

Case Note

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd: Administrative Body as ‘Prosecutor, Judge and Jury’?

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Abstract

In December 2012, radio station Today FM broadcasted a recorded telephone conversation between hospital staff members treating the Duchess of Cambridge and radio presenters impersonating Queen Elizabeth II and the Prince of Wales. This case note examines Today FM’s challenge to the statutory authority of the Australian Communications and Media Authority (‘ACMA’) to make a determination, as a precondition to taking administrative enforcement action, that the broadcaster had committed a criminal offence in recording the telephone conversation. It provides an analysis of the Full Federal Court of Australia and High Court of Australia judgments, giving particular attention to the application of the principle of legality as a presumption of statutory interpretation. The majority judgment of the High Court rejected the Full Court’s particular application of the principle of legality and the concurring judgment of Gageler J delivered a broader critique of the application of the principle to constitutionally imposed structural limitations on legislative power. In upholding the statutory authority of the ACMA, the High Court also provided confirmation as to the validity of the comparable powers of administrative bodies operating at both the state and federal level.

I Introduction

In December 2012, radio station Today FM (Sydney) Pty Ltd (‘Today FM’) broadcast a recorded telephone conversation between presenters of the ‘Summer 30’ radio program and staff members of a hospital at which the Duchess of Cambridge was an in-patient for a condition related to her pregnancy. Impersonating Queen Elizabeth II and the Prince of Wales, the presenters elicited

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Jonathan Holmes of the *Media Watch* television program broadcast by the Australian Broadcasting Corporation (‘ABC’) noted in response to the ACMA’s authority to investigate the commission of a criminal offence that ‘it does seem concerning that a government agency thinks it can act as prosecutor, judge and jury in what is essentially a criminal matter’: ABC, ‘ACMA v Southern Cross Austereo’, *Media Watch*, 24 June 2013 (Jonathan Holmes) <<http://www.abc.net.au/mediawatch/transcripts/s3788644.htm>>.

an overview of the Duchess' medical treatment from an on-duty nurse.¹ The Australian Communications and Media Authority ('ACMA') commenced an investigation into the broadcasts following widespread publicity of the breach of patient privacy and the suicide of an on-duty nurse who had been recorded and broadcast in the Summer 30 segment, who blamed the presenters in a suicide note.² In a preliminary investigation report, the ACMA formed the view that Today FM had contravened a criminal offence provision contrary to its licence conditions,³ which prompted the broadcaster to challenge the statutory authority and constitutional validity of this administrative power. In *ACMA v Today FM*, the Full Bench of the High Court of Australia held that the ACMA was authorised to make a determination that Today FM had committed a criminal offence for the purposes of administrative enforcement action.⁴ The High Court also held that the statutory power to do so was not an attempt on the part of the Australian Parliament to confer judicial power on a body that is not a court under ch III of the *Australian Constitution*.⁵

This case note examines the judgments of the Full Court of the Federal Court of Australia ('Full Federal Court') and the High Court of Australia. Part II provides an overview of the factual background to the case and the statutory basis of the ACMA's investigatory and enforcement powers. Part III and IV analyse the Full Federal Court and High Court judgments, which provide differing approaches to statutory interpretation with respect to the scope and applicability of the principle of legality.

Part V discusses the importance of *ACMA v Today FM* for administrative bodies with similar statutory powers to the ACMA, on which the Full Federal Court's interpretation had the potential to cast doubt. In allowing the appeal, the High Court has provided clarity regarding the legality of administrative bodies operating across Australia to make determinations as to whether criminal offences have been committed as a precondition to taking administrative enforcement action. This issue was of such importance that the Attorneys-General of the Commonwealth of Australia, Western Australia, Queensland and South Australia intervened in support of the ACMA's submissions.⁶

Part V also outlines the implications of the case for future jurisprudence on statutory interpretation. Specific attention will be given to the principle of legality, which is a device of statutory construction that requires legislation be construed so as to avoid an infringement of common law rights and freedoms unless such an

¹ 'Full Transcript: Hoax Call by 2DayFM DJs', *The Sydney Morning Herald* (online), 10 December 2012 <<http://www.smh.com.au/entertainment/tv-and-radio/full-transcript-hoax-call-by-2dayfm-djs-20121210-2b5gr.html>>.

² Michael Lallo, 'Royal Prank Station 2Day FM May Fight Licence Suspension as ACMA Publishes Investigation', *The Sydney Morning Herald* (online), 22 April 2015 <<http://www.smh.com.au/entertainment/tv-and-radio/royal-prank-station-2day-fm-may-fight-licence-suspension-as-acma-publishes-investigation-20150422-1mqry1.html>>.

³ *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279, 284 [14] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (*ACMA v Today FM*).

⁴ *Ibid* 291–2 [45]–[49] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 299 [77] (Gageler J).

⁵ *Ibid* 294 [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 299 [79] (Gageler J).

⁶ See, eg, Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *ACMA v Today FM*, No S225 of 2014, 17 October 2014.

infringement is expressed by the legislature in ‘clear and unequivocal language’.⁷ In its narrower construction of the relevant provisions, the Full Federal Court applied the principle of legality to the constitutional doctrine that judicial power is vested exclusively in the courts. In the absence of clear language to the contrary, the Full Court held that ‘it is not normally to be expected that an administrative body’ would be granted the power to make its own determination as to whether an offence had been committed.⁸ The majority judgment of the High Court rejected the Full Court’s application of the principle of legality to the ACMA’s statutory authority.⁹ The concurring judgment of Gageler J went further than the majority, criticising more broadly the application of the principle of legality to rights sourced in constitutional limitations on legislative power.¹⁰

II Background

A *The ACMA’s Regulation of Commercial Radio Broadcasting*

The ACMA was established in 2005 as an independent statutory authority.¹¹ It is charged with the responsibility for much of the regulation of the broadcasting, datacasting, Internet and commercial content service industries.¹² As part of its functions, the ACMA regulates the licences required for commercial radio broadcasting.¹³ In relation to commercial radio broadcasting licensees, this includes monitoring and investigating the compliance of licensees with mandatory licence conditions imposed by the *Broadcasting Services Act 1992* (Cth) (‘BSA’) and additional conditions imposed by the ACMA itself.¹⁴ The BSA sch 2 pt 4 cl 8 imposes 18 conditions on all commercial radio broadcasting licensees, such as compliance with program and industry standards, a prohibition on broadcasting tobacco advertisements,¹⁵ and relevantly to this case, a prohibition on the use of broadcasting services ‘in the commission of an offence against another Act or a law of a State or Territory’ (‘cl 8(1)(g)’).¹⁶ For the purpose of fulfilling its regulatory functions, the BSA provides the ACMA with a range of investigatory powers and enforcement mechanisms.

⁷ *Momcilovic v The Queen* (2011) 245 CLR 1, 46–7 [43] (French CJ). For recent commentary on the principle, see Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* 372; Dan Meagher ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Sydney Law Review* 413.

⁸ *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2014) 218 FCR 461, 478 [76] (Allsop CJ, Robertson and Griffiths JJ) (‘*Today FM v ACMA*’).

⁹ *ACMA v Today FM* (2015) 317 ALR 279, 288 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹⁰ *Ibid* 296 [67] (Gageler J).

¹¹ ACMA, *Introduction to the ACMA* (30 January 2014) <<http://www.acma.gov.au/theACMA/About/The-ACMA-story/Communicating/introduction-to-the-acma#1>>.

¹² *Ibid*; *Australian Communications and Media Authority Act 2005* (Cth) pt 2 div 2; *Broadcasting Services Act 1992* (Cth) s 5(1)(a) (‘BSA’).

¹³ BSA s 133.

¹⁴ *Ibid* s 42(2)(a), sch 2 pt 4 cl 8.

¹⁵ Within the meaning of the *Tobacco Advertising Prohibition Act 1992* (Cth), BSA sch 2 pt 4 cl 8(1)(a).

¹⁶ BSA sch 2 pt 4 cl 8(1)(g) (emphasis added).

B *The ACMA's Investigatory Powers and Enforcement Measures*

The ACMA has significant information-gathering powers for the purpose of monitoring compliance with broadcasting licence conditions. It may conduct an investigation on the basis of a complaint made to it in relation to licence conditions and codes of practice, and is obliged to conduct an investigation when directed to by the Minister.¹⁷ As occurred in relation to Today FM, the ACMA may also conduct an investigation of its own motion for the purpose of performing its functions and related powers.¹⁸ The ACMA may call for written submissions from members of the public and require from persons the production of documents that may contain information relevant to the subject matter of an investigation.¹⁹ The ACMA may also summon persons to be examined under oath or affirmation, and may require a person summoned to answer questions relevant to the matter being investigated.²⁰ Such examinations are to be held in private and recorded,²¹ and examinees are entitled to have an adviser present and to be given a copy of the record.²² The ACMA is also empowered to conduct private and public hearings and may 'otherwise inform itself in any manner it thinks fit' in relation to its broadcasting functions.²³ Further, the ACMA 'is not limited to a consideration of material made available through an investigation or hearing', and may take into account other matters it considers relevant, including the knowledge and experience of its members.²⁴

The ACMA has discretionary power as to whether to prepare a report on an investigation of its own motion or in relation to a complaint, but is obliged to do so when an investigation is conducted at the direction of the Minister.²⁵ Similarly, with the exception of investigations directed by the Minister, the ACMA may decide whether to publish its report.²⁶ Two protections of licensees under investigation are provided for in the *BSA* in relation to the publication of reports. First, the publication of a report or part of a report is not required if doing so would disclose a 'matter of a confidential character' or be likely to prejudice the fair trial of a person.²⁷ Second, as a matter of procedural fairness, if the publication of a report would, or would be likely to, adversely affect the interests of a person, the ACMA must not publish the report, or part of the report, until it has given the person a reasonable period to make representations, orally or in writing, in relation to the matter.²⁸

¹⁷ *Ibid* ss 149, 171.

¹⁸ *Ibid* s 170.

¹⁹ *Ibid* ss 172, 177.

²⁰ *Ibid* s 174.

²¹ *Ibid* ss 175–6.

²² *Ibid* s 176.

²³ *Ibid* s 168(1).

²⁴ *Ibid* s 169.

²⁵ *Ibid* s 178.

²⁶ *Ibid* s 179.

²⁷ *Ibid* s 179(3). For a similar provision for reports on hearings conducted by the ACMA, see s 199(3).

²⁸ *Ibid* s 180.

The ACMA has recourse to several enforcement mechanisms for the purpose of regulating licensees. Section 5 of the *BSA* requires it to use the powers and functions conferred on it by Parliament to produce ‘stable and predictable’ regulatory arrangements and to ‘deal effectively’ with breaches of the *BSA*, while using its powers in a manner that is ‘commensurate with the seriousness of the breach concerned’.²⁹ The ACMA may take administrative enforcement action for the breach of a condition, including providing notice of a remedial direction to a licensee or a person in a position to exercise control of the licence,³⁰ and may cancel a broadcaster’s licence or suspend it for a period of up to three months.³¹ For the suspension or cancellation of a licence, the ACMA must give written notice to the licensee of its intention and ‘a reasonable opportunity to make representations to the ACMA in relation to the proposed action’.³² The ACMA may also issue remedial directions and pursue civil penalties in the Federal Court.³³ Further, it may provide to the Commonwealth Director of Public Prosecutions (‘CDPP’) a copy of a report on investigations that relate to conduct that could constitute an offence under a law of the Commonwealth,³⁴ including for prosecution of a criminal offence for breaches of licence conditions under the *BSA*,³⁵ the maximum penalty for which is A\$90,000.³⁶

C *The ACMA’s Investigation*

Following the broadcasts of the recorded conversation between the Summer 30 presenters and hospital staff members, the ACMA opened an own-motion investigation, focusing on the compliance of Today FM with its licence conditions and the Commercial Radio Codes of Practice.³⁷ The ACMA notified Today FM in a letter on 13 December 2012 of the investigation and invited the broadcaster to make submissions on its compliance.³⁸ It specifically directed Today FM to address whether it had breached cl 8(1)(g) (which prohibits the use of broadcasting services ‘in the commission of an offence’),³⁹ by committing an offence under s 11(1) of the *Surveillance Devices Act 2007* (NSW).⁴⁰ Section 11(1) prohibits the publication of a private conversation recorded using a listening device without the consent of all principal parties to the conversation. Today FM provided the ACMA

²⁹ Ibid ss 5(1)–(2).

³⁰ Ibid ss 141. The *BSA* specifies that a remedial direction may include, for example, a direction for the licensee to ‘implement effective administrative systems for monitoring compliance with a condition of the licence’: *ibid* s 141(2)(a).

³¹ Ibid s 143.

³² Ibid s 143(2)(b).

³³ Ibid ss 140A(3), 141, 142(3).

³⁴ Ibid s 178(2).

³⁵ Ibid s 139(3).

³⁶ Ibid s 205F; *Crimes Act 1914* (Cth) s 4AA(1). For the interaction of court proceedings for a civil penalty and criminal offence, see *BSA* ss 205L–205N.

³⁷ ACMA, ‘ACMA to Investigate 2DayFM Prank Call Broadcast’ (Media Release, MR 97/2012, 13 December 2012) <<http://www.acma.gov.au/Industry/Broadcast/Radio/Radio-content-regulation/mr-972012-acma-to-investigate-2dayfm-prank-call-broadcast>>.

³⁸ *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2013) 218 FCR 447, 449 [4] (Edmonds J) (‘*Today FM (Sydney) Pty Ltd v ACMA*’).

³⁹ *BSA* sch 2 pt 4 cl 8(1)(g).

⁴⁰ *ACMA v Today FM* (2015) 317 ALR 279, 284 [13] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

with submissions on 2 January 2013, which included the advice of their Senior Counsel that the ACMA did not have ‘jurisdiction to investigate or determine whether any criminal offence had been committed under either State or Commonwealth legislation unless that jurisdiction was expressly conferred.’⁴¹ The submission also included information on how the telephone conversation was recorded and broadcasted.⁴² The ACMA provided Today FM with a confidential copy of its preliminary investigation report on 4 June 2013, which included the preliminary finding that it was ‘of the view’ that the licensee had contravened s 11(1) of the *Surveillance Devices Act 2007* (NSW) and therefore breached cl 8(1)(g) of its licence.⁴³

D *Today FM’s Legal Challenge*

Rather than await the suspension or cancellation of its licence and then appeal to the Commonwealth Administrative Appeals Tribunal for merits review,⁴⁴ Today FM sought judicial review in the Federal Court of Australia. As outlined by the judgment of Edmonds J at first instance, Today FM sought ‘interlocutory and final injunctive relief, restraining the ACMA (amongst other things) from making any determination that Today FM ha[d] committed any criminal offence’.⁴⁵ Today FM also sought ‘declaratory relief as to the proper construction, and in the alternative, the validity, of certain provisions of the *BSA* and the *Australian Communications and Media Authority Act 2005* (Cth)’ (*ACMA Act*).⁴⁶

Today FM made three arguments in support of its applications. First, that ‘the *BSA* and the *ACMA Act* did not authorise the ACMA to make findings that a licensee ha[d] committed a criminal offence’.⁴⁷ Second, and in the alternative, if the legislation did provide for such a power, it was an invalid conferral of judicial power not in accordance with ch III of the *Australian Constitution*.⁴⁸ Third, the ACMA’s proposed finding — that Today FM had committed an offence — would ‘interfere, or at least [carry] a real risk of interference, with the administration of justice in a criminal proceeding’ as the Australian Federal Police had commenced an investigation.⁴⁹ All three arguments were rejected by the judge at first instance, who was in ‘total agreement with the submissions of the ACMA’.⁵⁰ Justice Edmonds held that the language of cl 8(1)(g) and the investigation power in s 170 did not provide a basis to confine the ACMA to await a judgment of a court of competent jurisdiction to determine whether a licensee had committed an offence.⁵¹ Further, the only effect of a determination by the ACMA as to whether an offence has been committed is with respect to the ACMA’s own administrative

⁴¹ *Today FM v ACMA* (2014) 218 FCR 461, 464 [11] (Allsop CJ, Robertson and Griffiths JJ).

⁴² *Ibid.*

⁴³ *ACMA v Today FM* (2015) 317 ALR 279, 284 [14] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁴⁴ *BSA* s 204(1).

⁴⁵ *Today FM (Sydney) Pty Ltd v ACMA* (2013) 218 FCR 447, 450 [8] (Edmonds J).

⁴⁶ *Ibid.*

⁴⁷ *Ibid* 450 [9].

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 454 [25].

⁵¹ *Ibid* 454 [26].

enforcement powers. A determination of ‘criminal guilt and any punishment can only rest with a court exercising judicial power’.⁵² Today FM’s applications were therefore dismissed, leading the broadcaster to subsequently appeal to the Full Court of the Federal Court of Australia.

Prior to the hearing of the appeal, the ACMA provided Today FM with a copy of its final Investigation Report in a letter dated 20 February 2014, advising the broadcaster that it had made a determination that it had ‘breached the condition of its licence set out in paragraph [sic] 8(1)(g) of Schedule 2 to the *Broadcasting Services Act 1992*’.⁵³ The ACMA formed the opinion that Today FM had breached the *Surveillance Devices Act 2007* (NSW) by recording and subsequently broadcasting ‘a private conversation without the consent of the parties to that conversation’.⁵⁴ Following the High Court decision upholding the validity of the ACMA’s power to make such a determination, Today FM agreed to broadcast a three-hour special program to promote media ethics and raise public awareness of bullying, depression and anxiety, and agreed to an enforceable undertaking to require presenters, production and management personnel to complete a training program.⁵⁵ The broadcaster also agreed to an additional three-year licence condition, which ‘specifies that the station will not broadcast the words of an identifiable person’ unless the person has been informed in advance of the words to be broadcast.⁵⁶ Further, the consent of a person is now required to broadcast a recording made without that person’s knowledge.⁵⁷

III The Full Court of the Federal Court of Australia

In a unanimous judgment, Allsop CJ, Robertson and Griffiths JJ of the Full Court of the Federal Court of Australia allowed the appeal of Today FM, ordering that the ACMA’s determination be set aside.⁵⁸ Favouring a narrower construction of the relevant provisions of the *BSA* than that adopted by Edmonds J at first instance, the Full Federal Court held that the ACMA was not empowered to make a finding that a criminal offence has been committed.⁵⁹ Consequently, the Full Court found it unnecessary and inappropriate to determine the constitutional challenge of the ACMA’s powers directly.⁶⁰ The Full Court did, however, agree with Edmonds J at first instance that an injunction to restrain ‘an administrative process on the basis

⁵² Ibid 454 [27].

⁵³ *Today FM v ACMA* (2014) 218 FCR 461, 465 [17] (Allsop CJ, Robertson and Griffiths JJ).

⁵⁴ ACMA, ‘ACMA Publishes “Royal Prank Call” Investigation Report’ (Media Release, MR 19/2015, 22 April 2015) <<http://www.acma.gov.au/Industry/Broadcast/Radio/Radio-content-regulation/acma-publishes-royal-prank-call-investigation-report>>.

⁵⁵ ACMA, ‘2DayFM “Royal Prank” Broadcast’ (Media Release, MR 35/2015, 17 July 2015) <<http://www.acma.gov.au/theACMA/Newsroom/Newsroom/Media-releases/2dayfm-royal-prank-broadcast>>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ *Today FM v ACMA* (2014) 218 FCR 461, 490 [118] (Allsop CJ, Robertson and Griffiths JJ).

⁵⁹ Ibid 484 [94].

⁶⁰ Ibid 489 [116].

that it would interfere with the due administration of criminal justice' may only be granted if criminal proceedings have already commenced.⁶¹

The Application of the Principle of Legality

The Full Federal Court's narrower construction of the ACMA's legislative powers was primarily due to its application of the principle of legality. The Full Court cited the following excerpt from the judgment of French CJ in *Lee v New South Wales Crime Commission*, in which the Chief Justice noted that:

When the text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms. However, subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected.⁶²

The Full Federal Court held that cl 8(1)(g) consists of two essential parts. It is to be determined whether the licensee has committed a criminal offence against either another Commonwealth Act (apart from the *BSA*) or any law of a state or territory, and then whether the licensee used its broadcasting service in committing such an offence.⁶³ According to their Honours, the ACMA is capable of determining the question of fact as to whether the latter has been achieved.⁶⁴ However, in regard to the former task:

As a matter of general principle it is not normally to be expected that an administrative body such as the ACMA will determine whether or not particular conduct constitutes the commission of a relevant offence. It may be open to the legislature, subject to relevant constitutional constraints, to make clear that such a body is empowered to undertake that or a similar task. But under our legal system the determination of whether or not a person has committed a criminal offence can generally only be determined by a court exercising criminal jurisdiction.⁶⁵

The Full Federal Court did not accept the ACMA's emphasis on the word 'commission' of an offence, rather than 'conviction', as evincing a legislative intention that the ACMA make its own finding.⁶⁶ Their Honours held that the ordinary meaning of the phrase 'the commission of an offence' has the connotation of a court exercising criminal jurisdiction having found that an offence has been committed. The legislation did not explicitly provide for the ACMA to come to a non-binding 'administrative opinion'.⁶⁷ In line with the principle of legality, the Full Court therefore decided that because the text of cl 8(1)(g) does not explicitly provide for the ACMA to form an opinion on whether an offence has been

⁶¹ Ibid 489–490 [117].

⁶² (2013) 251 CLR 196, 203 [3] (French CJ), quoted in *Today FM v ACMA* (2014) 218 FCR 461, 488 [112] (Allsop CJ, Robertson and Griffiths JJ).

⁶³ *Today FM v ACMA* (2014) 218 FCR 461, 478 [74].

⁶⁴ Ibid 478 [75].

⁶⁵ Ibid 478 [76].

⁶⁶ Ibid 480–481 [84].

⁶⁷ Ibid 479–80 [80].

committed, it saw ‘no warrant’ for reading the words into the text.⁶⁸ Rather, the Full Court considered that the omission of the word ‘conviction’ enables the ACMA to find that a licence condition has been breached in only three circumstances. First, if the licensee has been found guilty of a relevant offence and a conviction has been entered. Second, if the licensee has been found guilty of a relevant offence, but no conviction has been entered. Third, where a person has admitted to the offence and the matter has yet to proceed to conviction.⁶⁹ In addition, the Full Court held that the ACMA would be bound by a court’s decision in relation to whether an offence had been committed.⁷⁰

The Full Federal Court sourced the ‘general principle’ from the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (‘*Lim*’), in which it was held that the ‘adjudgment and punishment of criminal guilt under a law of the Commonwealth’ is a function that ‘appertains exclusively to and “could not be excluded from” the judicial power of the Commonwealth’.⁷¹ Chapter III of the *Australian Constitution* ‘precludes the enactment ... of any law purporting to vest any part of that function in the Commonwealth Executive.’⁷² Thus, although not addressing the constitutional challenge raised by Today FM directly, the constitutional constraints of the doctrine of the separation of powers informed the Full Federal Court’s interpretation of the relevant legislative provisions. The Full Federal Court extended its interpretation beyond cl 8(1)(g) to other provisions of the *BSA*, raising concerns derived from the rationale that judicial power is vested exclusively in ch III courts.

The Full Federal Court noted that the powers and procedures available to the ACMA in conducting an investigation or hearing are ‘profoundly different’ from the powers, procedures and protections that apply in a criminal court.⁷³ For example, as outlined above in Part II of this note, the ACMA is able to compel a person to provide evidence related to an investigation. This may be contrasted with the common law privilege in respect of self-incrimination for a witness in criminal proceedings. The Full Court also noted: the higher standard of proof for conviction; the ethical obligations imposed on prosecutors; the lack of a requirement that ACMA members hold legal qualifications; and that the ACMA’s procedural powers are subject to any binding directions imposed by the Minister for investigations or hearings per ss 171 and 183, respectively.⁷⁴ The Full Court was concerned with the risk of reputational damage and prejudice to future criminal proceedings,⁷⁵ citing the applicability of the principle of legality in relation to these two rights as discussed by the High Court in *Balog v Independent Commission Against Corruption* (‘*Balog*’).⁷⁶

⁶⁸ Ibid 479 [78].

⁶⁹ Ibid 480–81 [84], 481 [86]–[87].

⁷⁰ Ibid 482–3 [90].

⁷¹ Ibid 478 [76] (Allsop CJ, Robertson and Griffiths JJ) quoting *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

⁷² Ibid.

⁷³ *Today FM v ACMA* (2014) 218 FCR 461, 486 [105] (Allsop CJ, Robertson and Griffiths JJ).

⁷⁴ Ibid.

⁷⁵ Ibid 486–8 [107]–[111].

⁷⁶ (1990) 169 CLR 625, 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

The Full Federal Court was also concerned about potential outcomes for license holders if the broader construction, argued for by the ACMA, were accepted, which would not have been intended by the legislature. The Full Court observed that if the ACMA made a finding that a licensee had committed an offence, and subsequently cancelled its licence, a licensee would ‘derive no comfort from understanding that the ACMA has simply expressed an administrative opinion’ if following several months of a criminal prosecution, the licensee was acquitted.⁷⁷ Further, the Full Court noted that the licensee would also not be comforted in the knowledge that it had the right of appeal to the Administrative Appeals Tribunal against the cancellation and that there was no certainty that the Tribunal would grant a stay of the cancellation decision.⁷⁸ To avoid such consequences, the Full Court held that the preferable interpretation of the relevant provisions of the *BSA* was one that confined the powers of the ACMA to what it considered as appropriate for an administrative body, thereby preventing it from exercising judicial power.

In support of its narrower construction of the *BSA*, the Court considered s 178(2) of the *BSA*, which, as noted above, provides the ACMA with the discretion to provide a copy of an investigation report to the CDPP if the report relates ‘to conduct that could constitute an offence’ under the Act or another law of the Commonwealth. The Full Federal Court noted that the focus of the provision was on ‘conduct’ that ‘could’ constitute an offence, not on the ACMA making a finding.⁷⁹ According to the Full Court, the ‘plain expectation is that ... the [CDPP], as the appropriate Commonwealth officer, will then determine whether or not to prosecute.’⁸⁰ Further, the Full Court read as consistent with its narrow interpretation the discretion of the ACMA not to publish the whole or part of a report that may be likely to prejudice the fair trial of a person.⁸¹ The Full Court held that the purpose of the provision was similar to the concern in s 178(2), namely that an investigation could relate to ‘conduct’ that might constitute an offence.⁸² It considered the provision as reinforcing the ACMA’s own limited role and functions where criminal conduct may be involved, requiring it to take appropriate steps to avoid prejudicing a person’s right to a fair trial in a court exercising criminal law jurisdiction.⁸³ Finally, the Full Court rejected an assumption that may have been made by the primary judge that cl 8(1)(g) was limited to the commission of an offence by a licensee. On a broader construction of the scope of the provision, the improbability that the legislature intended the ACMA to make a determination or to express an opinion as to whether any person has committed a criminal offence ‘becomes all the more stark’.⁸⁴

For these reasons, the Full Federal Court therefore held that the *BSA* did not manifest a clear intention to modify or depart ‘from an important principle in the

⁷⁷ *Today FM v ACMA* (2014) 218 FCR 461, 485–6 [104] (Allsop CJ, Robertson and Griffiths JJ).

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 484 [95].

⁸⁰ *Ibid* 485 [101].

⁸¹ *Broadcasting Services Act 1992* (Cth) s 179(3).

⁸² *Today FM v ACMA* (2014) 218 FCR 461, 484 [98] (Allsop CJ, Robertson and Griffiths JJ).

⁸³ *Ibid.*

⁸⁴ *Ibid* 484–5 [99].

Australian legal system that the determination of whether or not a person has committed a criminal offence is vested in courts exercising criminal jurisdiction’, not administrative bodies exercising executive power.⁸⁵

IV The High Court of Australia

A *The Question of Statutory Authority*

1 *The Majority Decision*

In their majority judgment, French CJ, Hayne, Kiefel, Bell and Keane JJ allowed the ACMA’s appeal, rejecting the Full Federal Court’s application of the principle of legality. Their Honours agreed with the ACMA that the Full Federal Court’s construction of cl 8(1)(g) — requiring the ACMA to defer taking enforcement action until a court exercising criminal jurisdiction has found that an offence has been committed, and holding that the ACMA is bound by the outcome of that court process — was incorrect.⁸⁶ The majority did accept the Full Court’s contention that cl 8(1)(g) is not limited to the commission of an offence by the licensee, but held that the application of the provision to third parties does not lend credence to a narrower construction of cl 8(1)(g).⁸⁷

The majority held that the Full Federal Court had erred in deriving, from the joint judgment of Brennan, Deane and Dawson JJ in *Lim*, the principle that it is not normally to be expected that an administrative body will determine whether conduct constitutes the commission of an offence.⁸⁸ The majority accepted the submission of the ACMA that the relevant principle from the joint judgment in *Lim* is with respect to the ‘*adjudgment and punishment of criminal guilt*’ and does not support the wider application given to it by the Full Federal Court.⁸⁹ The majority noted that the High Court has previously held that an administrative body may make findings in relation to criminal offences for a non-curial purpose, and that such functions alone do not involve the exercise of judicial power.⁹⁰ With respect to cl 8(1)(g) and its allied provisions in the *BSA*, the majority held that there are no indicia of an intention of Parliament to favour a narrower construction, and that to do so would hinder the ACMA’s enforcement powers.⁹¹

⁸⁵ Ibid 489 [114].

⁸⁶ *ACMA v Today FM* (2015) 317 ALR 279, 286 [22]–[24] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸⁷ Ibid 291–2 [48]–[50] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸⁸ Ibid 288 [32]–[34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸⁹ ACMA, ‘Appellant’s Submissions’, Submission in *ACMA v Today FM*, No S225 of 2014, 19 September 2014, 3 [16] (emphasis in original); *ACMA v Today FM* (2015) 317 ALR 279, 288 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁰ *ACMA v Today FM* (2015) 317 ALR 279, 288 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ) citing *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542 and *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350.

⁹¹ Ibid 291 [45] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

Their Honours considered that the risk of reputational damage and prejudice to future criminal proceedings from the operation of cl 8(1)(g) and subsequent administrative enforcement action are addressed in the *BSA*. The risk of reputational damage and prejudice to future criminal proceedings were considered to invoke the principle of legality by the High Court in *Balog*,⁹² which, as noted above, was relied upon by the Full Federal Court.⁹³ It will be recalled, as set out above in Part II, that ss 179(3) and 180 of the *BSA* provide the ACMA with the authority not to publish a report so as to prevent prejudice in court proceedings, and require the ACMA not to publish a report that would, or would be likely to, adversely affect the interests of a person, until it has given the person a reasonable period to make representations in relation to the matter. An opportunity to apply the principle of legality to the relevant provisions therefore did not arise in the opinion of their Honours with respect to the ACMA.⁹⁴ As such, the majority considered that there is nothing to warrant the phrase ‘commission of an offence’ as connoting that only a court exercising criminal jurisdiction may determine if an offence has been committed for the purposes of the ACMA taking administrative enforcement action.⁹⁵ The majority therefore confirmed that, in making a determination under cl 8(1)(g), the ACMA ‘is not constrained by the criminal standard of proof and it may take into account material that would not be admitted in the trial of a person charged with the relevant offence’.⁹⁶ Further, the ACMA is not required to defer administrative enforcement action until a court exercising criminal jurisdiction has found that the relevant offence has been proven, and is not bound by the outcome of a criminal proceeding for the relevant offence.⁹⁷

2 *The Concurring Judgment of Gageler J*

In a separate, concurring judgment, Gageler J rejected what he considered to be the Full Federal Court’s attempt to apply the principle of legality to constitutional limitations. His Honour expressed concern in relation to extending the principle of legality beyond the established categories of protected common law rights and immunities to ‘a common law penumbra around constitutionally imposed structural limitations on legislative power’.⁹⁸ Justice Gageler noted that questions as to the constitutional validity of legislative provisions conferring powers on administrative agencies may arise.⁹⁹ That alone, however, does not provide a basis to construe a statute as not empowering a government agency to conduct an investigation or make a determination as to whether a criminal offence has been committed.¹⁰⁰ His Honour held that the current Australian approach to statutory construction does not provide ‘room for a presumption that any Australian legislature intends to enact

⁹² (1990) 169 CLR 625, 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

⁹³ *Today FM v ACMA* (2014) 218 FCR 461, 486–8 [107]–[111] (Allsop CJ, Robertson and Griffiths JJ).

⁹⁴ *ACMA v Today FM* (2015) 317 ALR 279, 290 [42] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁵ *Ibid* 289 [37] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁶ *Ibid* 292 [49] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁷ *Ibid* 292 [49]–[50] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁹⁸ *Ibid* 296 [67] (Gageler J).

⁹⁹ *Ibid* 295 [65] (Gageler J).

¹⁰⁰ *Ibid*.

only legislation the validity of which is beyond dispute'.¹⁰¹ This would run counter to the presumption that legislatures intend to enact legislation that is valid and the approach of reading down provisions that are ultra vires.¹⁰²

Justice Gageler also focused on the practical effect that the Full Federal Court's construction would have vis-à-vis the purpose of cl 8(1)(g). If the narrower construction of the Full Court were applied, the enforcement mechanisms available to the ACMA could only be engaged with respect to cl 8(1)(g) if a prosecuting agency decided to commence proceedings for the relevant conduct and following a conviction being entered by a court exercising criminal jurisdiction.¹⁰³ The Full Court considered that their construction did not strip cl 8(1)(g) of meaningful effect.¹⁰⁴ However, in accordance with similar considerations raised by Edmonds J at first instance,¹⁰⁵ Gageler J noted that the norm of conduct prescribed by cl 8(1)(g) would be 'deprived of much of its force' and that the day-to-day enforcement of the condition would be unworkable operating within the confines of the narrower construction,¹⁰⁶ as 'contemporaneous objective determination' of whether a licensee was complying with cl 8(1)(g) would not be possible.¹⁰⁷

B *Constitutional Validity*

Today FM maintained an alternative challenge to the ACMA's purported powers on the basis that it was an invalid conferral of judicial power on an administrative body contrary to the doctrine of the separation of powers. The respondent sought to invoke an exception provided by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*¹⁰⁸ — namely that a power may include a 'special compelling feature' to justify its inclusion in the category of judicial power notwithstanding that one or all of the characteristics of judicial power identified by his Honour may be absent.¹⁰⁹ The 'special compelling feature' raised by Senior Counsel during argument was that a licensee seeking judicial review of the suspension or cancellation of a licence by the ACMA would need to prove that the jurisdictional fact that a broadcasting service was used in the commission of an offence did not exist, thus bearing the full onus of proof, which causes the finding to have a 'quasi-finality'.¹¹⁰

The majority and the concurring judgments held that it would not be an exercise of judicial power for the ACMA to suspend or cancel a commercial broadcasting licence on the basis of a finding that the offence provision has been

¹⁰¹ Ibid 295–6 [66] (Gageler J).

¹⁰² Ibid 295–6 [66] n 108 and accompanying text (Gageler J).

¹⁰³ Ibid 297–8 [73] (Gageler J).

¹⁰⁴ *Today FM v ACMA* (2014) 218 FCR 461, 489 [115] (Allsop CJ, Robertson and Griffiths JJ).

¹⁰⁵ *Today FM (Sydney) Pty Ltd v ACMA* (2013) 218 FCR 447, 456 [34] (Edmonds J).

¹⁰⁶ *ACMA v Today FM* (2015) 317 ALR 279, 297 [72] (Gageler J).

¹⁰⁷ Ibid 297–8 [73] (Gageler J).

¹⁰⁸ (1970) 123 CLR 361.

¹⁰⁹ Ibid 374–5.

¹¹⁰ Transcript of Proceedings, *ACMA v Today FM* [2014] HCATrans 246 (11 November 2014) 2501–9 (N Hutley SC).

breached.¹¹¹ Neither the majority nor concurring judgment found merit in the argument that the power to make a finding under the criminal offence provision possessed a quality of ‘quasi-finality’.¹¹² Justice Gageler held that such a finding is of ‘no operative legal effect’ — only a ch III court undertaking judicial review can make a conclusive determination of whether an offence has been committed.¹¹³ Although an appellant seeking judicial review would be required to prove that the jurisdictional fact did not exist, the burden does not make the ACMA’s view conclusive.¹¹⁴ The majority judgment also rejected the respondent’s characterisation of a licence as a ‘pre-existing and fundamental right’.¹¹⁵ Further, neither judgment considered the cancellation of a licence as ‘akin to the imposition of a penalty’¹¹⁶ or ‘punishment for the commission of an offence’.¹¹⁷ The ACMA was therefore held not to be exercising judicial power when making a determination under cl 8(1)(g).

V The Implications of *ACMA v Today FM*

A Upholding the Determinative Powers of Administrative Bodies

The Chairman of the ACMA welcomed the decision of the High Court, stating that it ‘provides clarity’ for the legislative prohibition on a broadcaster using its service in the commission of an offence.¹¹⁸ Industry body Free TV Australia Ltd, which sought leave to intervene in the High Court appeal, however, considers there to be a ‘serious flaw’ in the legislation, as it enables the ACMA to ‘act as policeman, judge and jury, despite the fact that it is not set-up to determine criminal law matters.’¹¹⁹ Yet, the ACMA’s power to make findings that a licensee has committed a criminal offence for the purposes of administrative enforcement action is not novel with respect to the regulatory framework of numerous administrative bodies within Australia.

As outlined in the written submissions of Queensland as intervener, a number of Queensland legislative schemes provide for an administrative body to make a finding that a person has committed an offence as a precondition for administrative action, such as in relation to liquor permits, mining leases and parole orders.¹²⁰ Similar statutory provisions exist in the legislation of other states,

¹¹¹ *ACMA v Today FM* (2015) 317 ALR 279, 293–4 [57]–[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 299 [79] (Gageler J).

¹¹² *Ibid* 293 [57] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹¹³ *Ibid* 299–300 [80]–[81] (Gageler J).

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* 293 [57] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* 299 [79] (Gageler J).

¹¹⁸ ACMA, ‘High Court Unanimously Allows ACMA Appeal’ (Media Release, MR 10/2015, 4 March 2015) <<http://www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/high-court-unanimously-allows-acma-appeal>>.

¹¹⁹ Free TV Australia Ltd, ‘Free TV Calls on Government to Amend the *Broadcasting Services Act*’ (Media Statement, 4 March 2015) <http://www.freetv.com.au/media/News-Media_Release/Free_TV_Media_Statement_Free_TV_Calls_On_Government_To_Amend_The_BSA.pdf>.

¹²⁰ Attorney-General (Qld), ‘Submissions for the Attorney-General for the State of Queensland (Intervening)’, Submission in *ACMA v Today FM*, No S225 of 2014, 17 October 2014, 5 [23]–[26].

territories and the Commonwealth. For example, the *Mining Act 1992* (NSW) provides the relevant decision-maker with the authority to make a decision regarding the grant, renewal, cancellation or suspension of a mining right on the ground that the applicant or holder of a mining right is not a ‘fit and proper person’ because of ‘compliance or criminal conduct issues’.¹²¹ A person or body corporate may have ‘compliance or criminal conduct issues’ because of a previous suspension or cancellation of a mining right or conviction of a ‘serious offence or an offence involving fraud or dishonesty’.¹²² Further, a ‘compliance or criminal conduct issue’ may arise if

the decision-maker is satisfied that the person or body corporate has contravened any relevant legislation, whether or not the person or body corporate has been prosecuted for or convicted of an offence arising from the contravention ...¹²³

‘Relevant legislation’ refers to the *Mining Act 1992* (NSW) and other statutes that contain criminal offences, such as the *Work Health and Safety Act 2011* (Cth).¹²⁴ *ACMA v Today FM* thus had the potential to cast doubt on the legislative framework of various administrative bodies operating across Australia. Partly in anticipation of the High Court judgment,¹²⁵ Commissioner Heydon AC QC limited the findings of his *Interim Report* on the Royal Commission into Trade Union Governance and Corruption to ‘conclusions that a person has engaged in conduct that **may** have been a breach of a relevant law, regulation or professional standard’.¹²⁶ This approach was also adopted in the Royal Commission’s *Final Report*.¹²⁷ The decision of the High Court provided important confirmation as to the validity of the comparable powers of administrative bodies operating at both the state and federal level. Within a month of the decision being handed down, *ACMA v Today FM* was applied to clarify the authority of the Adult Parole Board of Victoria and the South Australian Residential Tenancies Tribunal to determine whether an offence had occurred as a precondition to administrative enforcement action.¹²⁸

See also ACMA, ‘Appellant’s Submissions’, Submission in *ACMA v Today FM*, No S225 of 2014, 19 September 2014, 3–5 [17]–[21].

¹²¹ *Mining Act 1992* (NSW) s 380A.

¹²² *Ibid* ss 380A(3)(b)–(c).

¹²³ *Ibid* s 380A(3)(a).

¹²⁴ *Ibid* s 380A(7). As an example of a criminal offence under the *Mining Act 1992* (NSW), see s 291(1A)(b) regarding failure to pay royalty. As an example of a criminal offence under the *Work Health and Safety Act 2011* (Cth), see s 31 regarding reckless conduct.

¹²⁵ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014) vol 1, 18–19 [56].

¹²⁶ *Ibid* 19 [60] (emphasis in original).

¹²⁷ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 1, 55 [131].

¹²⁸ *Yaxon v Secretary to the Department of Justice* [2015] VSC 124 (2 April 2015) [51] (Forrest J); *Maddeford v South Australian Housing Trust* [2015] SADC 65 (24 April 2015) [6] (Tilmouth J). Note that the matters of the South Australian Residential Tenancies Tribunal are now heard by the South Australian Civil and Administrative Tribunal under the *Residential Tenancies Act 1995* (SA) s 24.

B *The Principle of Legality*

As the Full Federal Court noted in its judgment, ‘reasonable minds may differ on the better construction of a particular provision’.¹²⁹ The High Court rejected the Full Court’s attempt to extend the principle of legality to encompass the constitutional doctrine that judicial power is exclusively vested in ch III courts for the purpose of interpreting cl 8(1)(g) and its allied provisions in the *BSA*.

The principle of legality is a presumption of statutory interpretation, which is one aspect of the broader concept of the principle of legality that a government body must have a legal basis for its actions.¹³⁰ The principle requires statutes to be construed so as to avoid an infringement of common law rights and freedoms unless such infringement is expressed by the legislature in clear and unequivocal language,¹³¹ therefore protecting rights and freedoms while respecting the doctrine of parliamentary supremacy.¹³² However, the application of the principle has generated uncertainty for parties and the legislature with respect to which rights the courts will consider protected by the principle.¹³³ Notwithstanding criticism, recent cases have included references to an accused’s right to silence,¹³⁴ personal liberty in relation to effective indefinite detention,¹³⁵ and the right to object to the production of documents under one’s control.¹³⁶ In one of the most recent considerations of the principle by the High Court prior to the present case, Keane and Gageler JJ noted that:

Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values.¹³⁷

In *X7 v Australian Crime Commission*, Hayne and Bell JJ held that the principle of legality is not confined to legislation that may affect the rights, privileges and immunities of a person, but may also be applied to ‘a defining characteristic of the criminal justice system’.¹³⁸

¹²⁹ *Today FM v ACMA* (2014) 218 FCR 461, 477 [72] (Allsop CJ, Robertson and Griffiths JJ).

¹³⁰ For an analysis of the development of the principle of legality in Australian jurisprudence and the identification of two competing conceptions of the principle, which is beyond the scope of this case note, see Lim, above n 7.

¹³¹ *Momcilovic v The Queen* (2011) 245 CLR 1, 46–47 [43] (French CJ).

¹³² *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); Chief Justice Robert French, ‘The Courts and the Parliament’ (Speech delivered at the Queensland Supreme Court Seminar, Brisbane, 4 August 2012) 16 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj04aug12.pdf>>.

¹³³ Meagher, above n 7, 434.

¹³⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ), 153–5 [158]–[162] (Kiefel J); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

¹³⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ) (dissenting); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 61 [120] (Gummow J) (dissenting), 193–4 [534] (Bell J) (dissenting).

¹³⁶ *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, 248–9 [27] (Basten JA); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹³⁷ *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).

¹³⁸ (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ).

Although such judicial statements ostensibly leave open the potential for a broadening of the applicability of the principle of legality, in *ACMA v Today FM*, Gageler J has sought to restrain an expansion of the principle that would lead to, as his Honour put it, ‘a common law penumbra around constitutionally imposed structural limitations on legislative power.’¹³⁹ In a later 2015 judgment, Gageler J also emphasised the limit of the principle’s utility when legislation evinces a clear statutory object to infringe a right or freedom.¹⁴⁰ The principle of legality serves to protect against inadvertent and collateral alterations of rights by Parliament, but does not provide a court with a ‘licence ... to adjust the meaning of a legislative restriction ... which the court might think to be unwise or ill-considered.’¹⁴¹ Neither of the High Court judgments in *ACMA v Today FM* criticised the application of the principle generally, as evidenced by their consideration of whether there was a risk to reputational damage and prejudice to future criminal proceedings from the operation of the powers of the ACMA.¹⁴² The majority judgment instead rejected the Full Federal Court’s particular application of the principle of legality, with Gageler J extending his criticism of the application of the principle of legality to rights sourced in constitutional principles that impose limitations on legislative power.

VI Conclusion

The High Court in *ACMA v Today FM* held that the ACMA may make a determination, as a precondition to taking administrative enforcement action, that a commercial radio broadcasting licensee has committed a criminal offence. Further, in doing so, the ACMA is not engaged in the exercise of judicial power. The judgments therefore provided a broad confirmation of the validity of the comparable powers of administrative bodies operating at both the state and federal level, as indicated by the application of *ACMA v Today FM* in recent cases. When analysed against the judgment of the Full Federal Court, the High Court judgments also provide guidance on the application of the principle of legality to constitutional doctrines. While the majority judgment rejected the Full Federal Court’s particular application of the principle of legality in this case, the concurring judgment of Gageler J presented a broader critique of the application of the principle to constitutionally imposed structural limitations on legislative power.

¹³⁹ *ACMA v Today FM* (2015) 317 ALR 279, 296 [67] (Gageler J).

¹⁴⁰ *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 39 [81] (Gageler J).

¹⁴¹ *Ibid.*

¹⁴² *ACMA v Today FM* (2015) 317 ALR 279, 290 [42] (French CJ, Hayne, Kiefel, Bell and Keane JJ), 298 [74] (Gageler J).

