

# HIGH COURT OF AUSTRALIA

Australian Communications and Media  
Authority

Vs.

Today Fm (Sydney) Pty Ltd.

[2015] HCA 7

(French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ.)

04.03.2015

## ORDER

### **French CJ, Hayne, Kiefel, Bell and Keane JJ.**

1. The Australian Communications and Media Authority ("the Authority") is established by the Australian Communications and Media Authority Act 2005 (Cth) ("the ACMA Act") . The Authority is charged with regulating broadcasting services in accordance with the Broadcasting Services Act 1992 (Cth) ("the BSA") . Providers of commercial radio broadcasting services in Australia must hold a license under the BSA . Clause 8(1)(g) of Sched 2 to the BSA imposes a condition ("the cl 8(1)(g) license condition") that a commercial radio broadcasting licensee will not use the broadcasting service in the commission of an offence against another Commonwealth Act or a law of a State or Territory ("a relevant offence").

2. The issue in the appeal is whether the Authority is precluded from finding that a licensee has breached the cl 8(1)(g) license condition and from taking any enforcement action arising out of the breach until a court exercising criminal jurisdiction finds the commission of the relevant offence proven. If there is no such preclusion, a second issue is whether the provisions of the BSA empowering the Authority to determine that a licensee has used the broadcasting service in the commission of a relevant offence, and to take consequential enforcement action, are an invalid attempt to confer the judicial power of the Commonwealth on the Authority. The legislative scheme

3. The Authority is charged with responsibility for monitoring the broadcasting industry in order to achieve the objects of the BSA in a way that is consistent with the regulatory policy set out in s 4 of the BSA . Relevantly, s 4(2) of the BSA provides:

"The Parliament also intends that broadcasting services ... be regulated in a manner that, in the opinion of the [Authority]:

(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 ..."

4. The objects of the BSA include providing a regulatory environment that facilitates the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs . Other objects are the promotion of high quality and innovative programming , and the encouragement of broadcasting services providers to be responsive to the need for fair and accurate coverage of matters of public interest and to respect community standards in the provision of program material .

5. In the balance of these reasons, references to legislative provisions unless otherwise stated are references to the BSA.

Licenses

6. Commercial broadcasting services are broadcasting services that are made available to the general public for free and which generally are funded by advertising revenue . Commercial radio broadcasting licenses are subject to the conditions set out in cl 8 of Sched 2 to the BSA and to such other conditions as may be imposed by the Authority . Fourteen conditions are set out in cl 8(1). They include:

"(a) the licensee will not, in contravention of the Tobacco Advertising Prohibition Act 1992, broadcast a tobacco advertisement within the meaning of that Act;

(b) the licensee will comply with program standards applicable to the license under Part 9 of this Act;

...

(g) the licensee 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".

7. The Authority's functions include the allocation, renewal, suspension and cancellation of licenses and taking enforcement action under the BSA ; assisting broadcasting services providers to develop codes of practice that accord with community standards ; monitoring compliance with those codes of practice ; developing program standards ; monitoring compliance with those standards ; and monitoring and investigating complaints concerning broadcasting services .

8. If the Authority is satisfied that allowing a company to provide, or to continue to provide, commercial broadcasting services would lead to a significant risk of the commission of an offence against the BSA or regulations made under the BSA ("the regulations"), the breach of a civil penalty provision or breach of the conditions of the company's commercial broadcasting license, it may decide that a company is not a suitable licensee (or that it is not a suitable applicant for a license) .

9. The Authority is to exercise the powers conferred on it under the BSA in a manner that in its opinion will deal effectively with breaches of the rules established by that Act . In these respects, the Authority may act on its own motion , or in response to a direction made by the Minister or a complaint made by a member of the public . Any person may complain to the Authority if the person believes that the provider of a broadcasting service has committed an offence against the BSA or the regulations, or breached a civil penalty provision or the condition of a license . In such a case, the Authority was required to investigate the complaint and notify the complainant of the results of its investigation .

#### Investigations

10. The Authority may conduct investigations for the purposes of its broadcasting functions and related powers . It may summon a person to appear before it and examine the person on oath or affirmation . It may require the person to answer questions . The examination must take place in private . The Authority may, but is not required to, save in the case of an investigation conducted at the direction of the Minister, prepare a report on an investigation . Again, save in the case of an investigation directed by the Minister, the Authority may choose whether or not to publish its report on an investigation .

#### Enforcement of license conditions

11. Breach of a condition of a commercial radio broadcasting license is subject to a range of enforcement mechanisms. The breach may be prosecuted as a criminal offence under s 139(3) , or made the subject of a civil penalty order under s 140A(3) or administrative action. Administrative action may take the form of a remedial direction issued under s 141(1) or the suspension or cancellation of the license under s 143(1). Failure to comply with a requirement of a remedial notice issued under s 141 is itself an offence and subject to a civil penalty order . The selection of the appropriate enforcement mechanism, if any, to apply to breach of a condition of a commercial broadcasting license is largely at the discretion of the Authority. Only the Authority may apply for a civil penalty order . The Authority is required to use its powers in dealing with breaches of the BSA or the regulations in a manner that in its opinion is commensurate with the seriousness of the breach . The Authority's decision to suspend or cancel a license is subject to merits review by the Administrative Appeals Tribunal ("the AAT") .

#### The factual background

12. Today FM (Sydney) Pty Ltd ("Today FM") holds a commercial radio broadcasting license. On 4 December 2012, Today FM recorded a telephone call between two presenters of its "Summer 30" program and two members of the staff of the King Edward VII Hospital in London, at which the Duchess of Cambridge was an in-patient. The presenters represented that they were Queen Elizabeth II and Prince Charles and they inquired about the Duchess. One of the staff, apparently accepting the callers as genuine, provided some information about the Duchess' condition. The recording was broadcast during the "Summer 30" program some hours later and re-broadcast the following day.

13. The Authority initiated an investigation into the broadcast. It invited Today FM to make submissions directed to whether, among other things, it had breached the cl 8(1)(g) license condition by the commission of the offence in s 11(1) of the Surveillance Devices Act 2007 (NSW) ("the SDA") . Today FM acknowledged that, before the segment was broadcast, it had not obtained the consent of either of the hospital staff to the recording, but it did not accept that it had committed any offence.

14. The Authority prepared a preliminary investigation report, which contained the following "preliminary finding":

"The [Authority] is of the view that the licensee, in broadcasting the recording of the private conversation (which was made in contravention of subsection 7(1) of the SDA), has contravened subsection 11(1) of the SDA. Furthermore, because the licensee has used its broadcasting service in the commission of an offence under subsection 11 of the SDA, the licensee has breached a condition of its license as set out in paragraph 8(1)(g) of Schedule 2 to the BSA."

15. On 4 June 2013, the Authority provided Today FM with a copy of the preliminary investigation report.

The proceedings before the primary judge

16. On 18 June 2013, Today FM commenced proceedings in the Federal Court of Australia (Edmonds J) seeking declaratory relief arising out of the Authority's investigation and the preliminary investigation report. Today FM contended that the Authority was not authorised to find that it had breached the cl 8(1)(g) license condition unless and until a competent court adjudicated that it had committed the SDA offence . In the alternative, Today FM contended that, if the ACMA Act and the BSA authorised the Authority to find that it had breached the cl 8(1)(g) license condition, the empowering provisions are an invalid purported conferral of judicial power on the Authority . Orders were sought to permanently restrain the Authority from making any determination that Today FM has committed any criminal offence and from the preparation of any report purporting to determine, or express any opinion, that Today FM used its broadcasting service in the commission of an offence under the SDA .

17. Edmonds J dismissed Today FM's application. His Honour reasoned that, in determining that a licensee has breached the cl 8(1)(g) license condition, the Authority is not making a judgment of the licensee's criminal guilt; rather, the product of its investigation is no more or less than its conclusion as an administrative body of an issue relevant to the determination of the breach of the license condition .

18. Today FM's constitutional challenge identified ss 10 and 12 of the ACMA Act, ss 5, 170 and 178 of the BSA and cl 8(1)(g) as impermissibly conferring judicial power on the Authority. Edmonds J rejected this characterisation, taking into account that the Authority's

broad regulatory functions are to be discharged in accordance with the objects of the BSA ; that it may act on its own motion in conducting an investigation ; that the investigation is non-adversarial and has as its purpose uncovering facts and circumstances that may support action under the BSA ; and that the determination did not involve the resolution of a legal controversy between it and Today FM .

The appeal to the Full Court

19. Today FM appealed to the Full Court of the Federal Court of Australia (Allsop CJ, Robertson and Griffiths JJ) . Before the hearing of the appeal, the Authority notified Today FM that it had finalised its investigation and had determined that Today FM had breached the cl 8(1)(g) license condition . The Authority advised that it would "consider the compliance issues raised by the investigation, as well as any other appropriate remedial measures, in due course" . The final investigation report contained the same findings with respect to breach of the cl 8(1)(g) license condition as in the preliminary investigation report .

20. The Full Court rejected the primary judge's construction of cl 8(1)(g), holding that, absent clear language, the legislature is not to be taken to have intended to confer upon the Authority the power to make an administrative determination or finding of the commission of a criminal offence .

21. In light of its conclusion, it was unnecessary for the Full Court to address Today FM's constitutional challenge . The appeal was allowed, the orders made by Edmonds J were set aside and, in their place, the Full Court set aside the Authority's determination .  
Special leave to appeal

22. On 15 August 2014, French CJ and Keane J granted the Authority special leave to appeal. The appeal is brought on three grounds. The first ground asserts that the Full Court erred in construing cl 8(1)(g) as requiring, for the purposes of enforcement action under s 141 or s 143, that the Authority may only find that a relevant offence has been committed upon a conviction by a criminal court (or a finding by a criminal court that the offence is proved). The second ground asserts that the Full Court erred in construing cl 8(1)(g) as requiring the Authority to defer administrative enforcement action until after (if at all) the conclusion of the criminal process and in holding the Authority bound by the outcome of that process. The third ground asserts that the Full Court erred in construing the expression "commission of an offence" in cl 8(1)(g) as extending to the commission of offences by persons other than the commercial radio broadcasting licensee.

23. By notice of contention, Today FM seeks to have the Full Court's decision affirmed on the strength of its constitutional challenge.

24. For the reasons to be given, the Authority's appeal should be allowed on its first and second grounds and Today FM's constitutional challenge rejected.

The Full Court's statement of general principle

25. The Attorneys-General of the Commonwealth and for the States of South Australia, Western Australia and Queensland intervene in support of the Authority respecting the resolution of the constitutional issue. Their submissions overlap with the parties' submissions on the construction issue. The overlap is explained by the Full Court's embrace of an interpretative approach sourced in constitutional principle.

26. The starting point in the Full Court's analysis was the statement in the joint reasons in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* of the exclusively judicial character of the adjudgment and punishment of criminal guilt under Commonwealth law . The Full Court took from *Lim* a wider general principle :

"As a matter of general principle it is not normally to be expected that an administrative body such as the [Authority] will determine whether or not particular conduct constitutes the commission of a relevant offence. It may be open to the legislature, subject to relevant constitutional constraints, to make clear that such a body is empowered to undertake that or a similar task. But under our legal system the determination of whether or not a person has committed a criminal offence can generally only be determined by a court exercising criminal jurisdiction."

27. This "general principle" informed the Full Court's construction of the provision. The Full Court said :

"The text of cl 8(1)(g) does not state that the [Authority] is to form an opinion on whether or not a relevant offence has been committed, let alone an opinion which is based on the balance of probabilities and not the normal criminal standard of beyond reasonable doubt. We see no warrant for reading those words into the text".  
(emphasis added)

28. It will be recalled that cl 8(1)(g) conditions the license on the licensee not using the broadcasting service in "the commission of an offence". The Full Court considered that the ordinary meaning of this phrase connotes that "a court exercising criminal jurisdiction has found that an offence has been committed" . The Full Court said the phrase has this connotation because, conformably with the statement in the joint reasons in *Lim*, "that matter is one for determination only by a criminal court" .

29. The Full Court considered that the weight of contextual matters favoured a narrower construction of cl 8(1)(g) than the construction adopted by the primary judge . The Full Court referred to s 178(2), which provides that, if the Authority's report on an investigation relates to conduct that could constitute an offence under the BSA or another law of the Commonwealth, the Authority may give a copy of the report to the Director of Public Prosecutions . The Full Court said that s 178(2) evinces the "plain object" of involving the Director of Public Prosecutions in deciding whether to commence a prosecution, as distinct from "simply leav[ing] the matter in the hands of the [Authority]" . The Full Court also referred to s 179(3), which provides that the Authority is not required to publish a report (or

part of a report) if the publication would be likely to prejudice the fair trial of a person . The Full Court said that s 179(3) demonstrates an "overarching concern to preserve the due administration of the criminal justice system" and is against a conclusion that the Authority "would make any findings itself on criminal liability" .

30. In the Full Court's view, it is unlikely that the legislature intended to empower the Authority to make findings that a licensee has committed an offence against any State or Territory law . The Full Court considered the unlikelihood of that intention to be "all the more stark" when it is appreciated that the Authority might make an administrative finding that a person other than the licensee has committed an offence . The Full Court also considered it incongruous that the Authority might determine that a licensee has breached cl 8(1)(g), and cancel the broadcasting service license, in circumstances in which the licensee may be subsequently acquitted of the relevant offence .

31. These matters were said to underline the unlikelihood, in the absence of clear language, that the legislature intended to confer power on the Authority to make an administrative determination or finding that a licensee has committed a criminal offence . The Full Court considered that its approach accorded with the statements made by this Court in *Balog v Independent Commission Against Corruption* .

The "general principle"

32. The Authority submits, correctly, that the "general principle" stated by the Full Court and set out at [26] above is expressed too widely and does not follow from the constitutional constraint stated in the joint reasons in *Lim* on the adjudgment and punishment of criminal guilt under Commonwealth law. Not uncommonly, courts exercising civil jurisdiction are required to determine facts which establish that a person has committed a crime . Satisfaction in such a case is upon the balance of probability . In *Helton v Allen*, Mr Helton's acquittal of the murder of the testatrix was no bar, on the trial of the civil suit arising out of the will, to the finding that he had unlawfully killed her .

33. More generally, and contrary to the "normal expectation" stated by the Full Court, it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action. The decisions of this Court in *Attorney-General (Cth) v Alinta Ltd* and *Albarran v Companies Auditors and Liquidators Disciplinary Board* accept so much . There is no reason to suppose that a Commonwealth public housing authority might lack the capacity to terminate a lease on the ground of the tenant's use of the premises for an unlawful purpose notwithstanding that the tenant has not been convicted of an offence arising out of that unlawful use.

34. It was an error to construe cl 8(1)(g) in light of the posited principle that "it is not normally to be expected that an administrative body such as the [Authority] will determine whether or not particular conduct constitutes the commission of a relevant offence" .

The construction of cl 8(1)(g) and allied provisions of the BSA

35. It will be recalled that cl 8(1)(g) states:

"[T]he licensee 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".

36. The prohibition is upon the use of the broadcasting service in the commission of a relevant offence.

37. Today FM argues that the phrase "the commission of an offence" is ambiguous. As enacted, Today FM submits, the BSA evinced "a very clear distinction" between the words "guilty of [an] offence" and the words "committing [an] offence", the former being used to identify the objective facts constituting a wrong and the latter being used to convey the conclusion (that the offence has been committed) in the opinion of some third party. The submission is strained. The words "guilty of an offence" in the BSA as enacted (and now) are used in offence-creating provisions. As a matter of ordinary English, the phrase "the commission of an offence" is to be distinguished from the phrase "conviction for an offence".

The former refers to the fact of the commission of the offence and the latter to the finding of the criminal court. There is no warrant for holding that the words "the commission of an offence" in cl 8(1)(g) convey that the licensee (or other person) has been convicted of an offence (or that a court exercising criminal jurisdiction has found the offence proven).

38. Today FM supports the Full Court's adoption of a narrow construction of the Authority's power to investigate and report on the breach of the cl 8(1)(g) license condition having regard to the gravity of a finding of criminal conduct and resulting reputational damage. It submits that it is not to the point to observe that administrative enforcement mechanisms under ss 141 and 143 are not expressed to depend upon conviction. These provisions are engaged by the breach of any of the license conditions. The condition in cl 8(1)(g) is said to stand apart.

39. The submission does not address cl 8(1)(a), to which there should be some reference. Clause 8(1)(a) conditions the license on non-contravention of the Tobacco Advertising Prohibition Act 1992 (Cth) ("the TAP Act") by the broadcast of a tobacco advertisement. Broadcasting a tobacco advertisement in contravention of the TAP Act is an offence. It follows that conduct in breach of cl 8(1)(a) will also be in breach of cl 8(1)(g). The anomaly may be explained by the legislative history. As enacted, cl 8(1)(a) stated a prohibition on the broadcasting of an advertisement or sponsorship announcement for cigarettes or other tobacco products. The TAP Act amended the BSA by the insertion of cl 8(1)(a) in its present form without apparent advertence to cl 8(1)(g).

40. Today FM's submission must apply to cl 8(1)(a) as well as cl 8(1)(g). Acceptance of the submission carries with it that the Authority is precluded from taking administrative enforcement action against a commercial radio broadcasting licensee that advertises tobacco products unless and until the licensee is convicted of the offence under the TAP Act.

41. Today FM's submissions call in aid statements in *Balog v Independent Commission Against Corruption*. In that case, it was held that New South Wales' Independent Commission Against Corruption ("the ICAC") is not authorised under its statute to include in its report of an investigation a finding that a person was or may have been guilty of a criminal offence or corrupt conduct. Although this construction was arrived at upon application of ordinary principles of interpretation, the Court endorsed recourse to the principle of legality as appropriate in light of the risk of reputational damage and prejudice to any criminal proceedings that might follow publication of a finding of corrupt conduct.

42. As the Full Court acknowledged, there are significant differences between the functions of the ICAC under its statute and those of the Authority under the ACMA Act and the BSA. The ICAC is primarily an investigative body whose investigations are intended to facilitate action by others in combating corrupt conduct. By contrast, the Authority is charged with the regulation of broadcasting services including by the enforcement of license conditions. As earlier noted, the mechanism for enforcement of those conditions, including the conditions stated in cl 8(1)(a) and (g), may, depending upon the Authority's opinion of the seriousness of the breach, be by administrative action, application for a civil penalty order or prosecution for the criminal offence. The risk of damage to reputation that may arise in consequence of an adverse finding in the Authority's report of an investigation is addressed under the BSA by ss 179(3) and 180.

43. As Today FM acknowledges, the meaning of cl 8(1)(g) cannot vary depending on the means selected for its enforcement. In seeking to support the Full Court's construction of the provision, Today FM is driven to the submission that in the case of a prosecution for the offence created by s 139(3), particularised as a breach of the cl 8(1)(g) license condition, the prosecution must prove the earlier conviction of a person for the relevant offence. So, too, on this analysis would it be necessary to prove the conviction of a person for the relevant offence before the court trying an application under s 140A(3) arising out of the breach of the cl 8(1)(g) license condition may make a civil penalty order.

44. Whether a licensee has used the broadcasting service in the commission of a relevant offence is a question of fact. It is a determination that may be made by the Authority as a preliminary step to the taking of administrative enforcement action, or by the court in civil penalty proceedings or in a prosecution for the offence under s 139(3) of the BSA. In each case the question is the same: did the licensee use the broadcasting service in the commission of a relevant offence? It is only in the last-mentioned instance that the determination is made on the criminal standard.

45. To construe cl 8(1)(g) as conditioning the power of the Authority to determine that the licensee has used the broadcasting service in the commission of an offence, and to take administrative enforcement action, upon a finding by a court exercising criminal jurisdiction that the offence is proven, would significantly confine the Authority's enforcement powers. There is nothing in the text of cl 8(1)(g) to support that confinement. Nor do the objects of the BSA or the contextual matters identified by the Full Court support that confinement.

46. Section 178(2) allows the Authority to give a copy of its report to the Director of Public Prosecutions in a case in which it becomes aware of conduct that could constitute an offence against Commonwealth law. The provision allows the Authority to give a copy of its report in the case of a use of a broadcasting service in the commission of an offence against Commonwealth law, but the provision's purpose is not confined to the report of an investigation into a breach of the cl 8(1)(g) license condition. In the course of an investigation, the Authority may become aware of conduct that could constitute an offence against Commonwealth law that does not involve the use of the broadcasting service. Additionally, breach of the cl 8(1)(g) license condition may involve an offence against State or Territory law, in which case no question of supplying the Director of Public Prosecutions with a copy of the report will arise. The point to be made is that there is no reason to take from s 178(2) a legislative purpose to involve the Director of Public Prosecutions in deciding whether to prosecute for a relevant offence so as not to leave the matter in the hands of the Authority and permit it to form an administrative opinion that a relevant offence has been committed .

47. Section 179(3) does not provide contextual support for the narrow construction of cl 8(1)(g) and the allied provisions of the BSA adopted by the Full Court. The evident purpose of s 179(3)(b) – to protect the fair trial of a person from prejudice that may flow from the publication of the Authority's report or part of its report – is not confined to investigations into suspected breaches of the cl 8(1)(g) license condition. Section 179(3) says nothing about the Authority's power to determine that administrative enforcement is appropriate to the seriousness of the breach of any license condition, including the conditions stated in cl (8)(1)(a) and (g).

48. The Full Court was right to hold that the express terms of cl 8(1)(g) do not confine the condition to the commission of offences by the licensee . However, this recognition does not support the Full Court's construction of the statutory scheme. It is the Authority's function to monitor and regulate broadcasting services throughout Australia. There is no incongruity in empowering the Authority to take administrative enforcement action against a licensee who uses the broadcasting service in the commission of an offence, whether the offence is against Commonwealth, State or Territory law. Nor is it incongruous that the Authority may suspend or cancel a license based upon its determination that the broadcasting service has been used in the commission of an offence notwithstanding the licensee's (or a third person's) subsequent acquittal of the offence. The court trying the criminal offence is required to determine guilt upon admissible evidence beyond reasonable doubt.

49. In determining that a licensee has breached the cl 8(1)(g) license condition, as a preliminary to taking enforcement action, the Authority is not adjudging and punishing criminal guilt. It is not constrained by the criminal standard of proof and it may take into account material that would not be admitted in the trial of a person charged with the relevant offence. It may find that the broadcasting service has been used in the commission of an offence notwithstanding that there has been no finding by a court exercising criminal

jurisdiction that the offence has been proven. Where a person is prosecuted for the relevant offence, the Authority is not bound by the outcome of the criminal proceeding and may come to a contrary view based upon the material and submissions before it .

50. It follows that the provisions of the BSA which empower the Authority to investigate the breach of a license condition, report on the investigation and take administrative enforcement action do not require, in the case of the cl 8(1)(g) license condition, that any such action be deferred until after (if at all) a court exercising criminal jurisdiction has found that the relevant offence is proven.

The judicial power of the Commonwealth

51. By its Notice of Contention, Today FM asserts that if, upon its proper construction, cl 8(1)(g) authorises the Authority to find that the licensee has breached the condition and to take enforcement action under ss 141 and 143 prior to a competent court finding that the relevant offence has been committed, the provisions of the BSA that purport to authorise that conduct are invalid to that extent because they are inconsistent with the separation of executive and judicial power under the Constitution.

52. Today FM's constitutional argument in its written submissions was consistent with the way its challenge was advanced before the primary judge. The submissions invoked Kitto J's statement of the attributes of judicial power in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* :

"[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons."

53. A number of features of the statutory scheme were relied upon for the conclusion that "the Authority is purporting to exercise judicial power". It was asserted that the Authority has purported to: resolve "a controversy" relating to "pre-existing and fundamental rights", being Today FM's "legal rights and interests in license 3032"; exercise a discretion by applying legal criteria to facts as found by it ; and have the capacity to make consequential decisions with immediate effect depriving Today FM of its "property rights" in the license. Finally, it was said that the subject-matter on which the Authority has made findings of fact is "quintessentially a subject-matter of the exercise of the judicial power" – the function of adjudicating and punishing criminal guilt.

54. To date, the Authority has carried out an investigation and prepared a report on the investigation . It has not determined whether it will publish the report or what, if any, enforcement action it will take in light of its findings. The point at which the Authority is said to exercise judicial power was not identified in Today FM's written submissions.

55. On the hearing of the appeal in this Court, Today FM's constitutional argument was refined. Today FM acknowledges that it is open to an administrative body to form an opinion as to the legal rights of an individual as a step in that body's ultimate determination. It accepts that the formation of such an opinion does not involve the exercise of judicial power. It does not contend that the Authority's finding in its report is a final determination giving rise to any issue estoppel or merger. Rather than characterising that finding and any consequential enforcement action as possessing all or any of the attributes of judicial power within Kitto J's classic statement, Today FM now relies upon the exception his Honour allowed in the concluding passage of his analysis :

"It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."  
(emphasis added)

56. The "special compelling feature" on which Today FM relies is the power under s 143 to suspend or cancel a commercial broadcasting license when that power is enlivened by a claimed breach of the cl 8(1)(g) license condition. The predicate of the power in this event is the finding of the commission of the relevant offence. That finding is the essential step to the imposition of what is said to be in substance a penalty. To gainsay the finding in proceedings in the AAT, the licensee is required to discharge an onus of demonstrating that it, or a third person, did not commit the relevant offence. In this limited sense, Today FM submits that the Authority's finding has a "quasi-finality" to it. Although no determination to suspend or cancel Today FM's license has been made, the challenge to the validity of the Authority's finding is put on the footing that the cl 8(1)(g) license condition is part of the "integrated structure" of Pt 10 of the BSA, governing the enforcement of license conditions.

57. It adds nothing to the constitutional challenge to describe the Authority's finding of breach of the cl 8(1)(g) license condition, where it is the foundation for suspension or cancellation of a commercial broadcasting license, as possessing a quality of "quasi-finality". Nor do the submissions that characterise a commercial broadcasting license as a "pre-existing and fundamental right" and its suspension or cancellation as akin to the imposition of a penalty. Commercial broadcasting licenses are issued subject to conditions, the breach of any one of which may result in suspension or cancellation.

58. The characterisation of the Authority's enforcement power under s 143 does not depend upon whether the Authority is acting on the breach of the condition that the licensee will comply with program standards under cl 8(1)(b) or the condition that the licensee not use the broadcasting service in the commission of a relevant offence under cl 8(1)(g). The finding that Today FM's broadcasting service was used in the commission of an offence does not resolve a controversy respecting pre-existing rights or obligations . It is a step in the determination of breach of the cl 8(1)(g) license condition and is the foundation for the Authority to institute civil penalty proceedings in the Federal Court of Australia or to take administrative enforcement measures, including imposing further conditions on Today FM's

license , accepting an enforceable undertaking , issuing a remedial direction , or suspending or cancelling Today FM's license .

59. It is well settled that functions may be judicial or administrative depending upon the manner of their exercise . Edmonds J rightly concluded that none of the features of the power conferred on the Authority to investigate and report on breach of the cl 8(1)(g) license condition and to take consequential administrative enforcement action support the conclusion that it is engaged in the exercise of judicial power.

Order

60. For these reasons, the following orders should be made:

1. Appeal allowed with costs.
2. Set aside paragraphs 1 to 3 of the orders of the Full Court of the Federal Court of Australia made on 14 March 2014 and, in their place, order that the appeal to that Court be dismissed with costs.

61. GAGELER J. I agree that the appeal must be allowed, the decision of the Full Court of the Federal Court set aside, and the appeal to the Full Court from the decision of Edmonds J dismissed. In the reasons which follow, I adopt the explanation of the facts and legislation as well as the abbreviations set out in the joint reasons for judgment.

62. The Full Court reasoned from the premise that a statute is not ordinarily interpreted as empowering an administrative body to inquire into and determine whether or not a person has committed a criminal offence. The Full Court derived that premise from Ch III of the Constitution and explained it also to be consonant with the common law .

63. The premise cannot, in my opinion, be derived from Ch III of the Constitution. The function of judging and punishing criminal guilt, which is exclusively judicial in character and no part of which can be conferred by Commonwealth legislation on a body that is not a Ch III court, is the function of conclusively determining a controversy about criminal liability and the punitive consequences of that criminal liability . An administrative body does not perform any part of that exclusively judicial function merely by making its own inquiry and determining for itself that a person has committed a criminal offence.

64. This Court has repeatedly held that a power of inquiry and determination takes its legal character from the purpose for which it is undertaken, and that a power of inquiry and determination undertaken for a non-curial purpose (be it arbitral, administrative, executive or legislative) can encompass formation and expression of an opinion about an existing legal right or obligation . No distinction has been drawn in that respect between an opinion about an existing legal obligation sounding only in civil liability and an opinion about an existing legal obligation sounding only, or also, in criminal liability. It has been held, for example, that a commission of inquiry established under Commonwealth legislation can be authorised to inquire into and report on whether or not a person has committed an offence, for the

purpose of informing the exercise or performance of a power or function of the Commonwealth Parliament or of the Commonwealth Executive .

65. That is not to say that a question may not arise as to whether or not judicial power is invalidly conferred on a particular administrative body by the terms of a particular statute under which that body might be authorised or required to form and give effect to an opinion that a person has committed a criminal offence. The point of significance for present purposes is that the fact that such a question can arise is not a reason for a statute ordinarily to be interpreted as not empowering an administrative body to inquire into and determine whether or not a person has committed a criminal offence. The fact that such a question does arise in relation to a particular statute is also no reason for interpreting that statute as not empowering a particular administrative body to undertake such an inquiry or to make such a determination.

66. In Australia, unlike the United States , the view has not been adopted that a statute is to be interpreted to avoid constitutional doubt. Here the "fundamental rule of construction [is] that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid" . Here also interpretation provisions enacted by each Australian legislature provide for legislation to be read down if, and to the extent that, the legislation would exceed constitutional power . Those provisions, of their nature, assume that questions of validity may arise. There is no room for a presumption that any Australian legislature intends to enact only legislation the validity of which is beyond dispute.

67. The Full Court identified the premise of its reasoning as consonant with the Australian version of the common law principle of statutory construction which has come to be known in the United Kingdom as the "principle of legality" , and which has long been known in the United States as the "clear statement rule" . The principle insists on a manifestation of unmistakable legislative intention for a statute to be interpreted as abrogating or curtailing a right or immunity protected by the common law or a principle recognised by the common law to be important within our system of representative and responsible government under the rule of law . Outside its application to established categories of protected common law rights and immunities, that principle must be approached with caution. The principle should not be extended to create a common law penumbra around constitutionally imposed structural limitations on legislative power.

68. The common law principle of construction does operate to insist on the manifestation of unmistakable legislative intention for a statute to be interpreted as empowering an administrative body publicly to inquire into and determine whether or not a person has committed a criminal offence, but the trigger for the operation of the principle is more narrowly focussed. It is in part because of the potential for such an exercise of power adversely to affect the person's reputation; "the law proceeds on the basis that reputation itself is to be protected" . It is also in part because of the risk that such an exercise of power can pose to established processes by which criminal liability and its punitive consequences are determined by a court.

69. That more narrowly focussed application of the common law principle of construction is the enduring significance of *Balog v Independent Commission Against Corruption* . This Court there determined, on close analysis of its empowering statute, that the Independent Commission Against Corruption was not entitled to include, in a report to be laid before each House of the Parliament of New South Wales of its investigation into alleged corrupt conduct, a finding that a person was guilty of a criminal offence. This Court added, however, that even if the statute admitted of a wider construction, "then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred" .

70. That said, I am unable to agree with the Full Court that the common law principle assists in the construction of cl 8(1)(g) of Sched 2 to the BSA. That is because the clause is not directed to defining the scope of the functions of the Authority. The clause is directed instead to prescribing a norm of conduct to which a commercial radio broadcasting licensee must adhere as a condition of its license . The significance of that distinction requires elaboration.

71. The norm of conduct prescribed by cl 8(1)(g) is applicable at all times throughout the period of a commercial radio broadcasting license. Breach can result in the Authority giving a notice under s 141 directing the licensee to take remedial action to ensure compliance, accepting an enforceable undertaking from the licensee under s 205W that it will take remedial action to ensure compliance, or cancelling or suspending the license by reference to s 143(1)(b). Quite independently of any action on the part of the Authority, however, a breach constitutes a criminal offence which is committed each day during which the contravention continues . The criminal offence for which the licensee is liable can be prosecuted by the Director of Public Prosecutions in the Federal Court or in a State or Territory court of competent jurisdiction . Breach also renders the licensee liable to a civil penalty for each day during which the contravention continues . That civil penalty can be recovered by the Authority in proceedings in the Federal Court . And where the Authority does give a notice under s 141 directing the licensee to take remedial action to ensure compliance, contravention of that direction itself constitutes a criminal offence which is committed each day during which the contravention continues and itself renders the licensee liable to a civil penalty for each day during which the contravention continues , in addition to being able to result in the Authority taking further action by reference to s 143(1)(a) to cancel or suspend the license.

72. If compliance or non-compliance with the norm of conduct prescribed by cl 8(1)(g) were not capable of objective determination from time to time and at each point in time throughout the period of a commercial radio broadcasting license, the norm itself would be deprived of much of its force, and the provisions of the BSA providing for its day-to-day enforcement would be unworkable. The licensee's compliance or non-compliance is rendered capable of objective determination from time to time and at each point in time throughout the period of the license if the phrase "the commission of an offence" in cl 8(1)(g) is read as referring to the doing of acts which constitute the commission of an offence.

73. The difficulty with the Full Court's reading of the phrase "the commission of an offence" in cl 8(1)(g), as connoting that a court exercising criminal jurisdiction has found an offence to have been committed, is that it would make compliance or non-compliance with the norm of conduct specified by the clause incapable of contemporaneous objective determination. The licensee's compliance or non-compliance at any point in time within the period of the license would always be subject to two future contingencies. One would be the contingency of the appropriate Commonwealth, State or Territory prosecuting authority choosing to prosecute the offence constituted by past or present conduct. The other would be the entry of a subsequent conviction for that offence by the federal, State or Territory court which exercised criminal jurisdiction in respect of the matter pertaining to that prosecution. Only once those two contingencies had come to pass could it then be seen, retrospectively, that the licensee was in breach of the license condition. In the meantime, neither the Authority nor the Director of Public Prosecutions could take any action in relation to breach of the license condition. Pending prosecution and conviction for the offence, the Authority could not even direct the licensee to take remedial action to ensure that the conduct constituting the commission of the offence did not continue or recur.

74. When attention is turned from the norm of conduct prescribed by cl 8(1)(g) to the powers of investigation conferred on the Authority by Div 2 of Pt 13 of the BSA, it is tolerably clear that the concerns of the common law which invoke the common law principle of construction are specifically addressed and given a precise statutory measure of protection. Reputation is addressed and protected by the requirement that any examination by the Authority is to be in private and the Authority being prohibited from publishing in a report any matter, disclosure of which would be likely to adversely affect the interests of a person, until the Authority has given the person a reasonable period to make representations in relation to the matter . Integrity of the criminal process is addressed and protected by the Authority not being required to publish any part of its report, disclosure of which would be likely to prejudice the fair trial of a person . The Authority's decision to publish or not to publish would be subject to the standard implied conditions that the decision be made according to a process which is fair and that the decision not be unreasonable .

75. The existence of those provisions, addressed specifically to the powers of investigation conferred on the Authority, militates further against cl 8(1)(g) being read in a manner which would deprive the Authority, in investigating a contravention of that provision, of any power to inquire into or determine whether or not a person has committed a criminal offence. To do so would be to introduce indirectly into the conduct of an investigation by the Authority a different and more stringent measure of protection than that for which the BSA has specifically provided.

76. In construing cl 8(1)(g), the Full Court placed some weight on the terms of the specific power conferred on the Authority to give to the Director of Public Prosecutions a copy of a report "[i]f a report on an investigation relates to conduct that could constitute an offence under [the BSA] or another law of the Commonwealth" . The existence of that power is

unsurprising given that the Director of Public Prosecutions and not the Authority is empowered to prosecute offences under the BSA and other laws of the Commonwealth. The purpose of the power is evidently to allow the Director of Public Prosecutions to be given information relevant to the performance of its independent statutory function of deciding whether or not to prosecute. The language in which the power is expressed does not, in my opinion, assist in the construction of cl 8(1)(g). It is not directed to whether or not the Authority can include in a report its own finding as to whether or not an offence has been committed. It says nothing about an offence against a State or Territory law. It fairly encompasses all conduct which has the potential to constitute an offence against the BSA or another Commonwealth law, irrespective of whether or not the Authority has formed its own view for the purpose of performing its own statutory functions that the conduct does constitute such an offence.

77. The preferable conclusion is therefore that the phrase "the commission of an offence" in cl 8(1)(g) refers to conduct which constitutes the commission of an offence. The powers of investigation conferred on the Authority by Div 2 of Pt 13 of the BSA permit the Authority to form and report its own view as to whether conduct constitutes the commission of an offence within the scope of cl 8(1)(g) for the purpose of the Authority going on to perform other statutory functions or to exercise other statutory powers.

78. That conclusion makes it necessary to address a constitutional question, which the Full Court did not reach, as to whether it would amount to an exercise of judicial power for the Authority to act on its own view that conduct constitutes the commission of an offence within the scope of cl 8(1)(g) in exercising a particular statutory power. As narrowed in the course of oral argument before this Court, the question came down to whether the Authority would exercise judicial power were it to act on its own view that conduct constitutes the commission of an offence in going on to exercise the power conferred on it by s 143(1) to suspend or cancel a commercial radio broadcasting license on the basis of breach of the condition of that license in cl 8(1)(g).

79. The short answer is that there is no basis on which the Authority, in so acting, could be said to exercise judicial power. None of the indicia of exclusively judicial power would be present. The Authority's cancellation or suspension of the license would not be, in form or in substance, the imposition of punishment for the commission of an offence against a Commonwealth, State or Territory law. The Authority would not be declaring or enforcing any existing criminal liability or civil liability of the licensee or of anyone else. The Authority would not be resolving, conclusively or at all, any controversy between parties.

80. The Authority would need to satisfy itself that there was or had been conduct constituting the commission of an offence within the scope of cl 8(1)(g) as an element of satisfying itself that it had power to cancel or suspend the license by reference to s 143(1). That is because the fact of breach of a license condition is, for the purpose of s 143(1), a "jurisdictional fact" in the sense that it is a fact which must exist as a precondition to the valid exercise of the discretion of the Authority to cancel or suspend a license. But the Authority's own view that

there was or had been conduct constituting the commission of an offence within the scope of cl 8(1)(g) would have no operative legal effect. The objective existence of that fact could be conclusively determined for legal purposes only by a decision of a court. Were the validity of the Authority's purported cancellation or suspension of a license under s 143(1)(b) to be the subject of judicial review, it would thereafter be for the Ch III court undertaking that review to be satisfied for itself whether or not the license condition had been breached.

81. The applicant for judicial review would ordinarily have the burden of proving that the license condition had not been breached in order to establish invalidity on the ground that the factual precondition to the exercise of the power conferred on the Authority by s 143(1) did not exist. The gravamen of the constitutional argument as presented orally on behalf of Today FM in this Court was to focus on that ordinary forensic burden. The argument was that it would operate to render the Authority's own view that the license condition had been breached close to conclusive in practice. It would not. The Authority's own view would remain just that; it would bind no one and conclude nothing. The constitutional character of the Authority's cancellation or suspension of the license would remain that of administrative action.