



Australian Government
**Australian Communications
and Media Authority**

Investigation Report No. 1789

File no.	PF2006/2330
Licensee	Elmie Investments Pty Ltd
Station	4EL
Type of service	Commercial radio
Name of program	<i>John McKenzie Morning</i>
Date of broadcast	3 November 2006
Relevant code	Clauses 2.2(a), 2.2(c), 5.6 and 5.7 of the <i>Commercial Radio Australia Codes of Practice 2004</i>

Investigation conclusion

The Australian Communications and Media Authority (ACMA) finds that the licensee of 4EL, Elmie Investments Pty Ltd, breached clauses 5.6 and 5.7 of the *Commercial Radio Australia Codes of Practice 2004* (the Code).

The complaint

On 7 December 2006, the Australian Communications and Media Authority (ACMA) received a written complaint regarding a comment made on the program *John McKenzie Morning*, broadcast on 3 November 2006 by Elmie Investments Pty Ltd, the licensee of 4EL at the time of the broadcast¹. Not satisfied with the response provided by the licensee, the complainant forwarded the matter to ACMA for investigation.

The complainant alleged the following:

- a statement made by a guest on the program was inaccurate and the station made no attempt to verify the truth of this statement;
- there was no opportunity for listeners to respond to the statement, as the broadcast was terminated immediately after the statement was made; and
- the station did not correct the error when made aware of the inaccuracy.

These allegations have been investigated in relation to the licensee's compliance with clauses 2.2(a), 2.2(c), 5.6 and 5.7 of the *Commercial Radio Australia Codes of Practice 2004* (the Code).

The program

John McKenzie Morning is a three-hour talkback program, broadcast weekdays from 9.00 am – 12.00 noon.

According to the licensee:

The format of the show is both current affairs and open-line talk back. John introduces his daily show with an editorial, based on current issues, locally, nationally or internationally. He invites listeners to "have their say" through our open-line...

The broadcast complained of included an interview with a Councillor from Cairns City Council about coral spawning, resulting in 'sludge' along the coastline, and the issue of residential development along the foreshore at Clifton Beach, Cairns, and associated road changes.

Assessment

In assessing the complaint, ACMA has considered the following:

- the complainant's submission;
- comments and audio disc recording of the broadcast provided to ACMA by the licensee; and
- an audio cassette recording of the Councillor's apology and withdrawal of the statement in question, broadcast on the program on 9 January 2007, and provided to ACMA by the licensee.

¹ The licensee of 4EL from 31 January 2007, Prime Radio (Cairns-AM) Pty Limited, has required Elmie Investments Pty Ltd to make submissions in this investigation (see letters to ACMA dated 19 January and 21 March 2007)

Issue 1: Whether factual material was presented accurately and reasonable efforts were made to correct substantial errors of fact at the earliest possible opportunity

Relevant section of code

Clause 2.2(a) of the Code states:

Code of Practice 2: News and Current Affairs Programs

2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:

- (a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity.

Complainant's submission

- 'The statement made by the Station guest, and broadcast by the Station, was factually untrue.'
- 'The subject matter broadcast was provocative and the Station made no attempt to verify the truth of the statement made.'
- 'Having been made aware of the facts, the Station took no action to rectify the matter.'

Licensee's submission

- The comments that were made regarding [x] and the Labor Party were the opinion of the Councillor, and he was not prompted by the presenter.

Finding

The delegate is of the view that the licensee did not breach clause 2.2(a) of the Code in the broadcast of the interview segment with the Councillor on the *John McKenzie Morning* program on 3 November 2006, as a statement by the interviewee is not factual material and therefore not subject to the accuracy requirement at clause 2.2(a).

Reasons

The Code requires that factual material in news and current affairs programs is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity. Expressions of opinion, implications and inferences do not constitute factual material and are not subject to the requirement for accuracy.

In assessing whether the requirements of the Code have been met, the delegate has considered what an 'ordinary, reasonable listener' would have understood the program concerned to have conveyed, rather than on personal reactions by individuals. 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.²

The complainant referred to the following comment made by the Councillor, which occurred at approximately 10.22 am:

Councillor: So, what this was about was that [x], who actually created this group out here, it's a Labor Party group, and you know, he's very involved with them and supports them and everything... [complainant's underlining]

The reference to 'this group' concerns a community group opposed to the planned foreshore development.

In regard to the Councillor's remark, the complainant stated the following:³

- The Association is incorporated under the Associations Incorporation Act 1981
- Officers of the Association are elected, in a Public Meeting, by members of the Association
- The Association has no connection with the Labor Party
- Association dealings with [x] are as appropriate between a Community group and our Member of Parliament

The complainant's main concern seems to be the statement that the community group is 'a Labor Party group'. The delegate is of the view that the ordinary, reasonable listener would have understood that the statement made by the Councillor about 'this group' and its connection with the Labor Party was an opinion expressed by the Councillor, rather than factual material presented by the licensee. In particular, the delegate notes the following:

- the segment focused on the various components of the planned foreshore redevelopment at Clifton Beach, Cairns, and not on [x], the Labor Party or the specific community group opposed to the development. For example, the Councillor provided information about and expressed his views on the nature of the redevelopment, including the potential aesthetic look of the area. While discussing these matters, the presenter and the Councillor made some general references to associated community concerns;
- the statement was made by the Councillor and not the interviewer/presenter;
- the Councillor's opinion about 'this group' and its association with the Labor Party was made at the end of the commentary (which was approximately six minutes in duration) and was not given any prominence. Nor was the statement made in response to a direct question from the presenter; and
- in expressing his opinion about community concerns associated with the redevelopment, the Councillor did not name the organisation or group which he implicitly referred to. Nor did the presenter name the group at any other time during the interview.

² *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164-167.

³ Complainant's letter to licensee dated 12 November 2006

As the statement made by the Councillor is not factual material, it is not subject to the requirement for accuracy under clause 2.2 (a) of the Code.

Issue 2: Whether reasonable efforts were made or reasonable opportunities given to present significant viewpoints

Relevant section of code

Clause 2.2(c) of the Code states:

Code of Practice 2: News and Current Affairs Programs

2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:

[...]

- (c) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community.

Complainant's submission

- 'There was no opportunity for anybody hearing the broadcast to respond to the Councillor's statement, the broadcast being terminated immediately after the statement was made.'
- '...this is not the first occasion that this Councillor has raised the ire of members of the Association. However, it has been the experience of those members that there is little, or no, opportunity to respond as stated by the Station, as they have never been able to be connected as talkback respondees.'

The complainant did not provide details regarding previous attempts by members to contact the station and did not indicate whether any member had attempted to contact the station following the broadcast of the Councillor's statement on 3 November 2006.

Licensee's submission

- The Councillor contacted the radio station and spoke about the issues relevant to the Clifton Beach area.
- The comments that the Councillor made regarding [x] and the Labor Party were not prompted by the presenter.

Finding

The delegate is of the view that the licensee did not breach clause 2.2(c) of the Code in the broadcast of the interview segment with the Councillor on the *John McKenzie Morning* program on 3 November 2006, as reasonable efforts were made to present significant viewpoints within the program.

Reasons

The Code requires that a broadcaster make reasonable efforts or provide reasonable opportunities to present significant viewpoints when dealing with issues of immediate relevance to the community, although this need not occur in the same program.

As noted above, the interview with the Councillor focused on various aspects of the planned foreshore redevelopment and not on the community group, [x] or the Labor Party. Accordingly, the delegate is of the view that, in this case, the issue of immediate relevance to the community was the redevelopment of the Clifton Beach foreshore area and associated community concern.

While the interview with the Councillor provided an opportunity for him to express his views on the foreshore redevelopment, it did not preclude the representation of community concern regarding this issue. For example, the presenter commenced his interview with the Councillor on this issue, noting that there is 'ongoing' community concern regarding the redevelopment. The presenter also probed the Councillor about the nature of the development and potential misperception regarding public access. Accordingly, the delegate considers that a significant viewpoint on the issue of immediate relevance to the community was presented in the program.

The complainant's main concern seems to be with the above-mentioned comment made by the Councillor, regarding the community group's association with the Labor Party. The complainant noted that there was no opportunity for listeners to call in and dispute this statement, as the broadcast was terminated immediately following the statement.

The Code does not require the licensee to present significant viewpoints on an issue of immediate relevance to the community within the same program. In this case, the delegate considers that it was not necessary for the licensee to present a counter viewpoint in the same program, given that the statement in question was an off-the-cuff remark made by an interviewee at the end of a six-minute discussion, which focused primarily on the nature of the foreshore redevelopment.

Issue 3: Whether the licensee provided a substantive response to the complainant

Relevant section of code

Clauses 5.6 and 5.7 of the Code state:

Code of Practice 5: Complaints

Advice in writing

- 5.6 Written complaints must be conscientiously considered by the licensee and the licensee must use its best endeavours to respond substantively in writing within 30 days of the receipt of the complaint. If the licensee needs to investigate the complaint or obtain professional advice and a substantive response is not possible within 30 days, the licensee must, in any event, acknowledge receipt of the complaint within 30 days and provide a final reply within 45 days of receiving the complaint.

- 5.7 The response must inform the complainant that he or she has the right to refer the complaint to the ABA [now ACMA] if the complainant is not satisfied with the response by the licensee.

Complainant's submission

- '[The complainant] takes issue with the Station's response.'

Licensee's submission

In its letter of 22 November 2006 to the complainant, the licensee advised that:

In reference to your letter dated 12th November, 2006.

If the [complainant] has an issue with [the Councillor], I suggest you take the matter up directly with him.

You mentioned there was a statement made on air, this would have been the appropriate time to call our open line number and "have your say" that is how the show is programmed. This radio station has not breached a code and we do not make statements on behalf of organisations or individuals.

In its submission of 8 January 2007 to ACMA, the licensee stated that:

I was on annual leave from November 12th through to November 22nd, the day I received and replied to the letter. By this stage I [the Station Manager] did not believe there was immediate relevance to the issue and that was the reasoning behind my asking that the [complainant] to contact [the Councillor] direct.

In its 21 March 2007 submission to ACMA⁴, the licensee advised that it did not agree with the preliminary view that it breached clause 5.6 of the Code:

(a) Requirement to 'respond substantively in writing'

...

It should be noted that the letter of complaint dated 12 November 2006 did not refer to specific provisions of the Code, so the station manager needed to identify what the complainant's key concerns were (for the purposes of the Code or otherwise). The station manager understood that a key issue was whether or not the complainant had been provided with a reasonable opportunity to present a view that was contrary to that expressed by [the Councillor]. In that context, Elmie's view is that it was reasonable for the station manager's response to highlight that the program format of the *John Mackenzie's Morning* program referred to the format of the program as providing opportunities for the complainant to make their view heard.

Therefore, it should not be concluded that the station manager's response to that aspect of the complaint was not a substantive response. While the station manager could have discussed the other key concern raised in the complaint (accuracy) in more detail, Elmie's

⁴ Submission from Gilbert & Tobin, on behalf of Elmie Investments Pty Limited, dated 21 March 2007.

view is that this should not mean that the entire response should be dismissed as a response that was not substantive.

(b) Requirement to ‘conscientiously consider’ the complaint

Further, after concluding that the station manager’s letter did not amount to a ‘substantive response’, the Preliminary Report goes on to find that the licensee did not conscientiously consider the matters raised by the complainant.

...

Elmie requests that the final investigation report refer to the fact that efforts were made by the station manager to contact [the Councillor] about whether he would be prepared to retract the statement that he had previously made on air (consistent with the wishes of the complainant). While the station manager did not consider the Code had been breached, the station manager applied these efforts in order to address the complainant’s concerns. The station manager went to some lengths to contact [the Councillor], and ultimately managed to contact him while he was on vacation in India during January 2007. [The Councillor] agreed to retract his statement on air. The station manager organised for this retraction to be recorded and then broadcast at 11.45 am on 9 January 2007.

Taking these subsequent actions into account, to state that the station manager did not give conscientious consideration to the complaint (throughout the relevant period) is a somewhat harsh assessment. In the interests of fairness to the station manager and to 4EL, Elmie requests that the additional efforts undertaken be acknowledged in the final version of the report. Elmie also requests that the ACMA reverse its preliminary finding that the station manager did not act in a conscientious way (having regard to all the circumstances). This appears to be a separate issue to the issue of whether a substantive response was provided in writing.

In regard to clause 5.7, the licensee submitted in its 21 March 2007 letter to ACMA that:

Elmie does not have additional submissions to make in respect of Code 5.7. However, it is noted that the complainant’s subsequent email dated 23 November 2006 (attached) made it clear that the complainant understood it had the right to refer the matter to the ABA/ACMA.

Finding

The delegate is of the view that the licensee:

- breached clause 5.6 of the Code, as the written complaint was not conscientiously considered and not responded to substantively;
- breached clause 5.7 of the Code, as the response to the complainant did not inform them that they have the right to refer the complaint to ACMA if the complainant was not satisfied with the response.

Reasons

Clause 5.6 of the code requires licensees to conscientiously consider written complaints and to ‘respond substantively in writing’ to them either within 30 days or within 45 days when an acknowledgment is provided within 30 days.

‘Conscientious’ is defined in the Macquarie Dictionary as:⁵

conscientious /*adjective* controlled by or done according to conscience; scrupulous: *a conscientious judge; conscientious conduct.* – **conscientiously**, *adv.* – **conscientiousness**, *n.*

‘Scrupulous’ is defined as:⁶

scrupulous /*adjective* **1.** having scruples; having or showing a strict regard for what is right. **2.** punctiliously or minutely careful, precise, or exact. – **scrupulosity** /, **scrupulousness**, *n.* – **scrupulously**, *adv.*

In this instance, while the licensee considered the complaint, this was not done conscientiously, as suggesting that the complainant take the matter up directly with the Councillor cannot be regarded as having considered the complaint scrupulously.

In addition, while the licensee provided the complainant with a written response within 30 days, the delegate notes the licensee suggested that the complainant should have called the ‘open line’ to express his or her views on the topic and advised that it has not breached the Code. This cannot be regarded as a substantive response, as it did not specifically address the issues raised in the complainant’s letter of 12 November 2006.

The delegate therefore considers that the licensee did not conscientiously consider the matters raised by the complainant and did not respond substantively to the written complaint.

Further, the delegate notes that the licensee’s written response did not advise the complainant that they had the right to refer the complaint to ACMA if not satisfied with the response by the licensee.

The delegate notes from the licensee’s submission of 21 March 2007 that the complainant understood that it had the right to refer the matter to ACMA. While this may be the case, the onus is on the licensee to advise the complainant of their right to make such as referral to ACMA.

Action taken

In regard to future compliance with clause 5.7 of the Code, in its 21 March 2007 submission to ACMA, the licensee (Elmie Investments Pty Ltd) noted that this submission will also be forwarded to the new licensee of 4EL (Prime Television Limited) for the ‘purposes of future responses to complaints by 4EL’.

ACMA’s records indicate that 4EL has had only one other breach finding in regard to clauses 5.6 and 5.7. This was in relation to a matter which was investigated by the

⁵ Macquarie Dictionary (Third edition), p 465

⁶ Macquarie Dictionary (Third edition), p 1912

former ABA in 2004. The delegate notes that the licensee (Elmie Investments Pty Ltd) does not agree with ACMA's finding regarding clause 5.6. However, in forwarding its 21 March 2007 submission to ACMA to the new licensee (Prime Television Limited), the delegate is satisfied that the licensee is taking some steps to ensure future compliance with these clauses.

Accordingly, ACMA is satisfied that the actions are commensurate in this instance and will continue to monitor the licensee's performance in regard to these Code provisions.

Decision

I, Phyllis Fong, Manager, Investigations Section, being the appropriate delegated officer of the Australian Communications and Media Authority, determine for the above reasons that the licensee of 4EL, Elmie Investments Pty Ltd, in the broadcast of *John McKenzie Morning* on 3 November 2006:

- did not breach clause 2.2(a) of the *Commercial Radio Australia Codes of Practice 2004* (the Code), as a statement by the interviewee is not factual material and therefore not subject to the accuracy requirement at clause 2.2(a);
- did not breach clause 2.2(c) of the Code, as reasonable efforts were made to present significant viewpoints in the interview segment within the program;
- breached clause 5.6 of the Code, as the written complaint was not conscientiously considered and not responded to substantively;
- breached clause 5.7 of the Code, as the response to the complainant did not inform them that they have the right to refer the complaint to ACMA if the complainant was not satisfied with the response.

Signed: _____
Phyllis Fong

dated this 23 day of April 2007.