

Harbour Radio Pty Ltd v Australian Communications and Media Authority [2010] FCA 478

Harbour Radio, which operates 2GB in Sydney, has successfully challenged a decision by the ACMA to investigate a complaint by an advertiser against 2GB for adverse comments broadcast on the Ray Hadley Morning Show. The decision is the first to consider the interpretation of the complaint handling provisions of the Commercial Radio Code of Practice and the investigative powers of the ACMA. The effect of the decision is to reverse the approach historically taken by the ACMA in determining whether a complaint is a 'Code complaint' and demonstrates the discrete nature of the investigative powers granted under the Broadcasting Services Act 1992 (Cth).

Background

On 1 December 2009 Harbour Radio Pty Limited (**Harbour Radio**), the commercial radio licensee which operates the talkback station 2GB, received a letter from the Australian Communications and Media Authority (**ACMA**) indicating that it had made a decision to investigate a complaint regarding material broadcast by Harbour Radio on the Ray Morning Hadley Show. The investigation was to take place pursuant to the ACMA's duty to investigate under section 149 of the *Broadcasting Services Act 1992* (Cth) (the **BSA**).

During August 2009, Ray Hadley discussed the Federal Government's ceiling insulation scheme and allegations of rorts under the scheme. A business trading as the House Doctor, operated by a Mr Kalfa, was one of the businesses discussed by Ray Hadley and his listeners.

Prior to the comments by Mr Haldey, the House Doctor had been advertising its insulation services on 2GB after being approached by 2GB in early 2009 and agreeing to pay \$27,600 for one month's advertising. As part of the advertising, Ray Hadley had been reading live advertisements for the House Doctor's services during his programs. When allegations against the House Doctor came to light, the live read advertisements were cancelled in a scenario described as a reverse of 'cash for comment'.

Subsequently, Mr Kalfa wrote to Harbour Radio complaining that 2GB had broadcast allegations including that the House Doctor had charged similar amounts of money despite varying ceiling sizes and that it used services such as Google Maps to determine ceiling sizes without confirming the size by inspection. Mr Kalfa denied the allegations.

Mr Kalfa wrote:

Our family business undertook in good faith advertising on radio 2GB only to learn later that we became the 2GB vehicle for repeated criticism of the government stimulus package by virtue of a campaign of unsubstantiated and unjustified allegations. We request that you give your urgent attention to the matters we have raised with a view to redressing the situation.

Although Harbour Radio responded to the letter of complaint, it did not believe that it was dealing with a complaint pursuant to the Commercial Radio Codes of Practice and Guidelines (2004) (the **Codes**) as the letter of complaint did not refer to the Codes either specifically or generally. Accordingly, Harbour Radio did not respond in the manner which would have been required had Mr Kalfa suggested that there had been a breach of the Codes.

On 13 November 2009 Mr Kalfa wrote to the ACMA alleging a breach of the Codes, in particular clause 1.3b relating to simulating news or events in such a way as to mislead or alarm listeners.

Following receipt of a letter from the ACMA indicating that it was investigating Harbour Radio pursuant to the Codes and sections 148 and 149 of the BSA, Harbour Radio requested a Statement of Reasons pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (The **ADJR**).

After engaging in correspondence with ACMA, arguing without success that Mr Kalfa's letter was not a complaint within the complaint handling provisions of the Codes, on 24 February 2010 Harbour Radio commenced proceedings under the ADJR.

Legal framework

Sections 148 and 149 of the BSA set out the rights of members of the public to complain to the ACMA regarding broadcast matters and the ACMA's duties with respect to such complaints:

148 Complaints under codes of practice

If:

- (a) *a person has made a complaint to a provider of broadcasting services on a matter relating to:*
 - (i) *program content; or*
 - (ii) *compliance with a code of practice that applies to those services and that is included in the Register of codes of practice; and*
- (b) *if there is a relevant code of practice relating to the handling of complaints of that kind—the complaint was made in accordance with that code of practice; and*
- (c) *either:*
 - (i) *the person has not received a response within 60 days after making the complaint; or*
 - (ii) *the person has received a response within that period but considers that response to be inadequate;*
the person may make a complaint to the ACMA about the matter.

Section 149 of the BSA then provides that, unless the ACMA is satisfied that the complaint is frivolous or vexatious or not made in good faith, it must investigate the complaint.

The Codes are divided into sections, each section referred to as a Code. Code 5, the complaint handling Code, indicates

5.1 The purpose of this Code is to prescribe:

- (d) *the method of handling complaints made by members of the public to licensees regarding compliance with these Codes; and*

- (e) *the manner of reporting by the commercial radio industry to the [ABA (now ACMA)] on complaints so made.*

5.2 For the purposes of this Part, a complaint is **an assertion:**

- (a) *made in writing by letter or fax by a person who provides his or her name and address;*
(b) *to a licensee or a person at the radio station concerned who is acting with the apparent authority of the licensee;*

that the licensee has broadcast matter which, in the opinion of the complainant, breaches these Codes. Complaints need not specify the section of the code to which the complaint relates, but must adequately identify the material broadcast and the nature of the complaint. *(emphasis added)*

The ACMA indicated in the Statement of Reasons that the complaint:

appears to relate to the accuracy of factual material presented in broadcasts, which is a matter covered by Code of Practice 2

and

while the complaint did not assert a breach of the code, it was taken...to contain an implicit assertion that Harbour Radio had broadcast matter which, in the opinion of the complainant, had breached the codes.

Additionally the ACMA indicated that it also intended to include in the investigation "an examination of Harbour Radio's compliance with clauses 5.7 and 5.7 of the Codes."

The ACMA submitted that the assertion of breach of the Codes was implicit

Issues

As identified at the by the Court (at [37]), the central question was:

whether the delegate was correct to conclude that Mr Kalfa's letter of 25 August 2009 constituted a written complaint which fell within the terms of cl 5.2 of the Commercial Radio Codes.

Harbour Radio submitted that, because the complaint did not assert a breach of the Codes, the complaint to it was not made in accordance with clause 5.2 of the Codes and therefore the requirement in section 148(b) was not met.

Accordingly, Harbour Radio submitted (at [27]):

it was not open to Mr Kalfa to make a complaint to ACMA under s 148 of the Broadcasting Act and there was no obligation on ACMA to investigate his complaint to it. Harbour Radio submits that the delegate's decision to the contrary is affected by legal and jurisdictional error and should be quashed or set aside .

Additionally, Harbour Radio took the view that the ACMA had misconstrued the complaint and that it was not open to the ACMA to sever aspects of a complaint to alter its character so that it becomes amenable to the ACMA's jurisdiction.

The ACMA submitted that the assertion of breach of the Codes was implicit and, even if the delegate was incorrect in finding an implicit assertion, the assertion was not required in order to satisfy section 148(b) or enliven section 149.

Despite the Codes being developed in consultation with the ACMA, the ACMA also submitted that:

(section) 148(b) should only pick up provisions of the Codes as they related to the making of complaints and not about the scope of them ... and not pick up any provisions that seeks to limit complaints about breaches of the Codes.

Finally, as noted by the Court at [41], the:

ACMA made a further attempt to save the decision in the event that all other arguments had gone against it. It argued that its powers to investigate (to be found elsewhere in the Broadcast-

ing Act and in other legislation) were adequate to support its decision to do so in the present case even if it came under no obligation from the terms of s 149(1) of the Broadcasting Act.

Finding

The Court did not accept the ACMA's submissions and set the decision aside with costs finding that (at [40]):

The reasons given by the delegate do not afford a reason adequate in law to support her conclusion that ACMA was bound to investigate the complaint made to it by Mr Kalfa. Nor has any other reason been advanced which would support such a conclusion.

In making its finding the Court recognised that (at [40]):

the requirement in cl 5.2, that the assertion of breach reflects the opinion of the complainant, is not without significance ... what is needed is an assertion that, in the opinion of the writer, a code has been breached. That condition was not met in the present case.

Additionally, the Court did not accept that the ACMA's alternative jurisdiction under a different section of the BSA meant that the decision should not be set aside, noting at [41] that:

that was not the effect of the decision. The effect of the decision was that ACMA was obliged to investigate Mr Kalfa's complaint to it ...what ACMA may decide to do, based on other statutory provisions, need not be considered here.

Implications

This decision will be welcomed by the industry as, in upholding the terms of the Codes, the Court has confirmed that the Codes place practical parameters around the obligations of broadcasters. At [40] the Court notes that the requirement under the Codes that a complainant explicitly assert a breach:

emphasises that it is not left to the recipient to search for, or eliminate, implications that might arise from the terms of a letter, much less speculate about the opinion of the writer. What is needed is an assertion that, in the opinion of the writer, a code has been breached.

At [38] the Court confirmed that the "contrary assumption would be unrealistic" identifying that:

Code of Practice 5 imposes a series of obligations on a broadcaster when a written complaint is made to it under cl 5.2. A complaint of that kind is one of, no doubt, a wide variety of written communications that might be made by a member of the public (whether an individual or a business) with a broadcaster. Some such communications might contain a complaint of one kind or another about programs in general or a particular program. The writer of such a letter may desire some level of inquiry (or other action) or be content merely to express a point of view. In my view, it is apparent from the terms of Code of Practice 5 that those who developed the code thought it important that it be apparent from the terms of a complaint that it constituted an allegation of breach of the Commercial Radio Codes.

The industry can take some comfort in the Court's declaration (at [38]) that:

a broadcaster is not required to speculate about the purpose or motives of someone advancing a "complaint" which is not assertively one about breach of the Commercial Radio Codes.

The case demonstrates that broadcasters are entitled to rely on the terms of the Codes and seek a review where they disagree with the interpretations placed on them by the ACMA.

As a consequence of the decision, the ACMA will need to ensure it approaches the exercise of its powers in accordance with the terms of the BSA, rather than a general invocation. This will promote integrity in the regulatory framework and counter against the possibility of capricious decision-making.

Alex Morrissey is an Associate and Andrew Stewart a Partner at Baker & McKenzie. The authors acted for Harbour Radio in these proceedings.