

AUSTRALIAN MEDIA LAW UPDATE

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THE ABA AND RADIO REGULATION

[71] During 2003, the Australian Broadcasting Authority (ABA) completed a range of investigations into commercial radio broadcasting and radio open narrowcasting. As well as providing some guidance as ‘case law’, these investigations perhaps also present a snapshot of the state of regulation of the two sectors. It is also serendipitous that the ABA decisions tell us a little about the regulatory mood affecting Australia’s largest radio market — Sydney — and the regulatory concerns applicable to rural and regional Australia.

Sydney commercial radio

In 2002, the ABA commenced investigations into Sydney commercial agreements between Telstra and 2UE, and Telstra and 2GB. It also undertook an investigation into the control of 2GB and 2CH in Sydney.² The ABA completed two of these three investigations as at February 2004. An investigation into the commercial agreements in relation to Telstra and 2GB is still current.³

Control of the licences of commercial radio 2GB and 2CH

In May 2003, the ABA published its *Report of Investigation into matters relating to the control of the 2GB and 2CH licences*.⁴ The investigation was prompted by information suggesting that Alan Jones, whom it had been announced would acquire an interest in 2GB, had been in a position to exercise control of licences of 2GB and 2CH (the two licences) in February 2002. The ABA decided that Mr Jones and associated companies had not been in a position to exercise control before 24 October 2002, [72] because he had not acquired any company interests before this date

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² The background is set out in Marett Leiboff ‘Australian Media Law Update: Commercial Radio Standards: extending the cash for comment provisions’ and ‘Commercial arrangements and the Commercial Radio Standards and control issues’ (2003) 8(2) *Media and Arts Law Review* 127, 130, 131.

³ Investigations: Current investigations, ‘ABA investigation into Telstra commercial arrangements — Harbour Radio Pty Ltd and Alan Jones’, <<http://www.aba.gov.au/radio/investigations/current.htm>>.

⁴ Australian Broadcasting Authority, *Report of Investigation into matters relating to the control of the 2GB and 2CH licences*, Sydney, May 2003.

(discussed below). There had therefore been no breach of the *Broadcasting Services Act 1992* (Cth) (the Act).

The ABA had been notified by the owner of the two licences, Macquarie Radio Network Pty Ltd,⁵ on 29, 30 and 31 October 2002, that Alan Jones and his associated companies had come to be in a position to exercise control of the two licences on 24 October 2002.⁶ In the period between February and October 2002, directors of Macquarie had said that there had been no change in control.⁷

On 6 February 2002, a binding one page agreement had been signed by Alan Jones and John Singleton (a director of Macquarie).⁸ The agreement between Alan Jones, Belford Productions Pty Ltd and Macquarie, agreed, among other things, that Macquarie would issue share options of 20 per cent in Macquarie to Alan Jones, exercisable over a ten year period (the 20 per cent share option). The *character and effect* of this one page agreement was the determining factor in the ABA's decision-making in this case.

The ABA investigated the transactions in order to ascertain if the licensee was able to satisfy the requirement that there was no significant risk that it would commit an offence under the Act or breach licence conditions.⁹ It did so in order to ensure that the licensee itself was suitable to hold the two licences. Under s 41(2), the Act presumes such suitability, unless a definable risk becomes known. Such a risk may relate to situations requiring trust and candour: ss 41(3)(b) and (d). So, a failure to inform the ABA about a change in the control of the two licences, under ss 62–64 would be an event likely to trigger a question about the suitability of the licensee.

Control

⁵ The licence of 2CH is a wholly owned subsidiary of Macquarie, while the licence of 2GB is held by Harbour Radio, which is owned by Macquarie (91 per cent) and 2CH (9 per cent): Australian Broadcasting Authority, *ibid* 16, 29.

⁶ *Ibid* 10. A detailed overview of the relevant personalities, transactions and events are described at 16–28.

⁷ *Ibid* 10, 27–8. If Alan Jones and his companies had acquired any relevant interests which would have put him in a position to exercise control before that date, the applicable notification provisions would have been breached: *Broadcasting Services Act 1992* (Cth) ss 62–64.

⁸ ABA, *ibid* 19. A full description of the events surrounding the signing of the one page agreement is contained at 18–21.

⁹ *Broadcasting Services Act 1992* (Cth) s 41: see *ibid* 12–13.

In reaching the conclusion that there had been no such change in control before the October 2002, the ABA undertook two lines of analysis as provided for through s 7, Sch 1 and the relevant interpretative provisions in s 6 and s 8. This analysis was based on the broad, informal and flexible concept of control provided for in the Act, which conceives of control not only through legal and equitable concepts, such as trusts and agreements, but includes arrangements, understandings and practices, whether or not they have legal or equitable force or based in legal or equitable rights.¹⁰ Control is to be considered using practical and commercial considerations, and not highly refined legal tests.¹¹ As conceived of by the legislative essay in cl 1 of Sch 1, distinct categories of interpretation, are not contemplated when determining, control. For instance, it does not treat as discreet company interests from other forms of control.¹²

[73] But in undertaking its analysis, the ABA narrowed the role of the ‘legislative essay’ in cl 1 by describing it as ‘an introductory statement’.¹³ Despite its claim to consider practical and commercial considerations, the ABA’s decision adopts a high level of interpretative nicety, relying upon fine points to delineate between legal and equitable rights, and legal concepts of arrangements, understandings, and practices to find that no change of control occurred before 24 October 2002.

Firstly, it considered whether Alan Jones became to be in a position to exercise control through an acquisition of company interests, namely the 20 per cent share option provided for in the one page agreement in February 2002. Deemed control will occur where a person has a company interest exceeding 15 per cent (cl 6, Sch 1 of the Act). Company interests are shareholding (s 8(1)), voting (s 8(2)), dividend (s 8(3)), and winding up interests (s 8(4)). A person may have an interest in the last three even if there is no beneficial entitlement to, or interest in, shares in the company (s 8(5)).

¹⁰ *Broadcasting Services Act 1992* (Cth) s 6(1).

¹¹ *Re Application of News Corp Limited* (1987) 15 FCR 227, Lockart J; approved by Hill J, below; referred to at ABA, above n 4, 53–4. The ABA indicated that it adopted this test in this investigation: at 54.

¹² The term the ‘legislative essay’ has been accepted by the courts; for instance, Hill J in *Canwest Global Communications v ABA* (1997) 147 ALR 539, 558–9. The Explanatory Memorandum Broadcasting Services Bill 1992 indicates that:

Part 1 of this Schedule contains an essay which explains the difficulties in setting control rules in legislation which will be definitive for each and every case which may arise for consideration. The essay gives some examples of how the O&C provisions in the Act may operate ... (emphasis added).

¹³ ABA, above n 4, 13. The description of cl 1 as an ‘introductory statement’ is novel.

Here, only shareholding and dividend interests were relevant.¹⁴ In relation to shareholding interests, the ABA considered the meaning of the provision that includes a beneficial entitlement to shares, or an interest in shares.¹⁵ It took the view that this extended to both a legal and equitable ownership, whether complete or partially held by the person entitled to the shares.¹⁶ So did the one page agreement constitute such ownership? The ABA took the view that while the one page agreement governed the entitlements for options until such time as it was replaced by an option deed. An option deed of 24 October 2002 now governed the entitlement of Alan Jones company, Hadiac, to the options, thus replacing the February one page agreement.¹⁷ It held that the one page agreement was only a binding arrangement *to agree to the grant of options*. It would not entitle Alan Jones to claim specific performance to obtain an allotment of shares, but could only obtain an order for specific performance in the terms of the one page agreement.¹⁸ Thus, Alan Jones had no possible shareholding interest until the date of the option deed, but the ABA was of the opinion that 'this type of right is not a shareholding interest within the meaning of the Act'.¹⁹

However, cl 13 of the deed brought out the possibility of Alan Jones having dividend interests, and the question as to whether such interests were in existence at the time of the one page agreement, or earlier, as some negotiations had already been on foot.²⁰ On the basis of evidence provided, the ABA concluded that 'no agreement, arrangement or understanding' existed before 24 October 2002.²¹ The ABA was also unconvinced that character of the dividends contemplated by the one page agreement and earlier negotiations, would meet the definitional requirements of a dividend interest, as a company interest, within the meaning of the Act.²² The ABA concluded that, on 24 October 2002, Alan Jones and his associated entities had a 20 per cent

¹⁴ Ibid 29.

¹⁵ *Broadcasting Services Act 1992* (Cth) s 8(1)(a).

¹⁶ ABA, above n 4, 30.

¹⁷ Ibid 30–1.

¹⁸ Ibid 31.

¹⁹ Ibid 35.

²⁰ Ibid 32–3.

²¹ Ibid 34.

²² Ibid.

dividend interest in Macquarie.²³ This meant that he was deemed to be in control at that date, and not before.

[74] Having concluded that there had been no deemed control, prior to October 2002, the ABA then looked at whether there had been any other indicia of control by Alan Jones at Macquarie. The ‘flexible’ or ‘actual’ concept of control (cl 2, Sch 1 of the Act) looks at matters like operational control (cl 2(1)(c)), control of programs (cl 2(1)(b)), or direction or restraint over management (cl 2(1)(d)). While Alan Jones had power with respect to his own program, and had influence at Macquarie, these factors did not meet the required standard to constitute control.²⁴

Suitability

In addition to the matters concerning control, the ABA considered events and circumstances that could impact on the suitability of the licensee under s 41 (referred to above), through the activities of both Macquarie and Alan Jones. In adopting the test that a significant risk of an offence against the Act or breach of conditions, the ABA took the view that significant meant important, notable, weighty, or more than ordinary.²⁵ It noted that neither the 2GB nor 2CH licensee had been the subject of such convictions or breaches, and that no adverse finding about suitability was made.²⁶

Through the process of investigation, the ABA was informed that Macquarie had not advised it of changes to its interests as required under s 63. The ABA accepted that there had been an error, and no adverse findings were made.²⁷

The ABA was concerned about the lack of candour of Macquarie in relation to the ABA’s queries about the control of Macquarie, prior to 24 October 2002. It noted that the control regime was dependent on self-reporting by licensees. The ABA observed that it was provided with legally accurate but incomplete advice, and it would have been appropriate and helpful to have been given meaningful briefings. It appeared to

²³ Ibid 35.

²⁴ Ibid 36–8.

²⁵ Ibid 40.

²⁶ Ibid 47.

²⁷ Ibid.

suggest that some directors of Macquarie sought to keep the ABA uninformed, and during the course of the investigation, two of the director's apologised.²⁸

The ABA was concerned about the lack of understanding of the control rules by the directors of Macquarie. It considered that directors have a general knowledge of the rules, and need to understand their flexible nature. It identified four key points:

- arrangements and understandings and not just binding contracts need to be considered;
- more than one person can be in a position to exercise control;
- control rules exist beyond deemed control;
- changes in control and notification failure, may raise questions about the suitability of a licensee.²⁹

A limited set of arrangements had been put in place to ensure compliance, and the ABA found the directors did not take sufficient care in respect of issues arising under the legislation. It did not accept that these matters should be left only with management, and that that directors needed to ensure that those responsible for reporting to the ABA carried out their duties fully and properly.³⁰ The ABA considered that it would be appropriate for Macquarie to improve its compliance system, and executive understanding of the control rules.³¹

[75] In relation to Alan Jones, while he had been involved in the 'cash for comment' investigation whilst a presenter at 2UE, which had led to breaches of radio codes of practice, the ABA found that his position to exercise control would impact on the suitability of the two licenses. It accepted that there was no serious risk of offences under the Act or regulations, or breaches of licence because:

- Mr Jones had not sought to persuade or require such offences or breaches by other broadcasters;
- No 'side deals' (of the cash for comment type) would be tolerated by a key director;
- Mr Jones is not responsible for reporting to the ABA;

²⁸ Ibid 41–2.

²⁹ Ibid 43–4.

³⁰ Ibid 44–5.

³¹ Ibid 47–8.

- Service agreements between Mr Jones and Macquarie are the subject of compliance under the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*;
- Neither of two key directors would defer to Mr Jones if he were to seek to breach the Act of conditions of the two licences.³²

Commercial Radio Current Affairs Disclosure Standard

In November 2003,³³ the ABA found that the licensee of 2UE had breached a number of its obligations under the Act, including the ‘cash for comment’ commercial radio standards *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (the disclosure standard). It also breached the equivalent licence conditions imposed on 2UE as a result of the ‘cash for comment’ investigation,³⁴ and the Commercial Radio Codes of Practice.

John Laws and Telstra had an agreement of a publicity or sponsorship kind, which was on foot in 2002. This agreement was subject to the disclosure standard and the 2UE licence conditions, which (imprecisely) agreed to and acknowledged the regulatory obligation of the 2UE.³⁵ The ABA considered a range of Telstra and NRMA related comments broadcast by John Laws, which had been the subject of complaint by the Communications Law Centre.³⁶ The ABA found a number of comments not in breach of the disclosure standard, the associated advertising standard,³⁷ or the requirements with respect to the broadcast of political matter set out in cl 1 of Sch 2 of the Act, to which commercial radio broadcasters are subject.³⁸

In total, the ABA found the following breaches occurred:³⁹

³² Ibid 46–7.

³³ ABA, *Report of Investigation into Radio 2UE Sydney Pty Ltd — Sponsorship of Mr John Law by Telstra Corporation Ltd and NRMA Insurance Ltd*, Sydney, November 2003.

³⁴ Ibid 12–13. An overview of the conditions imposed is set out in Marett Leiboff, ‘Australian Media Law Update: Commercial Radio Inquiry: Report of the ABA hearing into 2UE and the impositions of conditions’ (2000) 5 *Media and Arts Law Review* 112.

³⁵ ABA, above n 4, 17–21.

³⁶ Ibid 15. A number of media reports raised questions about the material broadcast: at 14–16.

³⁷ *Broadcasting Services (Commercial Radio Advertising) Standard 2000*.

³⁸ *Broadcasting Services Act 1992* (Cth) cl 8(1)(i).

³⁹ ABA, above n 34, ‘Schedule E: Summary of Breaches’ at 72–3. The detail of the findings in respect to all the material the subject of complaint is set out at Disclosure Standard: Telstra, at 23–31; Precision — Disclosure Standard: Telstra at 31–4; Advertising Standard: Telstra at 34–7; NRMA at 38–43, Political Matters.

- 10 breaches of s 7(1) of the Disclosure Standard, cl 3.2 of the 2UE licence condition and Code of Practice 2.2(d) occurred, because no disclosure announcements were broadcast;
- [76] nine breaches of s 7(1) of the Disclosure Standard and cl 3.1 and 3.2 of the 2UE licence condition and Code of Practice 2.2(d) occurred, because ambiguous or inadequate disclosure announcements were made, including a lack of personal attribution, such as saying 'ours' rather than 'mine', or referring to an 'arrangement' with Telstra;
- six breaches of cl 3(1)(e)–(h) of the 2UE Disclosure and Compliance Licence Condition occurred, because of a failure to disclose that the commercial agreement is a 'major' commercial agreement.

As a result of these breaches, the ABA is taking two steps because of the continued breaches by 2UE, including the special conditions imposed on it.⁴⁰ It has referred the matter to the Commonwealth Director of Public Prosecutions, who, for instance, can proceed in relation to the offence provisions of the legislation.⁴¹ The ABA is also considering imposing an additional licence condition on 2UE, which will require, at 2UE's expense, 2UE to engage an approved independent third party monitor to monitor the John Laws program for periods nominated by the ABA. The monitor will be required to provide a report and transcript directly to the ABA, in order to provide an incentive to ensure compliance with the disclosure obligations. The ABA will be able to make spot checks as a result.

The proposals of the ABA are an interesting way to ensure that the actions of an individual presenter can be directly monitored by the regulator, given that the ABA has no direct power over individuals under the Act. It can only take action in relation to licensees, unlike its predecessor legislation, the *Broadcasting Act 1942*.

Regional Australia

Unsuitable Licensee

⁴⁰ ABA, 'ABA to refer 2UE breaches of Disclosure Standard to DPP News Release' (NR 90/2003, 4 December 2003).

⁴¹ *Broadcasting Services Act 1992* (Cth) s139(3).

In July 2003, the ABA decided that the licensee of commercial radio licence 6GS Wagin, Cybervale Pty Ltd,⁴² had breached the notification provisions of the Act: ss 63 and 64,⁴³ and committed an offence under s 202 by failing to produce documents required in a notice issued by the ABA under s 173.⁴⁴ The consequence was that the ABA was unable to determine who was in control of the licensee. It also breached s 62 by failing to lodge a notification for the financial year by the due date.⁴⁵

The ABA suspended the commercial radio licence operated by Cybervale Pty Ltd for two weeks in June, because of its failure to provide audited statements.⁴⁶ This was the first time a licence had been suspended.

On 22 November 2003, the ABA determined that Cybervale was not a suitable licensee under s 41(2) of the Act, because of the significant risk that it would commit offences against the Act, or breach conditions. On 25 November, it refused to renew the licence,⁴⁷ which was due to expire on 25 November 2003.⁴⁸ Again, this was another first.

Practically, the service in Wagin had been off the air since June, and other radio services, including a narrowcasting service provided by the same company, were still functioning. Clearly, the community is [77] likely to be disadvantaged because of a lack of a service, as well as the consequences for licensee companies. Because the service did not use the broadcast service bands, however, the ABA noted that the frequency could be used by Cybervale for another purpose, such as providing a narrowcasting service after 25 November. The ABA's observations are interesting, as narrowcasters are not subject to the kinds of obligations to which commercial broadcasters have to comply.

⁴² ABA, *Investigation Report — Cybervale Pty Ltd licensee of commercial radio licence 6GS Wagin*, File No 2002/0746/2.

⁴³ *Ibid* 2–4; these are the same provisions considered in relation to Macquarie above.

⁴⁴ *Ibid* 4–5.

⁴⁵ *Ibid* 6.

⁴⁶ ABA, 'ABA suspends 6GS licence in Wagin WA' (NR 39/2003, 2 June 2003).

⁴⁷ *Broadcasting Services Act 1992* (Cth) s 47(2) provides that the licence must not be renewed if s 41(2) applies to the licensee.

⁴⁸ Australian Broadcasting Authority, 'ABA finds Cybervale Pty Ltd Not Suitable to Remain a Commercial Radio Licensee' (NR 85/2003, 25 November 2003).

Providing an unlicensed commercial broadcasting service

On 18 December 2003, the ABA determined that the then licensee of WOW-FM Mackay, in Queensland, was providing a commercial broadcasting service and not an open narrowcast radio service as it was licensed to do.⁴⁹

The then licensee claimed that it met the requirements of an open narrowcasting service, by providing programs of limited appeal,⁵⁰ namely dance music, targeted to a special interest group,⁵¹ who were those attending dance clubs and raves. It also indicated that it provided limited programming, comprised of 90 per cent dance.⁵²

It claimed that the ABA (through its *Open Narrowcasting — Clarifying the Criteria* document of March 2001) had determined that dance music would be classified as open narrowcasting.⁵³ It also claimed that as the ABA had determined that other dance music services had been categorised as open narrowcasting services, then this service must also determined in this fashion, on the basis of prior opinions given under s 21 of the Act.⁵⁴

The ABA rejected all these assertions. In particular, it took the view that s 21 opinions cannot be transferred from one service provider to another, and in this case, the service provided was distinguishable from the 4 services cited.⁵⁵ The ABA determined instead that WOW-FM contained all the characteristics of a commercial broadcasting service,⁵⁶ and in particular held that the service provided programs of appeal to the general public.⁵⁷ Thus, the then licensee was in breach of s 133, as it was providing an unlicensed service.

⁴⁹ Investigation Report No 1257, 8–9.

⁵⁰ *Broadcasting Services Act 1992* (Cth) s 18(1)(a)(iv).

⁵¹ Section 18(1)(a)(i).

⁵² Investigation Report No 1257, 4–6.

⁵³ *Ibid* 6.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ *Broadcasting Services Act 1992* (Cth) s 14.

⁵⁷ Investigation Report No 1257, 5–9.

On 7 November 2003, the ABA received a Form ABA 61 from the then licensee which was submitted as required under Sch 1 of the *Broadcasting Services Clarification Notice 2002*.⁵⁸ It was claimed the situation had been remedied, which the ABA did reject. In addition, there was a failure to correctly describe categories of music broadcast.⁵⁹ Because there was a new licensee, the ABA sought information from them to ascertain compliance with the obligations under the Act, and to give the ABA copies of broadcasts by 2 February 2004.

⁵⁸ See Marett Leiboff, 'Media Update: Open Narrowcasting Radio Services' (2002) 7 *Media and Arts Law Review* 327.

⁵⁹ Investigation Report No 1257, 10–11.