[2012] AATA 544

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) |  |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **The Hon. A C Bennett, Presidential Member**  **Senior Member A K Britton** |
| Date | **22 August 2012** |
| Place | **Sydney** |

Parties to file and serve any comments as to the wording of the proposed condition within seven days.

..............................[sgd]..........................................

**Senior Member A K Britton**

# Catchwords

RADIOCOMMUNICATIONS – commercial broadcasting licence – breach of Commercial Radio Australia Codes of Practice and Guidelines 2011 (Code) – imposition of licence condition that broadcaster comply with cl 1.3(a) of Code – cl 1.3(a) of Code required that content must not offend generally accepted standards of decency –whether cl 1.3(a) amenable to being made a condition of licence – whether cl 1.3(a) lacked certainty – whether imposition of condition disproportionate response to subject breach

# Legislation

Administrative Appeals Tribunal Act 1975 (Cth) - s 43

Australian Communications and Media Authority Act 2005 (Cth)

Broadcasting Services Act 1992 (Cth) - ss 3(1)(a), 3(1)(b), 3(1)(h), 3(1)(j), 4, 4(2), 4(2)(a), 5, 5(2), 42, 43, 44(2)(a), 44(2)(b), 123, 123(2)(a)-(c), 123(4), 125, 129, 205W, Pt 9B, Sch 2

# Cases

Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60

Re Star Broadcasting Network Pty Ltd and Australian Broadcasting Authority (2003) 79 ALD 637; [2003] AATA 1348

Herald Sun TV Pty Ltd and Others v Australian Broadcasting Tribunal (1985) 156 CLR 1

# Secondary Materials

Commercial Radio Australia Codes of Practice and Guidelines 2011 - cll 1.1(a), 1.1(e), 1.3(a)

# REASONS FOR DECISION

**The Hon. A C Bennett, Presidential Member**

**Senior Member A K Britton**

1. The “Kyle and Jackie O Show” (the Program) is a live-to-air radio program broadcast between 6:00 a.m. and 9:00 a.m. each weekday by Today FM Sydney Pty Ltd (Today FM). The Program is hosted by Mr Kyle Sandilands and Ms Jacqueline Henderson (Jackie O).
2. In late 2011, Mr Sandilands and Ms Henderson also hosted a television program called “A Night With The Stars”. It apparently rated badly. News.com.au carried an unfavourable review, “Feel the love: Twitter critics call Kyle and Jackie O’s TV show a disaster” written by journalist Ms Alison Stephenson. Her appraisal, it seems, irritated Mr Sandilands. Purporting to address Ms Stephenson in response to her review shortly after 6 a.m. on 22 November 2011, Mr Sandilands said on-air:

You know, you’re a piece of shit … You’re a bullshit artist, girl. That’s what you are. You should be fired from your job … You haven’t got that much titty to be wearing that low-cut a blouse. Change your image girl, and watch your mouth … or I will hunt you down.

1. On 24 November 2011, Today FM issued a press release apologising for any offence caused by the broadcast and stating that it did not condone the sentiments expressed by Mr Sandilands. Seventeen days after the offending broadcast, Mr Sandilands made an on-air apology and also issued an open letter to the media apologising for his offensive language.
2. Following receipt of a complaint, the Australian Communications and Media Authority (the Authority), a statutory authority established under the *Australian Communications and Media Authority Act 2005* (Cth), conducted an investigation into the offending broadcast. The Authority found that Today FM had breached cl 1.3(a) of the *Commercial Radio Australia Codes of Practice and Guidelines 2011* (the Code), which instructs that program content “must not offend generally accepted standards of decency … having regard to the demographic characteristics of the audience of the relevant program”. The Authority responded to the breach by imposing a condition on Today FM’s licence requiring that, for a period of five years, Today FM must:

* comply with cl 1.3(a) of the Code;
* develop and implement a training program in relation to cl 1.3(a); and
* provide it with evidence that the training program had been delivered.

1. Today FM seeks review of that decision by the Administrative Appeals Tribunal. Today FM accepts that the imposition of a condition is an appropriate regulatory response to the breach, but objects to the form of the condition, in particular, the requirement that, as a condition of its licence, it comply with cl 1.3(a) of the Code. It points out that while it accepts that it must comply with the Code, the penalties for a breach of a condition include loss or suspension of the subject licence and it says that given the voluntary steps it has taken to address the Authority’s concerns, the new condition is both an unwarranted and a disproportionate response to the breach. The Authority disagrees and contends that the condition it has imposed (the new condition) is a proportionate regulatory response to the breach. The Authority also says that a breach of a licence condition does not result in the automatic disqualification of the licence holder. Rather, the consequence of a breach is a matter for regulatory action that is reviewable by the Tribunal. That action may include a remedial direction pursuant to s 141 of the Act and/or a notice of intention to suspend or cancel a licence pursuant to s 143 of the Act, including an opportunity for the licence holder to make representations in relation to the proposed action.

# The regulatory regime

1. The objects of the *Broadcasting Services Act 1992* (Cth) (the Act) include:

* to promote the availability to audiences throughout Australia of a diverse range of radio services offering entertainment, education and information (sub-s 3(1)(a));
* to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs (sub-s 3(1)(b));
* to encourage providers of broadcasting services to respect community standards in the provision of program material (sub-s 3(1)(h)); and
* to ensure that broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them (sub-s 3(1)(j)).

1. Section 4 of the Act relevantly provides:

**Regulatory policy**

(1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.

(2) The Parliament also intends that broadcasting services ... in Australia be regulated in a manner that, in the opinion of the Authority:

(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and;

…

1. The Authority’s role is explained in s 5 of the Act:

**Role of Authority**

1) In order to achieve the objects of this Act in a way that is consistent with the regulatory policy referred to in section 4, the Parliament:

(a) charges the Authority with responsibility for monitoring the broadcasting industry, … and

(b) confers on the Authority a range of functions and powers that are to be used in a manner that, in the opinion of the Authority, will:

(i) produce regulatory arrangements that are stable and predictable; and

(ii) deal effectively with breaches of the rules established by this Act.

(2) Where it is necessary for the Authority to use any of the powers conferred on it by this Act to deal with a breach of this Act or the regulations, the Parliament intends that the Authority use its powers, or a combination of its powers, in a manner that, in the opinion of the Authority, is commensurate with the seriousness of the breach concerned.

1. Commercial radio broadcasting licences are subject to standard conditions listed in Schedule 2 of the Act and any additional condition that might be imposed by the Authority (ss 42 and 43). The Authority may impose a licence condition requiring a licensee to comply with a Code of Practice applicable to the licensee (sub-s 44(2)(a)). It may also impose a condition “designed to ensure that a breach of a condition by the licensee does not recur” (sub-s 44(2)(b)).
2. Parliament, recognising the industry’s capacity and expertise in this area, decided that representative industry bodies should draw up their own Codes of Practice (s 123). (See also generally Pt 9B – Industry Codes and Industry Standards of the Act.) Among other things, such Codes of Practice are intended to prevent the broadcasting of programs that do not meet community standards (sub-ss 123(2)(a)-(c)). The Authority may include a Code of Practice developed by a particular section of the broadcasting industry in the Register of Codes of Practice (sub-s 123(4)). It is important to observe that, except for children’s programs, the Authority may not set the standards itself, except where an industry group fails to produce a Code of Practice or when a Code of Practice fails (ss 125, 129).

# Commercial Radio Australia Codes of Practice and Guidelines

1. Registered by the Authority and endorsed by commercial radio broadcasters, the Code consists of nine Codes of Practice and various Guidelines. The stated purpose of Code of Practice 1: Programs Unsuitable for Broadcast is *“to prevent the broadcast of programs which are unsuitable having regard to prevailing community standards and attitudes”*.
2. Clause 1.3 of that Code provides:

(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).

# Investigation into the breach and decision

1. On 13 January 2012, the Authority notified Today FM that it had received a complaint about the offending broadcast and, as required by the Act, would be conducting an investigation into that complaint. On 30 January 2012, Today FM wrote to the Authority stating that, while in its opinion the offending broadcast did not breach the Code, steps had been taken to prevent a future broadcast of “unacceptable material”, which included:

* instructing Mr Sandilands and his management that these sort of remarks are unacceptable and must not be repeated;
* reminding all involved in the production of the Program of the requirements of the Codes;
* extending the broadcast delay from 10 seconds to 30 seconds for all 2Day FM programs which will allow extra time to consider content for editing;
* installing a warning light system in the Sydney studios to allow production staff and content advisers to notify announcers when content may be of concern or is heading in a concerning direction. This system will also be installed at the Los Angeles studio where Mr Sandilands broadcasts from, prior to any further broadcast taking place from that location;
* training all production staff in the new systems;
* employing a second full-time On-Air content adviser to work on the Program. Both advisers will be able to take action if content is deemed inappropriate by using the ‘dump button’ functions in their individual censor boxes. Additional ‘dump buttons’ have also been installed near other key production staff.

1. In the same letter, Today FM stated that:

On 12 January 2012, [the broadcaster] held a conference for all staff and members of the Program, including Mr Sandilands, which included training on compliance with the Codes. We will also continue to train all ‘on-air’ and ‘off-air’ production staff on the Codes every six months and during these training sessions we will make sure that the specific issues raised by the complaints are addressed.

1. In March 2012, the Authority notified Today FM of its decision that, in broadcasting the offending segment, it had breached cl 1.3(a) but not cl 1.1(a) (“likely to incite, encourage or present for its own sake violence or brutality”) or cl 1.1(e) (“likely to incite hatred against, or serious contempt for, or severe ridicule of, any person because of gender etc”). In addition, the Authority advised Today FM of its intention to impose an additional licence condition under s 43 of the Act.
2. Subsequently, the Authority released a draft licence condition and invited comment from Today FM. The draft condition differed from the condition ultimately settled on by the Authority, in that the requirement to comply with cl 1.3(a) of the Code was expressed to apply (i) only to the “Kyle and Jackie O Show” and to any program in which Mr Sandilands was retained as an on-air presenter, and (ii) to content that demeans or is reasonably likely to demean women or girls.
3. Today FM submitted to the Authority that the draft condition failed to recognise the “significant steps” already in place to prevent future broadcasts of inappropriate material. It offered, as an alternative, an enforceable undertaking under s 205W of the Act, in respect of the “Kyle and Jackie O Show”, between the hours of 6:00 a.m. and 9:00 a.m. each weekday for a period of two years to:

(a) maintain the broadcast delay for the Program at 30 seconds;

(b) employ 2 content monitors for the Program who have the ability to “dump material” from the Program which, in the opinion of the content monitors, is not appropriate for broadcast; and

(c) provide regular training on compliance with the Codes for all staff and talent involved in the production and broadcast of programs on Today FM.

1. The Authority rejected that offer and amended the draft condition by: (i) removing express reference to content that “demeans or is reasonably likely to demean women or girls”, and (ii) extending the compliance condition to all programs broadcast by Today FM. On 16 May 2012, the Authority imposed an additional licence condition upon licence 3032, held by Today FM, in the following terms:

1. The Licensee must comply with clause 1.3(a) of the Commercial Radio Australia Codes of Practice and Guidelines 2011, or any provision dealing with the same subject matter in any replacement code.

2. The Licensee must:

(a) develop and implement a training program in relation to the obligations contained in paragraph 1 of this additional licence condition which must be provided to all employees and contractors who are involved in the presentation or preparation of programs;

(b) deliver the training program referred to in subparagraph 2(a) to all employees and contractors who are involved in the presentation and preparation of programs, no later than 45 days after this additional licence condition comes into effect; and

(c) provide written evidence of the delivery of the training program referred to in subparagraph 2(b) to the Australian Communications and Media the Authority no later than 60 days after this additional licence condition comes into effect.

3. The Licensees’s obligations in this additional licence condition commence on the date of this notice and cease to have effect five (5) years after commencement.

# HISTORY OF COMPLIANCE with the Code

1. Today FM was found to have breached the decency provisions of the Code on three previous occasions: on 29 July 2009 (the Kyle and Jackie O Show); on 14 November 2005 (Lowie’s Hot 30 Countdown); and, on 16 April 2001 (Hot30.com Countdown – Bucket of Truth).
2. The 29 July 2009 breach arose as a result of the live-to-air broadcast of an interview with a minor in the presence of her mother who, when questioned about her sexual history (while connected to a lie detector machine), disclosed that she had been raped. The interview was terminated by Ms Henderson after the follow up question from Mr Sandilands, “Is that the only [sexual] experience you’ve had?”
3. In response to that breach, the Authority imposed the following additional condition on the licence held by Today FM:

1. Having regard to the special vulnerability of children, in broadcasting any program or program content in which a child:

a) is interviewed or takes a performing role; or

b) is referred to in an identifiable way;

the Licensee must regard the welfare and wellbeing of that child as paramount and act accordingly.

2. Without limiting the generality of paragraph 1, the Licensee:

a) must not act in a way that could reasonably be anticipated to cause a child referred to in paragraph 1 unnecessary distress or anxiety by the child’s involvement in a program or by the broadcast of a program or program content; and

b) must not cause a child referred to in paragraph 1 to be exploited or humiliated.

1. In addition the condition directed Today FM to develop and provide a training program to all persons involved in the presentation or preparation of programs about the obligation imposed by the condition.

# The Issues

1. Our task in reviewing the decision made by the Authority to impose the new condition is to reach the correct and preferable decision (s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 per Bowen CJ and Deane J at 68 and 70).
2. In the course of these proceedings, the matters in dispute between the parties narrowed. It is now agreed that:

* the offending broadcast constituted a breach of cl 1.3(a) of the Code;
* the imposition of an additional licence condition is an appropriate regulatory response to that breach; and
* any additional condition should include a requirement that Today FM develop and provide regular training to all on-air and production personnel.

1. Agreement was reached on a number of matters in respect of the drafting of the condition to which we shall return.
2. Four key questions remain to be determined:

Whether cl 1.3(a) of the Code is amenable to being made a condition of a radio broadcasting licence?

if so, should an additional licence condition include a condition that Today FM comply with cl 1.3(a) of the Code?

if so, should such a condition apply to all, or only some, programs broadcast by Today FM?

should such a condition apply for five years or a lesser period?

## Is cl 1.3(a) of the Code amendable to being made a condition of licence?

1. There is no argument that s 44(2) of the Act confers on the Authority, and the Tribunal acting as substitute decision-maker, the power to impose a condition requiring that Today FM comply with an applicable Code, and that cl 1.3 is an applicable Code. Today FM, however, asserts that cl 1.3 is not amenable to being imposed as a condition, because it lacks certainty. It argues that cl 1.3 is inherently vague and uncertain and rests on indefinite phrases such as “generally accepted standards of decency” and “unjustified language”. Today FM contends that the task of determining whether content may “offend generally accepted standards of decency” is further complicated by the requirement that that assessment be undertaken “having regard to the demographic characteristics” of the subject program’s audience.
2. In support, Today FM cites *Re Star Broadcasting Network Pty Ltd and Australian Broadcasting Authority* (2003) 79 ALD 637, a decision of President Downes about a condition imposed by the Authority’s predecessor, requiring the applicant licensee to market and promote its radio station as an Ipswich radio station notwithstanding that its broadcast signal (lawfully) spilled into parts of Brisbane (Ipswich and Brisbane are adjacent cities). His Honour said (at 646): “*the terms of regulatory controls [on broadcasters] should be as clear and unambiguous as possible*” and referred to the following passage from *Herald Sun TV Pty Ltd and Others v Australian Broadcasting Tribunal* (1985) 156 CLR 1 (at 4), where the High Court (per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) said:

A standard determined for a television programme must fix the quality or nature of the programme in such a way that both the licensee required to observe the standard and the court or other body called upon to decide whether it has done so can determine whether the programme answers the criteria set by the standard.

1. His Honour found that the proposed condition was “*at least confusing if not uncertain*” and concluded that it would be difficult for the licensee to know whether particular conduct is contrary to the conditions. He commented (at 646):

[T]he question is not whether past conduct of the station offended against the condition but whether the radio station will be able to know what conduct does and what does not for the future.

1. While any condition imposed under s 43 of the Act must be sufficiently clear so as to enable compliance we do not agree with the proposition that cl 1.3 lacks the requisite quality of certainty for the following reasons.
2. First, as the Authority points out, the concepts of offence, decency and indecency are not novel or new to either statute or the common law. While these concepts are not amenable to empirical measurement and may change over time, it does not follow that they are either incomprehensible or inherently uncertain.
3. Secondly, Today FM, by acknowledging the breach in this case and by its general acceptance of the Code itself, appears to have accepted that, while there may be grey areas in making value judgments about language or conduct, it is possible to identify language or conduct that is self-evidently in breach of the Code. Its own training program is replete with concrete examples of such language and conduct (see for example Exhibit A, pp 7-10).
4. Thirdly, the contention that cl 1.3 is uncertain and thus unworkable sits uncomfortably with the argument put by Today FM that the Tribunal can be satisfied on the basis of the remedial measures it has taken, that the decency requirement of the Code will be adhered to in the future.
5. Fourthly, Today FM’s contention that cl 1.3(a) is so uncertain as to make it unworkable sits uncomfortably with the history of the development of the Code. Registered by the Authority under s 123 of the Act, the Codes were developed and endorsed by Commercial Radio Australia, the national body representing Australian commercial radio broadcasters of which Today FM is a member. Commercial Radio Australia’s 2008 submission to the Authority concerning amendments to the Code indicates that the issue of clarity had been considered:

The amendments to Code 1.3(a) clarify its meaning, rather than imposing any substantive changes.

Licensees have found the “contemporary standards of decency” wording hard to explain to consumers and to staff who are the recipients of compliance training. It is a hypothetical standard which is difficult to define and apply, from the perspective of both licensees and consumers. The more easily identifiable goal is simply not to offend people.

The amended wording focuses on the outcome that the Code is trying to achieve – not to offend – rather than setting an arbitrary standard by which to judge content. It is easier for complainants to explain why they are offended, than to talk about an abstract concept of “contemporary standards of decency”.

## Should any additional licence condition include a compliance requirement?

1. Today FM contends that the decision to impose a condition requiring it to comply with cl 1.3 of the Code constitutes a disproportionate response to the subject breach given the remedial steps it has taken and the serious ramifications of a breach of the condition. It submits that the preferable decision would be to impose a condition in the terms it had previously proposed to the Authority (see [17] of these Reasons).
2. Today FM argues that, in contrast to the new condition, the condition it proposes has a determinate content and lends itself to external measurement. The Authority on the other hand, argues that the proposed condition is deficient as its focus is on operational matters, not what is actually broadcast.
3. Today FM submits that, by elevating compliance with the Code to a condition of licence, it will be prejudiced because of the gravity of the consequences of any future breach, which include suspension or loss of licence. It points out that a commercial radio broadcasting licence is a valuable asset and that $155 million was paid for the last commercial FM licence auctioned in Sydney.
4. Today FM also argues that the additional condition is inconsistent with several stated objectives of the Act, in particular, the objective of making a diverse range of broadcast programs available across Australia. It is said that that the new condition would require Today FM to remain “on high alert” throughout its broadcasting, unnecessarily adding to the costs of compliance. Today FM’s General Manager estimates that the cost of complying with the new condition will be in the order of about $15 million over five years. Today FM argues that this outcome would be inconsistent with the objective that regulation not impose unnecessary financial and administrative burdens on broadcasters (s 4(2) of the Act).
5. In exercising the power to impose a condition on the licence held by Today FM, we must do so in a manner which, in our opinion, will produce regulatory arrangements that are predictable and stable, and deal effectively with breaches of the Code (s 5(1) of the Act). That power must be also exercised in a manner which, in our opinion, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on Today FM and is commensurate with the seriousness of the subject breach (ss 4(2) and 5(2) of the Act). For present purposes, we will address whether a compliance requirement would be appropriate if applied to those programs which have been found to have breached the decency provisions of the Code namely, “The Kyle and Jackie O Show” and “Hot30 Countdown”.
6. In making the preferable decision we are not limited to the proposals advanced by the parties. We agree with Today FM that an appropriate regulatory response should include a requirement that it employ two content monitors and retain a 30 second broadcast delay for “The Kyle and Jackie O Show”. Having made that decision, we must decide whether, in addition, a compliance requirement is appropriate.
7. Whether or not the additional licence condition is imposed, Today FM has undertaken to comply with a Code that its own industry imposes on it and all of its competitors. The Code levels the playing field for all and cannot possibly be said to reduce diversity or competition in the industry. It cannot seriously be suggested that one of the objectives of the Act is to promote offensive content in the name of “diversity”. In any event, by setting its own standards, the industry itself has set its face against such a conception of diversity.
8. We find unpersuasive the argument that making compliance with the Code a condition of licence is inconsistent with Parliament’s direction to address public interest considerations in a way that does not impose unnecessary financial and administrative burdens on licensees. Today FM has told the Tribunal that irrespective of the new condition, it has and will continue to take steps to ensure that its programming complies with the Code. Presumably it has done so because it recognises that the measures in place at the time of the offending broadcast were insufficient. Section 4(2)(a) is directed at regulation that imposes an unnecessary financial or administrative burden. A measure taken because a licensee considers it necessary to achieve Code compliance could not, in our opinion, be said to represent an unnecessary financial and administrative burden. Furthermore, most of the $15 million that Today FM claims it would be forced to spend if the compliance requirement remained, relate to the costs of replacing those programs currently produced outside Sydney, which do not include the “Kyle and Jackie O Show”.
9. There can be no argument that the subject breach was serious in nature. The offending segment was on any measure deeply offensive. Notably, it ran for close to two minutes despite the fact that a monitor was said to have been on duty and “a 10 second delay” was in place. No explanation has been proffered for the failure of this control system. It was not the first occasion Today FM was found to have breached the Code, but occurred when Today FM was already subject to an additional condition imposed following the July 2009 breach by Mr Sandilands. Today FM now has the unfortunate record of being a repeat offender against the Code developed by its own industry, and Mr Sandilands himself is a repeat offender. Despite previous warnings and opportunities to address these breaches in standards, Mr Sandilands delivered his offensive broadside on air and Today FM did not stop him.
10. The training records produced by Today FM show that after the offending broadcast, Mr Sandilands and Ms Henderson attended a session concerning the expected standards for a mere 15 minutes, although it was suggested that they may have been there slightly longer. In view of Mr Sandilands’s previous conduct, we are not convinced that such a brief presentation on appropriate standards covering offensive language is sufficient to avoid repetition.
11. On Today FM’s own account, “The Kyle and Jackie O Show” (and other programs) are “edgy”. This seems to be a euphemism for at times sailing close to the wind in terms of community standards of decency even within the predominant demographic of their audience. If Today FM elects to produce programs of this type and to engage persons whose conduct have caused it in the past to fall foul of the decency provisions of the Code, it will need to monitor the broadcast carefully and to assess on an on-going basis whether the measures it has put in place, namely the employment of content monitors, an extended broadcast delay and training for presenters and staff, are sufficient to achieve compliance.
12. We think that the deterrent effect of a condition which includes a compliance requirement is more likely to ensure that Today FM takes a more vigilant approach to its obligations under the Code than it has in the past. It is also more likely to ensure that one of the objects of the Act, that content broadcast respects community standards, is achieved.
13. In our view, making compliance with the Code a condition of the licence is an appropriate, measured and proportionate regulatory response, given the character of the breach, the history of non-compliance and the stated objects of the Act. Whether or not the condition ought to apply to all programs, however, is a more complex issue to which we now turn.

## Should the licence condition apply to all programs?

1. Today FM contends that the Authority’s response to the incident was disproportionate. It says that this was a specific incident during a specific program and the Authority’s approach ought to have been to address the target problem(s) rather than to engage a “one size fits all” solution to the perceived issues. It argues that the regulatory regime contemplates a much more measured and tailored approach and that the Authority has overreached itself.
2. We agree that regard should be had to the fact that Today FM broadcasts different categories of programs. Different considerations may apply to programs which consist largely of recorded music compared to those where a significant proportion of the program is devoted to commentary. We observe that the submissions made by the parties were directed at particular programs and not parts of programs.
3. The history of Today FM’s breaches shows that they have occurred only in “The Kyle and Jackie O Show” and the “Hot30 Countdown” programs.
4. We accept that the Authority had a justifiable concern about the management of broadcasting standards by Today FM. We are of the view that attaching the condition of the licence to the offending programs, rather than to all of Today FM’s programs, is sufficient to ensure that appropriate care is taken to avoid repetition in respect of those programs.
5. Of course, Today FM remains liable to comply with the Code with respect to all of its programs. It is also the case that previous breaches are “on Today FM’s record”.

## Should the condition be imposed for five years?

1. Today FM argues that the term of the new condition is, in relative and absolute terms, excessive and seeks to have it reduced from five to two years. It points out that a five year condition is unprecedented and that to date the maximum duration of any condition is two years.
2. Today FM protests that the application of the new condition will have a deleterious effect on the editorial content and tone of its programs; reduce its ability to attract and retain the highest quality radio talent and production staff; diminish its capacity to broadcast diverse types and tastes of music and is likely, therefore, to shrink the demand for its syndicated programs from independent broadcasters.
3. Given that we intend to impose the additional licence condition only on two programs that have demonstrably breached broadcasting standards, these claims seem both speculative and exaggerated.
4. It was also argued by Today FM that 2UE was treated far more leniently in the “cash for comment” matters. It points out that 2UE had additional licence conditions imposed for a maximum of only three years despite having been found guilty of seven breaches of the relevant Code. It is suggested that 2UE’s conduct was far more egregious and worthy of condemnation than Today FM’s breaches, and that it would be unfair to impose a condition significantly more onerous on Today FM than was imposed in the “cash for comment” case.
5. We do not accept this “parity” argument. There are many features that distinguish the “cash for comment” cases from this one. In the present case, we take into account the fact that Mr Sandilands was found to have breached the Code in 2009 and again in 2011, that existing conditions did not deter or prevent the later breach and that the continuing program itself is, by self-description, “edgy”.
6. It is also significant, in our view, that Today FM’s conduct contrary to the Code has extended over more than a decade. This suggests a need to ensure a relatively lengthy period of adherence to the Code before confidence can be placed in supervision by Today FM management of broadcasting standards. Notably the 2011 breach occurred while the additional condition imposed following the 2009 breach was still in force.
7. We do not place significant weight on Today FM’s complaint that ensuring compliance with the Code is onerous. It is required to comply with the Code for all of its programs in any event. Further, the condition is to attach only in respect of two programs. Taking these matters into account together with the history of breaches as set out above, we consider it appropriate to accept the Authority’s submission that the condition should be imposed for five years.

# Conclusion

1. The parties are at issue over the precise wording of the condition. In particular, the question is raised whether the condition should refer to the existing names of the two programs or to the time in which they are broadcast. Clearly, if the condition were framed in terms of the existing names, it would be inappropriate for Today FM to seek to avoid the condition by changing the program name. Similarly, if the condition refers only to the times of the programs, it would be inappropriate for Today FM to reschedule the programs to avoid the condition.
2. We are minded to impose a condition that nominates the programs by name. We adopt the proposal by Today FM that the condition also apply to any program presented live-to-air by Mr Sandilands, alone or in combination with another presenter or presenters.
3. We assume that if there were to be any change in the name of either program, Today FM would notify the Authority in advance and would consent to an appropriate amendment to the condition.
4. Accordingly, the condition that we propose is:

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 “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 broadcast.

(ii) maintain the broadcast delay utilised at 30 seconds.

1. We direct the parties to file and serve any comments as to the wording of the proposed condition within seven days.

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| I certify that the preceding 64 (sixty -four) paragraphs are a true copy of the reasons for the decision herein of The Hon. A C Bennett, Presidential Member, Senior Member A K Britton |

.............................[sgd]...........................................

Dated 22 August 2012

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| Date(s) of hearing | **11 July 2012** |
| Date final submissions received | **18 July 2012** |
| Counsel for the Applicant | **R Cobden SC and R Higgins** |
| Solicitors for the Applicant | **Holding Redlich** |
| Counsel for the Respondent | **R Lancaster SC** |
| Solicitors for the Respondent | **Australian Government Solicitor** |