



Australian Government
**Australian Communications
and Media Authority**

Investigation Report No.1562

File no.	2005/1244
Licensee	Harbour Radio Pty Ltd
Station	2GB (Sydney)
Type of service	Commercial radio
Name of program	<i>Your Sydney Weekend</i>
Date of broadcast	15 May 2005
Relevant code	Clauses 1.3(e) and 1.4 of the <i>Commercial Radio Australia Codes of Practice 2004</i>

Investigation conclusion

The licensee of 2GB, Harbour Radio Pty Ltd, in relation to the broadcast of the program *Your Sydney Weekend* on 15 May 2005:

- breached clause 1.3(e) of the *Commercial Radio Australia Codes of Practice 2004*, as the licensee broadcast a program which was likely to vilify Indonesian judges on the basis of race and nationality and Indonesian people on the basis of nationality and which was not presented reasonably for one of the purposes specified in clause 1.4 of the code; and
- did not breach clause 1.3(e) of the *Commercial Radio Australia Codes of Practice 2004* in broadcasting comments about Mrs Megawati Sukarnoputri, as the licensee did not broadcast a program which was likely to incite or perpetuate hatred against or vilify Mrs Sukarnoputri on the basis of her gender.

The complaint

On 28 June 2005, the Australian Broadcasting Authority (the ABA) received a complaint regarding the broadcast of the program, *Your Sydney Weekend*, on 15 May 2005 by Sydney commercial radio station, 2GB. A complaint dated 24 May 2005 had been made to the licensee and the complainant, being dissatisfied with the response, complained to the former ABA.

The complainant alleged that comments made in the broadcast had vilified Indonesians, greatly harmed Indonesian-Australian relations and encouraged violence against Indonesians. The complainant also alleged that the broadcast had placed undue emphasis on the gender of ex-President Megawati Sukarnoputri.

From 1 July 2005, the Australian Communications and Media Authority (ACMA) continued the investigation in accordance with clause 11 of Schedule 4 to the *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005*.

The complaint has been investigated in relation to clauses 1.3(e) and 1.4 of the *Commercial Radio Australia Codes of Practice 2004* (the code).

The program

Your Sydney Weekend, also known as *Weekend Wireless*, is a magazine-style program broadcast from 9.00 am to midday on Saturdays and Sundays. The program on 15 May 2005 was hosted by a casual presenter, Malcolm T Elliott, filling in for the show's regular host. The comments complained of were made in the context of a discussion of the trial in Indonesia of accused drug smuggler, Schapelle Corby.

Transcripts of relevant excerpts are at Attachment A.¹

Assessment

The investigation report is based on audio copies of the broadcast and submissions by the complainant and the licensee of 2GB, Harbour Radio Pty Ltd.²

Relevant code provisions

Clause 1.3(e) of the code states that:

Proscribed Matter

- 1.3 A licensee must not broadcast a program which:
- (a) is likely to incite, encourage or present for its own sake violence or brutality;
 - (b) simulate news or events in such a way as to mislead or alarm listeners;
- [...]

¹ Transcripts are based on audio copies of the broadcast, recorded by Media Monitors and provided by the licensee.

² Submissions on behalf of the licensee were made by its legal representative.

- (e) is likely to incite or perpetuate hatred against or vilify any person or group on the basis of age, ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability.

Clause 1.4 of the code provides limits on the operation of clause 1.3(e):

- 1.4 Nothing in [sub-clause] 1.3(e) prevents a licensee from broadcasting a program of the kind or kinds referred to in [that sub-clause] if the program is presented reasonably and in good faith for academic, artistic (including comedy or satire), religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about any act or matter.

Issue 1: Whether the licensee broadcast a program which was likely to vilify Indonesian people on the basis of nationality or race

Complainant's submission

The complainant submits that the broadcast:

- vilified the President of Indonesia, an ex-President of Indonesia, and an Indonesian court
- vilified, by association, all Indonesians
- misled and alarmed listeners
- encouraged violence against Indonesia. In this respect, the complainant states that 'several acts of violence were enacted on Indonesian diplomatic personnel afterwards'.

The complainant made specific mention of the following:

- a reference to the Indonesian President, Susilo Bambang Yudhoyono, as 'Wham-Bam-Thank-You-Ma'am', and a comment which followed:
Well, that's what he is, isn't he? Have you ever—have you ever seen them?
Whoa! Give them a banana and away they go!
- statements about the judges hearing the Corby case, including:
The judges don't even speak English, mate; they're straight out of the trees, if you'll excuse the expression ...
They do look like the Three Wise Monkeys—I'll say it. They don't speak English ...
- a statement by the presenter that he had 'total disrespect for our neighbouring nation'.

Licensee's submission

Submissions of 22 July 2005

By letter dated 22 July 2005, the licensee submits that:

- in respect of Code 1.3(a), at no time did the presenter suggest to listeners that they should use acts of violence or brutality against Indonesian people;

- notes that Code 1.3(b) would appear to be directed towards programs that “simulate” news or events in a way as to mislead or alarm listeners and no simulation occurred during the broadcast;
- in respect of Code 1.3(e), while the licensee considers some of the presenter’s statements were ‘rude, inappropriate, unhelpful and disrespectful to Indonesian people’ and also insulting to the relevant people, the broadcast was not likely to have incited or perpetuated hatred against Indonesian people on the basis of their race or nationality:

The issue of whether [the presenter’s] statements breached Code 1.3(e) is a separate matter to the issue of whether or not the statements were insulting to the relevant individuals or to Indonesian people. In that context, it is noted that Code 1.3(e) sets out a high test for the likely effect of the relevant prohibited material, in that the broadcaster must have been likely to incite or perpetuate hatred against the relevant people, or to have vilified them. ... ‘Hatred’ is a strong word, and the *Macquarie Dictionary* defines it as ‘the feeling of one who hates, intense dislike, detestation’. Our view is that while the broadcast contained disrespectful and belittling comments about some Indonesian people (who hold positions of authority and respect), it did not incite or perpetuate hatred against them on the basis of their race or nationality.

Further, while the broadcast ridiculed the judges in the Schapelle Corby case, the Indonesian President and former President, it is less clear that it ‘vilified them’ on the basis of their race or nationality (noting that the *Macquarie Dictionary* definition of ‘vilify’ is ‘to speak evil of; defame; traduce’). While our clients consider that [the presenter’s] statements were foolish, rude and ignorant, the issue of whether or not those statements ‘vilified’ the relevant people on the basis of their race or nationality is a complex question.

The licensee also advised that:

- it understands that the presenter’s statement about the judges being ‘straight out of the trees’ and the reference to the banana were insulting to the relevant individuals and to Indonesian people generally, particularly in light of the positions of respect and authority that the relevant individuals hold in Indonesia;
- the description of the judges as ‘three wise monkeys’ was also likely to have been insulting to Indonesian people, in the context in which it was made, ‘although this may not have been the case if the expression had been used in isolation, as it is a common expression’; and
- it had taken steps to ensure that appropriate apologies were made and that the incident is not repeated.

Submission of 25 August 2006

A Draft Preliminary Investigation Report was provided to the licensee for the purpose of affording it natural justice. In response, the licensee made detailed submissions including those summarised below in respect of Code 1.3(e):

- In order for Code 1.3(e) to be breached:
 - the broadcast must have been likely to “incite or perpetuate hatred against or vilify” the relevant person or group; and

- such hatred or vilification must be based on a characteristic of that person or group (in this context, the relevant characteristics are nationality, ethnicity and race). [underlining in original]
- In context with the word “hatred”, a higher test is created than if the word “vilify” were used in isolation;
- While the broadcast was unfortunate, it was not sufficient to ‘incite or perpetuate hatred against or vilify’ any person or group on the basis of any of the grounds set out in Code 1.3(e), and no reasonable listener would conclude that it did;
- It is appropriate for Code 1.3(e) to be applied in a manner consistent with the application of State and Territory vilification laws as a contrary approach would give rise to confusion and regulatory uncertainty and ACMA is required to produce regulatory arrangements that are stable and predictable under s.5(1)(b)(i) of the *Broadcasting Services Act 1992*;
- That the meaning of ‘vilification’ adopted by the Administrative Decisions Tribunal in *Western Aboriginal Legal Service v Jones & Anor* [2000] NSW ADT 102, applying the provisions of the NSW *Anti-discrimination Act 1977* ought to be applied;
- That, based upon the above conclusion:
 - in order to establish vilification, it is necessary for the conduct complained of to have incited hatred of a particular group;
 - relevant words including, ‘incite’, ‘hatred’, ‘serious’, ‘contempt’, ‘severe’, and ‘ridicule’ ought to be given their ordinary English language meanings with reference to Dictionary definitions;
 - Applying these meanings, in order to constitute vilification, it is not sufficient that the conduct complained of was unpleasant or obnoxious. It must be conduct capable of inciting others to have hatred towards, serious contempt for or to severely ridicule a person or a group of persons on the ground of race, ethnicity or nationality. Nor is it sufficient that the conduct incites ill feeling or expresses ill feelings. The relevant conduct must incite hatred, serious contempt for, or severe ridicule of a person or group of persons on the grounds of their race (or their ethnicity or nationality), rather than merely express or convey contempt or ridicule;
 - Whether the relevant conduct meets those tests must be assessed objectively. The conduct complained of must be capable of inciting a reasonable person to have hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of their race, ethnicity or nationality. A reasonable person would have dismissed the comments as emotional, sensational or foolish.

Applying the above principles to the broadcast:

- It is not clear that the following statement ‘incites or perpetuates hatred against or vilifies’ the Indonesian President on the basis of his race, ethnicity or nationality as the words are verging on the incoherent.

But Wham-Bam-Thank-You-Ma’am-Yidd-yi-yon-yo is going to be called into all—Well, that’s what he is, isn’t he? Have you ever—have you ever seen them? Whoa! Give them a banana and away they go!

- The language in the ‘Exchange with caller Frank’ indicates that the presenter didn’t actually say what the caller accuses him of saying:

FRANK

... I was appalled by your comment when you were talking about Schapelle Corby ... when you referred to the Wham-Bam-Thank-You-Ma’am Yudhoyono and give him a banana, after all that’s what they look like.

[PRESENTER]

No, I don’t think I said that’s what they look like—or if I did, well, that is what I reckon the judges look like; I don’t know about Wham-Bam, but I think the judges do. The judges don’t even speak English, mate, they’re straight out of the trees, if you’ll excuse the expression.

- While acknowledging the insulting content of the above, for the reasons set out at Attachment B, the words did not incite hatred. Nor did they meet the ‘serious contempt and severe ridicule’ threshold. Nor is it clear that these words were based on the facts that the judges were of a particular race, nationality or ethnicity. Therefore, while these words were rude, it is not considered that they met the threshold tests in Code 1.3(e).

- In respect of the following ‘Commentary after caller Frank’:

And then we get this joke of a trial. And it’s nothing more than a joke, an absolute joke. The way they sit there. And they do look like the Three Wise Monkeys—I’ll say it! They don’t speak English; they read books; they don’t listen to her; they show us absolutely no respect, those judges.

‘Three Wise Monkeys’ is a common expression. While acknowledging the insulting content of the above, it does not follow that this commentary was likely to incite hatred, or serious contempt for, or severe ridicule of [underlining in original], any person or group’ on the basis of their race, nationality or ethnicity. In this case the criticism was based on the observation that the judges were not listening to the evidence that was presented as they did not speak English. As such it was based upon the fact that they were not English language speakers, rather than upon the fact that they were of Indonesian nationality.

- Similarly, in respect of the following extracts, these were general insults, rather than being based on the fact that the judges were of a particular race, nationality or ethnicity:

I’ve got an email here ... to say that I should apologise for referring to the Indonesian judges as looking like the Three Wise Monkeys. And I do apologise; it was very wrong of me to say that the Indonesian judges look like the Three Wise Monkeys. First of all, they look like three dumb monkeys; and when I went and analysed my nature book during the news break, they don’t even look like monkeys, they look like hippopotamuses.

- The broadcast must be listened to as a whole and this reduces the ‘sting’ of the words used in these extracts, and makes them even less likely to have breached Code 1.3(e).

A full copy of the licensee’s submissions of 25 August 2006 in respect of Code 1.3(e) is at Attachment B to this report

Finding

ACMA finds that the licensee broadcast a program which was likely to vilify Indonesian judges on the basis of nationality and race and Indonesian people on the basis of nationality. As the program was not presented reasonably for one of the purposes specified in clause 1.4 of the code, the licensee breached clause 1.3(e) of the code.

Reasons

ACMA notes that the complainant raised issues under clauses 1.3(a) and (b) of the Code. However, ACMA is of the view that no content in the broadcast incited, encouraged or presented violence and nor did the broadcast cover material of a type which simulated news or events as required for the application of clause 1.3(b). ACMA has considered the broadcast under code clause 1.3(e)

ACMA has considered:

- whether the program was likely to vilify Indonesian judges or Indonesian people on the basis of nationality or race and
- if so, whether the program was presented reasonably and in good faith for a purpose in the public interest.

Was the program likely to vilify Indonesian people on the basis of nationality or race?

Interpretation of clause 1.3(e) of the code

The code requires that the licensee not broadcast a program which is likely to either incite or perpetuate hatred or vilify a person or persons on specified grounds. In this regard, ACMA notes the licensee’s submission that the word ‘vilify’ in code 1.3(e) must be read in its context – that is, code 1.3(e) should be read and applied as a whole and the words ‘hatred’ and ‘vilify’ be read together. This, argued the licensee, ‘imposes a higher test than if the word ‘vilify’ was used in isolation.

ACMA does not accept this submission. The code presents alternatives. A program must not be ‘likely to incite *or* perpetuate hatred against *or* [likely] to vilify any person or group...’

Nor in ACMA’s view does the language of the code require ‘incitement’ of vilification. Were that intended, the word ‘vilification’ rather than ‘vilify’ would be used.

The word ‘likely’ has been interpreted to mean something that is a real and not a remote possibility or something which is probable.³

Thus clause 1.3(e) may apply where a broadcast is likely to vilify any person or group on one of the specified grounds.

Application of other laws

The licensee has submitted that in considering clause 1.3(e) and the meaning of the term ‘vilify’, regard should be had to the application of State and Territory vilification laws as to do otherwise may cause confusion and uncertainty in regulation.

However, ACMA is charged with the investigation of complaints under the code and the code is expressed in different terms than the State, Territory and Commonwealth legislation and serves a different purpose.

The purpose of clause 1.3(e) in the *Commercial Radio Codes of Practice* is to prevent the broadcast of programs that, in accordance with community standards, are not suitable to be broadcast by commercial radio licensees. The terms of the code are developed through consultation with industry groups and receipt of comment from the public. On the other hand, an important purpose of State and Territory racial vilification provisions is to provide civil and criminal redress for conduct proscribed by the Parliament by individuals or corporations in a wide range of circumstances.

Moreover, it is noted that while the term ‘racial vilification’ is used in section 20C of the *Anti-discrimination Act 1977* (NSW), neither it nor any other State, Territory or Commonwealth Acts directly define vilification or hatred. Rather the word ‘vilification’ is used in headings of these Acts with differently described conduct proscribed by the various provisions. There are also significant differences between the wording of the code and statutory provisions. In particular, the code uses the concept, ‘likely to incite...hatred or vilify’, whereas the NSW *Anti-discrimination Act 1977* uses ‘incite hatred...’

Consequently ACMA is of the view that little assistance can be found in the application of State, Territory and Commonwealth provisions regarding the meaning of clause 1.3(e), as these laws differ in terms and context from the words of the code.

Further, ACMA does not consider that this approach leads to regulatory uncertainty, as it is based on the widely accepted approach that, where a statute or a code contains no definition of a term, the ordinary English language meaning is used.

Ordinary English language meaning

As the *Commercial Radio Codes of Practice* do not include definitions of the terms, ‘hatred’ and ‘vilify’, ACMA gives these terms their ordinary English language meaning. In recent years Australian Courts have shown a preference for the *Macquarie Dictionary* in construing Australian documents.

The *Macquarie Dictionary* includes the following definitions:

³ See the discussion in *Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* (1994) 34 ALD 773 at 778

hate**hater**, *noun*./hayt/verb, **hated, hating***(verb) (t)*

1. to regard with a strong or passionate dislike; detest.
2. to dislike; be unwilling: I hate to do it.

verb (i)

to feel hatred.

noun

4. hatred; strong dislike.
5. the object of hatred: * *The jeans Judy wore were a pet hate of Olga's* RICKI FRANCIS, 1973.

adjective

6. devoted to expressing resentment or dislike: *a hate session*.

phrase

7. **have a hate on (or against)**, to feel strong antipathy to or dislike for.
[ME *hat(i)en*. OE *hatian*, c. G *hassen*]

vilify**vilification** /viluhfuh'kayshuhn/, *noun*. vilifier, *noun*./viluhfuy/verb (t), **vilified, vilifying**

1. to speak evil of; defame; traduce: **Existing standards say radio and television broadcasts must not incite hatred or vilify a group on the grounds of race and other factors*. – WEST AUSTRALIAN, 1992
2. *Obsolete* to make vile.

[ME, from LL *vilificare*]**traduce****traducer**, *noun*, **traducingly**, *adverb*/truh'dyoohs/ verb (t). **traduced, traducing**to speak evil or maliciously and falsely of; slander, calumniate, or malign: *to traduce someone's character*. [L *traducere* transport, disgrace]*Ordinary reasonable listener*

ACMA does however accept that assessment the content of the program is based on the ordinary reasonable listener's understanding of the program, rather than on personal reactions by particular individuals.⁴

Assessment*Likely to vilify*

ACMA accepts that the program was entitled to make critical comment, including robust critical comment, in discussion of the conduct of the Corby trial and associated

⁴ This test is applied by the New South Wales Administrative Decisions Tribunal in consideration of matters under State vilification laws. See, for example, *John Fairfax Publications Pty Ltd v Kazak* [2002] NSW ADTAP 35 at para 16.

political matters. However, the presenter included in his commentary references to Indonesian court officials as ‘monkeys’ who are ‘straight out of the trees’; ‘Give them a banana and away they go.’ Other comments included: ‘The judges don’t even speak English’ and ‘... they look like three *dumb* monkeys ...’ Although there is some doubt over whether these comments were also directed towards the Indonesian leader, the presenter clarified that this was not the case in his conversation with caller Frank.

ACMA considers that the ordinary, reasonable listener would have understood, from the cumulative effect of these comments, the program to impute that Indonesian judges and, as explained below, Indonesian people are to be likened to sub-human primates who have no proper language or culture, and who are racially inferior to Australians. That is, the comments were likely to be understood by the ordinary, reasonable listener as being sufficiently strong to defame, traduce or otherwise speak evil of the people about whom they were made and so were likely to vilify those people as per the meaning afforded by the *Macquarie Dictionary*.

Further, ACMA finds that an ordinary reasonable listener would have understood the comments to refer to Indonesian judges and to Indonesian people. This conclusion is based upon:

- comments preceding the call from Frank, including:

But Wham-Bam-Thank-You-Ma’am Yidd-yi-yon-yo [laugh] is going to be called into all—Well [laugh], that’s what he is, isn’t he? Have you ever—have you ever seen them? Whoa! Give them a banana and away they go!

With respect to which an ordinary reasonable listener would have considered the word “them” to be a reference to Indonesian people; and

- comments during the call with Frank, including:

Well, I have total—I have total disrespect—[speaking over the top of caller]—I have total disrespect for our neighbouring nation, my friend. A total disrespect.

which broaden the scope of the comments to Indonesian people; and

- comments expressly referring to Indonesian judges:

No, I don’t think I said that’s what they look like—or if I did, well, that *is* what I reckon the *judges* look like; I don’t know about Wham-Bam, but I think the judges do. The judges don’t even speak English, mate; they’re straight out of the trees, if you’ll excuse the expression.

ACMA therefore finds that the program was likely to vilify Indonesian judges and Indonesian people.

Basis for vilification

The *Macquarie Dictionary* defines ‘nationality’ and ‘race’ as follows:

nationality

/nashuh'naluhtee, nash'nal-/ *noun, plural nationalities.*

1. the quality of membership in a particular nation (original or acquired): *the nationality of an immigrant.*
2. relationship of property, etc., to a particular nation, or to one or more of its members: *the nationality of a ship.*
3. Refer to **nationalism**.
4. existence as a distinct nation; national independence.
5. nation or people: *the various nationalities of America.*
6. national quality or character.

race²

/rays/*noun*

1. a group of persons connected by common descent.
2. a population so connected.
3. *Ethnology* a subdivision of a stock, characterised by a more or less unique combination of physical traits which are transmitted in descent.
4. a group of tribes or peoples forming an ethnic stock.
5. the state of belonging to a certain ethnic stock.
6. the distinguishing characteristics of special ethnic stocks.
7. the human race or family, or humankind.
8. *Zoology* a subspecies; a variety.
9. a natural kind of living creature: *the human race; the race of fishes.*
10. any group, class, or kind, especially of persons.

ACMA finds that the basis of the vilifying comments were both nationality and race, in respect of Indonesian judges, and nationality in respect of Indonesian people.

The initial comment 'Whoa! Give them a banana and away they go!' refers to 'them' and follows a reference to the Indonesian President. This comment would appear to concern Indonesian people on the basis of their membership of a national group as per meaning 1 of nationality above.

ACMA is of the view that the direct comparison of the judges to primates is a reference to physical appearance and other attributes based upon race, within meaning 1 above, and that comments such as '[t]he judges don't even speak English, mate; they're straight out of the trees' are based both on race (by implying limited development) and nationality (by emphasising that the judges do not belong to an English-speaking nation).

The licensee, in response to the preliminary report, submitted that the comment 'they don't even speak English' was a criticism based upon the fact that the judges did not appear to be listening to the evidence because they were not English speakers. That is, it was made on the basis that the judges were non-English speakers as opposed to on the basis of race, ethnicity or nationality. However, the comment did not stand alone; rather it was followed by 'they're straight out of the trees'. As such it also carried a meaning identifying the judges as not Australian (nationality) and implying they were less evolved (race).

The licensee, in response to the preliminary report, submitted that the ‘sting’ of the words used is reduced if the entire broadcast is listened to. ACMA does not agree. In the first two hours of the program, a substantial number of negative comments about Indonesians in general were broadcast and the tone of the broadcast overall was explicitly emotional, with the presenter repeatedly referring to his negative feelings about Indonesia and Indonesian people. Examples are his comments to and after caller Frank:

I have total disrespect for our neighbouring nation, my friend. A total disrespect ... It is the most corrupt country in the world ... That’s what they think about life: life is cheap. In Indonesia ... Technically, they have been our enemy for over 60 years.

Having considered the program as a whole, ACMA’s view remains unchanged.

Was the program presented reasonably and in good faith for a purpose in the public interest?

Clause 1.4 of the code provides that nothing in clause 1.3(e) prevents a licensee from broadcasting a program if it is presented reasonably and in good faith for ‘academic, artistic (including comedy and satire), religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about any act or matter’.

In its submission of 25 August 2005 the licensee submitted:

We have not previously sought to rely on Code 1.4, which provides a defence to an alleged breach of Code 1.3(e) if the broadcast was presented reasonably and in good faith for purposes in the public interest (including discussion or public debate). It is clear that our clients did not consider that the presenter acted reasonably during the broadcast. Our client considered his language was inappropriate, and that is why he was immediately stood down, and why he is no longer a casual employee of our clients. It also explains why our clients considered it appropriate to respond to complaints from the Indonesian ambassador with letters of apology.

ACMA acknowledges this concession. As the licensee has conceded that the program was not presented reasonably, it is not necessary to consider the other aspects of code 1.4.

ACMA finds that the program was not presented reasonably for a purpose set out in clause 1.4 and therefore clause 1.4 does not limit clause 1.3(e) in this case.

Issue 2: Whether the licensee broadcast a program which was likely to incite or perpetuate hatred against or vilify a person on the basis of gender

Complainant’s submission

The complainant submits that the broadcast breached the code by placing an undue emphasis on ex-President Megawati Sukarnoputri’s gender in a reference to her as ‘that little midget woman’.

Licensee's submission

The licensee submits that while the presenter's words about the former President were 'rude, immature and foolish', they did not incite or perpetuate hatred against her on the basis of her gender; vilify her on that basis; or place an undue emphasis on her gender:

If anything, the broadcast placed an undue emphasis on her height, not her gender.

Finding

ACMA finds that the licensee did not broadcast a program which was likely to have incited or perpetuated hatred against or vilified Mrs Megawati Sukarnoputri on the basis of her gender. Accordingly, the licensee did not breach clause 1.3(e) of the code in broadcasting the comments about Mrs Sukarnoputri.

Reasons

While the comment made about Mrs Megawati Sukarnoputri was disparaging and reflected the overall attitude of the presenter towards Indonesian people, it did not of itself amount to a likely incitement to hatred or vilification under the code on the basis of gender. ACMA accepts the licensee's submission that the comment made an unnecessarily rude reference to Mrs Megawati's height, but did not otherwise focus on her gender.

Action taken

The licensee submits that it took 'swift and appropriate action' following the broadcast, in that:

- the presenter is no longer employed by 2GB, and has not been on air since the date of the broadcast
- the licensee has sent letters of apology to the Indonesian Ambassador and Consul-General and asked the presenter to do the same and
- the licensee has emphasised, in its annual compliance training for operational staff, that comments such as those made in the broadcast will not be tolerated on 2GB.

ACMA is satisfied that these actions address the compliance issues raised by the investigation.

While ACMA staff have made all reasonable efforts to contact the presenter, it has not been possible to obtain the presenter's comments on this report.

Decision

The Australian Communications and Media Authority determines for the above reasons that the licensee of 2GB, Harbour Radio Pty Ltd, in relation to the broadcast of the program *Your Sydney Weekend* on 15 May 2005:

- breached clause 1.3(e) of the *Commercial Radio Australia Codes of Practice 2004*, as the licensee broadcast a program which was likely to vilify Indonesian judges and Indonesian people on the basis of nationality and/or race and which was not presented reasonably for one of the purposes specified in clause 1.4 of the code; and
- did not breach clause 1.3(e) of the *Commercial Radio Australia Codes of Practice 2004* in broadcasting comments about Mrs Megawati Sukarnoputri, as the licensee did not broadcast a program which was likely to incite or perpetuate hatred against or vilify Mrs Sukarnoputri on the basis of her gender

The Common Seal of the
Australian Communications and Media Authority
was affixed to this document in
the presence of:

Signature of Member

Signature of Member

Name (please print)

Name (please print)

Dated this 16th day of November 2006

ATTACHMENT A

Transcripts of relevant excerpts from the program

Commentary on clemency prospects, 9.14 am

PRESENTER

My prediction is on 27 May Schapelle Corby will be found guilty. On 27 May she will be sentenced to 20 years to life in prison. And then we'll be told, 'Well, that's the legal system over and done with'. I then predict—and this is only a prediction—that by Christmas of this year Schapelle Corby will be released and sent home. Because of a clemency plea between the two governments. Because I believe right now Bambang Yudhoyono is sitting up there and his hands are tied because it's a legal matter. But Wham-Bam-Thank-You-Ma'am Yidd-yi-yon-yo [laugh] is going to be called into all—Well [laugh], that's what he is, isn't he? Have you ever—have you ever seen them? Whoa! Give them a banana and away they go! Anyhow [laugh], I believe that by Christmas Schapelle will be home, because it will become a diplomatic incident that has to be addressed.

Exchange with caller Frank, 9.36 am

PRESENTER

G'day, Frank; how are you today?

FRANK

Good, thank you, Malcolm. I was ringing up because I was appalled by your comment when you were talking about Schapelle Corby around about 9:14 when you referred to the Wham-Bam-Thank-You-Ma'am Yudhoyono and give him a banana, after all that's what they look like.

PRESENTER

No, I don't think I said that's what they look like—or if I did, well, that *is* what I reckon the *judges* look like; I don't know about Wham-Bam, but I think the judges do. The judges don't even speak English, mate; they're straight out of the trees, if you'll excuse the expression.

FRANK

Don't you think that disrespects the whole of our neighbouring nation?

PRESENTER

Well, I have total—I have total disrespect—[speaking over the top of caller]—I have total disrespect for our neighbouring nation, my friend. A total disrespect.

FRANK

But have you got disrespect for—?

PRESENTER

I tell you how much disrespect I have: I didn't even donate to the tsunami, because I knew what would happen—is happening now; that money would be sitting around, not being used, trying to give it back, goods sitting on docks that can't even be delivered to them. It is the most corrupt country in the world. If you want to get something delivered to a business partner in Indonesia, mate, you have got to bribe them from the wharf right through to the office. It's bribery, graft and corruption; that's how the country has worked for 40 years.

FRANK

But that doesn't excuse your bad taste, disrespect—

PRESENTER

I do have bad taste and disrespect towards Indonesia.

FRANK

What's it done for Schapelle Corby's court case? Nothing! Why did you do it?

Because your mouth wasn't in touch with your brain!

PRESENTER

Yeah, it was; it was very much in touch with my brain, mate. I'm not going to pander to those—absolute—fools. Why should I? I owe them nothing! Take them nowhere!

Commentary after caller Frank, 9.38 am

PRESENTER

And you know I just really object to people who go up there for holidays. What did some guy say to me the other day? 'Why don't go there?' he said. 'It's cheap.' So that's it. That's right. It's cheap. And that's what they think about life: life is cheap. In Indonesia.

I didn't donate to the tsunami. And I won't be donating to anything in Indonesia, I won't visit there, I won't encourage people to go there. I think the whole thing is wrong. Technically, they have been our enemy for over 60 years. Technically. But there's been a lot of schmoozing going on in the last 10 years; it started with Paul Keating. 'Let me give them a billion dollars to rebuild.' Then they want to give money back because the charity has got too much money and they can't spend it.

And then we get this joke of a trial. And it's nothing more than a joke, an absolute joke. The way they sit there. And they do look like the Three Wise Monkeys—I'll say it! They don't speak English; they read books; they don't listen to her; they show us absolutely no respect, those judges. And that's why it'll be taken out of their hands. They will find her guilty, they will jail her, 20 to a lifetime.

And the only one who's going to get her out, as I said before, is Wham-Bam-Thank-You-Ma'am Bambang Yudhoyono. He's the only one who's going to do it. No-one else will do it. There's no king up there, is it? To give clemency? If Bambang doesn't do it? I mean, they're sort of greasing with each other, aren't they, as Mark Latham would say, every day of the week, Howard and him? 'Oh, my great mate, my great—'

What about that little midget woman that was up there as the—? What was her name? Midget! [Laugh] Who was the president? Aah, Megawati! Megawati Midget. Yeah. Goodness! Look what she did to us—blib-blib-blib—President of Malaysia did—said to us, and we just sit here like little wimps and we cop it. Prime Minister was called 'recalcitrant'. All the names they can throw at us, but oh no! we can't throw any back.

Well, you know, if you want to report me to the Equal Opportunities or Racism or whatever, then do it. I don't do anything during the week, everything's in my wife's name, you won't get any money out of me. I'm only sitting around watching TV. Pay the air fares, fly me up and down to Sydney, I'm happy to do all that. [Indistinct] enough to do with my life. What a do-gooder he was!

Commentary on e-mail from Janette, 10.09 am

PRESENTER

I've got an e-mail here from Janette—I won't say your last name, Janette; but she goes on to say that I should apologise for referring to the Indonesian judges as looking like the Three Wise Monkeys. And I *do* apologise; it was very wrong of me to say that the Indonesian judges look like the Three Wise Monkeys. First of all, they look like three *dumb* monkeys; and when I went and analysed my nature book during the news break, they don't even look like monkeys, they look like hippopotamuses. [Music]

So I apologise. I got all that totally, totally wrong. And yes, you're absolutely right, I have *no* respect for Indonesia as a country, none at *all*. It is one of the most corrupt countries in the world, always has been, always will be. Those people who were fooled by it, well be it, that's your problem, you live with it. I live with my thoughts; you live with yours. Nothing will change it. They can speak about us any way they like; but we cannot speak about them—oh, no!

ATTACHMENT B

Extract of Submission on behalf of Licensee dated 25 August 2006

2 Code 1.3(e)

2.1 Interpretation issues

[Citation of code provision]

In order for Code 1.3(e) to be breached:

- the broadcast must have been likely to “incite or perpetuate hatred against or vilify” the relevant person or group; and
- such hatred or vilification must be based on a characteristic of that person or group (in this context, the relevant characteristics are nationality, ethnicity and race). [underlining in original]

Our view is that the use of the word ‘vilify’ in Code 1.3(e) needs to be read in its context—that is, Code 1.3(e) should be read and applied as a whole.

We have previously noted that ‘hatred’ is a particularly strong word. We have also previously noted the dictionary definition of this word and the word ‘vilify’. However, as noted, it is important to place weight on the fact that the words ‘hatred’ and ‘vilify’ are used together in code 1.3(e), which imposes a higher test than if the word ‘vilify’ was used in isolation.

Our submission is that while the broadcast was unfortunate, it was not sufficient to ‘incite or perpetuate hatred against or vilify’ any person or group on the basis of any of the grounds set out in Code 1.3(e), and no reasonable listener would conclude that it did.

ACMA will be aware that various Commonwealth, State and Territory laws deal with racial vilification and that those laws have been judicially considered. Our submission is that it is appropriate for Code 1.3(e) to be applied in a manner that is consistent with the application of those laws, as a contrary approach would give rise to confusion and regulatory uncertainty. In this context, we note that the ACMA is required to produce regulatory arrangements that are stable and predictable (under section 5(1)(b)(i) of the *Broadcasting Services Act 1992*).

The question of what conduct constitutes racial vilification has been extensively considered by State and Federal Anti-Discrimination Tribunals.

In the decision of *Western Aboriginal Legal Service v Jones & Anor* [2000] NSW ADT 102, the NSW Anti-Discrimination Tribunal considered the question of conduct constituting homosexual vilification. In that decision, the Tribunal found that vilification [underlining in original] must be conduct which:

- (a) incites;
- (b) hatred towards, serious contempt for, or severe ridicule of a person or group of persons;
- (c) on a prohibited ground (e.g. on the basis of race).

This supports our view that the test under Code 1.3(e) is whether a broadcast was ‘likely to incite or perpetuate hatred against or vilify’, not only whether the broadcast was likely to ‘vilify’. In any event, our submission is that the word ‘vilify’ imports all the elements identified by the NSW ADT (as listed above).

In order to establish vilification, it is necessary for the conduct complained of to have ‘incited’ hatred of the particular group. The word ‘incite’ has been held to have its ordinary meaning namely ‘urge, spur on ... stir up, stimulate to do something’ or ‘urge on, stimulate or prompt to action’ *Western Aboriginal Legal Service Limited v Jones & Anor* [2000] NSW ADT 102 at paragraph 84, *Veloskey & Anor v Karagiannakis & Anors* [2002] NSW ADTAP 18; *John Fairfax Publications Pty Ltd v Kazak* (EOD) [2002] NSW ADTAP 35.

It is essential that the conduct complained of must incite, that is urge on, spur or prompt to action. It is not sufficient that the words merely convey hatred or express serious contempt of a particular group or severe ridicule of a particular group (*Veloskey & Anor v Karagiannakis & Anors*).

In *Kazak -v- John Fairfax Publications Limited* [2000] NSW ADT 77, the NSW Anti-Discrimination Tribunal considered the meanings of the words “hatred”, “contempt” and “ridicule” and set out the following definitions:

‘hatred’ means ‘intense dislike; detestation’ (Macquarie); ‘a feeling of hostility or strong aversion towards a person or thing; active and violent dislike’ (Oxford);

‘serious’ means ‘important, grave’ (Oxford); ‘weight, important’ (Macquarie);

‘contempt’ means ‘the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account’ (Oxford); the feeling with which one regards anything considered mean, vile, or worthless’ (Macquarie);

‘severe’ means ‘rigorous, strict or harsh’ (Oxford); ‘harsh, extreme’ (Macquarie);

‘ridicule’ means ‘subject to ridicule or mockery; make fun of, deride, laugh at’ (Oxford); ‘words or actions intended to excite contemptuous laughter at a person or thing; derision (Macquarie). [at 40]

In *Veloskey*, the Tribunal held that “the public act must be capable of inciting intense dislike or hostility towards a person or group of persons, or grave scorn for a person or group or persons, or extreme derision of a person or groups of persons”.

In order to constitute vilification (whether under Code 1.3(e) or more generally), it is not sufficient that the conduct complained of was unpleasant or obnoxious. It must be conduct capable of inciting others to have hatred towards, serious contempt for or to severely ridicule a person or a group of persons on the ground of race, ethnicity or nationality.

Further, it is not sufficient that the conduct incites ill feeling or expresses ill feelings. The relevant conduct must incite hatred, serious contempt for, or severe ridicule of a person or group of persons on the grounds of their race (or their ethnicity or nationality), rather than merely express or convey contempt or ridicule.

Whether the relevant conduct meets those tests must be assessed objectively. The conduct complained of must be capable of inciting a reasonable person to have

hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of their race, ethnicity or nationality.

Our submission is that the reasonable talk back radio listener could not be incited to hold the requisite degree of ill feeling or hate on the grounds of race, ethnicity or nationality having regard to the content and tone of the broadcast (which did not constitute hatred or vilification). The broadcast did not incite hatred, or serious contempt for, or severe ridicule [underlining in original] of, any person or group on the basis of their race, nationality or ethnicity, and did not ‘incite or perpetuate hatred against or vilify’ any person or persons on the basis of them having a particular racial, national or ethnic characteristic. No reasonable listener would have reacted in that way to the comments made. Our submission is that a reasonable person would have considered the comments to be an emotional, sensational or foolish reaction to the subject matter, and would have dismissed them as such.

2.2 Application of Code 1.3(e)

The preliminary report annexes a transcript of the broadcast. We have reviewed this transcript, in addition to the audio record of the complete broadcast, which also evidences the tone used by the presenter. The transcript and the audio record illustrate that the words used by the presenter were foolish, but his words were not sufficiently powerful or compelling to stir up a response likely to meet the tests in Code 1.3(e).

First, the language of the first extract of the transcript at Attachment A of the preliminary report (‘Commentary on clemency prospects’) makes little sense:

But Wham-Bam-Thank-You-Ma’am-Yidd-yi-yon-yo is going to be called into all—Well, that’s what he is, isn’t he? Have you ever—have you ever seen them? Whoa! Give them a banana and away they go!

It is not clear that this language ‘incites or perpetuates hatred against or vilifies’ the Indonesian President on the basis of his race, ethnicity or nationality. These words are verging on the incoherent.

Second, the language in the second extract of the transcript (‘Exchange with caller Frank’) indicates that the presenter didn’t actually say what the caller accuses him of saying:

FRANK

... I was appalled by your comment when you were talking about Schapelle Corby ... when you referred to the Wham-Bam-Thank-You-Ma’am Yudhoyono and give him a banana, after all that’s what they look like.

[PRESENTER]

No, I don’t think I said that’s what they look like—or if I did, well, that is what I reckon the judges look like; I don’t know about Wham-Bam, but I think the judges do. The judges don’t even speak English, mate, they’re straight out of the trees, if you’ll excuse the expression.

It is acknowledged that most people would consider that describing someone as being ‘straight out of the trees’ is a term of abuse, but it is not necessarily abuse that is based on the person being of a particular race, nationality or ethnicity. In this exchange, what the presenter thought the judges actually looked like is not expressly stated, and this is also a relevant consideration in this context.

It appears that the presenter’s key criticism was that the judges didn’t speak English (which indicates that the expression ‘they’re straight out of the trees’ was intended to convey that they were of inferior intelligence). However, it is not

clear that such words were based on the fact that the judges were of a particular race, nationality or ethnicity.

While these statements were rude, even ludicrous (given that judges in non-English speaking countries do not need to speak English in order to carry out their functions), this is a different issue to whether words were likely to ‘incite hatred, or serious contempt for, or severe ridicule of, any person or group’ [underlining in original] on the basis of their race, nationality or ethnicity.

We do not consider that these words incited hatred, and while they could be argued to have been enough to incite contempt and ridicule, we don’t think it met the ‘serious contempt ad severe ridicule’ threshold. Further, and as noted above, it is not clear that these words were based on the facts that the judges were of a particular race, nationality or ethnicity. Therefore, while these words were rude, we do not consider that they met the threshold tests in Code 1.3(e).

The language used in the third extract of the transcript (‘Commentary after caller Frank’) follows:

And then we get this joke of a trial. And it’s nothing more than a joke, an absolute joke. The way they sit there. And they do look like the Three Wise Monkeys—I’ll say it! They don’t speak English; they read books; they don’t listen to her; they show us absolutely no respect, those judges.

We have previously noted that the expression ‘Three Wise Monkeys’ is a common expression. We accept that its use in relation to the judges was likely to have been considered insulting because it was used in conjunction with the criticism of the judges not speaking English. However, this is a separate issue to issue to whether this commentary was likely to incite hatred, or serious contempt for, or severe ridicule of [underlining in original], any person or group’ on the basis of their race, nationality or ethnicity.

Again, our view is that this criticism was not based on the judges being of any particular race, nationality or ethnicity—the criticism was based on the fact that they were not listening to evidence that was presented before them (because they did not speak English). This is a criticism that was not based on the fact that they were of Indonesian nationality (or had particular ethnic or racial characteristics), it was based on the fact that they were not English language speakers. This is a subtle but important distinction. Again, while these were rude statements, we do not consider that the high threshold tests in Code 1.3(e) were met in this context. Finally, the language used in the fourth broadcast illustrates that these were general insults, rather than being based on the fact that the judges were of a particular race, nationality or ethnicity:

I’ve got an email here ... to say that I should apologise for referring to the Indonesian judges as looking like the Three Wise Monkeys. And I do apologise; it was very wrong of me to say that the Indonesian judges look like the Three Wise Monkeys. First of all, they look like three dumb monkeys; and when I went and analysed my nature book during the news break, they don’t even look like monkeys, they look like hippopotamuses.

These comments are quite foolish. However, it is difficult to say that describing the judges as hippopotamuses was a description that met the tests in Code 1.3(e). The same analysis applies as outlined in relation to the second and third extracts above.

We note that the above extracts illustrate the most troubling words used by the presenter during the broadcast. The above analysis sets out how we consider Code 1.3(e) should be applied to these words.

In applying Code 1.3(e) in the context of any investigation, our view is that it is important that ACMA consider the relevant broadcast as a whole. When the entire broadcast is listened to, this reduces the ‘sting’ of the words used in these extracts, and makes them even less likely to have breached Code 1.3(e).

However, the preliminary report reaches a different conclusion. It states that:

“the ordinary, reasonable listener would have understood, from the cumulative effect of these comments, the program to impute that Indonesian people are the equivalent of sub-human primates who have no proper language or culture, and who are racially inferior to Australians. That is, the comments were likely to be understood by the ordinary, reasonable listener as having those highly derogatory meanings which constitute vilification.”

We have set out a range of reasons above about why we do not agree with this preliminary conclusion. Our view is that ACMA has not undertaken its analysis from the perspective of a reasonable person in the context of the broadcast, as required under Code 1.3 (e). The test is not what the likely impact of an unreasonable person would have been.

It is not clear that the comments used by the presenter were based on the President and the judges being of a particular race, nationality or ethnicity. Also, while the comments were rude, our view is that they were not likely to ‘incite hatred, or serious contempt for, or severe ridicule of, any person or group” on the basis of that person or group having a particular racial, national or ethnic characteristic. They did not “incite or perpetuate hatred against or vilify” any person or persons on the basis of them having a particular racial, national or ethnic characteristic.

For these reasons, we request that the ACMA revisit these issues in its final report, and reach a different conclusion.