

Publication: Entertainment Law Review  
Date: January 2010  
Page Nos: 21-24  
Author(s): Ian Robertson and Linda Luu (of Holding Redlich)  
Publisher: Sweet & Maxwell

## **"Cash for comment" in commercial radio – first civil penalties case under the Broadcasting Services Act 1992 (Cth)**

### **Introduction**

The regulation of so-called “cash for comment” on commercial radio has been a significant issue for the past decade. On July 12, 1999, the Australian Broadcasting Corporation programme “Media Watch” broadcast a story concerning an alleged financial agreement between one of Australia’s highest profile commercial radio talkback hosts, Mr John Laws, and the Australian Bankers Association, an organisation representing the major Australian banks. Briefly, the arrangement was said to have involved Mr Laws making positive on-air comments about the banks over and above paid advertisements, and also involved the airing of a segment concerning banking issues called “The Whole Story”. The Media Watch programme also stated that, prior to this agreement with the Australian Bankers Association, Mr Laws had been a strong critic of the banks on his very high rating and nationally syndicated radio programme “The John Laws Morning Show” (“the Show”). Mr Laws was, and continued to be until November 30, 2007, engaged by Sydney radio station 2UE as the presenter of the Show.

The Media Watch story received widespread media coverage. The predecessor regulatory authority to the Australian Communications and Media Authority (“ACMA”), the Australian Broadcasting Authority (“the ABA”), announced on July 15, 1999 that it would use its formal powers under the Broadcasting Services Act 1992 (Cth) (“the Act”) to conduct an inquiry into the issues raised by the Media Watch programme. The inquiry was constituted in order to determine whether the allegations, if correct, involved breaches of the Act, of 2UE’s licence conditions, or of the Commercial Radio Codes of Practice (“the Codes”), a coregulatory scheme which governs commercial radio broadcasting.

After further allegations appeared concerning financial arrangements involving sponsors and 2UE’s breakfast programme presenter, Mr Alan Jones, the scope of the ABA inquiry was widened to include other 2UE presenters and other radio stations.

### **The 1999 ABA Commercial Radio Inquiry**

After conducting a public hearing in late 1999, the ABA found that 2UE had breached the Act on five occasions and the Codes on a total of 90 occasions.

It was revealed in the hearing that the arrangements between the Australian Bankers Association and Mr Laws, the subject of the original “Media Watch” programme, involved a payment by the Australian Bankers Association of AUD 1,350,000 which was split between Mr Laws and 2UE.

The ABA also found that the commercial agreements examined by the ABA had led to a substantial failure by commercial radio licensees to comply with the standards of conduct required by the Codes; there appeared to be a systemic failure to ensure the effective operation of self-regulation particularly in relation to current affairs programmes, including a lack of staff awareness of the Codes and of their implications; and within a significant proportion of current affairs programmes, the Codes were not operating to provide appropriate community safe-guards.

The ABA accordingly used its powers under the Act to determine Standards for commercial radio broadcasting. A Standard has the same effect as a licence condition on a commercial radio broadcasting licence. The three Standards determined by the ABA commenced operation on November 1, 2000 and continue to operate.

One Standard, the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 (the "Disclosure Standard") requires, in particular, the on-air disclosure during current affairs radio programmes of commercial agreements between sponsors and presenters. For example, each time a sponsor's name, goods or services is mentioned on-air, the presenter is required to make a disclosure announcement, for example, "[Sponsor] is a sponsor of mine" (the "Disclosure Announcement"). The Disclosure Standard also requires licensees to keep a register of commercial agreements between sponsors and presenters of current affairs programmes and to make the register available to the ABA (now ACMA) and the public (including on the website of the licensee), and licensees to ensure that a condition of employment of presenters of current affairs programmes is that they comply with relevant obligations imposed by the Act, the Codes and the Standards. The other two Standards determined by the ABA require commercial radio broadcasting licensees to implement and maintain compliance programmes to ensure compliance with the Act, Codes and Standards, and also to ensure that advertisements are distinguishable from other programmes.

In its final report of the Commercial Radio Inquiry in August 2000, the ABA also commented that it considered that its existing powers lacked the flexibility for it to properly respond to serious code breaches or breaches of licence conditions, and that it lacked sanctions that had immediate effect. The ABA recommended, in particular, that it be given the power to impose a civil penalty (rather than to have to rely on criminal proceedings brought by the Australian Director of Public Prosecutions) in respect of a breach of licence conditions or broadcasting standards.

### **2006 Broader enforcement powers granted to ACMA**

In 2006 the Communications and Legislation Amendment (Enforcement Powers) Act 2006 (Cth) (Amendment Act) was enacted. It inserted s.140A into the Act. This expanded the powers of the ABA (now ACMA) to deal with breaches of licence conditions (including Standards) by arming ACMA with the power to bring civil proceedings to recover a civil penalty.

The provisions of the Amendment Act were intended to address the then lack of middle range penalties to deal with breaches of the Act, regulations and licence conditions by adding to the Act civil penalty and enforceable undertaking provisions, among other enforcement remedies. Such provisions were intended to address breaches of the Act, Codes or Standards that did not warrant criminal sanctions, or the suspension or cancellation of a licence. The explanatory memorandum to the Amendment Act referred to difficulties associated with criminal sanctions that had been highlighted following the ABA's findings in December 2003 (three years after the Commercial Radio Inquiry) that 2UE had committed a further 19 breaches of the Disclosure Standard. In respect of the 2003 breaches, the Director of Public Prosecutions had advised the ABA that, on the evidence available, there would be no reasonable prospect of a conviction of 2UE in relation to those breaches. Those breaches also involved Mr Laws and the Show.

The explanatory memorandum to the Amendment Act observed that suspension or cancellation of a commercial radio licence was a severe penalty that affected consumers of the service as well as the broadcaster who could be expected to suffer significant economic loss as a consequence. It noted that the ABA had never used this power in respect of breaches of licence conditions or Standards by commercial broadcasters.

## **Enforceable undertaking**

On August 31, 2006, 2UE's then ultimate holding company, Southern Cross Broadcasting (Australia) Limited, reported suspected breaches of the Disclosure Standard to ACMA which allegedly occurred on the Show.

On October 12, 2006, ACMA commenced an investigation into 2UE's compliance with the Disclosure Standard and other programming Standards. On September 25, 2007, ACMA published a report of its findings from that investigation. ACMA found 20 breaches of the Disclosure Standard by 2UE during the broadcast of the Show on August 28, 2006. A number of those breaches of the Disclosure Standard involved a failure by 2UE to cause a Disclosure Announcement to be broadcast during the Show at the time of and as part of a broadcast of material in which the name, products or services of a sponsor of Mr Laws were mentioned.

After these findings were made 2UE offered ACMA an enforceable undertaking pursuant to s.205W of the Act, which ACMA accepted on September 24, 2007 (the "Enforceable Undertaking"). 2UE undertook to do certain things in relation to its compliance with the Disclosure Standard, including to implement an effective administration system for monitoring each broadcast of the Show to ensure compliance with the Disclosure Standard, and to appoint an independent person to review at least four programmes of the Show each fortnight and to report on compliance with the Disclosure Standard to ACMA within 14 days after the end of each fortnight.

## **The 2007 breaches**

Between December 2007 and October 2008 ACMA conducted a further investigation into 2UE's compliance with the Disclosure Standard and the Enforceable Undertaking and prepared a report detailing its findings. The report detailed 13 breaches of the Disclosure Standard by 2UE between October 5, 2007 and November 30, 2007 as a result of Mr Laws' failure to mention his sponsors on the Show as required by the Disclosure Standard. Each of the breaches was admitted by 2UE and ACMA applied to the Federal Court for orders that 2UE pay pecuniary penalties pursuant to s.205F(1) of the Act in respect of the 13 breaches and for declarations recording each contravention.

Each contravention attracted a maximum civil penalty of 500 penalty units, or AUD 55,000 each, being a total of AUD 715,000 for the 13 breaches. ACMA and 2UE prepared an agreed statement of facts for the Court and agreed that it was appropriate to suggest to the Court that a penalty of AUD 10,000 per contravention should be imposed, which would have resulted in a total of AUD 130,000 in civil penalties being payable by 2UE.

ACMA and 2UE suggested that these figures were appropriate to reflect a penalty at the lower end of the range having regard to all the circumstances, including 2UE's immediate cooperation with ACMA's inquiry and its contrition and acceptance of responsibility for the contravention. In addition, the ownership \*23 of 2UE had changed so that 2UE was ultimately owned by Fairfax Media Limited, and only four of the breaches occurred during the period of Fairfax's ownership and all of those four breaches occurred on November 30, 2007 being Mr Laws' last day on air as a radio presenter. He retired from commercial radio broadcasting on that day.

## **Contradictor *amicus curiae***

As this was the first action for civil penalties under the Act, Rares J. of the Federal Court identified that the relationship between the contraventions and a commercial radio broadcasting licence might involve different considerations than other situations permitting the imposition of civil penalties for contraventions of other legislation. Rares J. accordingly asked the parties to consider whether there should be a contradictor. Although both of the parties opposed that course, the court granted leave for a relevant public interest organisation, the Communications Law Centre, to intervene to appear and make submissions.

## **Civil penalties under the Act--the public interest consideration**

A number of other laws permit the imposition of civil penalties for contraventions, including the Trade Practices Act 1974 (Cth) (the "TPA") and the Corporations Act 2001 (Cth), and under employment law. In those cases, the courts have established that a primary purpose of imposing civil penalties is deterrence.

In this case, the court also found that it was appropriate to include some element of punishment or retribution in the pecuniary penalty imposed upon 2UE.

This is because the court found that the purposes for imposing civil penalties under legislation such as the TPA, which regulates economic behaviour such as anti-trust, competition and misleading and deceptive conduct in trade or commerce, are different from the Act. First, the Act can be distinguished from the TPA as the Act creates the right for commercial radio licensees to hold a licence which is an economic privilege to broadcast radio for profit. Secondly, the objects of the Act differ markedly from the TPA and Corporations Act, in particular, s.4(1) provides that:

"The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, data casting services and Internet services according to the degree of influence that different types of broadcasting services, data casting services and Internet services are able to exert in shaping community views in Australia."

In particular, the court found that talk back radio programmes and current affairs programmes such as the Show, occupy a significant place in commercial radio broadcasting and that presenters of such programmes can exert considerable influence in shaping community views. As stated above, the Show was a high-ranking, nationally syndicated radio programme and Mr Laws was a well known radio presenter.

The court also found that the Disclosure Standard was a key instrument to ensure transparency in current affairs radio broadcasting and a failure to comply could violate the public's ability to trust in the quality and nature of information conveyed on such programmes.

## **Calculation of the penalties**

The court ordered 2UE to pay a pecuniary penalty of AUD 360,000, being penalties of varying amounts in respect of 13 breaches of the Disclosure Standard.

The court accepted that 2UE was entitled to have the penalties mitigated because it had demonstrated a responsible attitude and had given substantial attention to developing effective compliance programmes since the contraventions. 2UE had also accepted responsibility for the contraventions and expressed contrition. Notwithstanding that these factors warranted some reduction, the court found that the contraventions were of a serious nature.

In addition to the legislative factors set out in s.205F(3) of the Act and the additional factors identified by French J. in *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076, the court also considered that the following factors were relevant in calculating the amount of the pecuniary penalty:

- the existence of the Enforceable Undertaking;
- the particular conduct of Mr Laws and his role in the contraventions; and
- prior history of compliance, although 2UE had not previously been found by a court to have engaged in any similar conduct.

However, the existence of alternative enforcement options was not a relevant consideration.

## Particulars of the breaches

In considering the circumstances of each breach, the court found:

Contraventions 1 and 2 on October 5, 2007 fell within the AUD 10,000 range because there was no evidence Mr Laws had breached between August 2006 and October 5, 2007. Contravention 10 also fell within this range because it was a mention of the two majority shareholders of a sponsor which the court determined was not blatant or obvious.

On October 18, 2007, the date of Contraventions 3 and 4, management of 2UE had received an email from the independent person required to review the Show under the Enforceable Undertaking, containing information about Mr Laws' first and second breach on October 5, 2007 (albeit, the information was not read). Accordingly, the court determined it appropriate to increase the penalty to AUD 20,000 per breach.

- Contraventions 5 and 6 attracted a penalty of AUD 25,000 each as there was no extenuating circumstance for either contravention and Mr Laws rang a cowbell when mentioning the sponsor's name, which indicated that Mr Laws knew he was required to make a Disclosure Announcement.
- \*24 • Contravention 7 involved three mentions of a sponsor and attracted a penalty of AUD 30,000.
- Contravention 8 was a re-broadcast of Contravention 7 and attracted a penalty of AUD 45,000 because the rebroadcast of the segment was reckless conduct by 2UE.
- Contravention 9 attracted a penalty of AUD 35,000 because Mr Laws rang a cow bell which indicated he knew he was required to make a Disclosure Announcement and had, by this time, committed eight previous contraventions.
- Contraventions 11 and 12 were egregious and attracted penalties of AUD 35,000 and AUD 45,000. The court also found that Contravention 12 involved the mention of five sponsors.
- Contravention 13 was serious and deliberate and attracted the highest penalty of AUD 50,000. The court commented that this contravention expressly flouted the Disclosure Standard and was a blatant and direct challenge to ACMA. Mr Laws had just finished talking to a singer who had mentioned Byron Bay Beer. Mr Laws said, "And of course I've got to say Byron Bay Beer are sponsors of mine". Mr Laws went on to say:

"How bloody stupid. When are you people going to get over it? Never? What are you going to do next week when you don't have to sit around and listen to me all day in case I say Toyota? [pause] Oh did you hear that? Did you hear that, Alice? He said Toyota! God! Boring old bastards! 13 13 32 is our telephone number. [pause] No, not our people here, the people at the ... whatever you call it, what do you call it? ACMA. As I said yesterday, it sounds like a skin ailment."

## Conclusion

The issue of so-called "cash for comment" on commercial radio has resulted in considerable regulatory reform. ACMA (formerly the ABA) has imposed three Standards on commercial radio broadcasting licensees which have the same legal effect as licence conditions.

As a result of amendments in 2006 to the Act, ACMA has the power to bring civil proceedings to recover a civil penalty for breaches of the Act and to accept enforceable undertakings from licensees, among other remedies.

The first action for civil penalties under the Act was brought by ACMA as a result of 13 breaches of the Disclosure Standard by Sydney radio station 2UE, all of which occurred as a result of the presenter of the John Laws Morning Show, Mr John Laws, failing to mention his sponsors on the Show as required by the Disclosure Standard.

In determining the correct penalty for these breaches the court found that it was appropriate to include some element of punishment or retribution. This is because the Act creates the right for commercial radio licensees to hold a licence which is an economic privilege to broadcast radio for profit. Further, the court also found that the Disclosure Standard was a key instrument to ensure transparency in current affairs radio broadcasting and a failure to comply could violate the public's ability to trust in the quality and nature of information conveyed in such programmes.

The court accordingly ordered 2UE to pay penalties of varying amounts, depending on the court's view of the seriousness of each breach. The total penalty of AUD 360,000 was substantially more than the penalty of AUD 130,000 which ACMA had agreed with 2UE was appropriate.

### **More regulatory reform to the Standards?**

Finally, there may be more regulatory reform of the Standards to come. On December 18, 2008, ACMA announced it would undertake a review of the three Standards "to ensure they deliver appropriate and contemporary community safeguards".

As intimated in ACMA's press release, the commercial radio industry has long had concerns about the operational difficulties of complying with certain aspects of the Standards.

No doubt the extra enforcement powers inserted into the Act in 2006 have heightened the commercial radio industry's concerns about the workability of, and ease of compliance with, the Standards.