

ACMA v 2UE and the Public Interest

The Australian Communications and Media Authority applied to the Federal Court in November 2008 for orders that Radio 2UE Sydney Pty Ltd pay civil penalties for contraventions of the *Broadcasting Services Act 1992* (Cth). The Communications Law Centre intervened in the case in order to make submissions in the public interest. In this article, Professor Michael Fraser, Director of the Communications Law Centre, and Matt Vitins provide a summary of the decision and the submissions made by the CLC.

Background

In 1999-2000, the Australian Broadcasting Authority, a predecessor to the Australian Communications and Media Authority (the **ACMA**), conducted an inquiry prompted by the 'cash for comment' scandal.¹ The scandal concerned undisclosed commercial arrangements entered into by radio presenters including, amongst others, talk-back hosts John Laws and Alan Jones of Radio 2UE Sydney. The Authority concluded that these undisclosed commercial arrangements had influenced program content (in some cases directly) and it declared three program standards under the *Broadcasting Services Act 1992* (Cth) (the **Act**) in order to address an apparent problem of transparency.

Mr Laws obviously resented having to make disclosure announcements

The *Broadcasting Services (Commercial Radio Current Affairs) Standard 2000* (the **Disclosure Standard**) took effect in January 2001 and remains in force. It requires the on-air disclosure, during current affairs programming, of any commercial agreement between sponsors and presenters that has the potential to affect program content. Compliance with the Disclosure Standard is a standard licence condition for commercial radio broadcasters.² In turn, breach of the licence condition is both an offence and gives rise to civil liability under the Act.³

In *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No.2)* [2009] FCA 754 the ACMA sought orders from the Federal Court imposing civil penalties on Radio 2UE Sydney Pty Ltd (**Radio 2UE**) for contraventions of the Disclosure Standard, and therefore the Act. It was the first time civil penalties had been sought under the Act.⁴

The contraventions

It was agreed between the parties that Radio 2UE had breached the Disclosure Standard on thirteen separate occasions over the

course of two months in late 2007.⁵ On his morning radio program, *The John Laws Morning Show*, John Laws did not disclose sponsorship arrangements with Qantas, Toyota, Hamilton Island, Roche, Oatley Family Wines and Byron Bay Beer. Mr Laws had sponsorship arrangements with each for over \$100,000 per year, except for Byron Bay Beer which paid Mr Laws between \$10,000 and \$100,000 per year.

The parties' submissions described the contraventions as "careless".⁶ However, this was not accepted by the Court. Rares J commented that at least some of the contraventions "demonstrated a disturbing disregard" for the Disclosure Standard and further noted that Mr Laws obviously resented having to make disclosure announcements.⁷ In relation to one contravention, Mr Laws said on-air:

As you know Hamilton Island are sponsors of mine and I think in the heat of the moment... maybe we didn't mention that the other day, but of course we live in this environment of total terror and we have to say that Hamilton Island are sponsors of mine in order to appease the Nazis and also to appease the terrified management of this broadcasting station....⁸

In Mr Laws' final broadcast before he retired, he made the following comments referring to the ACMA:

How bloody stupid. When are you going to get over it? Never? What are you going to do next week when you don't have to sit around and listen to me all day in case I say Toyota? [pause] Oh did you hear that, Alice? He said Toyota! God! Boring old bastards!⁹

Laws was a recidivist offender against the disclosure standard. Aside from the thirteen incidents that were the subject of these proceedings and those that gave rise to the cash for comment scandal, Radio 2UE Sydney had also reported a series of suspected contraventions to the ACMA in 2006. In September 2007, Radio 2UE had provided the ACMA with enforceable undertakings designed to ensure future compliance with the Disclosure Standard.

1 Australian Broadcasting Authority *Commercial Radio Inquiry* (August 2000).

2 *Broadcasting Services Act 1992* (Cth) Schedule 2 cl 8(1)(b).

3 *Broadcasting Services Act 1992* (Cth) ss 139(3) and 140A(3).

4 Provisions allowing the ACMA to seek civil penalties for contraventions of the Act were inserted by the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth). See: *Broadcasting Services Act 1992* (Cth) ss 140A and 205F.

5 Section 140A(3) of the *Broadcasting Services Act 1992* (Cth) imposes direct liability on the licensee. See: *Hamilton v Whitehead* (1988) 166 CLR 121 at 127-128 as cited in *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754 (**ACMA v Radio 2UE**) at [125].

6 As cited in *ACMA v Radio 2UE* at [107].

7 *ACMA v Radio 2UE* at [141]-[143].

8 As cited in *ACMA v Radio 2UE* at [80].

9 As cited in *ACMA v Radio 2UE* at [82].

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Agreed penalties

The ACMA and Radio 2UE made joint submissions as to the penalty that should be imposed by the Court. As noted by Rares J, it is not uncommon for parties to proceedings to agree on the contraventions that have occurred and suggest civil penalties for those contraventions.

The parties' submissions highlighted Radio 2UE's immediate cooperation with the ACMA's enquiry (even before proceedings were begun), its contrition and acceptance of responsibility. Accordingly, the ACMA and Radio 2UE came to an agreed penalty of \$10,000 for each breach (amounting to a total penalty of \$130,000), which was at the lower end of the penalty range. The maximum civil penalty for a contravention of section 140A(3) of the Act is 500 penalty units, or \$55,000. The maximum total possible penalty for the 13 contraventions was therefore \$715,000.¹⁰

In cases of an agreed penalty the Court will typically impose the agreed penalty unless it is inadequate or inappropriate. However, the Court may of course reject the agreed penalty and impose a different one. As this case was the first to consider civil penalties under the Act, Justice Rares considered it might be of assistance for an intervenor to provide another view regarding the amount of the penalty. While both the ACMA and Radio 2UE opposed that course, the ACMA identified the Communications Law Centre (CLC) as a possible intervenor.¹¹

Submission made by the CLC

The CLC is an independent, not for profit, public interest centre specialising in communications, media and online law and policy. The CLC intervened in the case in order to make submissions in the public interest. The CLC submitted that the jointly proposed pecuniary penalties were not commensurate with the seriousness of the breaches and that Radio 2UE should pay a higher total penalty, in the upper half of the range. That is, a sum between \$357,500 and \$715,000. The reasons for the CLC's submission were presented to the Court as follows. In summary, the CLC argued that the 13 breaches by Radio 2UE were breaches of public trust and the public interest and that this should sound in the penalty imposed.

A licensed broadcaster enjoys a position of public trust.

Public licence

A commercial broadcasting licence is valuable not only in allocating the use of a public asset and not only in the commercial value it confers on the licensee. Its value is also in the important position of public trust which it bestows on the licensee. With the licence comes a privileged position in the national communications environment. This privileged position of the licensee carries with it a duty to fulfil its obligations as a commercial broadcaster under the Act.

Commercial radio news and current affairs services play a key role in the nation's political, social and commercial life. Large sections of

the community rely on commercial news and current affairs broadcasting to inform their views about current events in politics, commerce and social questions of the day. The major national issues of interest to the public are ventilated through commercial news current affairs and talkback radio. A licensed broadcaster enjoys a position of public trust. The community is entitled to have confidence in the honesty and candour of these broadcasts by licensed commercial broadcasters.

In addition to the central role which commercial radio plays in providing news, current affairs and commentary, Radio 2UE itself has a prominent position as a commercial broadcaster of long standing, having held a commercial broadcasting licence since 1924. Radio 2UE positions itself and is recognised as a prominent source of information. It has successfully promoted itself in the commercial market place and in the market place for ideas as a current affairs and talk-back radio station and it has invited the community to participate in a civic debate over the airwaves on a daily basis.

The CLC submitted that the jointly proposed pecuniary penalties were not commensurate with the seriousness of the breaches

The community is entitled to expect that the ground rules for this civic engagement are as they appear and are without hidden bias or hidden interests influencing the discussion without disclosure of the interests that the presenter was in fact serving, namely undisclosed sponsors. Maintaining the proper distinction between advertisement and editorial comment, and compliance with the Disclosure Standard are critical in this regard.

Failure to comply with the Disclosure Standard prevents the fair and accurate coverage of matters of public interest which is an object of the Act.¹² It undermines the validity and reliability of the current affairs and talk-back discourse, it undermines public confidence in it and it undermines the public's confidence in the possibility of genuine news, current affairs and public discourse over the radio or indeed anywhere. This undermining of public discourse has a corrosive effect on the public debate which is the life blood of a pluralistic, liberal and tolerant democratic society.

It may be said that the breaches were in respect of commercial sponsorships for commercially available products and services and were not undisclosed sponsors who hold a major political or socio-economic position, and that consequently the breaches are not significant in terms of their specific effect on public debate. The fact that the undisclosed sponsors in these particular instances before the Court were for products and services such as Toyota Motor Corporation Australia Limited does not make the contraventions unimportant. Information about these products and services influences the public's views about those products and services and that in turn informs their attitude towards social, economic, commercial and political conditions. Because these products and services are part of their day to day lives does not make them unimportant. On the contrary.

It may be said that the Disclosure Standard is no longer of significance in today's communications and media environment because current affairs, news and commentary of every colour are available

¹⁰ *Broadcasting Services Act 1992* (Cth) ss 139(3), 140A(3) and 205F(4).

¹¹ *ACMA v Radio 2UE* at [5].

¹² *Broadcasting Services Act 1992* (Cth) sub-s 3(1)(g).

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on the internet and are unregulated under the Act or similar legislation. The commercial broadcasters however, licensed under a public licence, enjoy a special position of prominence, confidence and trust in the community. The community looks to them in particular for reliable news and commentary and the licensee benefits from the imprimatur which the broadcast licence bestows on them.

The licence is the most important asset of commercial broadcasters' business. The media free for all in the online environment makes the fact of regulation of commercial broadcasters more important. The community knows that Radio 2UE is regulated and therefore assumes that in general, what they are hearing on Radio 2UE complies with the regulation. That means that the contraventions were a serious breach of public trust.

Laws: A radio broadcast icon

Radio 2UE employed Mr Laws as a presenter, who for decades was an iconic figure in the talk-back radio arena. He was a (if not 'the') pre-eminent talk-back radio news and current affairs presenter, with a following throughout Australia. He had a large and faithful following in metropolitan, regional and country areas. Mr Laws was genuinely regarded as a reliable authority by many people who tuned in to his show to listen to his current affairs broadcasts, editorial commentary and interviews with prominent figures. Many people used Mr Laws' show as an important source for their news and for informing their views.

Studies have shown that John Laws was one of the most influential figures in popular media.¹³ His opinions were the subject of public discussion and his views were very influential in the community and were a great mobiliser of public opinion. Senior political, corporate and other prominent figures frequently appeared on his program for interviews and discussion and to field calls from members of the audience because of this influence.

Radio 2UE employed Mr Laws because of the power to attract an audience and advertisers to 2UE. Mr Laws had a lot to say about political, social and commercial issues and this stirred debate which attracted an audience and in turn attracted advertisers to Radio 2UE. In his show Mr Laws presented himself as independent, self-opinionated, fair dinkum and untroubled by controversy; as his own man, unafraid to express his own opinion when confronted with powerful people or interests. He did not present himself in his show as a man whose opinion could be bought. The public was offended to learn otherwise. Mr Laws fashioned a public image of himself as the defender and protector of community standards and people believed him.

Penalties

The CLC argued in its submissions that if penalties are perceived by licensees as merely an acceptable operational cost, less than the reasonable cost of compliance, they will not be an effective sanction, nor will they be credible in the eyes of the community. They will not protect the public interest in compliance. It is important to the public interest that penalties imposed by the court should not

be seen by 2UE and by others as merely a 'brush off', or a cost of doing business, which would amount to an expense to 2UE which is less than the cost of implementing and operating a systematic, robust and effective corporate compliance program. If the penalties imposed in the face of the history of recidivism and inadequate compliance at 2UE, were less than the cost of compliance, they would not act as a deterrent to future breaches of licence conditions.¹⁴

The CLC submitted that consideration of the penalty should take into account the need for deterrence and that the agreed penalty proposed by the parties would have been counter-productive. It would not have been effective in engendering compliance in individual licensees. It would not give cause for public confidence in the commercial radio broadcast licence or the broadcasters.

Outcome

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The Court accepted that Radio 2UE had cooperated with the ACMA, that it had a new compliance program in place and that it showed genuine contrition. However, the Court also held that there had been a significant failure of Radio 2UE to ensure compliance with the Act and that Laws' conduct would not be addressed in an appropriate way by the agreed penalty.¹⁵

Rares J explained:

While Radio 2UE is entitled [to] have the penalties mitigated because of its responses to the contraventions and its good faith in its ineffective attempts to comply with the disclosure standard, it cannot relieve itself of the gravity of its contravening conduct (being the conduct of its presenter, Mr Laws).¹⁶

The Court found that the breaches were of a serious nature and that the agreed penalties were manifestly inadequate. The Court ordered that Radio 2UE pay pecuniary penalties in varying amounts for each of the breaches of its licence, totalling \$360,000.

Professor Michael Fraser is Director of the Communications Law Centre at University of Technology Sydney. Matt Vitins is a Lawyer in the Communications, Media and Technology group at Allens Arthur Robinson.

¹³ Terry Flew 'A Medium for Mateship: Commercial Talk Radio in Australia' in Andrew Crisell (ed) *More Than a Music Box*: (2006), 232.

¹⁴ See *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 re the deterrent purpose of civil penalties cited in *ACMA v Radio 2UE* at [31].

¹⁵ *ACMA v Radio 2UE* at [128].

¹⁶ *ACMA v Radio 2UE* at [148].