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High Court rules on 'Royal prank phone call' case

In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7, the High Court unanimously found that the Australian Communications and Media Authority (the ACMA) has the power to make a finding that a person has committed a criminal offence for the purpose of regulating the licensing system under which Australia's television and radio broadcasters operate. The Court also held that the existence of this power does not offend the separation of executive and judicial power established by Ch III of the Constitution.

Background

Television and radio licensing system

Under the *Broadcasting Services Act 1992* (Cth) (BSA), commercial television and radio broadcasters must hold a licence. Each licence is subject to a number of 'standard conditions', one of which provides: 'The licensee will not use the broadcasting service … in the commission of an offence against another Act or a law of a State or Territory' (the licence condition).

Today FM's prank phone call

On 4 December 2012, a popular Sydney radio station, Today FM, recorded a prank phone call in which 2 of its presenters telephoned King Edward VII Hospital in London, where the Duchess of Cambridge was being treated for acute morning sickness. Posing as Queen Elizabeth II and Prince Charles, the presenters spoke to 2 hospital staff, one of whom revealed certain details about the Duchess's condition. The prank phone call was then broadcast across Australia on 2 occasions. Today FM did not obtain the consent of the hospital staff to the broadcasts.

The ACMA's investigation

Shortly after the broadcasts, the ACMA commenced an investigation and produced a preliminary investigation report (which was later finalised). In the report, the ACMA made a finding that Today FM, in broadcasting the prank phone call, had committed an offence under s 11 of the *Surveillance Devices Act 2007* (NSW) (SDA) and therefore had breached the licence condition. Section 11 of the SDA prohibits the publication of a private conversation obtained through the use of a listening device without the consent of the principal parties to the conversation.

Federal Court proceedings

In June 2013, Today FM commenced proceedings in the Federal Court of Australia seeking declaratory and injunctive relief. Today FM argued that:

- the ACMA was not authorised to find that it had breached the licence condition *unless and until* a court had conclusively determined that it had committed the SDA offence
- if the ACMA was so authorised, the BSA offended the separation of executive and judicial power established by Ch III of the Constitution.

The Federal Court (Edmonds J) found in favour of the ACMA, but, on appeal, the Full Court of the Federal Court (Allsop CJ, Robertson and Griffiths JJ) accepted Today FM's first argument (and in the circumstances did not deal with the second argument).

The ACMA then obtained special leave to appeal to the High Court. The Attorney-General of the Commonwealth intervened in support of the ACMA, as did the Attorneys-General of Queensland, Western Australia and South Australia.

The High Court's decision

The High Court unanimously allowed the ACMA's appeal. French CJ and Hayne, Kiefel, Bell and Keane JJ (the plurality) delivered joint reasons; Gageler J delivered separate concurring reasons.

Was the ACMA authorised to find that Today FM committed a criminal offence for the purpose of administering the BSA?

The plurality began by rejecting the 'general principle', adopted by the Full Court of the Federal Court, that 'it is not normally to be expected that an administrative body such as the ACMA will determine whether or not particular conduct constitutes the commission of a relevant offence'. According to the plurality, it is not uncommon for legislative regimes to include such provisions and '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' (see [33]). Accordingly, the plurality saw no room for the introduction of a negative implication. Neither the statutory text nor the purpose of the legislative regime called for any such implication. Indeed, the plurality noted that a negative implication would seriously undermine enforcement integrity.

The plurality then considered the BSA in detail (see [35]ff) and decided that '[w]hether a licensee has used the broadcasting service in the commission of a relevant offence is a question of fact' (see [44]). That question may be determined by the ACMA 'as a preliminary step to the taking of administrative action' under the BSA (for example, imposing an additional licence condition, accepting an enforceable undertaking, issuing a remedial direction or suspending or cancelling a licence) (see [44]). Accordingly, it is not necessary for the ACMA to defer its determination and any consequent administrative action 'until after (if at all) a court exercising criminal jurisdiction has found that the relevant offence is proven' (see [50]).

Did the ACMA exercise judicial power?

The plurality's conclusion on the construction of the BSA made it necessary to consider the constitutional question: if the ACMA is permitted to make a finding that a person has committed a criminal offence in the course of administering the BSA, does that result in the ACMA exercising judicial power (which the Constitution vests exclusively in Ch III courts)?

The plurality answered this question in the negative. In its view, any finding by the ACMA that a person has committed a criminal offence does not have the binding and conclusive character of a judicial determination, nor does it amount to the adjudication and punishment of criminal guilt (see [51]ff, esp at [56]–[58]).

Gageler J's reasons

Gageler J agreed in substance with the plurality's reasoning. However, his Honour offered some interesting additional observations about the 'principle of legality': the principle that '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' (see [67]ff).

In his Honour's view, '[o]utside its application to established categories of protected common law rights and immunities, [the] principle must be approached with caution' (see [67]). In this case, it was clear that the 'concerns of the common law' that might invoke the principle (for

example, protection of reputation, the integrity of the criminal process and so on) had been specifically addressed by the Parliament when it enacted the BSA (see [74]–[75]).

Significance of the decision

As Gageler J pointed out in his concurring reasons (see [65]), it will always be a question of construing the relevant statute to determine:

- whether a regulator is authorised to make a finding that a person has committed a criminal offence
- if so, whether that *particular* authorisation is consistent with the separation of executive and judicial power established by Ch III of the Constitution.

However, the High Court's decision makes clear that there is no necessary barrier to a regulator being authorised to act in this way. As such, the decision is of considerable significance to all of those regulators – Commonwealth, State and Territory – that oversee legislative regimes that require them, as part of their regulatory functions, to consider whether breaches of the criminal law may have occurred.

AGS acted for the ACMA at all stages of the investigation and subsequent proceedings. AGS also acted for the Commonwealth Attorney-General in the High Court.

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