



**Australian Government**  
**Australian Communications  
and Media Authority**

## Investigation Report No. 1665

<b>File no.</b>	2006/396
<b>Licensee</b>	Harbour Radio Pty Limited
<b>Station and Licence area</b>	2GB Sydney RA1
<b>Type of service</b>	Commercial radio
<b>Name of program</b>	<i>The Open-Line Show</i>
<b>Date of broadcast</b>	15 December 2005
<b>Relevant legislation/code</b>	Clauses 1.3(e) and 1.4 of the Commercial Radio Codes of Practice 2004

### Investigation conclusion

The licensee of 2GB, Harbour Radio Pty Ltd, in relation to the broadcast of the program *The Open-Line Show* on 15 December 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 people of Lebanese background on the basis of their ethnicity and which was not presented reasonably and in good faith for one of the purposes specified in clause 1.4 of the code.

## The scope of the complaint

On 16 February 2006 the Australian Communications and Media Authority (ACMA) received an unresolved written complaint which referred to the program *The Open-Line Show* broadcast by Sydney commercial radio station 2GB on 15 December 2005. The complainant had previously complained to the licensee but considered the response to be inadequate.

In response to ACMA's preliminary investigation report,<sup>1</sup> the licensee submitted that the basis of the complaint was incitement of hatred on the basis of religion as opposed to a complaint about vilification on the basis of race, nationality or ethnicity. More particularly, the licensee contended that 'the scope of ACMA investigations of complaints arising under the Code should be by reference to the scope of the formal complaint, as set out in the complaint forms'<sup>2</sup>.

The licensee referred to sections 148 and 149 of the *Broadcasting Services Act 1992* (the BSA) in relation to which it made the following argument:

Section 148 of the *Broadcasting Services Act 1992* (BSA) sets out the basis upon which a complainant may complain to the ACMA in relation to an alleged Code breach. To summarise, this provides that if a person:

- makes a complaint to a 'provider of broadcasting services' on a matter relating to a registered code of practice (here, the Codes): and
- the complaint was made in accordance with that code of practice; and
- the person has not received a response within 60 days after making the complaint or the person considers the response received is 'inadequate'

that person may make a complaint to the ACMA about the matter<sup>3</sup>. Section 149 of the BSA requires the ACMA to investigate the complaint (unless, in the case of a Codes complaint, it is frivolous or vexatious or not made in good faith).

Our view is that the strong implication from the drafting of section 149 is that the ACMA's function is to investigate the complaint, as stated by the complainant, not as formulated by the ACMA.

ACMA does not interpret sections 148 and 149 as narrowly as the licensee and accordingly does not agree that the scope of the complaint should be limited to the complaint forms only. More particularly, ACMA notes that the complainant, in addition to the complaint forms, provided a number of pieces of correspondence which he referred to as 'supporting documentation'<sup>4</sup>. (A summary of the dates and contents of this correspondence is set out at Attachment A to this investigation report).

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<sup>1</sup> Letter from the licensee's legal representatives dated 27 September 2006.

<sup>2</sup> Both ACMA and the licensee provide separate complaint forms for completion as part of the complaints process, but the *Broadcasting Services Act 1992* does not require use of a particular form in complaining to ACMA.

<sup>3</sup> Emphasis added by the licensee

<sup>4</sup> See Fax cover sheet addressed to ACMA received on 16 February 2006

Having reviewed the ‘supporting documentation’, ACMA is of the view that the entire bundle (see summary at Attachment A) should be regarded as part of the current complaint. In his letter to the licensee dated 16 December 2005, the complainant referred to the incitement of **racial**<sup>5</sup> and religious hatred. While referring, generally, to a number of broadcasters, the complainant specifically singled out the presenter of the *Open-Line Show*<sup>6</sup> and included a substantial quote from the broadcast of 15 December 2005.

It appears that the licensee characterised the complainant’s letter of 16 December 2005 as a complaint under the code. In a letter to the complainant dated 12 January 2006 the licensee noted that (the complaint) ‘raises issues under the Commercial Radio Codes of Practice’ and advised the complainant that if he was dissatisfied with the licensee’s response, he could refer the matter to ACMA<sup>7</sup>.

In any event, it is noted that in his completed *Commercial Radio Codes of Practice – Listener Complaint Form*, the complainant cited, as the ‘Complaint Issue’ ‘Inciting hatred on religious grounds **etc.**’<sup>8</sup> It is considered that, in including the word ‘etc.’, the complainant impliedly included the additional grounds as set out in clause 1.3(e).

## The program

*The Open-Line Show* is a talkback program presented by Brian Wilshire and is broadcast by 2GB on weeknights between 9.00 pm and midnight. The complainant specifically referred to comments made by the presenter during a discussion with a caller (Caller 1). The discussion related to then current disturbances in and around the Sydney suburb of Cronulla. The discussion took place around 11.20 pm and lasted for approximately five minutes. It included the following exchange:

**Presenter:** Anyway, you were going to say?

**Caller 1:** I was going to say, I think...you know not wanting to sound racist but I think what hasn’t been discussed on the program, certainly since I’ve been listening, that is that in order to understand the Lebanese people you have to understand their recent history in Lebanon. Between 1975 and 1990, Lebanon was literally a basket case, where over, they estimate that over 100,000 people were murdered. And I’m talking about Muslim or Lebanese Muslims against Lebanese Christians and I think we’re talking about the very recent history ...I’m in my early 40’s so I hasten to add that the recent generation, this sort of hatred and carnage which certainly my generation in Lebanon would have experienced, I think a lot of that hatred has been passed down from one generation to the next.

**Presenter:** Yeah, that’s right.

**Caller 1:** And I think that the fact that over 1500 police have had to be employed this weekend to deal with this problem, I think, is indicative of the nature of the type of people which we’re dealing with.

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<sup>5</sup> Emphasis added by ACMA

<sup>6</sup> The program the subject of this investigation

<sup>7</sup> This is in accordance with the code 5.7 of the Commercial Radio Codes of Practice

<sup>8</sup> Emphasis added by ACMA

**Presenter:** Well, it's saying that we don't have the facility, we've got to bring in police from inter-state because the problem is so big. And nobody really knows whether it'll all die down because we've got the surfies saying, 'We're sorry we rioted on Sunday...we apologise, we've got the 'Bra boys, the Comancheros shaking hands saying, 'hey, we want to bring peace etcetera etcetera, but you still have a few car-loads of hotheads that aren't taking orders from anybody... but they're taking their model from France, it would appear.

**Caller 1:** Well, that's my concern you know and I mean, you gotta turn...say for example, an Australian, say for example a situation happened in Lebanon when a sort of a similar situation occurred, could you imagine what, and if it made headlines in Lebanon, could you imagine what the Australian ethnic community could experience in Lebanon ... I think, you know, we're apologising too much.

**Presenter:** We Australians do not have to apologise for anything. The surfies who rioted in a drunken riot, they have to apologise, that's fair enough...but my anger is reserved for the politicians and bureaucrats who conspire to bring in people who are guaranteed to be incompatible and have demonstrated that in every country into which they have moved. Many of them have parents who are first cousins whose parents were first cousins, because of the culture, not a religious thing. Doesn't say this in the Koran. But it's a cultural thing from some parts of the world to have parents who are very closely related. The result of this is inbreeding. The result of which is uneducationable people ... and very low IQ. But this doesn't let 'em off the hook. It means that somehow we've got to find some sort of plan that protects us. Whether you cage them or cage the good guys. At the moment most of the good guys are in cages waiting for their windows to be broken.

**Caller 1:** Absolutely. And I'd just like to make the point also, that, you know there are a lot of unemployed Italian youth...there are a lot of unemployed Greek youth, there are a lot of unemployed Yugoslav youth and Vietnamese youth, why is it, I mean, has the state government ever needed to employ 1500 policemen to ever have to deal with these unemployed youth...why is it that we keep on making an exceptions for these Lebanese Muslim...?

**Presenter:** Well the Premier is the member for Lakemba and he doesn't want to rock the boat and federally still they they think, 'Whoa, we got a quarter of a million people that's potentially quite a voting block there and even though you're only zeroing in on a few thousand that's a small percentage, it might be seen as a verbal attack on a quarter of a million and no politician can afford that, well most of them can't anyway and that's why again and again we, the people, don't get the government that we want...its very frustrating...

Subsequently, a number of calls were received that were broadly relevant to the topic. These were received at 11:38 pm, 11.41 pm and 11.48 pm, respectively.

## Assessment

The investigation is based on submissions from the complainant and the licensee and on an audio-copy of the broadcast provided by the licensee. The audio-copy includes the broadcast between 11.00 pm and midnight.

## Relevant Code Provisions

The complaint has been assessed against clauses 1.3(e) and 1.4 of the Commercial Radio Codes of Practice 2004 (the Codes), which state that:

- 1.3 A licensee must not broadcast a program which:
- ....
- (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.
- 1.4 Nothing in sub-clauses 1.3(c)(ii), 1.3(d) or 1.3(e) prevents a licensee from broadcasting a program of the kind or kinds referred to in those sub-clauses 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.

## Interpretation of clauses 1.3 and 1.4 of the code

ACMA has received a submission<sup>9</sup> from the licensee which queried the manner in which clauses 1.3 (e) and 1.4 of the code had been interpreted by ACMA. Accordingly, it is considered useful, at the outset, to set out matters relevant to construction of Commercial Radio Code 1.3(e) and 1.4

### ***Ordinary reasonable listener test***

In assessing whether the requirements of the Code have been met, ACMA has considered what an 'ordinary, reasonable listener' would have understood the program concerned to have conveyed. Courts have considered an ordinary, reasonable listener to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. An ordinary, reasonable listener does not live in an ivory tower, but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs.<sup>10</sup>

### ***Commercial Radio Codes of Practice vis a vis State and Commonwealth legislation***

The current investigation concerns a broadcast which took place in New South Wales and the licensee's submission includes reference to the application of decisions made under NSW law. The NSW provision is contained at Section 20C of the *Anti Discrimination Act 1977* (NSW) ('NSW ADA'). The relevant provisions of the

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<sup>9</sup> See letter from licensee's legal representatives dated 27 September 2006

<sup>10</sup> *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164-167.

Commonwealth law are at sections 18C, and 18D of the *Racial Discrimination Act 1975* (Cth) (RDA).

ACMA's role is to interpret the provisions of the code when deciding whether a broadcaster has engaged in conduct in breach of that code. Similar provisions and judicial consideration of those provisions may be helpful if they deal with the same concepts in the same terms as are in the code.

However, provisions have to be interpreted having regard to their purpose and the context in which they operate. The purpose of the code is to prevent the broadcast of programs that, in accordance with community standards, are not suitable to be broadcast by commercial radio licensees. 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.

It is noted that while the term 'racial vilification' is used in the NSW ADA, neither it nor any other State or Commonwealth Acts directly define vilification or hatred. There are a number of significant differences between the wording of the code and statutory provisions because they are drafted in different terms. For example, the code uses the concept, 'likely to incite...hatred against or vilify', whereas the ADA uses 'incite hatred'.

**Clause 1.3(e)**

***hatred and vilify***

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' read together. This, argued the licensee, 'imposes a higher test than if the word, 'vilify' was used in isolation.

ACMA does not accept the licensee's submissions. The code presents alternatives. A program must not be 'likely to incite *or* perpetuate hatred against *or* [likely] to vilify any person or group...' This clearly indicates that it is sufficient for the purposes of clause 1.3(e) that the broadcast was likely to vilify any person or group on one of the specified grounds.

When a statute or a code contains no definition, the ordinary English language meaning is used. *The Commercial Radio Codes of Practice* does not include definitions of the terms, 'hatred' and 'vilify'. Accordingly, 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:

**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]

### **Likely**

The word 'likely' has been interpreted to mean something that is a real and not a remote possibility or something which is probable.<sup>11</sup>

### **Clause 1.4**

#### **Reasonably and in good faith**

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 or satire), religious instruction, scientific or research purposes in the public interest, including discussion or debate about any act or matter'. There has been no argument that the general matters discussed in the program under investigation were not in the public interest. However, this is a case-by-case judgment and there may be occasions where ACMA is of the view that some matters may not be in the public interest in an individual case.

Section 18D of the RDA uses the phrase, 'reasonably and in good faith' to exempt conduct which might otherwise breach vilification provisions in a similar context to its use in the code.

The concept of reasonableness, in relation to the broadcasting of a program of the kind referred to in clause 1.3(e) implies elements of rationality and proportionality<sup>12</sup>.

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<sup>11</sup> See the discussion in *Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* (1994) 34 ALD 773 at 778

Matter likely to vilify will be presented ‘reasonably’ if it bears a rational relationship to the ‘public interest’ purpose of the broadcast.

The concept of ‘good faith’ in relation to the broadcasting of a program of the kind referred to in clause 1.3(e) implies both *subjective* and *objective* good faith<sup>13</sup>. In other words, it is not enough for the matter to be presented without dishonesty or malice, there must be a conscientious endeavour to minimise any vilification likely to occur in the course of discussing a particular topic.

## **Issue 1 – Whether the licensee breached clause 1.3(e) of the Codes**

### **Complainant’s submissions**

In his letter of complaint to the licensee, the complainant alleged that a number of presenters on 2GB were inciting ‘racial and religious hatred’. Referring to the comments made by the presenter on 15 December 2005 the complainant stated:

I am shocked and outraged that such comments can be made by the presenter. I am deeply hurt, particularly in the present climate of racial apprehensions, division, disharmony and many unreported race based attacks against members of my community.

The complainant, in his letter of complaint to ACMA, alleged that the above-mentioned comments incited hatred on religious grounds and also stated that:

(The presenter) referred to some Muslims as being inbred and undeducationable. He said we have demonstrated this in every country. He accused Muslims of having very low IQs, suggested a plan to “cage them” (the Muslims)<sup>14</sup> or cage the good guys.

### **Licensee’s submissions**

The licensee, via its legal representatives, provided two submissions to ACMA. These are dated 10 March 2006 and 27 September 2006<sup>15</sup>.

The licensee stated that the comments made by the presenter were ‘unhelpful’ and ‘inappropriate’ and noted that apologies had been broadcast.<sup>16</sup> However, the licensee submitted that the broadcast of an apology should not be construed as ‘an admission that the broadcast had breached the codes’. In support of its contention that the codes had not been breached, the licensee included the following submissions:

- a consideration of code 1.3(e) needed to question both whether the comments were ‘likely to incite or perpetuate hatred against or vilify’ an identifiable person

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<sup>12</sup> See for example, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 77 ALD 331 at paras 80 and 141

<sup>13</sup> See *Bropho v Human Rights and Equal Opportunity Commission* (2004) 77 ALD at, paras, 83-102

<sup>14</sup> The words, ‘the Muslims’ added in parentheses by the complainant

<sup>15</sup> The submission dated 27 September 2006 was provided in response to ACMA’s preliminary investigation report

<sup>16</sup> The licensee broadcast an apology on 2GB and on Channel 10 during the 5 pm news on 16 December 2005.



or group of people **and**<sup>17</sup> (whether) the comments were made ‘on the basis of’ one of the characteristics in code 1.3(e), and not ‘on the basis of’ some other factor

- it was ‘not clear from the broadcast exactly which group of people was the focus of the presenter’s comments and the caller’s comments did not contain a natural or obvious link to the presenter’s comments’
- during a talk-radio program it could not automatically be assumed that there would always be a logical flow or link between comments
- if the Authority took a different view in relation to the focus of the comments, then the ‘next question’ was whether the comments met the high threshold test
- code 1.3(e) should be applied as a whole – the words ‘hatred’ and ‘vilify’ are used together in the code and this imposes a higher test than if the word, ‘vilify’ was used in isolation
- while the comments were critical, they did not perpetuate ‘hatred’ which is a particularly strong word and the tone and substance of the presenter’s comments did not contain the level of virulence that would ordinarily be associated with ‘hatred’
- code 1.3(e) should be applied in a manner that was consistent with state and Commonwealth anti-vilification laws
- if the Authority disagreed and found that the comments did amount to vilification, then the basis for the vilification needed to be have been one or more of the attributes listed in the code and it does not appear that the basis for the comments was the fact that the relevant group were of a particular nationality, race or religion
- the presenter was criticising a cultural practice that is not limited to any particular group with a common nationality or ethnicity
- a reasonable person would have understood from the presenter’s comments that he was blaming politicians for accepting migrants who are from cultures where close relatives marry each other
- ‘ethnicity’ in the context of the codes refers to social groups marked by shared characteristics, particularly in relation to ancestry or language and this term was included in the codes to cover groups of people who may fall within groups that can be described as ‘Gypsies’ or ‘Hispanics’ for example
- the discussion and comments the subject of the complaint, which formed a very small part of the overall broadcast, should be considered in the context of the broader program rather than in isolation –callers were able to express a range of different views, particularly about the law and order debate and the presenter qualified his statements a number of times in that context

The licensee said that even if ACMA were to reach a different view, then code 1.4 ‘will operate such that there was no breach of code 1.3(e). In relation to code 1.4, the licensee’s submissions included the following:

- code 1.4 must not be ‘read down’ to have limited application and accordingly should be applied in a way that gives ‘full force and effect’ to it

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<sup>17</sup> Emphasis added by the licensee

- the broadcast was reasonable – there was a ‘rational’ relationship with the protected activity’, having regard to the nature of talk radio, and the nature of the issues put forward by the presenter
- the broadcast was made in good faith as when assessed from a subjective point of view it was clear that the comments were made honestly, having researched the topic of consanguinity before making the broadcasts. He made efforts not to link his comments with a particular nationality or ethnicity, given that the cultural practice that he described in the broadcast was not so limited
- when assessed from an objective perspective, and in the context of a talk radio format, it is clear that his comments were made to encourage debate and discussion about what factors contributed to the unrest that had been evident in parts of Sydney before the broadcast in a forum where many different views would be heard
- agreement that *Bropho*<sup>18</sup> case is relevant but it has been selectively quoted in the ACMA preliminary investigation report.

## Finding

ACMA finds that from 11:00 pm to midnight on 15 December 2005, the licensee broadcast a program which:

- was likely to vilify people of Lebanese background on the basis of their ethnicity; and
- was not presented reasonably and in good faith for purposes in the public interest, including discussion or debate about any act or matter.

It follows that ACMA is of the view that the licensee breached clause 1.3(e) of the code.

## Reasons

### *Identification of the relevant individual or group*

An important part of the assessment process was identifying the individual or group the target of the alleged vilification. ACMA finds that the ordinary reasonable listener would have thought the comments in the exchange between the presenter and Caller 1, including those of the presenter referring to “people who are guaranteed to be incompatible” and following, were about people of Lebanese background. The following combination of comments, which surrounded the presenter’s comments commencing with the reference to “people who are guaranteed to be incompatible”, gave rise to this conclusion:

- Caller 1’s comments about the recent history of Lebanon and violence between Lebanese Christians and Lebanese Muslims in Lebanon between 1975 – 1990
- Caller 1’s hypothetical example of a ‘similar situation’ [a reference to the widely publicised ‘Cronulla riots’ occurring in early December 2005<sup>19</sup>] is set in Lebanon
- the presenter’s answer to caller 1’s question :”why is it that we keep on making an exceptions for these Lebanese Muslim...?”, which refers to the Premier being the

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<sup>18</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 77 ALD 331

<sup>19</sup> NSW Police Public Affairs media release dated 5 December 2005.

member for Lakemba. Sydney listeners would probably be aware that the Lakemba electorate has a significant population of people with Lebanese backgrounds.<sup>20</sup>

ACMA notes concerns raised by the complainant that the comments were also based on religion. However, ACMA is of the view that, given the presenter's statement indicating that he was not talking about 'a religious thing', an ordinary reasonable listener would have thought the particular comments of concern here (commencing "people who are guaranteed to be incompatible" and following) were about people of Lebanese background generally.

The licensee argued that the preliminary report placed 'a large amount of weight upon the contents of the caller's comments' and that it is wrong to assume that 'because a caller was talking about Lebanese people, the presenter must have been too'. In this regard, the licensee submitted that in the context of talk radio 'it cannot automatically be assumed that there will always be a logical flow or link between comments' and that 'it is not unusual for a caller to be presenting comments about different issues to those being put forward by the presenter'.

ACMA cannot agree that the licensee's arguments apply in this case. For reasons enumerated above, it was clear in respect of whom the presenter's comments were addressed and the ordinary reasonable listener would be in no doubt that the presenter's comments referred to people of Lebanese background.

The relative relationship of comments in the context of talk back radio depends on the features of a particular discussion. The licensee has stated that the presenter's comments in this matter were 'related' to the 'themes' of what had been discussed before. In addition, it is noted that the caller remained 'on the line' when the presenter's comments were made and the discussion continued for some minutes thereafter. ACMA is not persuaded by the licensee's arguments and is of the view that in these circumstances to attempt to compartmentalise the discussion is artificial and accordingly not useful.

**'On the basis of'**

The code requirement is that the likelihood of incitement or perpetuation be on the basis of the specified characteristics. ACMA finds that the basis relevant to this matter is 'ethnicity'.

In coming to this conclusion, ACMA has had regard to the following *Macquarie Dictionary* definitions, of which meaning 3 is the most appropriate:

**ethnic**

**ethnically**, *adverb*. **ethnicity** /eth'nisitee/, *noun*.

/'ethnik/

*adjective*

1. relating to or peculiar to a population, especially to a speech group, loosely also to a race: \*pushing for absolute Fijian ethnic domination of Fiji. - HERALD, 1987.

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<sup>20</sup> Australian Bureau of Statistics 2001 Census Community Profile Series: Lakemba (State Electoral Division) Table B05 Ancestry (a) by birthplace of parents

2. relating to the origin, classification, characteristics, etc., of such groups: *\*Almost 40 per cent of New York pupils are black, 34 per cent Hispanic, 21 per cent white and 7 per cent from other ethnic backgrounds.* - HERALD, 1988.
3. of or relating to members of the community who are migrants or the descendants of migrants and whose native language is not English.
4. recognisable as coming from an identifiable culture: *ethnic music.*
5. for the use of ethnic groups: *ethnic radio.*
6. *Colloquial*
  - a. relating to those who seek an older and more simple life style, usually involving the practice of handicrafts and supposed folk ways.
  - b. relating to the life style itself.
  - c. odd; quaint.

*noun*
7. (*sometimes derogatory*) a member of an ethnic group whose native language is not English.  
Also, **ethnical**.  
[ME, from LL *ethnicus*, from Greek *ethnikós* national, gentile, heathen, from *éthnos* nation]  
**ethnic cleansing**  
/ethnik 'klenzing/  
*noun* the removal by force from a population of mixed ethnic origin of all those who are not of a particular origin.  
**ethnic group**  
/ethnik 'groohp/  
*noun* a group of people, racially or historically related, having a common and distinctive culture.

ACMA considers that people of Lebanese background living in Australia constitute a specific ethnic group, being members of the community who are migrants or the descendants of migrants from a particular country (Lebanon) and who share a common native language that is not English (Arabic<sup>21</sup>).

While there is some overlap between the concepts of ethnicity and those of race, nationality and religion, on balance, it is considered that an ordinary reasonable listener would have formed the impression that the negative comments made during this broadcast concerned people of Lebanese background on the basis of their ethnicity.

The licensee has argued that presenter's comments were about people with common cultural practices and not people who have a particular ethnicity or nationality. In this regard, the licensee said:

The key point is that the presenter was criticising a cultural practice that is not limited to any particular group with a common nationality or ethnicity...the presenter was talking about people with particular cultural practices, and not any group of people with a particular nationality or ethnicity.

The licensee has elaborated on this issue saying that the presenter was talking about consanguinity and that he has 'confirmed that he was not talking about Lebanese

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<sup>21</sup> *SBS World Guide*, Hardie Grant Books, Prahan, 2006, p 419.

people’. He has explained that the reasons he made the comments about consanguinity were as follows:

I was attempting to help listeners understand why last December’s car-convoy rioters from the south-western suburbs could have developed their anti-social attitudes and lack of fear of police. This was a serious attempt to deal with the causes of the problem, and I went to great lengths to avoid racial connotations.

It is simply not in any way a race-specific issue, and was not presented as such. I would suggest that it is grossly unfair to censor debate on such an important matter – one that is at present being debated publicly by politicians in Britain and Israel.

While the presenter’s highly negative comments were focused upon a perceived cultural practice, the negative characteristics said to result from the practice (‘in breeding’; ‘uneducationable people’; and ‘very low IQ’) were ascribed to a particular ethnic group; being the group described as ‘people who are guaranteed to be incompatible’. ACMA has already found that the latter reference would have been understood by an ordinary reasonable listener to be a reference to people of Lebanese background.

#### ***Perpetuate hatred against or vilify***

As stated above, the code does not include a definition of the terms ‘hatred’ and ‘vilify’ and accordingly ACMA has used the dictionary definitions set out above. Considering the Dictionary meanings, it is noted that while the terms ‘hatred’ and ‘vilify’ overlap, there is more intensity in the word, ‘hatred’ than in vilify.

In order to find that a program is likely to ‘vilify,’ a program must have a tendency to speak evil of, defame or traduce.

It is considered that a real possibility existed that the comments broadcast during this program were of sufficient intensity to have induced a strong reaction in the ordinary reasonable listener who would have understood the cumulative effect of the presenter’s comments to imply strongly that the group of people being discussed are not only of inferior intelligence and education to others within the community but are also a danger to the rest of the community. Comments imputing this included: ‘It means somehow we’ve got to find a plan that protects us’ and ‘whether you cage them or the good guys’. Important considerations in coming to this conclusion include the following:

- the presenter’s comments included unequivocal statements, the implication being that the point being made was incontrovertible – these included ‘guaranteed to be incompatible’ and ‘have demonstrated that in every country into which they have moved’;
- the terminology used included ‘inbreeding’, ‘uneducationable people’ (it is assumed that what was meant by the presenter was that these people were unable to be educated) and ‘very low IQ’ ascribed permanent highly negative characteristics to members of the group;
- the broadcast took place at a time of community conflict and tension along ethnic lines – in this context, use of the sort of terminology, ‘whether you cage them or cage the good guys’ was very likely to carry the implication that the group of people being discussed were not ‘good guys’ and were dangerous.

The licensee has argued that the presenter's comments need to be considered in the context of the entire broadcast rather than in isolation and, in this regard, that the program included several subsequent callers who made 'constructive contributions to the ongoing debate about law and order'.

ACMA notes that calls were received subsequent to the discussion which covered similar issues, however the subject of consanguinity did not arise again. On the one hand, the further discussions facilitated opportunities for some more positive contributions on the part of callers. The presenter acknowledged, on a number of occasions, that negative remarks had been directed against 'small percentage'.

On the other hand, the presenter made no attempt to retract, comment on or qualify in any way the comments he had made earlier in the program. ACMA is not convinced that the content of the subsequent calls counteracted the negative impression created by the earlier comments and discussion.

ACMA finds that the comments contained the necessary tendency to speak evil of, defame and traduce and were likely to vilify people of Lebanese background.

ACMA notes that statements (during the broadcast) such as, 'It means that somehow we've got to cage them or cage the good guys. At the moment most of the good guys are in cages waiting for their windows to be broken', may in the context of community unrest at the time of the broadcast, have amounted to incitement or perpetuation of hatred. However, ACMA is of the view that having already found that the relevant program was likely to vilify a person or group, it is unnecessary to decide this question.

***Was the program presented reasonably and in good faith for a purpose in the public interest (clause 1.4 of the Codes)?***

As noted above, it has not been argued that the program in question was presented for academic, artistic, religious instruction, scientific or research purposes. The question, then, is whether it was presented for 'other purposes in the public interest'. The relevant purpose in the public interest for presentation of this material might be described as 'discussion or debate'. Section 18D of the RDA, operates in a similar manner in respect of section 18C of the RDA as does clause 1.4 of the code with regard to clause 1.3(e). The courts, taking into account that section 18C creates an exception to the general principle that people should enjoy freedom of speech and expression, have construed section 18D as limiting the proscription in section 18C and therefore requiring a broad construction.<sup>22</sup> ACMA applies a similar broad construction to clause 1.4 of the code.

***Public Interest***

There has been no dispute that the general matters discussed and debated in the relevant program were not in the public interest. However, the licensee's obligation was, in addition, to present such material 'reasonably and in good faith'.

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<sup>22</sup> See, for example, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 77 ALD 331 at para 72-73 per French J.

### **'Reasonably'**

As noted above, matter likely to vilify will be presented 'reasonably' if it bears a rational relationship to the 'public interest' purpose of the broadcast, and if such matter is not disproportionate to what is necessary to the achievement of that purpose. In this regard, ACMA notes the Full Federal Court judgment in *Bropho* in which French, J said<sup>23</sup>:

An act will be done reasonably in the performance, exhibition or distribution of an artistic work if it is done for the purpose in a manner calculated to advance the purpose of the artistic expression in question. An act is done reasonably in relation to statements, publications, discussions or debates for genuine academic, artistic or scientific purposes, if it bears a rational relationship to those purposes. The publication of a genuine scientific paper on the topic of genetic differences between particular human populations, might for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation or its use to support a view that a particular group of persons is morally or otherwise 'inferior' to another by reason of their race or ethnicity, may not be a thing reasonably done...

The same kind of criterion may be applied to acts done in reports or comments on events or matters of public interest. A presentation of a report or comment which highlights, in a way that is gratuitously insulting or offensive, a matter that is irrelevant to the purported question of public interest under discussion may not be done 'reasonably'. A feature article on criminal activity said to be associated with a particular ethnic group would in the ordinary course be expected to fall within the protection (of the exemption). If it were written in such a way that offered gratuitous insults, by, for example, referring to members of the group in derogatory racist slang terms, it would be unlikely that the comment would be offered 'reasonably'.

ACMA notes the licensee's submission that:

Having regard to the nature of talk radio, and the range of issues put forward by the presenter, our strong view is that this 'rational relationship' clearly existed in these circumstances. In other words, the statements made by the presenter were within the range of what should be seen as reasonable for the purposes of the code. We are not saying that everything on a talk radio program should be considered as reasonable (no matter what the circumstances), but we do consider that what was said by the presenter in these circumstances fell within the scope of what is reasonable for the purposes of code 1.4.

However, having considered the material before it, ACMA finds that the program was not presented reasonably, as the vilifying material (in this context: 'guaranteed to be incompatible'; 'inbreeding'; 'uneducationable people'; 'very low IQ'; and references to the need for protection) did not bear a rational relationship to the purpose of conducting a discussion about the causes of the Cronulla disturbances, the Sydney Lebanese community and associated topics.

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<sup>23</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 77 ALD 331 at paras 80 and 81.

### **Good faith**

ACMA notes the comments of French J in the Federal case of *Bropho*<sup>24</sup> in relation to good faith:

A person acting in the exercise of a protected freedom of speech or expression under s 18D<sup>25</sup> will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. That is one way, not necessarily the only way, of acting in good faith for the purpose of s 18D. On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith.

ACMA notes the licensee's submission that, '...(i)t is also relevant from both an objective and subjective point of view that the presenter made deliberate efforts not to refer to people of a particular nationality or ethnicity.'

However, in the present case, any efforts that the presenter may have made were overshadowed by the clear connection that an ordinary reasonable listener would have made between his comments and people of Lebanese background as a group. The evidence does not disclose a conscientious endeavour was made to minimise the likelihood of vilification or to minimise the offence or insult humiliation or intimidation suffered by people affected by it.

Having found the program wanting in respect of the objective limb of good faith, it is not necessary to consider the subjective limb and ACMA finds that the program was not presented in good faith. However, ACMA notes that submissions were made in respect of the presenter's subjectively genuine attempt to consider the causes of the incidents at Cronulla.

### **Action Taken**

The licensee submitted<sup>26</sup> that:

An apology was aired on the day following the broadcast on the Channel 10 news and on 2GB.

The text of the apology was as follows:

2GB management, in consultation with (the presenter), wishes to unreservedly retract certain comments made in last night's show. At 11.20 last night (the presenter) made some comments about members of a community and their culture. We understand that those comments may have caused offence to some members of the Lebanese community and (the presenter) unreservedly retracts those comments and wishes to apologise for any offence caused. In consideration of community sensitivities and so as not to further inflame community concerns, (the presenter) has agreed to take leave early.

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<sup>24</sup> At para 102.

<sup>25</sup> Clause 1.4 of the code can be regarded, for these purposes, as the equivalent of section 18D of the Racial Discrimination Act.

<sup>26</sup> See letter from licensee's legal representatives dated 27 September 2006



Macquarie Radio Network appeals for all Australians, regardless of religion or ethnic origin, to work together to end violence on our streets.

In relation to the apology the licensee said that it:

...understood that some groups in the community were feeling upset at the time of the broadcast, and wished to ensure that those groups did not feel singled out by comments that were not directed at them. This was a highly charged environment, and our clients acted swiftly and responsibly, with the intention of calming emotions that were charged at the relevant time. Our view is that the broadcast of the apology achieved this purpose.

The licensee also noted that ‘in annual compliance training (which followed the broadcast), all presenters and production staff received reminders about the importance of ensuring that in discussing current affairs, criticisms of particular types of conduct is reasonable, but criticisms that are based on persons having any of the attributes listed in code 1.3(e) are not’.

ACMA notes that this is the second breach of clause 1.3 (e) by the licensee<sup>27</sup>. Accordingly, ACMA will be closely monitoring the licensee’s compliance with this provision of the code.

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<sup>27</sup> ACMA Investigation Report 1562

## 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 *The Open-Line Show* on 15 December 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 people of Lebanese background on the basis of their ethnicity and which was not presented reasonably and in good faith for one of the purposes specified in clause 1.4 of the code.

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

[Chris Chapman]

[Chris Cheah]

\_\_\_\_\_  
Signature of Member

\_\_\_\_\_  
Signature of Member

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

Dated this 16<sup>th</sup> day of November 2006

### **Scope of the Complaint**

The written complaint received by ACMA from the complainant on 16 February 2006 included a fax cover sheet which said, 'Please find enclosed a complaint form against broadcasts on 2GB radio along with supporting documentation being letters to and from the station'. The 'supporting documentation' comprised:

- a letter from the complainant to the Chief Executive Officer (CEO) of Radio 2GB dated 16 December 2005 (complainant's letter to the licensee, 16 December)
- a letter from the Chief Operating Officer (COO) of 2GB dated 20 December 2005 (2GB's letter to the complainant, 20 December)
- a letter from the COO of 2GB to the complainant dated 12 January 2006 (2GB's letter to the complainant, 12 January)
- a Commercial Radio Codes of Practice Listener Complaint Form from the complainant dated 13 January 2006 (Listener Complaint Form) and
- an ACMA Complaint Form from the complainant received by ACMA on 16 February 2006 (ACMA Complaint Form)

#### ***Complainant's letter to the licensee, 16 December***

- recorded that the complainant was perturbed by 'the direction that a number of presenters' (on 2GB) had taken and that he had formed the view that that 'a number' of them were 'inciting racial and religious hatred'
- referred, specifically, to comments by the presenter of the program and broadcast on 15 December 2005 (the broadcast which is the subject of this investigation)
- stated, 'I am extremely shocked and outraged that such comments can be made by the presenter. I am deeply hurt, particularly in the present climate of racial apprehensions, divisions, disharmony and many unreported race based attacks against members of my community'
- stated that the comments were 'totally unacceptable'
- noted that the complainant was writing to 'formally lodge' his complaint and to 'seek redress'
- said that the complainant would be taking the matter further and that he awaited the licensee's 'urgent reply to see if (they could) come to an understanding before this (matter) is escalated through every complaint and legal mechanism that is available'<sup>28</sup>

#### ***2GB's letter to the complainant, 20 December***

- thanked the complainant for the feedback and stated that the licensee would be 'happy to meet' with the complainant in the 'New Year' to discuss (his) suggestions

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<sup>28</sup> One of the steps suggested by the complainant was to 'sit down' with the licensee and explore avenues for improved future relations.

- noted that the COO would be on leave until 9 January 2006 and said, ‘but if you could contact me then to arrange a time it would be most appreciated’

***2GB’s letter to the complainant, 12 January***

- referred to the COO’s letter of 20 December (see above) and said that not sure whether the complainant had received it,
- his complaint had raised ‘some issues under the *Commercial Radio Codes of Practice*’
- said the COO understood that the complainant had ‘very strong objections to statements made by the presenter on 2GB on 15 December 2005
- said that 2GB’s management had reviewed a record of the broadcast and it was clear that some of the comments were ‘insulting and unacceptable’ and that they were not ‘authorised or condoned by 2GB and were most regrettable’ and that this had been conveyed to the presenter
- referred to the apology broadcast by the presenter on Channel 10 on 16 December 2005 and to a statement aired by 2GB on 16 December 2005
- requested the complainant to please ‘accept (the presenter’s) apologies and the apologies of Macquarie and Harbour Radio, for any hurt, harm or embarrassment caused by (the presenter) (to the complainant) and other Lebanese people
- advised the complainant of his right under the Commercial Radio Codes of Practice to refer his complaint to ACMA if not satisfied with the licensee’s response
- referred to the complainant’s letter of 16 December to 2GB and said that (2GB) was ‘interested in (the complainant’s) views and suggestions on training and would like to meet with (the complainant) to discuss’

***Listener Complaint Form***

- provided name, date and time of program complained about
- described Complaint Issue as ‘Inciting hatred on religious grounds etc.’
- described (relevant) Code Provision as 1.3

***ACMA Complaint Form***

- provided name, date and time of broadcast complained about
- described ‘Complaint Issue’ as ‘Inciting hatred on religious grounds’
- described (relevant) Code Provision as 1.3