

## Investigation Report No. 2928

<b>File No.</b>	ACMA2012/1569
<b>Licensee</b>	Today FM (Sydney) Pty Ltd
<b>Station</b>	2DAY
<b>Type of Service</b>	Commercial radio broadcasting
<b>Name of Program</b>	<i>Summer 30</i>
<b>Date of Broadcast</b>	4 December 2012
<b>Relevant Code or Licence Condition</b>	<p>Clauses 1.3, 2.1(d), 2.3(d), 6.1 and 9.1 of <i>Commercial Radio Australia Codes of Practice and Guidelines 2011</i>.</p> <p>Additional licence condition on commercial radio broadcasting licence no. 3032 imposed by the Administrative Appeals Tribunal on 8 October 2012 under subsection 43(1) of the <i>Broadcasting Services Act 1992</i> (Cth).</p> <p>Paragraph 8(1)(g) of Schedule 2 to the <i>Broadcasting Services Act 1992</i> (Cth).</p>
<b>Date finalised</b>	14 February 2014
<b>Decision</b>	<p>No breach of clauses 1.3, 2.1(d) and 2.3(d) of the <i>Commercial Radio Australia Codes of Practice and Guidelines 2011</i></p> <p>Breach of clauses 6.1 and 9.1 of the <i>Commercial Radio Australia Codes of Practice and Guidelines 2011</i></p> <p>No breach of the additional licence condition on commercial radio broadcasting licence no. 3032 imposed by the Administrative Appeals Tribunal on 8 October 2012</p> <p>Breach of the licence condition set out in paragraph 8(1)(g) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>.</p>

# Introduction

On 4 December 2012, the licensee, Today FM (Sydney) Pty Ltd (Today FM), broadcast a prank call, during a broadcast of its 'Summer 30' program during which two presenters telephoned the King Edward VII Hospital in London where the Duchess of Cambridge (the Duchess) was an inpatient being treated for acute morning sickness.

Posing as Queen Elizabeth II and Prince Charles, the presenters spoke to two hospital staff, one of whom, apparently accepting that the presenters were indeed the Queen and Prince Charles, provided certain details about the Duchess's condition.

The ACMA is investigating whether, in relation to and at the time of the broadcast of the prank call, Today FM complied with its regulatory obligations including:

1. Clauses 1.3, 2.1(d), 2.3(d), 6.1, and 9.1 of the *Commercial Radio Australia Codes of Practice and Guidelines 2011* (the Codes);
2. The additional licence condition on commercial radio broadcasting licence no. 3032 imposed by the Administrative Appeals Tribunal on 8 October 2012 under subsection 43(1) of the *Broadcasting Services Act 1992* (Cth) (the BSA); and
3. The standard licence condition set out at paragraph 8(1)(g) of Schedule 2 to the BSA.

## The program

*Summer 30* was<sup>1</sup> broadcast in Sydney on Monday to Thursday from 7.30 pm to 10.30 pm and on Friday from 7.30pm to 10.00pm. The program was also broadcast nationally as part of its syndication across the Southern Cross Media Group Ltd commercial radio network.

The licensee has told the ACMA that the program is:

a variation of the regular nightly program 'the Hot 30 Countdown'. The Hot 30 Countdown program became the Summer 30 Program with different hosts on 3 December 2012. [*Summer 30*] varies from the regular Hot 30 Countdown in that the Hot 30 Countdown had a greater focus on content, including phone topics on serious issues and stunts and celebrity interviews. [*Summer 30*] is lighter in content.

In its submission to the ACMA, Today FM's description of the program includes the following:

a music based pop culture radio program, which plays listeners' favourite songs (voted for by listeners), and reflects what's 'hot' right now (including prizes, celebrities, movies, gaming and television). The Program features popular music, celebrities and prizes. It aims to be interactive with its audience. It broadcasts a mixture of live and pre-recorded content.

A transcript of the relevant broadcast is at **Attachment A**.

## Assessment

This investigation is based on:

- > a copy of the broadcast provided by the licensee;

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<sup>1</sup> The licensee has told the ACMA that both the *Summer 30* and the *Hot 30 Countdown* programs have been 'cancelled' and that 'neither program will be produced or broadcast by Today FM, or any of the commercial stations controlled by [Southern Cross Media Group], in the future'.

- > a submission from the licensee to the ACMA dated 2 January 2013 which attached legal advice prepared by senior counsel and a further submission from the licensee dated 18 June 2013; and
- > a Summary of Facts concerning the method used to make, record and broadcast the telephone call, the accuracy of which was confirmed by the licensee on 18 April 2013.

Other sources used have been identified where relevant.

## Issue 1: Commercial Radio Codes of Practice

### ‘Ordinary reasonable listener’

In assessing content against the Codes, the ACMA considers the meaning conveyed by the relevant material. This is assessed according to the understanding of an ‘ordinary reasonable listener’.

Australian courts have considered an ‘ordinary, reasonable reader (or listener or viewer)’ to be:

a person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.<sup>2</sup>

The ACMA asks what the ‘ordinary reasonable listener’ would have understood a program to have conveyed. It considers the natural, ordinary meaning of the language, context, tenor, tone, inferences that may be drawn, and in the case of factual material, relevant omissions (if any).

Once this test has been applied to ascertain the meaning of the broadcast material, it is for the ACMA to determine whether it is satisfied that the material has breached the Codes.

### Code provisions

The ACMA has identified clauses 1.3, 2.1(d), 2.3(d), 6.1 and 9.1 of the Codes as having relevance to this investigation. These provisions are extracted at **Attachment B** and an assessment against each provision is set out below.

### Clause 1.3: Generally accepted standards of decency

Clause 1.3 provides:

- 1.3 (a) Program content must not offend generally accepted standards of decency (for example, through the use of unjustified language), having regard to the demographic characteristics of the audience of the relevant program.
- (b) For the purposes of determining:
  - (i) the audience of the relevant program; and
  - (ii) the demographic characteristics of that audience,

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<sup>2</sup> *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 165 (Hunt CJ at CL; Mason P and Handley JA agreeing; citations omitted); see, generally, at 164-167.

regard must be had, in particular, to the results of any official ratings surveys of the licensee's service in the prior 12 months, (or, in the case of any licensee service operating in regional areas, the most recent official ratings surveys for the licensee's service).

## Licensee's submissions

The licensee's submissions included the following

[...] regular listeners of the Program would be aware of its standard format and content, including prank calls.

Although events subsequent to the broadcast of the Segment were subject to a significant amount of media commentary, including from overseas, that media commentary cannot be a factor in considering whether the Segment offended generally accepted standards of decency. In particular, because the views that were published are not representative of the demographic characteristics of the listening audience of the Program.

The broadcast of the Segment did not breach Code 1.3(a) because the Segment did not offend standards of decency, having regard to the Program's audience. While [Today FM] accepts that some people may have considered the Segment to be in poor taste, the Segment was not offensive, rude, or harassing or indecent in the manner contemplated by Code 1.3(a).

## Finding

The licensee did not breach clause 1.3 of the Codes.

## Reasons

### ***Generally accepted standards of decency***

Subclause 1.3(a) requires the ACMA to consider the meaning of the phrase 'generally accepted standards of decency'.

The objects of the BSA include the promotion of the availability of a diverse range of radio services to audiences throughout Australia.<sup>3</sup> Another object is to encourage providers of broadcasting services to respect community standards in the provision of program material.<sup>4</sup>

Determining the current consensus of recognised present day standards of decency is challenging because there is a range of standards within the community and there will always be different views on these matters.

The ACMA acknowledges that such standards are not hard and fast, either over time or across all sections of the community. Diverse audiences in Australia will not have everyday tastes and standards in common. The majority of people in the community are likely to accept that material that they find coarse or offensive may not be similarly judged by others.

The licensee has submitted that the content did not offend standards of decency because it was not offensive, rude, harassing or indecent. 'Generally accepted standards of decency' is a broad concept and is not only defined by material that might be considered 'indecent'. In determining whether a breach of clause 1.3 has occurred, the ACMA must reflect on whether

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<sup>3</sup> See paragraph 3(1)(a) of the BSA.

<sup>4</sup> See paragraph 3(1)(h) of the BSA.

material, which may not be to everyone's taste, so offends generally accepted standards that it is inappropriate for broadcast.

Previously, where the ACMA has found breaches of the decency provisions of the code it has reflected on a number of matters, including:

- > the subject matter or themes dealt with: for example, care needs to be taken with material that is sexually explicit or extremely sensitive;<sup>5</sup>
- > the tenor or tone of the broadcast: for example, was it light-hearted or threatening, matter-of-fact or salacious;<sup>6</sup>
- > the language used in the broadcast: for example, was it abusive, profane, vulgar or lewd;<sup>7</sup> and
- > the attitudes conveyed: for example, contemptuous disregard for human life or suffering.<sup>8</sup>

### ***Demographic characteristics of the audience of the relevant program***

Subclause 1.3(a) of the Codes requires the ACMA to have regard (though not sole regard) to the demographic characteristics of the audience of the relevant program. Pursuant to subclause 1.3(b) of the Codes, for the purposes of determining the audience of the relevant program and the demographic characteristics of that audience, regard must be had, in particular, to the results of any official ratings surveys of the licensee's service in the past 12 months.

On the question of demographics, the licensee submitted:

The audience of the Program is young adults between the ages of 18 and 24, who enjoy popular music, popular culture and edgy, fun content. The majority of listeners are female. [...]

The audience is fun-loving, liberal, accepting of diversity, controversy, and followers of gossip and celebrity news. The audience would reasonably expect the Program to broadcast jokes, pranks and light-hearted entertainment, often at the expense of the hosts, and celebrity news and interviews.

The licensee further submitted:

Prank calls were a regular part of the program format of the Hot 30 Countdown and the Program. [Today FM's] research and audience feedback demonstrate that prank telephone calls are considered by the audience to be enjoyable and entertaining. [...] Prank calls are a regular feature of commercial radio broadcasting in Australia and other countries.

In this case, the licensee's audience is predominantly women aged between 18 and 24.

One of the relevant characteristics of the audience of the program would be the likely expectations of that audience. In that regard, it is considered that the audience of *Summer 30* would have been familiar with the nature of prank telephone calls on commercial radio. However, information about age, gender and the audience's familiarity with prank telephone

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<sup>5</sup> For example, ABA Investigation 1270, and ACMA Investigations 1628 and 2266.

<sup>6</sup> For example, ACMA Investigation 2751 and 2848.

<sup>7</sup> For example, ACMA Investigations 1628, 1717 and 2848.

<sup>8</sup> For example, ABA Investigation 1270 and ACMA Investigations 2598 and 2848.

calls does not necessarily indicate the attitudes of that group to the content that ultimately went to air.

### ***Assessment of the content against the Code provision***

A program does not offend standards of decency, in the sense contemplated by the Codes, if it simply has 'shock value' or has the effect of making one cringe or feel uncomfortable.

Some content, almost from inception, is likely to offend against standards of decency while in other content the offensive elements will unfold, sometimes unexpectedly.

In this case, what was initially conceived of as a formulaic prank call resulted in the availability of pre-recorded material, including personal information, which was subsequently vetted by management before going to air.

In assessing program content against clause 1.3, the ACMA considers the material actually broadcast, regardless of how it was formulated, derived or executed. The mere fact that program content was obtained in the course of a so-called 'light-hearted' prank does not preclude the possibility of a code breach, nor does it diminish the licensee's obligation to ensure that content complies with clause 1.3.

The licensee has submitted:

It was thought that a prank call to the Hospital featuring bad impersonations of the Queen and the Prince of Wales would be humorous and entertaining. It was never the intention to seek confidential medical information concerning the Duchess of Cambridge.

In this case, the ACMA acknowledges that some people will hold the view that the segment offended standards of decency because, to them:

- > the very notion of telephoning a hospital to ascertain potentially private personal information about a patient for broadcast is repugnant;
- > using deception to trick nurses into a breach of their employment duties, thereby causing them embarrassment or potentially putting their employment at risk, is not decent; or
- > the decision by management to broadcast the content obtained through the execution of that prank was made despite the potential consequences for those involved and without the customary securing of prior approval from those being 'pranked'.

However, having regard to generally accepted standards of decency as referred to in clause 1.3, in this case the ACMA makes the following observations which inform the view that the material broadcast did not offend those standards:

- > The tone of the telephone call and language used in the surrounding content was polite and light-hearted, and the language was not vulgar or sexually explicit;
- > The context of the telephone call was established by the hosts in the lead-up to the telephone call; for example, the hosts reported that the Duchess's pregnancy had been confirmed and that she was being treated in hospital for 'severe morning sickness';
- > The information about the Duchess's pregnancy and health was already in the public domain and the subject of news reports and public comment and some speculation as to whether she was expecting twins;

- > This information (including details of the Duchess's' medical condition) had been provided by the Royal family – specifically on 3 December 2012, the Duke and Duchess released a statement that the Duchess was pregnant and had been admitted to King Edward VII Hospital to receive treatment for hyperemesis gravidarum, a condition that required “supplementary hydration and nutrients”, and that she was expected to stay in hospital for several days;<sup>9</sup> and
- > The subject matter of the broadcast was not explicit and the attitudes conveyed were not extreme or contemptuous towards the Duchess, or the nurses who received the telephone call.

The ACMA finds that the broadcast did not contain material of the type which is inherently indecent; for example, material that was sexually explicit or otherwise extremely sensitive, or vulgar in its use of language, or which conveyed contemptuous disregard for human life or suffering.

Notwithstanding the clearly tragic circumstances that ensued subsequent to the broadcast, having regard to general standards of decency and the demographic characteristics of the program, the content broadcast did not contain elements that were so offensive as to breach those standards.

Therefore the licensee did not breach subclause 1.3(a) of the Codes.

## Code 2: News and current affairs programs

Code 2 includes the following provisions:

### CODE OF PRACTICE 2: NEWS AND CURRENT AFFAIRS PROGRAMS

#### Purpose

The purpose of this Code is to promote accuracy and fairness in news and current affairs programs.

2.1 News programs (including news flashes) broadcast by a licensee must:

...

- (d) not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.

2.3 In the preparation and presentation of current affairs programs a licensee must ensure that:

...

- (d) the licensee does not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.

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<sup>9</sup> Announcement from the Duke and Duchess of Cambridge: 'The Duke and Duchess of Cambridge are expecting a baby' accessed at: <http://www.dukeandduchessofcambridge.org/news-and-diary/the-duke-and-duchess-of-cambridge-are-expecting-baby>.

## **Finding**

The licensee did not breach subclauses 2.1(d) or 2.3(d) of the Codes.

### **Licensee's submissions**

The licensee's submissions included:

Code 2 applies to news and current affairs programs only. 'News program' is defined in the Codes to mean a program or bulletin, the predominant purpose of which is to present factual new information on current events and which is typically prepared by journalists. 'Current affairs program' means a program a substantial purpose of which is to provide interviews, analysis, commentary or discussion, including open-line discussion with listeners, about current social, economic or political issues.

The ACMA accepts the licensee's submission that the program is not a news or current affairs program. Consequently, neither subclause 2.1(d) nor subclause 2.3(d) applies.



## Code 6: Broadcasting the words of an identifiable person

Code 6 provides:

### CODE OF PRACTICE 6: INTERVIEWS AND TALKBACK PROGRAMS

#### Purpose

The purpose of this Code is to prevent the unauthorised broadcast of statements by identifiable persons.

- 6.1 A licensee must not broadcast the words of an identifiable person unless:
- (a) that person has been informed in advance or a reasonable person would be aware that the words may be broadcast; or
  - (b) in the case of words which have been recorded without the knowledge of the person, that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

### Licensee's submissions

The licensee's submissions included:

It is relevant to note that Code 6 is headed 'Interviews and Talkback Programs'. The prank call was not an interview and the Program was not a talkback program.

[Today FM] acknowledge[s] that consent was not obtained from either speaker heard in the call. However, [Today FM] do[es] not consider that either speaker is an identifiable person within the meaning of Code 6.

The [ACMA's *Privacy Guidelines for Broadcasters 2011*] state 'a person is identifiable if, from the broadcast, the person's identity is apparent or can reasonably be ascertained'. [...] The Macquarie Dictionary defines identifiable as 'able to be identified'. The question to consider is whether either of the two individuals heard during the Segment are able to be identified based on the material broadcast only.

In Investigation Report 2812 issued by the ACMA on 3 August 2012, the ACMA considered whether the additional licence condition imposed on commercial radio broadcasting licence no 3032 by the ACMA on 3 March 2010 had been breached. Paragraph 1(b) of that additional licence condition will be applicable if a child is referred to in an 'identifiable way'.

In its report the ACMA accepted the licensee's submissions that the child in question was not referred to in an 'identifiable way' during the relevant broadcast. The ACMA noted that neither the child's name nor his location (other than his country of birth) was mentioned during the segment. Any person seeking to identify the child relying on the contents of the segment would be unable to do so. In all of the circumstances, the ACMA did not consider it necessary to consider whether a listener may have been able to do so by conducting further enquiries.

Similarly, a person listening to broadcast of the Segment would not have been able to identify either of the individuals' voices being recorded without substantial further enquiry, and possibly not even then.

The person whose voice is broadcast must be able to be identified by people listening to the broadcast in the licence area of the licensee which is undertaking the broadcast. In this regard,

retransmission of the broadcast to other geographic areas and by other technologies is not to be regarded and neither is subsequent publicity concerning a broadcast.

Neither individual is identifiable because their identity is not apparent and cannot reasonably be ascertained from the Segment. [Today FM] note[s] the following:

- At no time during the Segment were the names of either of the individuals broadcast.
- The Segment does not refer to either individual in an identifiable way.
- The hosts made no reference to the name or the location of the Hospital (neither the city nor country where the Hospital was located).
- The only time the name of the Hospital was mentioned was when the phone call was answered, and then the name was only briefly mentioned and was not clearly audible.
- In respect of the first individual briefly heard in the broadcast, no reference to the job or position of that individual was broadcast.
- In respect of the second individual heard in the broadcast, the only information broadcast is that the individual is a nurse at the Hospital, which does not mean that the individual is identifiable.
- The Segment appears to be being broadcast live to air when it was in fact recorded hours earlier. So a person listening to the Segment would have assumed that the hospital staff who speak in the segment were working at 10.04 am London time when that was not the case.

[Today FM] submit[s] that any person seeking to identify either of the individuals heard in the broadcast relying on the content of the Segment only would be unable to do so, and as such there has been no breach of Code 6.

## Finding

The licensee breached clause 6.1 of the Codes.

## Reasons

### ***Application of Code 6***

The licensee's submission regarding the heading of Code 6 is noted. However, there is nothing in the language of the Code itself that limits its application to a particular type of program. Moreover, a broad interpretation is consistent with that accepted by the commercial radio industry. In this regard, the ACMA notes industry peak body Commercial Radio Australia's submission to the ACMA's 2009 investigation '*Live hosted entertainment radio programs: Adequacy of community safeguards for the protection of participants*' (the Live Hosted Radio Investigation) which stated:

Generally, the industry interprets Code 6.1 as covering all calls, including stunt/prank calls, competitions and challenges.<sup>10</sup>

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<sup>10</sup> Commercial Radio Australia, '*Submission by Commercial Radio Australia – Investigation by the Australian Communications and Media Authority into Hosted Live Entertainment Programs*', September 2009, page 4.

The purpose of Code 6 is to prevent the unauthorised broadcast of statements by identifiable persons.

A breach of clause 6.1 will occur when the licensee broadcasts the words of an identifiable person and either:

- > the person has not been informed in advance or a reasonable person would not be aware that the words may be broadcast (subclause 6.1(a)); or
- > where the words were recorded without the person's knowledge, the person has not subsequently, but prior to the broadcast, expressed consent to the broadcast of the words (subclause 6.1(b)).

Apart from the two hosts and the production crew heard in the background of the recording, two other voices featured in the broadcast: that is, the voice of the employee of the hospital who answered the telephone (Employee 1) and that of the second employee who provided information as to the Duchess's condition (Employee 2).

Employee 1 and Employee 2 were not informed, in advance, that their words may be broadcast, did not know that they were being recorded and did not consent to the broadcast.

In this regard the licensee has said:

It is acknowledged that although consent was sought from the individuals and the Hospital in five subsequent telephone calls after the initial call, consent to broadcast the Segment was not obtained.

Accordingly, the question of whether a breach of Code 6 has occurred turns on whether either employee was an 'identifiable person'.

### ***Identifiable persons***

The question of whether a person is 'identifiable' is considered on a case-by-case basis, having regard to the context and content of the particular broadcast.

The concept of an 'identifiable person' in Code 6 is properly elastic. A balance is to be struck between the interests of licensees and the interests of persons whose words are broadcast. If the utterance of an unnamed person is broadcast in a way that is merely incidental, then it may not be appropriate to require a licensee to obtain their consent before the broadcast. However, context and content are crucial and account must be taken of matters including:

- > the significance of, and the likely interest in, the broadcast; and
- > the potential consequence of the broadcast for the person whose words are broadcast: for example, whether it is likely that the broadcast of those words could cause harm.

Particularly when the broadcast of the person's words could be to their detriment, an identifiable person is entitled to the protections afforded by Code 6 and greater care must be taken to ensure that identification cannot occur, or, if it does, that consent is obtained.

The licensee has submitted that Employee 1 and Employee 2 were not identifiable because a person listening to the segment would not have been able to identify either of them without substantial further enquiry.

In support of its submission, the licensee has referred to the ACMA's *Privacy Guidelines for Broadcasters 2011*, in which the ACMA has said:

A person is identifiable if, from the broadcast (including audio or visual material), the person's identity is apparent or can be reasonably ascertained.<sup>11</sup>

In this case, the ACMA is satisfied that the identity of Employee 1 and Employee 2 could be reasonably ascertained from the broadcast and that therefore Employee 1 and Employee 2 are identifiable persons for the purposes of Code 6. The ACMA notes that:

- > the voices of both were clearly audible, and no attempt was made to disguise the voices, in a context that made clear they were employees of the hospital concerned;
- > the identity of the hospital concerned was in the public domain and specifically identified during the prank call;
- > the content broadcast, elicited initially by the licensee's prank, was inherently and overwhelmingly likely to be highly newsworthy,<sup>12</sup> controversial and its publication detrimental to the interests of Employee 1 and Employee 2; and
- > predictably, Employee 1 and Employee 2 were identified by the hospital as a result of the prank call.<sup>13</sup>

The licensee also noted Investigation Report 2812, in which the ACMA determined that a Pakistani child referred to by the presenter as 'spider baby' was 'not referred to in an identifiable way'. However, there the ACMA considered the licensee's compliance with a different provision, being an additional condition intended to protect children whose welfare or well-being may be put at risk by a broadcast. The child concerned was not a participant in the radio program but was referred to in the discussion. The ACMA found that, having regard to the intended purpose of the licence condition, the child was not referred to in an identifiable way.

The licensee also asserts that, for the purposes of Code 6, the person whose words are broadcast must be identifiable by listeners in the licence area of the relevant broadcast. There is nothing in the Code that seeks to limit its application to people who are identifiable within the licence area of the broadcast, and the ACMA does not accept that the protections provided by Code 6 should be confined in this way.

The licensee's own actions in promoting the success of the prank telephone call indicate its awareness that the broadcast would generate widespread interest.<sup>14</sup> The notoriety and inherent international interest in the subject matter made it likely that Employee 1 and

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<sup>11</sup> ACMA, *Privacy Guidelines for Broadcasters*, December 2011, page 3.

<sup>12</sup> The ACMA notes the context of the phone call, as established in the introductory remarks of the presenters, was the recent announcement by the Duke and Duchess of Cambridge that they were expecting a baby and that the Duchess was in hospital being treated for acute morning sickness.

<sup>13</sup> Refer for example: <http://www.guardian.co.uk/uk/2012/dec/05/royal-baby-phone-hoax>; <http://www.bbc.co.uk/news/uk-20610197>; <http://www.dailymail.co.uk/news/article-2243315/Kate-Middleton-pregnant-Security-scare-Australian-radio-DJs-dupe-nurse-giving-medical-details.html>.

<sup>14</sup> Refer for example: <http://www.sbs.com.au/news/article/1718535/Much-better-Catherine-leaves-hospital>; <http://www.smh.com.au/lifestyle/celebrity/pregnant-duchess-leaves-hospital-20121206-zayni.html>; <http://www.telegraph.co.uk/news/9731359/Cruel-hospital-hoax-still-playing-on-radio.html>.

Employee 2 would be identified from the broadcast and that the licensee should therefore have obtained their consent for the broadcast.

Accordingly, the ACMA finds that the licensee has breached clause 6.1 by broadcasting the words of identifiable persons in circumstances where those persons:

- > were not informed in advance that their words may be broadcast;
- > would not have been aware that their words may be broadcast;
- > did not give their consent to the broadcast of the words.

## **Code 9: Treatment of participants in live hosted entertainment programs**

The full text of Code 9 is set out at **Attachment B**.

Relevantly, Code 9 prohibits the broadcast of a program which, in all of the circumstances, treats participants in live hosted entertainment programs in a highly demeaning or highly exploitative manner.

### **Licensee's submissions**

The licensee's response included the following:

[Today FM] submit[s] that the two individuals were not participants in a live hosted entertainment program. Further, even if the two individuals were participants, which is not the case, they were not treated in a highly demeaning or highly exploitative manner in all of the circumstances.

[...]

The program is a hybrid entertainment program, and while it has live hosts, and conducts competitions, and broadcasts stunts and pranks, it is not produced live to air. The stunts and pranks are pre-recorded.

In addition, the two individuals whose voices were heard during the Segment were not participants in the Program, as the Segment was pre-recorded. The Segment was a small two minute part of the entire Program for the evening. Code 9.1(a) refers to the broadcast of radio program content in a *highly* demeaning or *highly* exploitative manner. The definition of 'demeaning' in the Codes refers to a depiction or description, sexual in nature, which is a serious **debasing** of the participant. Exploitative refers to clearly appearing to purposefully **debase** or abuse the participant for the enjoyment of others, and lacking moral, artistic or other values.

Debase is defined in the Oxford Dictionary as –

*Verb*

*[with object] reduce (something) in quality or value; degrade: the love episodes debase the dignity of the drama*

*lower the moral character of (someone): war debases people*

Further, the ACMA has stated in its Investigation Report 2850 (which examined the equivalent provision in the Commercial Television Industry Code of Practice 2010) that, 'use of the word

*“highly” indicates that the Code contemplates an extreme scenario and sets a strong test for the prohibited program material. It is not sufficient that the program material presents participants in a [reality television program] in a demeaning or exploitative manner. The participants must be presented in a highly demeaning or highly exploitative manner for a breach of the Code to occur.’* [Today FM] submit[s] that the same threshold must apply to Code 9.

***Treatment was not highly demeaning***

The Segment involved a telephone call to a hospital where the hosts pretended to be members of the Royal Family. The answering of a telephone call and providing information about the health of the Duchess is not sexual in nature. [Today FM] submit[s] that neither individual was treated in a demeaning way nor were comments made during the Segment that were sexual in nature or contained any sexual innuendo. As such there was no debasement of the individuals of a sexual nature and neither individual was treated in a highly demeaning manner within the meaning of Code 9.1(a).

***Treatment was not highly exploitative***

To be found to have treated participants in a highly exploitative manner the Program must clearly appear to ‘purposefully debase or abuse a person for the enjoyment of others’ to a high degree. Here, the Program did not purposefully debase or abuse either individual. The Segment was light-hearted and the hosts did not act in an abusive, cruel or degrading way towards either individual. The Segment was intended to be entertaining and poke fun at the hosts. It was not the intention of the hosts to obtain any details of the Duchess’ condition, and the hosts did not exploit either individual in order to obtain the information that they did. As stated above, the Segment involved a telephone call and the majority of the audio is the hosts pretending to be members of the Royal Family, and acting in a polite and courteous manner to the nurse. Accordingly, neither individual was treated in a highly exploitative manner within the meaning of Code 9.1(a).

It is acknowledged that although consent was sought from the individuals and the Hospital in five subsequent telephone calls after the initial call, consent to broadcast the Segment was not obtained.

Accordingly, [Today FM] submits that the two individuals were not ‘participants’ in the Program and that the Program did not, in all of the circumstances, treat the two individuals in a highly demeaning or highly exploitative manner. [Original emphasis.]

## **Finding**

The licensee breached clause 9.1 of the Codes.

## **Reasons**

### ***Application of Code 9***

Code 9 applies to live hosted entertainment programs. The Code defines a ‘live hosted entertainment program’ as:

a program (excluding any news program and any current affairs program) that is produced and broadcast live to air and is a hybrid program, a substantial part of which includes the following components:

- (a) a live host; and

(b) one or more of the following:

- competitions;
- stunts;
- pranks.

The licensee has submitted that the program is a 'hybrid entertainment program, and while it has live hosts, and conducts competitions, and broadcasts stunts and pranks, it is not produced live to air. The stunts and pranks are pre-recorded'.

The licensee has also argued that 'the two individuals whose voices were heard during the segment were not participants in the program as the segment was pre-recorded'.

In this regard, the licensee has told the ACMA that the program hosts telephoned the London Hospital:

On 4 December 2012 at approximately 4.25pm AEDST, being approximately 5.25am in London ...

And that the program was broadcast:

... at approximately 9.04pm [AEDST], being approximately 10.04am in London.

The ACMA takes the view that the program, including any pre-recorded segments, is appropriately and correctly characterised (as a whole) as a live hosted entertainment program within the meaning of the Code and that accordingly any participant in the program, whether or not their participation was pre-recorded, is afforded the protections provided by Code 9.

The ACMA notes that Code 9 was developed in response to the findings of the ACMA's Live Hosted Radio Investigation. In the report of that investigation the ACMA noted:

For the purposes of the investigation the ACMA has defined live hosted entertainment radio programs as those that feature one or more of the following elements:

- A live host, as in one or more persons operating a microphone, introducing songs or transitioning from one program element to another – some program elements may be pre-recorded such as interviews, nonetheless this is not considered to change the category of programming;
- Some audience interaction including:
  - Open-line conversations – for example when audience members are asked to phone in and tell anecdotes about a particular theme;
  - Competitions – for example being the fifth caller to 'name that tune' or participating in quizzes or stunts for a prize;
  - Stunts – may include audience members appearing in the studio or some other location participating in some physical activity, or the hosts themselves doing some activity [...]; or
  - Pranks – including 'gotcha' calls where the program host prank-calls another party or sets up a scenario in which an audience members calls an unsuspecting friend.

Generally speaking, live hosted entertainment programs are hybrid programs featuring a mix of music, interviews and one or more of the programming elements identified above.<sup>15</sup>

### **Participants**

The ACMA does not accept the licensee's argument to the effect that the Employees were not participants because the segment during which they were featured was pre-recorded. There is no indication in the relevant code provision that limits interpretation of the meaning of a participant in these terms. Neither is there anything in the ordinary definition of the word 'participant' which lends support to this argument.

### **Assessment against the relevant content**

A breach of clause 9.1 will have occurred if, in all the circumstances, a participant is treated in either a *highly* demeaning or *highly* exploitative manner. The use of the word 'highly' sets a strong test for the prohibited content. It will not be enough that a participant is demeaned or exploited.

### **Highly demeaning**

Clause 9.1 defines demeaning as follows:

**Demeaning:** A depiction or description, sexual in nature, which is a serious debasement of the participant.

In this case, the relevant broadcast material did not contain any depiction or description that was sexual in nature. Accordingly, the ACMA has not considered whether either participant was treated in a highly demeaning manner.

### **Highly exploitative**

The Code provides the following definition:

**Exploitative:** Clearly appearing to purposefully debase or abuse the participant for the enjoyment of others, and lacking moral, artistic or other values.

That is, the relevant content must, in all the circumstances, 'clearly appear to purposefully debase or abuse the participant for the enjoyment of others'.

*The Macquarie English Dictionary* (online) provides the following relevant definitions:

#### **'debase'**

1. To reduce in quality or value; adulterate.
2. To lower in rank or dignity.

#### **'abuse'**

1. to use wrongly or improperly; misuse: *to abuse authority; to abuse a confidence.*
2. To maltreat; act injuriously towards: *to abuse the dog.*
3. [...]
4. To speak insultingly to; revile.

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<sup>15</sup> Australian Communications and Media Authority, *ACMA Investigation: Live hosted entertainment radio programs: Adequacy of community safeguards for the protection of participants*, January 2010, page 2.



The ACMA is satisfied that the broadcast, in all the circumstances, treated the Employees in a highly exploitative manner. The broadcast used the deception of the prank to engage with the Employees in a way that was personally degrading and humiliating and was likely to reduce their professional standing.

Notwithstanding the licensee's submission that the presenters never intended to obtain information about the Duchess's condition, the ACMA considers this debasement of the Employees to have been purposeful in the sense contemplated by Code 9. The unexpected 'success' of the prank (and the resulting debasement of the Employees) depended on the success of the deception pursued by the licensee.

Even if the material obtained as a result of the prank was unexpected, once it was obtained the decision to broadcast it – some four and a half hours after it was recorded – was made deliberately by the licensee and in circumstances in which the licensee could have assessed the likely impact of its broadcast on the Employees.

The ACMA is satisfied that the exploitation of both Employees had the requisite level of intensity to meet the threshold for a breach of the Code; that is, the program treated the participants in a *highly* exploitative manner, clearly appearing to purposefully debase the Employees for the enjoyment of others. In this regard, the ACMA notes:

- The seriousness of the potential repercussions of the broadcast:
  - In respect of their professional standing: the real possibility that standing would be gravely or adversely impacted in a way that could have placed their ongoing and future employment in jeopardy; and
  - In respect of their personal reputations: the potential for the content to be personally degrading and humiliating – the broadcast would make them appear foolish and gullible;
- The notoriety of the material broadcast:
  - by deception, the licensee sought and obtained information concerning the pregnancy of the Duchess, one of the most recognisable women in the world. The public's interest in the Duchess and her pregnancy heightened the likely level of interest in the broadcast and the likelihood that the Employees would ultimately be identified.

In response to the preliminary investigation report, the licensee submitted that 'it is wrong ... to make a finding that there has been a breach of Code 9 based on speculation as to what may happen to the employees in the future'.

The ACMA considers that the potential (and in this case predictable and likely) consequences for the Employees – namely, the risks to their professional standing and personal reputations – are relevant to the ACMA's assessment of whether the treatment of the program participants was *highly* exploitative or debasing.

#### *Lacking moral, artistic and other values*

Under the definition provided by the Code, in determining whether the program treated a participant in a highly exploitative manner, the ACMA must consider whether the relevant content was lacking in moral, artistic and other values. 'Values' in this context must be

interpreted in the sense of something which has general merit and contributes something desirable or publicly useful and which outweighs the potential harm of the broadcast.

While the licensee has made no submissions on this point, there is no evidence that the content exhibited moral, artistic or other values.

***Consent***

The licensee has acknowledged that consent was not obtained for the broadcast of the relevant material. Accordingly, the licensee has breached clause 9.1.

## Issue 2: Relevant additional licence condition

### Background

In 2012, the ACMA investigated a segment of *The Kyle and Jackie O Show* broadcast by Today FM in November 2011. The ACMA found that Kyle Sandilands' comments about a female journalist were deeply derogatory and offensive, and amounted to a breach of the Codes.

As a result of this finding, the ACMA imposed an additional licence condition on the broadcasting licence of Today FM under s 43(1) of the BSA. The additional licence condition was varied by an Administrative Appeals Tribunal (AAT) decision made on 8 October 2012 (applying retrospectively from 16 May 2012 for a period of five years). Relevantly, the condition as varied requires the *Hot 30 Countdown* program to comply with Codes 1.3(a) and 1.3(b) of the Codes concerning the prevention of program content that offends generally accepted standards of decency.

The terms of the additional licence condition imposed upon the licence by the AAT can be found at **Attachment C**.

### Licensee's submissions

The licensee submitted that it complied with Code 1.3 and accordingly complied with the terms of the additional licence condition.

### Finding

The licensee did not breach the additional licence condition on commercial radio broadcasting licence no. 3032 dated 8 October 2012.

### Reasons

For the reasons set out at Issue 1 above (refer pages 3-7), the licensee complied with Code 1.3 of the Codes. Accordingly, the licensee did not breach the additional licence condition on commercial broadcasting licence no. 3032 dated 8 October 2012.

## Issue 3: Standard licence condition under the BSA

Paragraph 8(1)(g) of Schedule 2 to the BSA provides:

### 8 Standard conditions of commercial radio broadcasting licences:

- (1) Each commercial radio broadcasting licence is subject to the following conditions:  
[...]
- (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; ...

The ACMA considers that offences established by the *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIAA) and the *Surveillance Devices Act 2007* (NSW) (the SDA) may be relevant for the purposes of assessing the licensee's compliance with the licence condition at paragraph 8(1)(g) of Schedule 2 to the BSA. Relevant extracts from these statutes are set out in **Attachment D**.

### Finding

The ACMA 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 licence as set out in paragraph 8(1)(g) of Schedule 2 to the BSA.

While the ACMA considers, based on the Summary of Facts (referred to below), that the licensee's conduct falls within the scope of the SDA rather than the TIAA (because the relevant communications were *not* passing over a telecommunications system at the time they were recorded by the licensee), the ACMA also notes that the only available alternative factual position would be that the relevant communications *were* passing over a telecommunications system at the time they were recorded. If that were the case, then, in the ACMA's view, the licensee's conduct would have constituted an interception in contravention of subsection 7(1) of the TIAA, and the subsequent broadcast of the recording would also have constituted a contravention of subsection 63(1) of the TIAA. Accordingly, even if the factual situation differs from that set out in the Summary of Facts, the licensee would still have used its broadcasting service in the commission of an offence and would therefore still be in breach of the condition of its licence set out in paragraph 8(1)(g) of Schedule 2 to the BSA.

## Background

### The ACMA's jurisdiction

On 13 December 2012, the ACMA sought information from the licensee on, amongst other things, details of the method by which the licensee recorded and broadcast the telephone conversation and the question of whether the broadcast involved the use of the licensee's broadcasting service in the commission of an offence as prohibited by paragraph 8(1)(g) of Schedule 2 to the BSA.

The licensee's submissions dated 2 January 2013 (which attached advice provided by senior counsel retained by the licensee), asserted the following:

The ACMA has no jurisdiction to investigate or determine whether any criminal offence under State or Commonwealth legislation, other than legislation which expressly provides the ACMA with that power, including whether an offence under the *Surveillance Devices Act 2007* (NSW) or the *Telecommunications (Interception and Access) Act 1979* (Cth) has been committed.

The ACMA's power is limited to investigating whether the **broadcasting service** has been **used in the commission of an offence** (our emphasis). In this regard, the ACMA's statutory duty and role is limited to the regulation of broadcasting services, and whether a licensee has used its service to commit an offence. A licensee must first have been found guilty of committing an offence. It is only after a licensee has been properly charged and found guilty of an offence that the ACMA may then consider whether the licensee's broadcasting service has been used in the commission of that offence.

The ACMA, as an administrative body, has the power to form an opinion as to whether a licensee has committed a Commonwealth, State or Territory criminal offence, for the purposes of deciding whether a licensee has breached the licence condition set out at paragraph 8(1)(g) of Schedule 2 to the BSA. The ACMA is not limited to forming such an opinion after an adjudication of criminal guilt by a criminal court. The formation of such an opinion by the ACMA may occur independently of any trial or conviction for a criminal offence. The ACMA particularly notes that any formation of such an opinion by it, or reliance on that opinion for the purpose of taking further action as contemplated by the BSA, does not, and could not, amount to an adjudication of criminal guilt in the manner in which a court's decision would operate.

The ACMA's opinion is to be formed on the civil standard of proof, that is, to the reasonable satisfaction of the ACMA (on the balance of probabilities): *Rejfeek v McElroy* (1965) 112 CLR 517. However, the ACMA is mindful that formation of an opinion about the commission of an offence is a serious matter and of the general rule that as the gravity of the consequences of a finding increase, so too does the weight of proof which should be required: see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

## **Method of recording: Summary of Facts**

In relation to the method of recording the telephone call, the licensee submitted:

The method by which Today FM records telephone calls uses interlinked digital equipment and occurs instantaneously. The call is established by a PABX under the control of an electronic telephone answering device called 'Phone Box' which interlinks the telephone call with the studio microphones and audio equipment. If the call is to be recorded an interlinked item of digital equipment, Voxpro, is used. Voxpro is the digital equipment which records and plays out various material – including telephone calls, pre-recorded voiceovers and pre-recorded segments – which is broadcast by the station.

On 15 April 2013, the ACMA wrote to the licensee putting forward a summary of facts detailing the ACMA's understanding of the method used by the licensee to make, record and broadcast the telephone call. On 18 April 2013, the licensee provided some amendments to that summary of facts. The ACMA's summary of facts, incorporating those amendments (the 'Summary of Facts'), is set out below.

- 1 On 4 December 2012 at approximately 4.25pm (AEDST), being approximately 5.25am in London, the hosts of the *Summer 30* program (**Program**) called the King

Edward VII Hospital in London (**Hospital**) where the Duchess of Cambridge was a patient.

- 2 The telephone call was answered by a female (who was presumed to be a receptionist) [Employee 1] and, after the hosts asked to speak to Kate, 'my granddaughter', the call was apparently transferred to a nurse [Employee 2] who had knowledge of the Duchess of Cambridge's condition. That nurse spoke to the hosts of the Program.
- 3 The telephone call was established by a private automatic branch exchange (**PABX**) 'under the control of an electronic telephone answering device called "Phone Box" which interlinks the telephone call with the studio microphones and audio equipment'.
- 4 Communications from the receptionist and the nurse at the Hospital were converted by telephony systems in London into electromagnetic signals which were transmitted to Australia. Those electromagnetic signals passed over a telecommunications system in Australia until they reached the PABX under Today FM's control. Under the control of the "Phone Box" software the electromagnetic signals then passed to audio equipment owned and controlled by Today FM, eventually reaching the Program's studio console (connected to microphone and audio equipment), operated by the Program's hosts and producers. The signals were then converted into soundwaves and heard by the hosts.
- 5 The telephone call was recorded by 'an interlinked item of digital equipment' known as Voxpro. Voxpro 'is the digital equipment which records and plays out various material - including telephone calls, pre-recorded voiceovers and pre-recorded segments - which is broadcast by the station'.
- 6 The recording is said to have occurred 'instantaneously', by which it is understood that:
  - (a) the Voxpro digital equipment records the electromagnetic signals passing over Today FM's digital equipment contemporaneously with the signals reaching the studio console; and
  - (b) the recording of the signals by Voxpro, and the conversion of the signals into audio waves heard by the hosts, occurs at or about the same time.
- 7 Subject to two minor modifications, not relevant for present purposes, the recording of the telephone call was broadcast by Today FM at approximately 9.04pm (AEDST) on 4 December 2012.
- 8 Today FM broadcast the recording without obtaining consent from either of the two relevant individuals whose voices can be heard during the segment, or the Hospital.

## ***Telecommunications (Interception and Access) Act 1979 (Cth)***

### ***Did the licensee contravene the Telecommunications (Interception and Access) Act 1979 (Cth)?***

Subsection 7(1) of the TIAA states:

A person shall not:

- (a) intercept;
- (b) authorize, suffer or permit another person to intercept; or
- (c) do any act or thing that will enable him or her or another person to intercept; a communication passing over a telecommunications system.

Pursuant to subsection 5(1) of the TIAA, “communication” includes conversation and a message, and any part of a conversation or message, whether:

- (a) in the form of:
  - (i) speech, music or other sounds;
  - (ii) data;
  - (iii) text;
  - (iv) visual images, whether or not animated; or
  - (v) signals; or
- (b) in any other form or in any combination of forms.

The ACMA is satisfied that the words spoken in the course of the telephone call constitute communication for the purposes of the TIAA.

A ‘telecommunications system’ is defined to mean a telecommunications network that is within Australia or is partly within Australia (but only to the extent that it is within Australia), and includes ‘equipment, a line or facility that is connected to such a network and is within Australia’ (subsection 5(1)).

Subsection 6(1) of the TIAA provides:

For the purposes of this Act, but subject to this section, interception of a communication **passing over a telecommunications system** consists of listening to or recording, by any means, such a communication **in its passage over that telecommunications system** without the knowledge of the person making the communication. [Emphasis added.]

Sections 5F, 5G and 5H of the TIAA expand upon the meaning of ‘passing over a telecommunications system’ in subsection 6(1) of the TIAA.

Aside from imposing the prohibition on interception, section 7 enumerates circumstances in which the prohibition on interception does not apply. None of those exceptions appear relevant or are relied upon by the licensee.

Subsection 63(1) of the TIAA provides that ‘a person shall not ... communicate to another person, make use of, or make a record of ... information obtained by intercepting a communication in contravention of subsection 7(1)’. A person who contravenes subsections 7(1) or 63(1) is guilty of an offence (subsection 105(1)). As the prohibition in subsection 63(1) is contingent upon a contravention of subsection 7(1), a threshold issue is whether Today FM intercepted a communication passing over a telecommunications system.

### **Licensee’s submission**

The licensee has contended that, as a result of the process involved in recording the telephone call, there was no contravention of subsection 7(1) of the TIAA because, at the point of recording, the relevant communication was accessible to Today FM and its staff and therefore no longer ‘passing over’ a telecommunications system. Accordingly, the licensee has submitted that broadcasting the recorded telephone conversation did not constitute an

offence under subsection 63(1) of the TIAA because it was not 'obtained by intercepting a communication in contravention of subsection 7(1)'.

## Reasons

Paragraph 4 of the agreed summary of facts indicates that the electromagnetic signals comprising the communications of Employee 1 and Employee 2 at the London Hospital were transmitted to Australia and passed over a telecommunications system 'until they reached the PABX under Today FM's control'. At that point, under the control of 'Phone Box' software the signals passed to audio equipment owned and controlled by Today FM. The signals were ultimately converted into soundwaves after reaching the console in the studio.

According to subparagraph 6(a) of the agreed summary of facts, the communications of Employee 1 and Employee 2 were recorded, using Voxpro, when they were still in the form of electromagnetic signals but at the same time as those signals reached the studio console. The recording of the signals by Voxpro, and the conversion of the signals into audio waves heard by the hosts, occurred at or about the same time (see subparagraph 6(b) of the agreed summary of facts). The radio hosts' communications to the receptionist and nurse were recorded at the same time, namely at the point of conversion to electromagnetic signals and before those signals reached the PABX controlled by Today FM.

In so far as a communication passed from the radio hosts to Employee 1 or Employee 2 in London, the ACMA considers that the communication had not started passing over a telecommunications system when it was recorded because at that point, the electromagnetic signals had not reached Today FM's PABX (paragraph 5F(a) of the TIAA). Accordingly, the recording of that communication did not involve an interception of a communication passing over a telecommunications system.

In relation to communications passing from Employee 1 or Employee 2 to Today FM, those communications started passing over a telecommunication system when (or shortly after) either Employee 1 or Employee 2 spoke into the telephone. On application of paragraph 5F(b) of the TIAA, the communication continued to pass over the system until it 'became accessible' to the intended recipient. The communications from Employee 1 and Employee 2 'became accessible' to Today FM and its staff by the time those communications were recorded because, among other reasons:<sup>16</sup>

- the communication had been received by the telecommunications service provided to the intended recipient (having passed through Today FM's PABX) (paragraph 5H(1)(a)); and/or
- the communication was under the control of the intended recipient, being routed through Today FM's particular programming equipment (paragraph 5H(1)(b)).

On the basis of the agreed summary of facts, it would be difficult to characterise the recording of the phone call which was broadcast as involving the interception of a communication 'passing over' a telecommunications system, contrary to the prohibition in subsection 7(1) of the TIAA. Although the communications were recorded as electromagnetic signals, the recording of those signals took place after the signals had completed their passage over the telecommunications system (in the case of communications from Employee 1 or Employee 2)

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<sup>16</sup> See subsection 5H(2) of the TIAA.



or before the signals had commenced their passage over the system (in the case of communications from the radio hosts).

## **Section 109 of the Constitution**

### ***Is the SDA inconsistent with the TIAA and does section 109 of the Constitution render the SDA invalid to the extent of that inconsistency?***

Being of the view that, based on the Summary of Facts, it is unlikely that the licensee contravened the TIAA, the ACMA has considered, for the purpose of assessing the licensee's compliance with the licence condition at paragraph 8(1)(g) of Schedule 2 to the BSA, whether the licensee has contravened the SDA.

Before arriving at a conclusion on that matter, the ACMA has considered the licensee's contention that the SDA is in part inconsistent with the TIAA and that section 109 of the Constitution renders the SDA invalid to the extent of that inconsistency and, consequently, inoperative in the circumstances.

Section 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

### **Licensee's submission**

Legal advice obtained by the licensee and provided to the ACMA asserts that: '[c]learly enough, the [TIAA] is intended to "cover the field" (as the phrase goes) in relation to the listening to and recording of communications passing over the telecommunications system. So much is clear from the long title of the Act and [its] provisions .... This is confirmed by authority, especially *Miller v Miller* (1978) 141 CLR 269.'

The advice goes on to conclude that 'Today FM has not committed any offence under either the [SDA] or the [TIAA]. This may appear anomalous and it may appear that Today FM has fortuitously fallen between two stools. The reason is, however, that the Commonwealth Parliament has chosen to impose an endpoint at which interception of telecommunications in their passage over a telecommunications system ceases, that is, when it becomes accessible to the intended recipient.'

### **Reasons**

As discussed above, the ACMA is of the view (a view shared by the licensee) that it is likely that the licensee's listening to and recording of the telephone call falls outside the concept of interception within the meaning subsection 6(1) of the TIAA because that concept is confined to instances of listening to or recordings of communications which occur *during* the period of passage of communications over a telecommunications system. While it may be accepted that 'the [TIAA] is intended to "cover the field"... in relation to the listening to and recording of communications passing over a telecommunications system' that does not answer the question of whether the TIAA covers any part of the field of listening to and recording of communications which are not 'passing over a telecommunications system'.

It is clear from subsection 6 of the TIAA that it is the nature of the communication being intercepted, namely one passing over a telecommunications system, which is integral to the regulatory scheme under the TIAA.

The ACMA is of the view that the TIAA does not express an intention that, where listening or recording of communications occurs either before or after passage over a telecommunications system, that listening or recording is to be lawful and free from any restriction under State law.

The licensee has also sought to rely upon the High Court's decision in *Miller v Miller* (1978) 141 CLR 269 (*Miller's case*) to conclude that the SDA is inconsistent with the TIAA.

However, in *Miller's case*, the field covered by the relevant predecessor to the TIAA (the *Telephonic Communications (Interception) Act 1960* (Cth)) was interception in the sense of listening or recording communications while they were passing over a telephone system (see, for example, Barwick CJ at 275-276 and Gibbs J at 277), and the interception in that case fell squarely within the scope of that concept. The conduct in that case also fell within an exception (subsection 4(2)) rendering the listening lawful under the Commonwealth Act, and so there was no room for the State Act to stipulate that conduct to be unlawful. Accordingly, even leaving to one side the fact the Commonwealth Act in question was in a different form to the TIAA, *Miller's case* is distinguishable.

As the ACMA is of the view that, based on the agreed summary of facts, the licensee's listening to and recording of the telephone call falls outside the concept of interception within the meaning subsection 6(1) of the TIAA, the reasoning in *Miller v Miller* cannot be applied in the present circumstances.

For the reasons set out above, the ACMA is of the view that, for present purposes, the SDA is not inconsistent with the TIAA and that the SDA is not rendered invalid pursuant to section 109 of the Constitution.

## **Assessment of compliance with the *Surveillance Devices Act 2007* (NSW)**

### ***Did the licensee contravene the Surveillance Devices Act 2007 (NSW) and has the licensee breached a condition of its licence?***

The long title to the SDA Act describes it, among other things, as an Act 'to regulate the installation, use, maintenance and retrieval of surveillance devices'. The term 'surveillance device' is defined in subsection 4(1) of the SDA to include a range of devices including a 'listening device'. A 'listening device' means 'any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation ...'. The ACMA is satisfied that the Voxpro device used by the licensee to record the telephone conversation (pursuant to paragraph 5 of the agreed summary of facts) is a 'listening device' for the purposes of the SDA.

Paragraph 7(1)(b) in Part 2 of the SDA creates a prohibition on a person 'knowingly' installing, using or causing to be used, a listening device 'to record a private conversation to which the person is a party'.

'Private conversation' is defined in subsection 4(1) of the SDA to mean 'any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:

- (a) by themselves, or

(b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.’

The ACMA is of the view that the conversations that took place between the radio hosts and Employee 1 and Employee 2 were private conversations for the purposes of the SDA. The ACMA notes that there was no consent given by Employee 1 or Employee 2 for that private conversation to be recorded.<sup>17</sup>

Subsections 7(2)-(4) create a number of exceptions to the prohibition at subsection 7(1), including where the listening device is used pursuant to a warrant or when all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being used. The licensee has not sought to rely on any of the exceptions set out at subsections 7(2)-(4) and on the information available, the ACMA does not consider that any of those exceptions are available to the licensee.

On the basis of the ACMA’s findings (which are consistent with the licensee’s submissions) that the communications that took place in the course of the telephone call were not passing over the telecommunications system at the point at which the Voxpro device recorded them (and therefore not caught within the concept of ‘interception’ for the purposes of the TIAA), the ACMA is of the view that the licensee’s act of using a listening device to record a private conversation without the consent of the relevant parties is within the scope of the SDA and constitutes a contravention of subsection 7(1) of the SDA.

Subsection 11(1) of the SDA provides that a ‘person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person’s knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of Part 2<sup>18</sup>.’

The ACMA 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(1) of the SDA, the licensee has breached a condition of its licence as set out in paragraph 8(1)(g) of Schedule 2 to the BSA.

While the ACMA considers, based on the agreed summary of facts, that the licensee’s conduct contravened the SDA rather than the TIAA (because the relevant communications were not passing over a telecommunications system at the time they were recorded by the licensee), the ACMA also notes that the only available alternative factual position would be that the relevant communications *were* passing over a telecommunications system at the time they were recorded. If that were the case, then, in the ACMA’s view, the licensee’s conduct would have constituted an interception in contravention of subsection 7(1) of the TIAA, and the subsequent broadcast of the recording would also have constituted a contravention of subsection 63(1) of the TIAA. Accordingly, even if the Summary of Facts, in this regard, is

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<sup>17</sup> Submission from the licensee dated 2 January 2013, page 1.

<sup>18</sup> Part 2 of the *Surveillance Devices Act 2007* (NSW) includes subsection 7(1).

incorrect, the licensee would still have used its broadcasting service in the commission of an offence and would therefore still be in breach of the condition of its licence set out in paragraph 8(1)(g) of Schedule 2 to the BSA.

## Attachment A

### Transcript

The following is a transcript of the prank telephone call as provided to the ACMA by the licensee<sup>19</sup>.

**Host 1:** Now [Host 2] today is a, is a very special day.

**Host 2:** Yes.

**Host 1:** It is the day that a lot of people have been waiting for, for a very, very long time.

**Host 2:** There has been speculation for months that Kate Middleton, married to Prince William, is pregnant.

**Host 1:** Yes.

**Host 2:** And it has been confirmed that she is pregnant. She is in hospital with severe morning sickness, poor little dear.

**Host 1:** The thing is though, that this condition that she has is often attached to women that are having twins, so maybe not one, but two royal babies.

**Host 2:** I would rather pump out like a couple at a time. Makes it easier I think.

**Host 1:** You make it sound so special and emotional.

**Host 2:** LAUGHING

**Host 1:** "I would rather pump out a couple. That would be alright wouldn't it". Have someone in the corner of the room with a baseball mitt catching them. "No pump them out."

**Host 2:** LAUGHING

**Host 1:** Here's the thing, we've been handed a phone number, alright, and we have been told that this phone number is the hospital where Kate Middleton is currently staying. Now we don't want, we thought we would give it a call. We don't want to cause any trouble.

**Host 2:** Yeah.

**Host 1:** We don't want to stress her out because she is doing it tough.

**Host 2:** Yep.

**Host 1:** But I reckon we could maybe get her on the radio tonight.

**Host 2:** Look I don't know, I mean everybody would be trying this.

**Host 1:** Well this, this is why I thought of a plan.

**Host 2:** Yeah.

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<sup>19</sup> The ACMA has de-identified the speakers.

**Host 1:** We can't just ring up and go, "Hi its [Host 1] and [Host 2] from the Summer 30 can we chat to Kate". Hang up. Not going to happen.

**Host 2:** Yeah.

**Host 1:** You are going to be the Queen.

**Host 2:** This is awesome.

**Host 1:** I am going to be Prince Charles.

**Host 2:** Hello I'm the Queen.

**Host 1:** [Station staff member 1] and [Station staff member 2] you are involved in this as well. Ah, we thought that maybe you could be the, the royal corgies if, if you are ok with that.

LAUGHING

**Station staff member 2:** Ruff Ruff.

**Host 1:** Yes, exactly.

**Station staff member 2:** Sure we will pop on in a sec.

**Station staff member 1:** We'll come in.

**Host 1:** Come into the studio. I am going to dial this number.

**Host 2:** This is fun. Oh I mean this is fun.

**Host 1:** Yes, yeah yeah yeah. So you are going to be the Queen.

**Host 2:** Hello I'm the Queen.

**Host 1:** Hello Prince Charles over here mummy.

**Host 2:** Oh you are Prince Charles. I like your ears.

**Host 1:** And [Station staff member 1] and [Stations staff member 2] are going to be the royal corgies, so lets um.

**Host 2:** OK be serious.

**Host 1:** Let's let's let's give this hospital a call.

**Host 2:** OK.

**Host 1:** And see if we can get Kate Middleton or maybe even Prince Wills on the phone tonight so the number. The number is going in.

DIAL TONE

**Host 1:** Oh gees I hope this happens.

DIAL TONE

**Hospital Employee 1:** Hello good morning King Edward VII Hospital.

**Host 2:** Oh hello there, could I please speak to Kate please my granddaughter?

**Hospital Employee 1:** Oh yes just hold on ma'am.

**Host 2:** Thank you.

**Host 1:** Are they putting us through?

**Host 2:** Yes.

LAUGHING

**Host 1:** If this has worked it is the easiest prank call we have ever made. Your accent sucked by the way. I just wanted you to know.

LAUGHING

**Host 2:** I'm not use to playing old 80 year olds.

**Hospital Employee 2:** UNDECIPHERABLE

**Host 2:** Kate my darling are you there?

**Hospital Employee 2:** Good morning ma'am this is the nurse speaking. How may I help you?

**Host 2:** Hello I am just after my granddaughter Kate. I want to see how her little tummy bug is going.

**Host 1:** Mummy.

**Hospital Employee 2:** She is sleeping at the moment.

**Host 1:** Mummy mummy.

**Hospital Employee 2:** And she has had an uneventful night, um, and sleep is good for her, as we speak she has been given some fluids to rehydrate her because she was quite dehydrated when she came in. Um, but she is stable at the moment.

**Host 2:** Ok I will just feed my little corgies then.

BARKING

**Host 2:** Um so what time, when is a good time to come and visit her cause I am the Queen so I need a lift down there. Oh Prince Charles.

**Hospital Employee 2:** UNDECIPHERABLE

**Host 1:** Mummy is everything OK?

**Host 2:** Oh wait my Charles. When can you take me to the hospital Charles?

**Host 1:** I don't know, when when will it be alright to come down and see her? Maybe, maybe in the morning or something if that is OK.

**Hospital Employee 2:** I would suggest at any time after 9 o'clock would be suitable because the doctor will be in in the morning.

**Host 1:** OK.

**Hospital Employee 2:** And we'll just be getting her freshened up in the morning. I would think any time after 9.

**Host 1:** Wonderful. And is Wills, is Wills still there or has he gone home? I haven't spoken to him yet.

**Hospital Employee 2:** He went home at about half past 9 last, no actually about 9 o'clock last night to be fair.

**Host 1:** OK, lovely. But they are all OK, everything is alright?

**Hospital Employee 2:** Yes she, she is quite stable at the moment. She hasn't had any retching with me since I have been on duty and she has been sleeping on and off.

**Host 1:** Wonderful.

**Hospital Employee 2:** I think it is difficult sleeping in a strange bed as well.

**Host 1:** Yes of course. It is hardly the palace is it?

**Host 2:** Oh, it is nothing like the palace is it Charles? And when are you going to walk those bloody corgies?

BARKING

**Host 1:** Mumsy I will go and take the dogs outside.

**Host 2:** I need to go visit Kate in the morning. My dear thank you so much.

**Hospital Employee 2:** You are very welcome.

**Host 2:** Thank you. Bye.

**Hospital Employee 2:** Bye Bye.

**Host 1:** Good bye.

**Host 2:** Bye.

LAUGHING

**Host 2:** She was giving us real information.

**Host 1:** Mumsy I think that they believed everything that we just said.

**Host 2:** I am the Queen bow for me, bow for me.

**Host 1:** Bow for you and your terrible accent.

LAUGHING

The licensee has advised that the segment was broadcast at 9.04 pm on Tuesday 4 December 2012.



## Relevant Code Provisions

### CODE OF PRACTICE 1: PROGRAMS UNSUITABLE FOR BROADCAST

#### Purpose

The purpose of this Code is to prevent the broadcast of programs which are unsuitable having regard to prevailing community standards and attitudes.

#### Program Content and Language, including Sex and Sexual Behaviour

- 1.3 (a) Program content must not offend generally accepted standards of decency (for example, through the use of unjustified language), having regard to the demographic characteristics of the audience of the relevant program.
- (b) For the purposes of determining:
- (i) the audience of the relevant program; and
  - (ii) the demographic characteristics of that audience,
- regard must be had, in particular, to the results of any official ratings surveys of the licensee's service in the prior 12 months, (or, in the case of any licensee service operating in regional areas, the most recent official ratings surveys for the licensee's service).

[...]

### CODE OF PRACTICE 2: NEWS AND CURRENT AFFAIRS PROGRAMS

#### Purpose

The purpose of this Code is to promote accuracy and fairness in news and current affairs programs.

- 2.1 News programs (including news flashes) broadcast by a licensee must:
- ...
  - (d) not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.
- 2.3 In the preparation and presentation of current affairs programs a licensee must ensure that:
- ...
  - (d) the licensee does not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.

### CODE OF PRACTICE 6: INTERVIEWS AND TALKBACK PROGRAMS

#### Purpose

The purpose of this Code is to prevent the unauthorised broadcast of statements by identifiable persons.

- 6.1 A licensee must not broadcast the words of an identifiable person unless:
- (a) that person has been informed in advance or a reasonable person would be aware that the words may be broadcast; or

- (b) in the case of words which have been recorded without the knowledge of the person, that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

## **CODE OF PRACTICE 9: LIVE HOSTED ENTERTAINMENT PROGRAMS**

### **Purpose**

The radio industry recognises that many people in the community consider children to have a special vulnerability in the context of live hosted entertainment programs and this Code is intended to address those concerns.

- 9.1 Subject to Codes 9.2 to 9.3 below, a licensee must not broadcast a program which, in all of the circumstances:
- (a) treats participants in live hosted entertainment programs in a highly demeaning or highly exploitative manner; or
  - (b) treats children participating in live hosted entertainment programs in a demeaning or exploitative manner.

**Demeaning:** A depiction or description, sexual in nature, which is a serious debasement of the participant.

**Child/children:** a person/people under 16 years old.

**Exploitative:** Clearly appearing to purposefully debase or abuse the participant for the enjoyment of others, and lacking moral, artistic or other values.

**Live hosted entertainment program:** a program (excluding any news program and any current affairs program) that is produced and broadcast live to air and is a hybrid program, a substantial part of which includes the following components:

- (a) a live host; and
  - (b) one or more of the following:
    - competitions;
    - stunts;
    - pranks.
- 9.2 Straightforward telephone only competitions, such as “call to win”, shall be excluded from the scope of “competitions” for the purposes of Code 9.
- 9.3 The obligation on a licensee under Code 9.1 will not be taken to have been breached in relation to adults if:
- (a) the participant consents prior to the broadcast of the relevant content in the program; and
  - (b) the licensee informed the participant of the character of the relevant segment to be broadcast.

### Relevant Additional Licence Condition

#### AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

#### *Broadcasting Services Act 1992*

Subsection 43(4)

#### NOTICE OF ADDITIONAL CONDITION ON COMMERCIAL RADIO BROADCASTING LICENCE NO. 3032

On 8 October 2012 the Administrative Appeals Tribunal ordered as follows:

“Pursuant to s 43(1) of the *Broadcasting Services Act 1992* (Cth) an additional condition is imposed upon commercial radio broadcasting licence number 3032, held by Today FM Sydney Pty Ltd (the Licensee) in the following terms:

For a period of five (5) years from 16 May 2012 the Licensee must:

1. In respect of the programs “Hot30 Countdown” and “The Kyle & Jackie O Show” and any other radio program presented live to air by Mr Kyle Sandilands alone or in combination with another presenter or presenters, comply with clauses 1.3(a) and 1.3(b) of the Commercial Radio Australia Codes of Practice and Guidelines 2011, or any equivalent provision replacing clauses 1.3(a) and (b) in any replacement code registered by the Australian Communications and Media Authority, (the Codes).
2. Provide training at least once every six (6) months on compliance with the Codes for all its employees and contractors involved in the production and presentation of all programs produced by the Licensee and report in writing to the ACMA within fourteen (14) days after each training cycle has been completed on the training that the Licensee has conducted.
3. In respect of “The Kyle & Jackie O Show” (the Program):
  - (i) employ two content monitors for the Program who are required to remove material from the Program which, in the opinion of the content monitors, is not appropriate for the broadcast.
  - (ii) maintain the broadcast delay utilised at 30 seconds.
4. In these orders “live to air” is defined to mean broadcast at the moment the content is being presented in the studio or elsewhere and includes where there is a delay in the broadcast for technical, regulatory or content control purposes.”

**Dated this 22<sup>nd</sup> Day of October 2012**

## Relevant legislation

### ***Telecommunications (Interception and Access) Act 1979 (Cth)***

#### **5 Interpretation**

(1) In this Act, unless the contrary appears:

[...]

'*communication*' includes conversation and a message, and any part of a conversation or message, whether:

(a) in the form of:

- (i) speech, music or other sounds;
- (ii) data;
- (iii) text;
- (iv) visual images, whether or not animated; or
- (v) signals; or

(b) in any other form or in any combination of forms.

[...]

'*telecommunications network*' means a system, or series of systems, for carrying communications by means of guided or unguided electromagnetic energy or both, but does not include a system, or series of systems, for carrying communications solely by means of radiocommunication.

'*telecommunications system*' means:

- (a) a telecommunications network that is within Australia; or
- (b) a telecommunications network that is partly within Australia, but only to the extent that the network is within Australia;

and includes equipment, a line or other facility that is connected to such a network and is within Australia.

[...]

#### **5F When a communication is passing over a telecommunications system**

For the purposes of this Act, a communication:

- (a) is taken to start passing over a telecommunications system when it is sent or transmitted by the person sending the communication; and
- (b) is taken to continue to pass over the system until it becomes accessible to the intended recipient of the communication.

#### **5G The intended recipient of a communication**

For the purposes of this Act, the **intended recipient** of a communication is:

- (a) if the communication is addressed to an individual (either in the individual's own capacity or in the capacity of an employee or agent of another person)—the individual; or
- (b) if the communication is addressed to a person who is not an individual—the person; or
- (c) if the communication is not addressed to a person—the person who has, or whose employee or agent has, control over the telecommunications service to which the communication is sent.

#### **5H When a communication is accessible to the intended recipient**

- (1) For the purposes of this Act, a communication is **accessible** to its intended recipient if it:
  - (a) has been received by the telecommunications service provided to the intended recipient; or
  - (b) is under the control of the intended recipient; or
  - (c) has been delivered to the telecommunications service provided to the intended recipient.
- (2) Subsection (1) does not limit the circumstances in which a communication may be taken to be accessible to its intended recipient for the purposes of this Act.

#### **6 Interception of a communication**

- (1) For the purposes of this Act, but subject to this section, interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication.

[...]

#### **7 Telecommunications not to be intercepted**

- (1) A person shall not:
  - (a) intercept;
  - (b) authorize, suffer or permit another person to intercept; or
  - (c) do any act or thing that will enable him or her or another person to intercept;a communication passing over a telecommunications system.

[...]

#### **63 No dealing in intercepted information or interception warrant information**

- (1) Subject to this Part, a person shall not, after the commencement of this Part:
  - (a) communicate to another person, make use of, or make a record of; or

(b) give in evidence in a proceeding;

lawfully intercepted information or information obtained by intercepting a communication in contravention of subsection 7(1).

(2) Subject to this Part, a person must not, after the commencement of this subsection:

(a) communicate interception warrant information to another person; or

(b) make use of interception warrant information; or

(c) make a record of interception warrant information; or

(d) give interception warrant information in evidence in a proceeding.

[...]

### **105 Contravention of section 7 or 63**

(1) A person who contravenes subsection 7(1) or section 63 is guilty of an offence against that subsection or section.

(2) An offence against subsection 7(1) or section 63 is an indictable offence and, subject to this section, is punishable on conviction by imprisonment for a period not exceeding 2 years.

(3) Notwithstanding that an offence against subsection 7(1) or section 63 is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if, and only if:

(a) the proceedings are brought in the name of the Attorney-General or the Director of Public Prosecutions;

(b) the defendant and the prosecutor consent; and

(c) the court is satisfied that it is proper for the court to hear and determine proceedings in respect of the offence.

(4) Where, in accordance with subsection (3), a court of summary jurisdiction convicts a person of an offence against subsection 7(1) or section 63, the penalty that the court may impose is imprisonment for a period not exceeding 6 months.

(5) Section 15.1 (extended geographical jurisdiction—category A) of the *Criminal Code* applies to an offence against subsection 7(1) or section 63.

## **Surveillance Devices Act 2007 (NSW)**

### **4 Definitions**

(1) In this Act:

[...]

*device* includes instrument, apparatus and equipment.

[...]

*listening device* means any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

[...]

*private conversation* means any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:

- (a) by themselves, or
- (b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.

[...]

## **7 Prohibition on installation, use and maintenance of listening devices**

- (1) A person must not knowingly install, use or cause to be used or maintain a listening device:
  - (a) to overhear, record, monitor or listen to a private conversation to which the person is not a party, or
  - (b) to record a private conversation to which the person is a party.

Maximum penalty: 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

- (2) Subsection (1) does not apply to the following:
  - (a) the installation, use or maintenance of a listening device in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation,
  - (b) the installation, use or maintenance of a listening device in accordance with the Telecommunications (Interception and Access) Act 1979, or any other law, of the Commonwealth,
  - (c) the unintentional hearing of a private conversation by means of a listening device,
  - (d) the use of a listening device to record a refusal to consent to the recording of an interview by a member of the NSW Police Force in connection with the commission of an offence by a person suspected of having committed the offence,
  - (e) the use of a listening device and any enhancement equipment in relation to the device solely for the purposes of the location and retrieval of the device or equipment,

- (f) the use of a listening device, being a device integrated into a Taser issued to a member of the NSW Police Force, to record the operation of the Taser and the circumstances surrounding its operation.
- (3) Subsection (1) (b) does not apply to the use of a listening device by a party to a private conversation if:
  - (a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or
  - (b) a principal party to the conversation consents to the listening device being so used and the recording of the conversation:
    - (i) is reasonably necessary for the protection of the lawful interests of that principal party, or
    - (ii) is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.
- (4) Subsection (1) does not apply to the use of a listening device to record, monitor or listen to a private conversation if:
  - (a) a law enforcement officer is a party to the private conversation, and
  - (b) the law enforcement officer is a participant (within the meaning of the Law Enforcement (Controlled Operations) Act 1997 ) in an authorised operation (within the meaning of that Act) who is using an assumed name or assumed identity.

[...]

#### **11 Prohibition on communication or publication of private conversations or recordings of activities**

- (1) A person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part.

Maximum penalty: 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

- (2) Subsection (1) does not apply to the following:
  - (a) if the communication or publication is made:
    - (i) to a party to the private conversation or activity, or
    - (ii) with the consent, express or implied, of all the principal parties to the private conversation or activity, or
    - (iii) for the purpose of investigating or prosecuting an offence against this section, or
    - (iv) in the course of proceedings for an offence against this Act or the regulations,



- (b) if the communication or publication is no more than is reasonably necessary in connection with an imminent threat of:
  - (i) serious violence to persons or of substantial damage to property, or
  - (ii) commission of a serious narcotics offence.
- (3) A person who obtains knowledge of a private conversation or activity in a manner that does not involve a contravention of a provision of this Part is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened this Part.