain conduct *could* constitute an offence.[15] The use of "could" indicates that the question of whether such conduct *in fact* constitutes an offence remains provisional until prosecuted by the proper authority and established, to the requisite standard of proof, in a competent court. Section 178(2) does not posit that the question of whether such conduct could constitute an offence is a matter upon which the Authority may form an opinion, which opinion will in turn provide the factum on the basis of which new rights or obligations can be established. This emerges from the plain language of the provision and is supported by the canon of construction *expressio unius est exclusio alterius.*[16]

49. This operation fully accounts for the language of s 179(3)(b), discussed by the primary judge at 455, [31] and the Full Court at 484, [97]. The publication by the Authority of a report that stated that conduct could constitute an offence could, without more, carry some likelihood of prejudicing the fair trial of a person. Contrary to AS [28], s 179(3) bears no weightier significance.

50. As correctly held by the Full Court at 488-489, [110]-[114], it is necessary to construe clause 8(1)(g) in a manner consistent with the principle that, unless unavoidable, legislation will not, without language of irresistible clearness, be construed so as to overthrow fundamental principles: *Potter v Minahan* (1908) 7 CLR 277 at 304, [121] (O'Connor J); *Lee v NSW Crime Commission* (2013) 302 ALR 363 at [313] (Gageler and Keane JJ). Amongst the fundamental principles and systemic values the principle of legality protects, are the maintenance of separation between the executive and the judicial function, the affording of clear and strong protections to persons in respect of whom findings concerning the commission of criminal offences may be made, and a fundamental right not to have findings of criminal guilt made without that finding being arrived at by a competent Court. If Parliament had intended to abrogate that right, this should and would have been done by plain statutory language. It is not correct, as contended at AS [43], that it is sufficient clarity for a statute to use language such as "commission of an offence" to convey the intention that an administrative power is to be exercised on a "non-conviction basis".

51. Given the subject matter of the condition (commission of a criminal offence), and consistent with the principle of legality, the *absence* of express provision for the Authority

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[13] *Macquarie Dictionary* 10th noun meaning

[14] *Macquarie Dictionary* (5th Edition) (2009) 2nd – 4th meanings

[15] If the Authority forms such an opinion, it may, but need not, give a copy of the investigation report, or a part thereof, to the CDPP. Any such referral is in turn affected by s 215 of the BSA. "May" in this context indicates that the course of referring the matter to the CDPP is open to the Authority, if, in its opinion, it is appropriate. It does not indicate some further unstated alternative, by which the Authority may itself form an opinion as to whether the conduct could constitute an offence.

[16] DC Pearce & RS Geddes, *Statutory Construction in Australia* (8th edition) (Australia: LexisNexis Butterworths, 2014) at [4.33]-[4.35]

to be satisfied, to form an opinion or to determine whether an offence has been committed, that is significant. This is especially so where:

(a) the clause 8(1)(g) licence condition in principle comprehends the universe of Commonwealth and State and Territory criminal laws (in contrast to the limited enumerated empowering statutes in Part 2, Div 2 of the ACMA Act); and

(b) the clause 8(1)(g) licence condition, and the empowering statute more broadly, lack any substantive criteria to guide the exercise of the Authority's putative discretion. One would expect these to be included were the question of the commission of an offence properly the subject of a discretionary exercise of power by the Authority.

52. Similarly, if the argument on TodayFM's notice of contention succeeds, such that, read together the empowering provisions of the scheme, of which ss 43, 141, 143, 170 and 178 form part, are contrary to Ch III, s 15A of the *Acts Interpretation Act 1901* (Cth) would apply so that clause 8(1)(g) would be read down, and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth.

53. One further textual indicator supports the application of the principle, and the resolution of the appeal in favour of a narrow construction of the BSA: see Full Court 481, [87]. When regard is had to the text of the BSA as passed, on 14 July 1992, it becomes apparent that, as enacted, the only reference to the notion of commission of an offence or its cognates, was within the clause (8)(1)(g) licence condition (which was identical to its current terms) and ss 41(2)(a) and 147(a). While the current legislation contains various provisions that use this language (including ss 41CA(c)(i), 43AA(3)(b)(i), 61AG, 136F, 138, 139 and 142) the original legislation consistently used the different notions of commission of an offence and being guilty of an offence (notably in ss 138(1) and 139 and 142) in distinct senses. The latter connoted the facts and matters that would constitute a person as being guilty. The former connoted a matter conditioned by establishing a state of mind on the part of a person, and hence a matter only properly to be adjudicated by a competent Court. It is in this manner that the clause 8(1)(g) licence condition is correctly construed.

(ii) The Authority's apparent proposed construction

54. The Authority contends that the Full Court started from a premise concerning a binding, authoritative determination of rights, and proceeded to a conclusion of statutory construction: AS [13]. This is a mischaracterisation.

55. The Full Court began with the process of construing the language used: 477-478, [72]-[73]. It directed itself to six textual matters arising from the language of the statute (479-481, [78]-[87]) and seven contextual matters that buttressed the Court's preferred textual construction: 484-486, [94]-[105]. As part of that analysis, it properly sought to characterise the exercise mandated by the statute: 478-479, [74]-[78]. The submission that the Full Court's exercise of construction (at [80]) harks back to the description of the function of a Court exercising criminal jurisdiction (at [76]), does not exhibit any error of reasoning of the kind the Authority suggests. The Court identified the ordinary usage of a phrase not otherwise expressly defined by the statute. That it corresponds with the matters identified at [76] is a function of, supports, and does not detract from, that usage.

56. Instead, various aspects of the Authority's approach exhibit the error it attributes to the Full Court. *First*, the manner in which the first issue on the appeal is framed, at AS [2], is

revealing. The question is framed in functional and not linguistic terms. *Secondly*, the Authority departs from a consideration of the range of permissible findings of an administrative decision-maker: AS [15]-[21].[17] *Thirdly*, the Authority fails directly to attend to the meaning of the language used in clause 8(1)(g). It is convenient to begin here.

57. Nowhere in its submissions does the Authority identify the correct meaning to be ascribed to the phrase "[use the broadcasting service(s)...] in the commission of an offence". It never directly addresses the language used. AS [53.2]-[52.3] are submissions concerning available evidence; AS [53.4] is a submission concerning the implications of the Authority's proposed construction. Similarly, the Authority re-drafts clause 8(1)(g) in the manner in which it contends it must be read in order to conform to the Full Court's construction: AS [40]. That re-drafting is misconceived, and neglects the fact that any construction of the subject phrase requires some amplification of its text and meaning. The Authority then approaches the task of construction indirectly by observing that "whether a person has committed an offence is a question of fact", and juxtaposes this proposition with the role of a criminal Court, being to adjudicate whether there is criminal guilt and, if so, determine punishment: AS [46]. However, this contention begs, but does not answer, the question of construction, which concerns what the statutory text denotes in the statutory context.

58. It appears, however, to be the case that, on the construction for which the Authority contends, the commission of an offence connotes the congeries of events and mental states capable of constituting a crime, as they occur, and prior to their curial characterisation as such.

59. The Authority's proposed construction involves the following. *First*, the Authority has the power to issue a direction under s 141(1)(b). Those remedial directions are to have the character of requiring action directed to ensuring that the person does not breach a licence condition or that a breach is unlikely to occur in the future. Compliance with those directions is required and breach constitutes a criminal offence: s 142(3), and of a civil penalty provision: s 142A(2). Any failure to comply with the direction exposes the licensee to the risk of suspension and cancellation of the licence: s 143(1). *Secondly*, no provision is made for the licensee to have any role in addressing or leading material bearing upon the Authority arriving at the relevant state of satisfaction. *Thirdly*, the Authority needs to be satisfied that a licence condition has been, or is being, breached. *Fourthly*, the Authority can be satisfied of a breach of clause 8(1)(g) in respect of the commission of any offence against Commonwealth legislation other than the BSA, or a State or Territory law.

60. It follows that, on its preferred construction, the Authority is given a power to erect mandatory directions adverse to the interests of a licensee, contingent upon its determination that the licensee has, *inter alia*, committed an offence, without any provision to protect the reputation or interests of the licensee. Further, no provision is made for challenging such a state of satisfaction by appeal to the AAT, such that there could be a merits review of a determination by the Authority of the licensee's commission of a criminal offence: s 204. All that would be left to the licensee would be administrative law relief, whether under s 75(5) of the Constitution, s 39B of the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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[17] In this respect, the Authority's reliance on *General Medical Council v Spackman* [1943] AC 627 (e.g., AS [20] and [53.5]), is misconceived for the reasons identified by the Full Court at 482-483, [88]-[90].

61. It is important to recall that the subject under consideration is a determination that a corporate person has committed a crime; the most serious determination that can confront a commercial organisation. Unconstrained by a construction requiring antecedent curial determination, clause 8(1)(g) would empower the Authority to take material steps adverse to the interests of a licensee in respect of a vast range of potential factual circumstances called up by the criminal law throughout the Commonwealth from time to time, without the licensee having any capacity to contest its innocence beyond conventional administrative law remedies, which would become available only after the determination by the Authority.

62. The Authority observes (at AS [39]) that neither the text of ss 141 and 143 nor the wording of clause 8(1)(g), nor any other provision of the BSA, expressly or impliedly states that a conviction by a criminal Court is a precondition for the exercise of administrative power under ss 141 or 143. This misses the point. Sections 141 and 143 are drafted in a manner that generically picks up all licence conditions, and are not drafted in a manner particular to any one of these. The clause 8(1)(g) licence condition gives rise to the current difficulty. The specific matter of its construction and interaction with ss 141 and 143 is to be resolved by its proper construction. Moreover, the Authority's observation applies *mutatis mutandis* to the construction for which it contends - that is, it is necessary to construe the language and, to some extent, to read in words. This is so, *inter alia*, because whether a person commits an offence is not necessarily a mere question of fact, but may involve issues of fact and law, and mixed issues of fact and law (including in respect of the operation of defences).

63. Nor did the Full Court elide the notion of "commission of an offence" with that of "conviction[18] for an offence": cf AS [40.2] and [41]. The judicially recognised distinction between the notions of commission of an offence and conviction for an offence referred to by Latham CJ in *Nassoor v Nette* (1937) 58 CLR 446 at 454 does not progress the current analysis. In *Nassoor*, Latham CJ observed (emphasis added) that: "the words "has committed an offence" *do not in themselves* mean "has been convicted of an offence"." There is no suggestion to the contrary. What must be determined is what the text of clause 8(1)(g) denotes in its context. That, indeed, was the form the argument followed in *Nassoor* (456).

64. Similarly, there is nothing anomalous in a result by which the Authority must treat a criminal finding as conclusive for its regulatory purposes. Nor that it must treat an acquittal as conclusive of the question of whether an offence has been committed. Further, the Authority would continue to be be able to have regard to facts bearing upon the exercise of its related discretions: Full Court 482, [89].

65. As observed by the Full Court at 485-486, [104], the construction advanced by the Authority is apt to lead to complex and conflicting regulation. Upon that construction, the Authority may purport to determine that a licensee has breached clause 8(1)(g) and, on that basis, purport to take remedial action pursuant to s 141(1), or cancel the licensee's licence pursuant to s 143(1). The latter decision may be subject to challenge of the present kind, or appeal to the AAT under s 204(1). The underlying offence may pick

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[18] "Conviction" can connote the complete orders made by a Court after finding an accused guilty of an offence: *Re Stubbs* (1947) 47 SR (NSW) 329; or finding an accused person guilty of the offence charged; or the recording of a guilty finding by a Court: *Griffiths v* R (1977) 137 CLR 293. "Convicted of an offence" has been held to connote found guilty or pleaded guilty: R *v Robertson;* R *v Golder* [1987] 3 WLR 327 (in respect of the *Police and Criminal Evidence Act 1984* (c 60) s 74).

up any Commonwealth, State or Territory law. Pursuant to s 139(3) of the BSA, that breach itself is a criminal offence, to be prosecuted in the Federal Court by the CDPP. Highly complex questions arise as to the manner in which a licensee could, upon defending that derivative offence, establish exculpating matters in respect of the underlying offence (especially were it not an offence arising under a law of the Commonwealth). Concurrently, the Australian Federal Police may investigate whether the conduct predicating the Authority's finding of breach constitutes the commission of an offence. The CDPP may determine not to prosecute that offence, or any derivative offence involved in breaching a licence condition (pursuant to s 139 and/or 140 of the BSA). It may prosecute the offence and fail at trial. Alternatively, it may succeed at trial, but the Authority later come to a different conclusion as to whether an offence has been committed and whether the broadcasting services was used in the course thereof. These matters are not beyond resolution, but a scheme expressly contemplating such complexity might be expected expressly to provide for it.

66. "Commission of an offence" is a phrase without a settled meaning, and the meaning of which is affected by its context. An available construction of clause 8(1)(g) is one under which that phrase extends only to those offences that have been curially determined. As accepted by the Full Court (478-479, [74]-[77]) clause 8(1)(g) predicates a two-step structure. The basal notion of the second step - commission of an offence - denotes a legal conclusion, capable of being reached only once a competent decision-maker has considered whether the physical, mental and fault elements of the underlying crime are satisfied, and that no available defence or exception applies: Full Court 479-480, [80].

(b) The Context

67. The Full Court correctly concluded that matters of context supported the textual reading it preferred: 484-486, [94]-[105].

68. The legislation operates in a consistent manner in respect of the commission of offences. An offence committed under ss 139(3), 140 or 140A of the BSA may be prosecuted at any time: s 209(1). It is to be prosecuted by the CDPP, in proceedings brought in the Federal Court: s 209(4). The BSA operates in a cognate manner in respect of contraventions of civil penalty provisions. The Authority may apply for a civil penalty order (s 205G(1)) in the Federal Court, which Court must only make a civil penalty order if satisfied of the matters in s 205F(1).

69. The Full Court correctly identified the harm that might be visited upon a licensee were findings of the kind the Authority purported to make authorised by the BSA: 480, [81]-[83]. While the report is one step along the way to the Authority's consideration of possible enforcement action, that action was directed, within a clear legislative scheme, to implementing (one of) a series of statutorily identified outcomes; each of which would have affected the reputation and other interests of TodayFM.

70. It is important to recall that the appeal concerns only *one* of the standard conditions of licence. It does not similarly affect other standard conditions of licence. It does not similarly affect the role of other regulatory bodies, such as the Australian Federal Police, to take steps immediately to prevent the continuation of any conduct apprehended to be criminal in character. This narrow scope can be contrasted with the otherwise vast field in respect of which the Authority would be authorised to make findings concerning the commission of a criminal offence.

71. AS [37], contends that the scope of offences which might fall within the clause 8(1)(g) licence condition is not "very wide", but is instead "necessarily limited by the fact that the broadcasting service (as defined) must be used in its commission." This is not so. Read as requested by the Authority, clause 8(1)(g) necessarily has the potential to comprehend the universe of Commonwealth and State and Territory criminal laws: Full Court 478, [74(a)]. The only substantive constraint that arises does so by virtue of the fact that the offence must be capable of being committed through the use of the broadcasting service. This may impose only limited constraints. An example from conspiracy illustrates this. Use of a broadcasting service may be the means by which a licensee commits an overt act, pursuant to an agreement, which perfects the elements of a conspiracy to commit a qualifying primary offence: Criminal Code, section 11.5(2)(c).

72. Highly complex questions arise as to the manner in which a licensee could, upon defending the underlying offence engaged by clause 8(1)(g), establish exculpating matters (especially were it not an offence arising under a law of the Commonwealth). These matters are apt to raise a myriad of difficulties. The confronting of - let alone the solution to – these difficulties, cannot be predicted in advance, since the procedure of the Authority is a matter for it, subject to Ministerial control: s 171 BSA. Nor is it clear what significance the Authority ascribes to a narrowing of the potential class of offences picked up by the condition. On any view, the class is broad. On any view, it picks up matters with which the Authority, as a body without any statutorily required legal membership, may be ill-equipped to consider: Full Court 466, [23] and 486, [105].

73. Further, the Full Court correctly observed that the principle identified in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 - that, where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred – assists in resolving the current question: 486-488, [107]-[112]. This favours a narrow construction of clause 8(1)(g).

74. As to AS [49], the Full Court, at 479 [78], rejected an argument it understood the Authority to have put (and the primary judge implicitly to have accepted), that words adverting to the Authority forming an opinion about the matters within the licence condition should be read into clause 8(1)(g). Contrary to the Authority's submissions, the Full Court was not suggesting that such words were either necessary or should be read into the provision. It was addressing a form of the submission now made at AS [53.1].

75. Finally, the proper operation of the provisions is confirmed by the Second Reading Speech to the BSA, and the comments in the Explanatory Memorandum concerning then clause 208(4) (see [31] above).[19] The Parliament was astute to express its intention that, because decisions by the Courts could fundamentally affect the operation of the BSA, the CDPP should take cases that are likely to set precedents to the Federal Court, to assist in consistency in judicial decisions on the operation of the Act. So much is orthodox. The safeguards inherent in the judicial process – the requirement of impartiality,[20] the norm of open and public hearings,[21] and certain procedurally entrenched aspects of due process[22] - optimise the protections for any subject

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[19] As to the relevance of which, see s 15AB(1) and (2)(f) of the *Acts Interpretation Act 1901* (Cth)

[20] *Nicholas v The Queen* (1998) 193 CLR 173; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, at 368, 373

[21] *Grollo v Palmer* (1995) 184 CLR 348 at 379 and F Wheeler, "The Doctrine of Separation of Powers and Procedurally Entrenched Due Process in Australia" (1997) 23 *Monash Law Review* 248, 262

[22] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638

confronting a determination that it has committed an offence. This kind of protection is, for example, evident in s 56(1) of the 2007 Act.

(c) The Statutory Purpose

76. The Authority characterises the purposes of the BSA as including a "protective purpose": AS [29]-[30]. This characterisation captures only part of that purpose and is apt to mislead.

77. Section 4 of the BSA concerns regulatory policy and the degree of regulatory control to be exercised in respect of broadcasting activities in Australia. The chapeau to s 4(2) of the BSA operatively provides that the Parliament intends that broadcasting services in Australia be regulated in a manner that, in the opinion of the Authority, achieves certain enumerated objectives. Those objectives focus upon minimising regulatory burdens (s 4(2)(a)) while maximising technological change and the provision of broadcasting services and technologies to the Australian community (s 4(2)(b) and (c)). *Inter alia*, s 4 reflects an intention that regulation under the BSA not be unduly burdensome to the persons and technologies affected thereby. The reference to the opinion of the Authority within s 4(2) must be understood in that statutory context. So too, read with ss 3 and 4 (especially s 4(1)), s 5 articulates a norm of proportionate regulation.

78. Nothing in the conclusions of the Full Court subverts the enforcement regime for which the statute makes provision, nor does it denude the Authority of its proper role in the regime's administration (indeed, such a submission tends to beg the question of proper construction): cf AS [50]-[52].

79. It is not correct that, upon the construction preferred by the Full Court, the Authority "can do nothing unless or until the jurisdiction of a criminal Court is successfully invoked": cf AS [50]. The structure of the legislation would not preclude conduct by the Authority if it were concerned that criminal conduct was being engaged in, but had not yet been the subject of curial determination. Schedule 2, clause 8(2)(b) imposes a further condition upon each licensee that it remain a suitable licensee. Section 41 specifies when persons are regarded as suitable; which is relevantly expressed in terms of "risk" of, *inter alia*, an offence against the BSA or breach of a licence condition: s 41(2)(a) and (b). Were the Authority to be satisfied that there was a significant risk that criminal conduct was occurring on the part of a licensee, meriting a conviction, it would be able to act under that provision, to issue a direction for the purpose of s 141. This further condition is contingent upon risks; thus obviating any suggestion that the construction for which TodayFM contends would in some way sterilise the Authority in its regulatory role. True it is, that it would have to be conduct of a character that merited s 41 concerns. However, when dealing with matters of the gravity of the commission of an offence, it is wholly appropriate that the Authority's powers would be so conditioned. A further regulatory option would be the imposition of an additional licence condition, pursuant to s 43(1) BSA, to prevent any repetition of precisely specified conduct.

80. The Authority suggests that the utility of s 43 is limited by the fact that s 43(2)(a) requires the giving of written notice to the licensee, while s 43(2)(c) requires publication of the proposed changes in the Gazette. It notes that, by contrast, s 141 is not similarly constrained: AS [30]. This contrast however does not assist the Authority. It is counter-intuitive that so few procedural and substantive constraints would be placed upon a decision as to whether a Licensee had committed a criminal offence (a finding that can

ground revocation of the licence) while more onerous requirements were imposed upon the imposition of an additional licence condition upon a Licensee.[23]

81. Finally, while the Authority makes only a passing submission on the issue identified at AS [4] (at AS [37]), certain matters should be noted as to the proper scope of clause 8(1)(g). The Full Court, at 484-485, [99] correctly observed that the express terms of clause 8(1)(g) do not appear to confine its operation only to the commission of an offence by a licensee. "Licensee" in clause 8(1)(g) qualifies only the notion of the use of the broadcasting service. The provisions otherwise uses a noun instead of a transitive verb, in a manner that appears to allow that any other person – including a contactor or employee of the licensee or an independent advertiser – may engage in the conduct that constitutes the offence committed through and by the licensee using the broadcasting service. The Authority's contention to the contrary is mistaken, and *ex facie*, at odds with a contention that the statute ought be read under the aspect of a protective purpose. What is more, the correct construction, as the Full Court noted, renders still more improbable any legislative intention that the Authority would make determinations or express opinions concerning the commission of an offence.

PART VII: NOTICE OF CONTENTION

82. Sections 1, 61 and 71 of the Constitution give effect to the doctrine of the separation of powers by separately vesting the legislative, executive and judicial powers of the Commonwealth.[24]

83. Executive power comprehends a continuum of activities spanning from purely physical actions that do not affect individual rights, to quasi-judicial determinations capable of altering the status of persons in a particular case.[25] The commonest example of an executive power to perform acts that create new legal relations, or modify or extinguish existing legal relations – absent the consent of the affected persons – concerns the granting, altering and revoking of licences and authorisations under statute. Executive power to alter legal relations unilaterally or coercively involves the creation of new legal relations in a particular case; as opposed to determining the existing legal position under established law, which is a fundamental characteristic of the judicial power.

84. While "judicial power" defies "purely abstract conceptual analysis",[26] it describes the power of a sovereign authority "to decide controversies between its subjects, or between

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[23] See, generally: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [78]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 at [67], [156] and [177]

[24] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254. See also MJC Vile, *Constitutionalism and the Separation of Powers* (2nd ed, 1998) at 14; S Evans, "Continuity and Flexibility: Executive Power in Australia", in P Craig and A Tomkins, *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006), Ch 3; G Saywer, "The Separation of Powers in Australian Federalism" (1961) 35 *Australian Law Journal* 177-196

[25] S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Cambridge: Cambridge University Press, 2002) 93

[26] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J) and 374-375 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ)

itself and its subjects, whether the rights relate to life, liberty or property".[27] The basal characteristics of judicial power are as follows.[28]

85. *First*, there is an existing controversy. That is: "the concept of the judicial function is inseparably bound up with the idea of a dispute between parties, whether Crown and the subject or between subject and subject": *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149.

86. *Secondly*, the controversy concerns pre-existing,[29] fundamental rights: *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J).

87. *Thirdly*, the tribunal's decision is conclusive, in the sense that it cannot be questioned in collateral proceedings or by way of a complete rehearing. A sufficient but not necessary indicium of the conclusiveness of a decision is the tribunal's capacity to enforce its own decisions.[30] A binding, authoritative or conclusive decision has the following four qualities: (a) the matter cannot be re-litigated by the same litigants or their privies (*res judicata*); (b) the decision cannot be varied by the tribunal that made it save in exceptional circumstances (*functus officio*); (c) the decision made within jurisdiction cannot be questioned by a collateral attack; and (d) the decision, made within jurisdiction, is not subject to a *de novo* judicial hearing before it can be enforced.

88. *Fourthly*, the tribunal's authority is non-consensual, not being derived from an agreement between the parties to the dispute: *Alexander's Case* (1918) 25 CLR 434 at 444 (Griffith CJ).

89. These substantive indicia of judicial power have, through recent authority, been supplemented by two contextual considerations. *First*, historical use may assist to determine whether a function is judicial or not.[31] *Secondly*, a function may take the character of the body to which it has been given, on the basis of assumptions about Parliamentary intention, and a related assumption that Parliament intends a function to be exercised in a manner characteristic of a body of the type upon which it is conferred.[32] *Thirdly*, certain limiting principles apply, in respect of core functions that are exclusive to the judiciary and cannot be conferred on a body of another kind. Central to these are the

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[27] *Huddart, Parker & Co. Pty. Ltd. & Appleton v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Russell v Russell* (1976) 134 CLR 495 at 505 (Barwick CJ), 520 (Gibbs J) and 532 (Stephen J); *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 295 ALR 596 at 605-606, [27] (French CJ and Gageler J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101, [42] (Gaudron and Gummow JJ); *R v Kirby; ex parte Boilermakers Association* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullager and Kitto JJ); *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Nicholas v R* (1998) 193 CLR 173 at 187 (Brennan CJ); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358, [16] – [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ)

[28] Cf S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Cambridge: CUP, 2002) at 131

[29] *R v Gallagher; Ex Parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40

[30] *Brandy v Human Rights and Equal Opportunity Commission and Other* (1995) 183 CLR 245 at 256; *Rocla (Australia) Co Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 189 (Latham CJ); *R v Davison* (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J) and at 374 (Webb J); *Waterside Workers' Federation of Australia v J. W. Alexander Ltd* (1918) 25 CLR 434 at 455 (Barton J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176 (Isaacs J)

[31] *R v Davison* (1954) 90 CLR 353

[32] *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18; *Brandy v Human Rights and Equal Opportunity Commission and Other* (1995) 183 CLR 245 at 259

"determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs."[33]

90. It is necessary to identify what the Authority purports to have done in and by its Investigation Report.

91. The Authority considered whether the recording (the **Conversation**) contravened s 7(1)(b) of the 2007 Act and/or s 7(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) (the **1979 Act**) (pp 23-25 and 27). It formed a view that the Conversation was a private conversation for the purposes of s 4(1) of the 2007 Act (p 27). It then formed a view that none of the exceptions within ss 7(2) –(4) applied to the recording of the Conversation (p 27). The Authority made findings that the communications that took place in the course of the Conversation were not passing over the telecommunications system at the point they were recorded, and were therefore not caught within the concept of "interception" in the 1979 Act (pp 24-27). It then formed the view that "the licensee's act of using a listening device to record the Conversation without the consent of the relevant parties was within the scope of the [2007 Act] and constituted a contravention of subsection 7(1) of the [2007 Act]" (pp 27-28). The Authority formed the view that the licensee, "in broadcasting the recording of the private conversation (which was made in contravention of subsection 7(1) of the [2007 Act]) has contravened subsection 11(1) of the [2007 Act]" (p 28). It finally concluded that, "because the licensee has used its broadcasting service in the commission of an offence under subsection 11(1) of the [2007 Act], the licensee has breached a condition of its licence as set out in paragraph 8(1)(g) of Schedule 2 to the BSA." (p 28).

92. In short, the Authority made findings of fact, applied settled legal standards to those primary facts, and concluded that a contravention of criminal legislation has occurred.[34] In the ordinary course, a crime is defined by legislation, investigated by executive action and adjudicated through the judicial function. The Authority's conduct in effect collapses the latter two limbs of this constitutional process into one.

93. The inconsistency between the Authority's purported findings and the separation of powers is brought into stark relief by the manner in which the statutory scheme issues in s 143(1)(b) of the BSA. As the Authority notes, the Report issued under s 178 concludes the first stage of the Authority's investigation and provides a foundation for possible enforcement action under s 141 and 143 of the BSA: AS [26]. The Authority acknowledges, at AS [44], that its administrative powers under ss 141 and 143 exist as part of a "suite of enforcement mechanisms". This is of course so. The BSA comprises a scheme of provisions for the regulation of broadcasting services. Against this background, limited weight can be given to the suggestion, at AS [58.3] and [58.5], that the Authority's conclusion may or may not be relied upon for action in some relevant way under the BSA. The immediate end product of the investigation may be no more or less than the Authority forming an opinion on a matter within its remit (AS [58.6]), but it is the foundation of significant enforcement options.

94. The jurisdictional fact upon which enforcement action under section 143(1)(b) is based is of the kind to which Spigelman CJ referred in *Timbarra Protection Coalition Inc v Ross Mining*

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[33] *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358; *HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547 at 562; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 (Isaacs J)

[34] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, Press, 1990) p. 33

NL (1999) 46 NSWLR 55 at 64. Its existence does not turn upon a state of satisfaction on the part of the Authority. It has an objective existence in the sense that it exists in fact, and the existence of the fact is essential to the validity of action under s 143 (see also Full Court 479, [79]). That compound jurisdictional fact is a finding of fact - made by the Authority itself - that the licensee has used the broadcasting service in the commission of an offence. Upon the basis of that fact, the Authority is *ex hypoethsi* empowered to suspend or cancel the affected licence. More strikingly still, on a judicial review challenge concerning the validity of such a decision, authority suggests that the Applicant – being the person alleged to have committed an offence – bears the legal burden of proof on the issue of the validity of the decision;[35] indeed, possibly even where the person is not the moving party.[36]

95. The combination of five matters leads to the conclusion that the Authority is purporting to exercise judicial power.

96. *First*, the Authority has purported to resolve a controversy, between it, in its capacity as an agency of the Commonwealth, and TodayFM, relating to pre-existing and fundamental rights. Those rights are, in short, TodayFM's legal rights and interests in licence 3032.

97. *Secondly*, in doing so, the Authority considered complex facts, applied existing legal criteria to the facts as ascertained - as opposed to, for example, policy considerations - and in doing so has purported to exercise a discretion: *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43 (Kitto J).

98. *Thirdly*, the Authority is capable of making consequential decisions that take immediate effect, including, *inter alia*, to cancel TodayFM's licence under s 143(1)(b) and (d) of the BSA. While such a decision is subject to full merits review by the AAT,[37] by reason of s 204(1) of the BSA, the making of an application to the AAT for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision: s 41(1) AAT Act. Application must be made to obtain a stay of the decision: s 41(2).[38]

99. *Fourthly*, the making of the decision is capable, were consequential enforcement steps taken under s 143(1)(b) and (d) of the BSA, of involving the deprivation of property rights in licence 3032. As Isaacs J remarked in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175, the punishment of crime is "appropriate *exclusively* to judicial action."

100. *Fifthly*, the subject-matter upon which the Authority has purported to make findings of fact, and apply settled legal standards, is quintessentially a subject-matter of the exercise

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[35] *Caledonian Collieries Pty Ltd v Australasian Coal and Shale Employees' Federation [No 1]* (1930) 42 CLR 527 at 546-548; R *v Blakely; Ex parte Association of Architects of Australia* (1950) 82 CLR 54 at 92-93; R *v Alley; Ex parte NSW Plumbers and Gasfitters Employee's Union* (1981) 153 CLR 376 at 382, 390 and 395-397; R *v Isaac; Ex parte Transport Workers' Union* (1985) 159 CLR 323 at 330-331 and 342; *Re State Public Services Federation; Ex parte Attorney General (WA)* (1993) 178 CLR 249 at 268-269 and 303-304. See, generally, M Aronson & M Groves *Judicial Review of Administrative Action* (Sydney: Lawbook Co, 2013) at [4.480], pp. 235-236

[36] *Boddington v British Transport Police* [1999] 2 AC 143 at 153-158 and 173-174.

[37] As to "review", see *Brandy v Human Rights and Equal Opportunity Commission and Other* (1995) 183 CLR 245 at 261

[38] *Attorney-General (Cth) v Breckler and Others* (1999) 197 CLR 83 at [40] – [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Luton v Lessels and Another* (2002) 210 CLR 333, at [21], [22], [66], [76], [126], [129] and [201]

of the judicial power, that is, the function of adjudication and punishment of criminal guilt: *Victorian Chamber of Manufacturers v The Commonwealth* (1943) 67 CLR 413 at 422 (Starke J).

101. 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].

10 102. The relevant provisions of the empowering statute are, accordingly, invalid to the extent that they purport to authorise the Authority to make findings that a licensee has used a broadcasting service in the commission of an offence, because each provision, to that extent, provides for an exercise of judicial power otherwise than in conformity with Ch III of the Constitution, in that the power is exercised by the Authority, which is not a Court established pursuant to s 71 and constituted in accordance with s 72 of the Constitution.

PART VIII: ESTIMATE OF TIME

103. It is estimated that two hours will be required for the presentation of TodayFM's argument.

20 Date: 10 October 2014

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