

First civil penalty under the BSA: 2UE fined \$360,000

The Federal Court has made the first civil penalty order under the *Broadcasting Services Act 1992* (BSA).

On 17 July 2009 Justice Rares made orders imposing a pecuniary penalty on 2UE for breaches of 2UE's licence condition which require it to comply with the disclosure requirements set out in the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (the *Disclosure Standard*).



The court imposed a penalty totalling \$360,000 on 2UE in respect of 13 breaches of the Disclosure Standard that occurred during broadcasts of the *John Laws Morning Show* in October and November 2007.

Civil penalties have been a part of the ACMA's suite of enforcement powers since February 2007.

The Disclosure Standard

The Disclosure Standard requires a licensee to cause a disclosure announcement to be broadcast during a current affairs program when the name, products or services of a presenter's sponsor are mentioned. A licensee must keep a register of commercial agreements between presenters and sponsors and must provide the ACMA with details of those agreements.

History of breaches by 2UE

The ACMA applied to the Federal Court for a civil penalty order in November 2008 after publishing a report assessing compliance by 2UE with the Disclosure Standard, and with an enforceable undertaking that 2UE had given the ACMA in September 2007.

This enforceable undertaking had been given in response to earlier findings by the ACMA that, in August 2006, 2UE had failed to cause disclosure announcements to be made on 20 occasions when Mr Laws mentioned a sponsor, Telstra, including during an interview with the then Prime Minister on the *John Laws Morning Show*. Before these breaches in 2006, the former Australian Broadcasting Authority (ABA) found in December 2003 that 2UE

The ACMA's 2007 findings

In its 2008 Compliance Assessment, the ACMA investigated 2UE's compliance with the enforceable undertaking as well as with the Disclosure Standard.

The ACMA identified 13 incidents when no disclosure announcement had been made, or when a disclosure announcement was not made in the manner or at the time required under the Disclosure Standard.

As 2UE had either failed to take action in relation to these breaches, or had failed to report the breaches to the ACMA (or both), the ACMA found that 2UE had breached its enforceable undertaking on these occasions.

The Disclosure Standard is a program standard made under Part 9 of the BSA. The standard licence condition set out at Paragraph 8(1)(b) of Schedule 2 to the BSA requires a licensee to comply with program standards applicable under Part 9. As the ACMA found that the licensee breached the Disclosure Standard on 13 occasions, the ACMA also found that the licensee breached the standard licence condition on 13 occasions.

It was these breaches that formed the basis of the application for the civil penalty order.

Application for the civil penalty order

In November 2008, the ACMA reached an agreement with 2UE on what the parties regarded as an appropriate amount for 2UE to pay by way of a civil penalty order for each of the incidents identified, and agreed to suggest that

The parties agreed on a sum of \$10,000 per breach. In agreeing to that sum, the ACMA noted that the ownership of 2UE had changed over the two-month period subject to on-air monitoring under the enforceable undertaking. While it is the licensee rather than the ultimate owner of the licensee that is responsible for compliance with the BSA, the ACMA noted that most of the breaches of the licence condition occurred before Fairfax Media acquired full control of 2UE on 9 November 2007. Fairfax Media had cooperated with the ACMA in investigating the breaches, had accepted liability for the contraventions and had taken a number of steps to improve compliance at 2UE.

Outcome

During the course of the hearing, Justice Rares observed that it was the first time a penalty had been sought under the Act but that, because the parties had agreed on the penalty to be sought, there was no party before the court who might provide a different view on the appropriateness of the quantum of the penalty. His Honour therefore considered his deliberations may be assisted by an intervener who might provide a different view. The Communications Law Centre was appointed to this role and provided arguments as to why a higher penalty should be imposed.

On 17 July 2009, Justice Rares delivered his judgement. In awarding penalties totalling \$360,000, His Honour found that the agreed penalty suggested by the ACMA and 2UE did not adequately reflect the circumstances of the breaches. These circumstances included the history of breaches on the part of 2UE, and the conduct of Mr Laws. His Honour awarded penalties varying from \$10,000 to \$50,000 per breach.

Guidance for industry and the ACMA

Justice Rares' judgement will provide guidance both to the ACMA when it considers applying for civil penalty orders in the future, and to industry participants who face such proceedings. His Honour clarified the principles that will apply when civil penalties are sought under the BSA, pointing out some important differences from other legislation. ☞

The decision is available online at the Australasian Legal Information Institute website www.austlii.edu.au (go to Cases & Legislation: Australia: Commonwealth > Federal Court of Australia 1977 > 2009 > Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2) [2009] FCA 754 (17 July 2009) or www.austlii.edu.au/au/cases/cth/FCA/2009/754.html).

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had breached the Disclosure Standard on 19 occasions (in relation to sponsors Telstra and NRMA Insurance). At that time, the ABA also found six breaches of the special licence conditions imposed on 2UE in March 2000, following the Commercial Radio Inquiry.

Mr Laws retired from broadcasting on 30 November 2007.

amount to the court as appropriate for the contraventions. This was an important step in the process, because it resulted in an agreement by 2UE that it would concede liability for the breaches. That meant that a lengthy contested hearing would be avoided.