

Investigation Report No. 2540

File No.	ACMA2011/154
Licensee	Harbour Radio Pty Limited
Station	2GB
Type of Service	Commercial radio broadcasting
Name of Program	<i>The Alan Jones Breakfast Show</i>
Dates of Broadcast	8 and 11 February 2010
Relevant Code	Clauses 1.3(a) [inciting/encouraging violence], 2.2(a) [accurate presentation of factual material] and 2.2(c) [presentation of significant viewpoints] of the <i>Commercial Radio Australia Codes of Practice 2004</i>

Investigation conclusion

The licensee of 2GB, Harbour Radio Pty Limited, in relation to the broadcast of *The Alan Jones Breakfast Show* on 8 February 2010 and 11 February 2010:

- did not breach clause 1.3(a) of the *Commercial Radio Australia Codes of Practice 2004*.
- breached clause 2.2(a) of the *Commercial Radio Australia Codes of Practice 2004*;
- breached clause 2.2(c) of the *Commercial Radio Australia Codes of Practice 2004*;

The complaint

On 16 December 2010 the Australian Communications and Media Authority (the ACMA) received a complaint regarding comments made during three segments of *The Alan Jones Breakfast Show*, broadcast by Sydney commercial radio station 2GB. The complainant alleged that these segments included factual material that was presented inaccurately, were not balanced and contained comments likely to incite violence and brutality.

The program

The Alan Jones Breakfast Show is broadcast by the licensee of 2GB, Harbour Radio Pty Limited (the licensee), on weekdays between 5.30 am and 9.00 am. A substantial programming element is talkback. However, the program also includes news, commentary by the presenter, discussions and interviews relating to current events.

The complaint referred to three separate segments, which all dealt with the issue of the operation, implementation and administration of the native vegetation laws by the (then) Department of Environment and Climate Change (DECC)¹.

Segment 1: (approximately 2½ minutes) broadcast on 8 February 2010, related to the clearing of native vegetation and a dispute between a farmer and DECC. The program's presenter, Alan Jones, referred to, and commented on, a 'show cause notice' sent by DECC in January 2009.

Segment 2: (approximately 11½ minutes) broadcast on 11 February 2010, related to a (separate) dispute between a landowner and DECC that began in 2006 and included an interview with the landowner in question.

Segment 3: (approximately 2½ minutes) broadcast on 11 February 2010 and approximately one hour after Segment 2, related to the same dispute as Segment 2 and involved a conversation between the program's presenter, Alan Jones, and a phone-in caller.

During these segments Alan Jones was highly critical of the actions of DECC, as was the interviewee in Segment 2 and the phone-in caller in Segment 3.

Transcripts of Segments 1 and 3 and a summary of Segment 2 are at Attachment A.

Assessment

The assessment is based on audio recordings of the relevant material provided to the ACMA by the licensee and written submissions from the complainant and the licensee.

In assessing whether the Codes have been breached the ACMA has considered what an 'ordinary, reasonable' listener would have understood the material broadcast to have conveyed.

¹ In 2009 the Department of Environment and Climate Change changed its name to the Department of Environment, Climate Change and Water. As the Department was referred to as "DECC" in the relevant broadcasts, the ACMA has referred to it as "DECC" throughout this report. The responsibilities of that Department have since been transferred to an office within the NSW Department of Premier and Cabinet.

Australian courts have considered an ordinary, reasonable listener/viewer to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person 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

Issue 1: Whether the broadcasts contained material that was likely to incite, encourage or present for its own sake violence or brutality (Segments 2 and 3)

Relevant code provision

Clause 1.3(a) of the *Commercial Radio Australia Codes of Practice 2004* (the Codes) states:

- 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;

Complainant's submissions

In its letter of complaint to 2GB the complainant wrote:

In addition [the complainant] complains about the naming of, and Mr Jones' behaviour towards, an individual staff member. [The complainant] considers statements such as "We'll find out where he goes next ..." to be intimidating and we argue likely to incite violence or brutality towards that officer or other DECCW officers [...]. He also made additional comments between 8.30 am and 9.00 am on that same morning and inferred and then called for the individual to lose his job. This is unacceptable.

In its letter of complaint to the ACMA, the complainant wrote:

[The complainant] submits that the proper test is to look at the segment as a whole and consider whether an ordinary reasonable listener would regard the program as likely to urge on or stimulate violence.

Licensee's submissions

In its letter of response to the complainant the licensee wrote:

In our view, none of the material contained in the Segments urges, inspires or stimulates any person to take violent action against [name], the named officer of DECCW.

The only mention of violent action in any of the Segments is a reference to murder. This reference is made at the opening of the second Segment, transcribed below:

"Over the last two and a half years the farmer I am about to speak to has had his life slowly destroyed, and his farming business destroyed, by the NSW Department of Environment and Climate Change. I mean, the behaviour of this department is the kind of behaviour that leads people to murder ..."

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

In our view, this reference to murder is hyperbolic and intended to highlight Mr Jones' opinion of the impact of departmental practices on landowners. The reference to murder is undirected and is abstract, and does not call for action by any person.

While we can appreciate that the statement "*We'll find out where he goes next*" in the second Segment could, in isolation, be considered intimidating, we do not consider that it is of sufficient severity to constitute an incitement to violence. In addition, in the context of the second Segment as a whole, we suggest that this statement reflects Mr Jones' broader opinions that:

- the Department's administration of the native vegetation laws in [the landowner's] circumstances, has itself caused hardship and distress; and
- the Department should be wound up and its people sacked.

While we recognise that these are strongly held opinions that are expressed in somewhat colourful language, we consider that the expression of such opinions does not contravene the Code.

Finding

The licensee, in relation to the broadcast of the current affairs program *The Alan Jones Breakfast Show*, on 11 February 2010, did not breach clause 1.3(a) of the Codes in that these programs did not contain material that was likely to incite, encourage or present for its own sake violence or brutality.

Reasons

The ACMA adopts the general approach set out below in applying clause 1.3(a) of the Codes.

The ACMA considers the natural, ordinary meaning of the language, context, tenor, tone and any inferences that may be drawn.

Once this test has been applied to ascertain the meaning of the broadcast material, it is for the ACMA to determine whether the material has breached the Codes.

Interpretation of clause 1.3(a) of the code

'Likely'

Clause 1.1(a) states that a licensee must not broadcast a program which is 'likely' to have an effect indicated in those clauses. The term 'likely' has been interpreted to convey the notion of a real and not remote possibility; something which is probable.³

'Incite' and 'encourage'

The *Macquarie Dictionary (fifth edition)* gives the following meanings for the words 'incite' and 'encourage':

incite

to urge on; stimulate or prompt to action.

³ See the discussion in *Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* (1994) 34 ALD 773 at 778-779.

encourage

1. to inspire with courage, spirit or confidence.
2. to stimulate by assistance, approval, etc.

In deciding whether there has been a breach of clause 1.3(a) of the Codes, having established the meaning conveyed by the program, the ACMA then considers whether it was likely to:

- urge on violence, stimulate violence, or prompt a person to take violent action; or
- inspire a person inclined to violence with courage, spirit or confidence; or
- stimulate violence by assistance or approval.

The ACMA will consider not only the likely effect of the program on the regular listener, but also the likely effect on other persons, including persons with characteristics, experiences or other attributes beyond those of the core listener demographic.

In applying this approach, the ACMA has assessed whether the comments of the program presenter would have been likely, in all of the circumstances, to have incited, encouraged or presented for its own sake violence or brutality.

During Segments 2 and 3, apart from referring to the behaviour of DECC as being 'the kind of behaviour that leads people to murder', Alan Jones names an employee of DECC and:

- refers to him several times as a 'turkey';
- states that he 'better start checking the address of the nearest Centrelink Office'; and
- states that 'this bloke [name of DECC employee], who's giving you grief, we'll find out where he goes next'.

The ACMA considers that an ordinary, reasonable listener would have understood the segments in question, as a whole, to pivot around what Alan Jones regards as the heavy-handed treatment of landowners and administration of native vegetation laws by DECC, and the particular remarks made by Mr Jones to question whether the employee named by him should keep his job, rather than to prompt violence or brutality against him.

The complainant's concern is certainly understandable given that the presenter's comments contained a reference to 'murder' and included a certain level of hostility directed towards DECC in general and one of its employees in particular.

However, for the purposes of the assessment of this broadcast against clause 1.3(a) of the Codes, the ACMA is of the view that the matter broadcast was not likely to incite or encourage listeners to violence or brutality, or present violence or brutality for its own sake.

The ACMA acknowledges that the complainant considered the comments to be offensive and that they may have invoked a similar reaction in other listeners. However, they were not, either in and of themselves or via the delivery and tone,

strong, intense or inflammatory enough to be capable of being construed as urging violence or brutality.

In this regard it is noted that the comments were brief rather than prolonged or emphasised and were made in the wider context of a discussion about ongoing disputes between landowners and DECC and, in the opinion of Mr Jones, the heavy-handed way in which native vegetation laws are administered. The comments were not sufficiently forceful to the extent that they would have induced a response towards DECC employees strong enough to have been captured by the wording of clause 1.3(a) of the Codes.

It is considered that the reference to 'murder' was not directed towards any individual, was not meant to have been taken literally and would not have been taken literally by listeners of the program.

Furthermore, the presenter's comments regarding the individual employee of DECC do not contain words or commands that incited, urged or encouraged listeners to take violent action against employees of DECC, or invited listeners to engage in violent behaviour generally.

Accordingly, the licensee did not breach clause 1.3(a) of the Codes.

Issue 2: Whether the broadcasts contained factual material that was not presented accurately (Segments 1 and 2)

Relevant code provision

Clause 2.2(a) of the Codes states:

- 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 submissions

The complainant has cited three instances of what it considered to be inaccurate presentation of factual material:

1. In Segment 1 the show cause letter was not sent by DECC to the owner of the property on which the clearing took place, as stated by Alan Jones, but to the owner of the adjacent property, who was alleged to have illegally cleared land that did not belong to him.
2. In Segment 1 the show cause letter sent by DECC did not threaten the landowner with a \$1.1 million fine, as stated by Alan Jones, but with a penalty infringement notice for a much lesser amount.
3. In Segment 2 it was not made clear that the dispute between DECC and the landowner was because of alleged illegal clearing of native vegetation.

In its letter of complaint to 2GB the complainant stated:

Segment 1: 8.10 am on 8 February 2010

[The complainant] complains that Mr Jones presented factual material inaccurately. In the segment, Mr Jones refers to the native vegetation clearing of a small strip of land and a show cause letter allegedly sent to the owner of that property.

While Mr Jones does not name the farm or the person concerned, [the complainant] has checked its records and believes Mr Jones is referring to alleged illegal native vegetation clearing on property at [name of property]. If [the complainant] is mistaken in that regard can you please inform us?

Assuming Mr Jones was referring to the alleged illegal native vegetation clearing at [name of property], [the complainant] complains that the material presented was factually inaccurate. In particular:

- (i) It is clear on the face of the show cause letter that it was sent, not to the owner of the property on which the clearing occurred, but rather to a neighbour, who DECCW alleges authorised the clearing and who did not have authority to arrange such clearing of someone else's property; and
- (ii) DECCW did not threaten that neighbour with a fine of \$1.1 million but rather asked the neighbour to show cause why a penalty infringement notice should not be issued. If the facts had been properly checked Mr Jones would know that the amount of a penalty infringement notice for illegal native vegetation clearing is for the amount of \$3,300 for an individual.

I attach a copy of the show cause letter concerned (with identifying material deleted to maintain privacy, however handwritten annotations have been provided to highlight the relative relationships between the parties mentioned in the letter).

[...]

Segment 2: 7.45 am on 11 February 2010

[The complainant] believes that there were a number of factual inaccuracies in this segment. Rather than detailing those inaccuracies, the complaint can be summarised as follows. At no point in the segment does Mr Jones refer to the fact that DECCW has been involved in regulatory activity at [name of landowner] farm only because it alleges [name of landowner] has cleared large amounts of vegetation illegally. DECCW's response has been to attempt to secure the remediation of damage caused by that alleged illegal clearing while working with [name of landowner] to ensure any further clearing is carried out lawfully.

In its letter of complaint to the ACMA, the complainant wrote:

Segment 1: 8.10 am on 8 February 2010

(i) Owner v neighbour

2GB's response to this aspect of the complaint is in essence that the redacted letter sent by [the complainant] to 2GB with its complaint could lead to dual interpretations. This response is unacceptable for a number of reasons:

The copy of the letter sent to 2GB accompanying the complaint was redacted to avoid identifying the individuals to whom the Notice to Show Cause was sent. This was done at least partially because [the complainant] was not certain which letter was discussed by Mr Jones in the segment complained of. The handwritten notation on the redacted version clearly sets out that the person to whom the letter was addressed is not the person who owned the property where the clearing was identified. The handwritten notation also clearly sets out that the property owned by the addressee is not the property where the clearing was identified. Indeed the redacted letter says that the properties are adjacent.

Assuming that 2GB had the unedited version of the letter, it is abundantly clear on the face that it was sent, not to the owner of the property on which the clearing occurred but rather to someone who did not have authority to clear on the property. If anyone had difficulty understanding that, reasonable inquiries should have been made to clarify it. While it is clear that Mr Jones holds strong views that existing native vegetation laws are inappropriate, surely he does not suggest that it is reasonable for someone to trespass on a neighbour's land. Even the most cursory checking of the facts would have revealed this.

Instead Mr Jones chose to broadcast a segment heavily critical of DECCW where the whole premise of the story was that a letter was sent concerning such a small strip of clearing on a farmer's own land.

(ii) \$1.1 million dollars

2GB's response to this aspect is accurate but it is heavily selective. It omits the sentence which appears in the letter directly in between the two quoted passages. That sentence makes the purpose of the letter abundantly plain. The broadcast itself omitted any reference to this sentence. Again 2GB chose to heavily criticise DECCW because a farmer was facing a \$1.1 million fine for such a small strip of clearing (on his own land) when all of the objective material was to the contrary.

[...]

Segment 2: 7.45 am on 11 February 2010

2GB responded to [the] complaint by referring to isolated references in the segment. When viewed in the context of the segment as a whole, [the complainant] does not believe they represent a genuine attempt to present the facts. We therefore reiterate our complaint that the segment is inaccurate for the reasons stated.

Licensee's submissions

In its letter of response to the complainant the licensee wrote:

[The complainant] identifies the following 2 inaccuracies in Segment 1.

- (i) That the DECCW's show cause letter (attached to the complaint) was NOT sent to the owner of the land on which land clearing occurred, but rather, to a neighbour to the subject land and the neighbour, rather than the landowner, is alleged to have cleared that land.

- (ii) That the DECCW did not threaten the neighbour with a \$1.1 million fine but with the issue of a penalty infringement notice for a much lesser amount.

It appears that both of these points relate to an interpretation of the show cause notice. In our view, there are alternative interpretations of the show cause notice which are consistent with the contents of Segment 1.

(i) **Owner vs neighbour**

Paragraph 2 of the show cause letter is in the following terms (brackets and underline added by me):

The monitoring indicates that around October 2008 native vegetation on the following areas was cleared:

A strip of land [approximately 150m long, varying from 18m to 26m wide, adjacent to the boundary with Cheese Factory Road, Bodalla,] owned by YOU.

Grammatically, and logically, we suggest that the ownership reference at the end of the sentence refers back to the 150 metre strip and not to the adjacent property address. The bracketed words – which describe length, wide and adjacent address – merely identify the strip of land but do not relate to the ownership allegation at the end of the sentence.

(ii) **\$1.1 million**

The final paragraph of page 1 of the show cause letter is in the following terms.

The maximum penalty for clearing native vegetation in contravention of the Act is \$1,100,000 with a further maximum daily penalty of \$110,000.

The second page of the show cause letter contains the following paragraph:

Any submissions you make must be submitted to DECC no later than 5 pm on Friday, 13 February 2009 after which time DECC will consider any submission made and take appropriate action.

While the DECCW's primary and immediate threat in the show cause notice is to issue a penalty infringement notice, DECCW does not foreclose, and in fact refers explicitly to, the ultimate penalty that is available – being the \$1.1 million penalty. There can be no other purpose for including the reference to that penalty other than to draw the addressee's attention to that ultimate possible penalty – otherwise the reference would not have been included in the show cause notice.

Because the show cause notice is open to dual interpretations on each of the 2 points above, we do not consider that Code 2.2(a) has been breached.

Segment 2

You have indicated that [the complainant] considers that there were a number of factual inaccuracies. As suggested by me below, I would be happy to meet up with you to discuss the details of those inaccuracies so that I can understand them more specifically.

However, you have specified that Mr Jones does not at any point in Segment 2 refer to the fact that DECCW had been involved in regulatory activity at [name of landowner] farm only because it alleges [name of landowner] has cleared large amounts of native vegetation illegally.

We agree that Mr Jones does not make a statement in these terms. However, I have reviewed Segment 2 several times and in my view, it is clear that DECCW have acted on the basis of illegal (or allegations of illegal) clearing.

The following 3 express references are contained in Segment 2:

- [Name of landowner] indicates that the DECCW officer told him that the road that he was constructing was too wide, and deemed illegal, since it exceeds the 6 metre limit.
- Mr Jones indicates as follows:
So it has been two and a half years of waiting for this mob, the DECCW, to charge you with alleged clearing ...
- [Name of landowner] states that:
Without a PVP⁴ to do this work, you are in breach of the Act ...

Finding

In relation to the broadcast of the current affairs program *The Alan Jones Breakfast Show*, on 8 February 2010, the licensee breached clause 2.2(a) of the Codes in that it did not present factual material accurately in relation to a statement made during Segment 1.

Reasons

In determining whether or not a statement complained of was compliant with the licensee's obligation to present factual material accurately, having regard to the circumstances at the time of preparing and broadcasting the program, the ACMA takes into account certain general considerations in relation to accuracy that are set out at Attachment B.

The three instances of factual inaccuracies alleged by the complainant are discussed separately below.

Alleged factual inaccuracy 1 – Segment 1 – owner vs neighbour

Mr Jones refers to the debate about farmers' rights to clear their own land and states that he has received correspondence from a farmer who has received a letter from DECC stating that:

He, the farmer, must show cause to the Department of Environment and Climate Change, who have discovered that he cleared a strip of land on his property at Bodalla.

⁴ Property Vegetation Plan

The ACMA is of the view that, due to the unequivocal nature of the language, the above is a statement of fact rather than opinion and would have been understood to be a statement of fact by the ordinary, reasonable listener.

Both the licensee and the ACMA were provided by the complainant with a copy of the letter sent by DECC to the farmer and referred to by Mr Jones. The letter was redacted by the complainant due to privacy considerations but was also annotated to 'highlight the relative relationships between the parties mentioned in the letter'.

After examining this letter it is apparent that the show cause notice was issued to a person as a result of that person clearing land on an adjacent property, rather than on their own property. This much would have been clear either from the original letter or from the redacted and annotated version of the letter provided to the licensee and to the ACMA. However, Mr Jones clearly states that the show cause notice was issued to a farmer because 'he cleared a strip of land on his property at Bodalla' (emphasis added). This statement is therefore inaccurate.

The licensee has stated that, in its opinion, 'there are alternative interpretations of the show cause notice'. Whether or not this is the case, the obligation is: "In the preparation... of current affairs programs, a licensee must ensure that ... factual material is presented accurately..." (emphasis added). Therefore, if a licensee is unsure as to key facts, it should make reasonable inquiries to ascertain them. This is particularly so with key facts that will form the basis of significant claims or criticisms.

In this case Segment 1 is solely concerned with farmers' rights to clear vegetation on their own land, because of the contents of the show cause notice. It turns out that Mr Jones' strident criticism of DECC, on this aspect at least, was based on an important factual error that could and should have been checked.

Clause 2.2(a) has therefore been breached on this occasion.

Alleged factual inaccuracy 2 – Segment 1 - \$1.1 million

Towards the end of this segment Mr Jones goes on to say:

He's been asked to show cause. And the letter said, quote, the maximum penalty for clearing native vegetation in contravention of the Act is \$1.1 million with a further maximum daily penalty of \$100,000 ... No wonder farmers are walking off their land. ... He's facing fines of over \$1 million.

Mr Jones' quote from the letter sent by DECC to the farmer in question is essentially accurate⁵. Although the complainant has stated that 'the amount of a penalty infringement notice for illegal native vegetation clearing is ... \$3,300 for an individual', this is not stated anywhere in the letter that was referred to by Mr Jones in the segment. The letter states that the maximum penalty for illegal clearing of native vegetation is \$1,100,000 and in the next paragraph states that 'The purpose of this letter is to [...] allow you an opportunity to show cause as to why you should not be issued with a penalty infringement notice under section 43 of the Act'. The ACMA is

⁵ The letter states that the 'further maximum daily penalty' is \$110,000, and not \$100,000 as stated by Mr Jones in the broadcast. There was no complaint about this matter and it has not been investigated.

of the view that anyone reading the letter could reasonably assume that the person to whom the letter was directed was facing a potential fine of up to \$1,100,000.

Furthermore, the comment 'No wonder farmers are walking off their land' is clearly an expression of opinion rather than of fact and would have been understood as such by the ordinary, reasonable listener.

Clause 2.2(a) has therefore not been breached on this occasion.

Alleged factual inaccuracy 3 – Segment 2 – illegal clearing of land

The complainant did not allege that any specific statements made during this segment were inaccurate, but rather that the inaccuracy stemmed from the fact that DECC's involvement in regulatory activity against the landowner being interviewed by Mr Jones was due to alleged illegal clearing of land by that landowner and that this was not explicitly referred to by Mr Jones.

As stated in Attachment B (general considerations), if the omission of some factual material means that the factual material actually broadcast is not presented accurately, this could amount to a breach of clause 2.2(a) of the Codes.

During the segment the landowner himself indicates to Mr Jones that his dispute with DECC has arisen because a road he had been constructing was illegal as it was too wide. Mr Jones also makes reference to the fact that the landowner has been charged with 'alleged clearing'. Reference is also made a number of times to the fact that negotiations between the landowner and DECC are continuing and that the landowner and representatives from DECC will be meeting in the near future to discuss the issue.

In this case the ACMA considers that there is enough information in the segment for the ordinary, reasonable listener to conclude that DECC's intervention is because it believes that native vegetation has been illegally cleared by the landowner who was interviewed on-air by Mr Jones.

Clause 2.2(a) has therefore not been breached on this occasion.

Licensee's response to preliminary breach finding

The licensee was provided with a copy of the Preliminary Investigation Report and asked to provide comments on its preliminary findings. It argued that, in determining whether or not the broadcasts breached clause 2.2(a) of the Codes, the ACMA should take into account the wording of the now current Codes, which came into effect on 10 June 2010, four months after the broadcasts in question. The new factual accuracy provisions state that 'a licensee must use reasonable efforts to ensure that factual material is reasonably supportable as being accurate'. The licensee argued that under these revised (and in the licensee's opinion, more practical) provisions 2GB would not have been in breach of the Codes.

The licensee's arguments in this regard are without merit. The broadcasts may only be assessed against the Codes that were in force and included in the Register of Codes of Practice at the time that the broadcasts occurred. Any changes made to the Codes after the material in question was broadcast are not relevant. The ACMA is

responsible for overseeing a licensee's compliance with its obligations under its own industry code, irrespective of later amendment.

Issue 3: Whether reasonable efforts were made to present significant viewpoints (Segments 1 and 2)

Relevant code provision

Clause 2.2(c) of the Codes states:

- 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 submissions

In its letter of complaint to 2GB the complainant, regarding Segment 1, stated:

[The complainant] complains that Mr Jones' segment lacked balance. While it is clear that Mr Jones does not agree with the State's native vegetation laws, it is inappropriate for a broadcast to criticise a government department in its effort to implement those laws. In the segment, Mr Jones refers to DECCW as "... *these scumbags that run around preying on productive people*". When the facts of this particular case are considered, such statements are completely unacceptable.

The complainant also alleged that information and an interview that was broadcast during Segment 2 were unbalanced.

In its letter of complaint to the ACMA, the complainant wrote:

2GB's response is that the Commercial Radio Codes of Practice impose no obligation of balance. In fact, they often do broadcast opinions which are strong, unpopular and divergent. Their response suggests that as long the viewpoint is significant there is no requirement for balance at all.

[...] 2GB's response indicates that as long as they are presenting a significant viewpoint, there is no requirement in the Codes to balance that with any facts. [The complainant] would contend that if Clause 2.2(c) is to have any worthwhile meaning in the context of this segment, it should require at the very least that reasonable efforts are made or reasonable opportunities are given to establish the facts. It might also require that reasonable efforts are made or reasonable opportunity given to present conflicting viewpoints to the divergent, unpopular ones presented.

Licensee's submissions

In its letter of response to the complainant, the licensee wrote:

[...] the commercial radio Codes do not impose an obligation to provide balance. In fact, 2GB's format of news talk programming is based on opinion and commentary. Often, 2GB presenters will present opinions that are strong, unpopular and divergent.

As indicated above, throughout the Segments, Mr Jones essentially provides opinions that include, in summary, the following:

- that native vegetation laws operate and are applied so as to effectively result in land confiscation without compensation;
- that native vegetation laws have been used to impose excessive and unreasonable use limitations on private land; and
- that the bureaucracy has been overly-interventionist, harmful and disproportionate in its administration of the native vegetation laws.

We consider that these viewpoints are significant – and that 2GB has therefore discharged its obligation under Code 2.2(c) to provide significant viewpoints on the issue of the operation and implementation of the native vegetation laws.

In its letter of response to the ACMA's request for comments the licensee further wrote:

Of course, Code 2.2(c) further contemplates that reasonable opportunities will be given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or within similar programs for so long as the issue has immediate relevance to the community.

A typical way in which 2GB discharges this alternative obligation in Code 2.2(c) is to provide relevant community participants on a particular issue with an opportunity to provide alternative perspectives, usually by way of an interview with a 2GB presenter on a subsequent day of the relevant program. If the 2GB program producers are contacted by an interested participant in a public debate shortly after viewpoints are broadcast, then 2GB will often extend to those other participants an opportunity for an on-air interview to provide other viewpoints.

We are not aware that [the complainant] contacted Mr Jones or his production team to seek an opportunity for such an interview – or even, more formally, a right of reply. Further, the letter of complaint – which was made many weeks after the broadcast – did not seek an opportunity to address the issues on-air, but rather, only a response in writing.

We suggest that Code 3.5 of the ABC Code of Practice, which relates to news and current affairs content, provides an instructive comparison in construing the scope of the obligation imposed by Code 2.2(c). As you are aware, Code 3.5 provides as follows:

- 3.5 *Balance will be sought but may not always be achieved within a single program or publication; it will be achieved as soon as reasonably practicable and in an appropriate manner. It is not essential to give all sides equal time. As far as possible, principal relevant views on matters of importance will be presented.*

The complaint appears, in its essence, to be based on a perceived lack of balance and the absence of principal relevant views from the Segments. While such complaints may properly arise under Code 3.5 of the ABC Code of Practice, in our view, they do not arise under Code 2.2(c) which is much more limited in its scope of operation.

Finding

The licensee, in relation to the broadcast of the current affairs program *The Alan Jones Breakfast Show*, on 8 and 11 February 2010, breached clause 2.2(c) of the Codes in that it did not make reasonable efforts or give reasonable opportunities to present significant viewpoints when dealing with a controversial issue of public importance.

Reasons

Clause 2.2(c) of the Codes requires that a licensee, in the preparation and presentation of current affairs programs, make reasonable efforts or give reasonable opportunities to present significant viewpoints when dealing with controversial issues of public importance. Such reasonable efforts or opportunities must be provided either within the same program or similar programs, and must be provided while the issue has immediate relevance to the community.

Does clause 2.2(c) apply?

It has not been disputed that the *Breakfast with Alan Jones* program is a current affairs program. Therefore, compliance with clause 2.2(c) of the Codes was a necessary consideration for the licensee when preparing and presenting the program.

Did the segments in question deal with controversial issues of public importance that had immediate relevance to the community?

Neither the licensee nor the complainant has argued that the matter discussed in the Segments, namely the operation and administration of the native vegetation laws in NSW, was not a controversial issue of public importance.

What is the meaning of 'significant viewpoints' as contemplated by the Code?

'Viewpoint' is not defined in the Codes. The Macquarie Dictionary (fifth edition) defines it as 'a point of view; an attitude of mind'.

The natural interpretation of clause 2.2(c) of the Codes is that it requires reasonable efforts to be made or reasonable opportunities be given to present more than one significant viewpoint in relation to any controversial issue of public importance. Contrary to the licensee's assertion, it is not enough that relevant efforts and/or opportunities are given in respect of only one significant viewpoint.

In some cases it may be that the only way to present more than one significant viewpoint is to present a viewpoint that is an opposing viewpoint. While this is not invariably required, a licensee will not comply with clause 2.2(c) simply by repeating a series of identical or slightly nuanced viewpoints about a controversial issue. This makes no sense in terms of either the natural construction of the clause or its stated purpose, which is:

to promote accuracy and fairness in news and current affairs.

It is not clear how clause 2.2(c) could promote accuracy and fairness if it merely ensured an opportunity to present substantially similar viewpoints on multiple occasions.

The requirement in clause 2.2(c) that reasonable efforts and/ or opportunities be given to present significant viewpoints "either within the same program or similar programs" also suggests that the presentation of more than one significant viewpoint is contemplated.

Where more than one viewpoint is not presented in a program or programs during the currency of a controversial issue, the ACMA must consider whether the licensee has made *reasonable efforts* to itself present significant viewpoints, or whether it has given *reasonable opportunities* to others to present such viewpoints.

This does not mean that clause 2.2(c) requires balance. The clause does not contemplate that all viewpoints on an issue must be presented – only significant viewpoints. Nor does it contemplate that equal time or prominence will be given to each of those significant viewpoints. The ACMA recognises that the realities of the live broadcasting environment must always be considered in assessing these matters.

Were significant viewpoints presented?

In this case Segments 1 and 2 were pre-arranged and researched, and included an interview with Mr B in a manner typical of current affairs content. As noted by the licensee in its submissions, the content included 'strongly held opinions expressed in colourful language.'

The licensee has submitted that the opinions presented by Mr Jones constitute three separate 'significant viewpoints' in relation to the operation, implementation and administration of the native vegetation laws by DECC. Specifically, the licensee has submitted that each of the following is a separate significant viewpoint for the purpose of clause 2.2(c):

- that native vegetation laws operate and are applied so as to effectively result in land confiscation without compensation;
- that native vegetation laws have been used to impose excessive and unreasonable use limitations on private land; and
- that the bureaucracy has been overly-interventionist, harmful and disproportionate in its administration of the native vegetation laws.

The ACMA does not accept this submission. It considers that the 'viewpoints' identified by the licensee are not properly characterised as different significant viewpoints. Rather they are properly characterised (either individually or collectively) as a single significant (highly critical) viewpoint on a controversial issue of public importance - namely the operation and administration of the native vegetation laws in NSW.

If the licensee's submission were accepted, this would mean that it could comply with clause 2.2(c) simply by repeating two or more facets of, or concerns about, a controversial issue while presenting only one stance, or viewpoint, throughout. The only way to present more than one significant viewpoint on a controversial issue is to present an alternative.

In the case of Segments 1 and 2, the ACMA finds that the programs did not present significant viewpoints.

Additional program material provided by the licensee

Subsequent to receiving a copy of the ACMA's Preliminary Investigation Report, the licensee provided the ACMA with copies of twelve additional program segments that were broadcast on several different 2GB programs including one program presented by Alan Jones. These segments were broadcast between 24 December 2009 and 15 January 2010. The programs the subject of this investigation were broadcast on 8 and 11 February 2011.

The licensee submitted that the additional broadcast material provided 'other significant viewpoints regarding the issue of land clearing by Australian farmers in the context of the application of the Native Vegetation Act'. A summary of the relevant content of these segments is at Attachment C.

Assessment of the additional program material provided by the licensee

In order for these additional segments to demonstrate compliance by the licensee with clause 2.2(c), they would have to have:

- Dealt with the same controversial issue of public importance as was dealt with in Mr Jones' segments;
- Presented a significant view on that issue, which was not presented in Mr Jones' segments; and
- Been presented in the same program or programs similar to those in which Mr Jones' segments were presented.

The ACMA has reviewed the additional program segments provided to it by the licensee.

As stated above, the ACMA originally characterised the controversial issue traversed by Mr Jones' segments as the operation and administration of native vegetation laws in New South Wales. That was because the broadcasts focused on New South Wales legislation and actions of the NSW DECC.

The additional material reviewed, with the exception of an interview with Kristina Keneally, the then Premier of NSW, on 24 December (during the program *Mornings with Ben Fordham*) and an interview with a caller on 8 January 2010 (during the program *Drive with David Oldfield*), is not primarily or directly focussed on New South Wales legislation or the actions of the NSW DECC. Instead the material is focussed on the hunger strike of NSW farmer, Peter Spencer and on associated Federal government policies including the Kyoto Agreement and the Emissions Trading Scheme.

The licensee now submits that the controversial issue of public importance, common to all the segments was 'land clearing by Australian farmers'. This is a 'broader' potential controversial issue characterisation than that previously articulated by the ACMA – namely 'the operation and administration of the NSW native vegetation laws'. This submission does not accord with Mr Jones's statement during the program of 11 February that "this is a State Government issue".

The ambit of any 'controversial issue' dealt with in a program or series of programs will depend on how that issue is manifest including the manner in which the issue and significant opinions on it are presented and whether 'continuity' is apparent between programs and segments. Given the NSW and DECC focus of Mr Jones' segments and given that they post-dated the other segments by almost six weeks, the ACMA remains of the view that the controversial issue is, indeed, 'the operation and administration of the NSW native vegetation laws'. Accordingly, it does not accept that the additional material provided by the licensee dealt with the same controversial issue as was dealt with in Mr Jones' segments.

In any case, the ACMA considers that the additional material provided by the licensee, to the extent it contains viewpoints relevant to the controversial issue identified, provide a series of very similar viewpoints to that offered by Mr Jones. They are overwhelmingly negative and stridently critical of government policy and actions impinging on the freedom of farmers to clear and use their land.

A recurring theme is the plight of Peter Spencer and the broader implications of his cause as well as the issue of different State and Federal compensation obligations in respect of legislation limiting land use. For example:

- an interview with National Party Senator Barnaby Joyce on 30 December 2009 in which, when talking about the issues behind Peter Spencer's hunger strike, Senator Joyce likens what the government is doing to 'theft' saying: 'Peter and a whole range of other people have had ... an asset basically thieved off them by the government ... which is like stealing something from you and then putting it back in the house...'
- *Drive with David Oldfield* on 7 January 2010 in which Mr Oldfield comments: 'But Peter Spencer is adamant he is going to stay there until he gets a commitment from Kevin Rudd that he will be compensated for the fact that most of his property has been sequestered as a carbon sink by the Federal Government and under the state native vegetation laws. Yes, they make the law and take your land to cover what it is that they've legislated'.
- an interview with a caller on 8 January 2010, during which the caller relates his own experience of being advised by 'an environmental department up in Canberra' that he was doing 'illegal clearing' and threatening him with a \$1.2 million fine. Mr Oldfield queries whether this was 'as a consequence of the Native Vegetation Act' brought in by the State Labour government and the caller affirms this. Mr Oldfield ends the call by encouraging the caller to send in all related correspondence from the relevant department noting that they would make sure that 'in particular Alan gets it when he gets back ... as this is something that he is pushing, appropriately so, and very heavily...'

- an interview with the Mayor of the Hills Shire on 11 January 2010 in which he comments, in relation to Peter Spencer, 'I just can't explain how heartbreaking it is to see an Australian citizen at the end of his means ... to go to such extraordinary lengths ... it is really very un-Australian this whole thing ... it makes you very angry at our Federal politicians who don't have the time, it seems, to come and listen...'
- *Drive with David Oldfield* on 13 January 2010 in which Mr Oldfield comments: '(Peter Spencer) has made a huge impact and dramatically increased both his own profile and that of this cause... the iniquitous Native Vegetation Act among other things ... Kyoto and the locking up of farmer's land, their land, not the government's land but the government using farmer's land to fulfil their promises, their commitments to overseas, to foreigners, to the UN'.
- *Breakfast with Andrew Moore* on 14 January 2010 in which Mr Moore reports that Peter Spencer has ended his hunger strike after 52 days. He had been protesting against the Native Vegetation Act 2003, 'which allowed the government to control parts of his land yet offer no compensation'.
- *Mornings with Ben Fordham* on 15 January 2010 in which Mr Fordham says that in the Wollombi Valley, NSW, Cessnock City Council will introduce a Local Environment Plan recommending 'draconian' changes that will have a 'devastating impact on land rights, property values and the local economy'. Mr Fordham interviews a local real estate agent, who says that the NSW Department of Planning is requiring all local councils to revise and rewrite their Local Environment Plans and that the State Government does not allow for any compensation to be paid to landowners when their rights and entitlements are removed. Mr Fordham likens this to the issue about which Peter Spencer has been protesting.

During an interview with Kristina Keneally, the (then) NSW Premier on 24 December 2009 (*Mornings with Ben Fordham*), a caller asks whether Ms Keneally thinks that the Native Vegetation Act is contributing to the problems currently facing farmers. Ms Keneally does not answer the question directly. She indicates that 'these issues were raised on our draft' saying 'we are looking at these.' She then briefly comments on the need to identify appropriate and sustainable assistance for farmers. However, this material cannot, given its brevity and oblique nature be regarded as providing an alternative or different viewpoint in relation to the operation and administration of the native vegetation laws. The issues of effort and opportunity are addressed below.

Ben Fordham on 5 January 2010 interviews the journalist, Peter Duffy. During the interview Mr Duffy provides his opinion, amongst other things, on the issue of government compensation for land. Mr Fordham queries why there is a difference between State and Federal legislation and Peter Duffy provides a response which suggests a benefit deriving from native vegetation laws, saying: 'It's all down to the Constitution and the Federal Constitution is better and I think that this is one of the reasons that this issue of climate change has come up because as you know this native vegetation that wasn't cleared has become a carbon sink under the Kyoto Agreement. And, the Australian government, in a sense, all Australians have

benefited from that because the rest of us were able to keep producing carbon while farmers, in a sense, carried the can for the rest of us. Now, under the Federal government constitution the Federal government has to pay compensation if they take something from you'. However, the ACMA is not satisfied that Peter Duffy's statement, taken as a whole, amounted to an alternative or different viewpoint in relation to the operation and administration the native vegetation laws in NSW.

Efforts and opportunities

The failure of the licensee to broadcast more than one significant viewpoint does not by itself determine compliance with clause 2.2(c).

The issue at the heart of clause 2.2(c) is whether a licensee *made reasonable efforts or gave reasonable opportunities* to present more than one significant viewpoint. The wording of clause 2.2(c) makes it clear that a licensee need satisfy only one limb of clause 2.2(c) for it to have complied with the Code provision.

The obligation to make reasonable efforts or give reasonable opportunities rests with the licensee. It does not pass to other parties such as listeners, interest groups or impugned persons.

'Reasonable efforts made' may be demonstrated by reference to the steps the licensee has taken to ascertain and incorporate more than one significant viewpoint in a program or similar programs during the currency of a controversial issue.

'Reasonable opportunities given' may be demonstrated by reference to the opportunities the licensee has created for third parties to present another significant viewpoint in the program or similar program.

Whether the efforts made or opportunities given are 'reasonable' in any case will depend on its particular facts and the circumstances of the case.

The licensee has submitted that a typical way in which it discharges its obligation at clause 2.2(c) is to provide people with an opportunity to provide alternative perspectives during an interview with a 2GB presenter. It is not clear from the licensee's submission whether this is achieved only in response to contact by such people or whether proactive efforts are also made to establish contact. The licensee has also made some general observations about the fact that listeners may call in during 'talk back' programs and present their opinions.

In this case, the licensee has submitted that the complainant did not contact the station seeking to present a different viewpoint to the one expressed on-air by Mr Jones and therefore the licensee's obligations had been discharged.

Were reasonable efforts made to present significant viewpoints?

As indicated above, in the ACMA's view, the 'reasonable efforts' limb requires consideration of the proactive steps that a licensee has taken to present more than one significant viewpoint. By way of example only, these efforts might include ensuring that a host presents different viewpoints on an issue; ensuring that different hosts present different viewpoints across programs; inviting persons on air who are known to hold different viewpoints and allowing them the opportunity to properly articulate them; or inviting someone to comment on an issue who has been, or will

be, the subject of criticism in a program. It need not do all these things; any one may well suffice. Whether the efforts made by a licensee in this regard are 'reasonable' will depend on the specific facts and circumstances of each case.

In this case, while the licensee has not made specific submissions on this point, the ACMA notes that in December 2010 Kristina Keneally was invited on air (as referred to at some length above). The ACMA has not been provided with the introduction to this interview or with any information about its premise and is not in a position to comment on the context in which the licensee extended this invitation.

During the interview, Ms Keneally is asked about the Native Vegetation Act (see above). The presenter notes that the caller 'makes a very good point' but apart from that does not seek to expand the discussion or test Ms Keneally's views any further. In fact, Ms Keneally did not directly answer the question but talked in more general and tangentially connected terms about the issue. Despite this, the presenter does not encourage further comment but moves to his next question: 'So, what's it like going bush, do you like it?' which then elicits a response unrelated to operation of native vegetation laws in NSW focussing on the Premier's impression of the general commitment of farmers in difficult circumstances.

The fact that the caller appears to have put this question to the Premier in the context of a broader discussion and the fact that it was not teased out any further by the presenter does not amount to evidence that the licensee sought comments from or extended interview invitations to people who may have had an alternative viewpoint to that expressed by Mr Jones in the material that is the subject of this investigation, which was presented in pre-produced program segments some six weeks later.

On the evidence before it, the ACMA finds that the licensee did not, with respect to the programs under investigation, make reasonable efforts to present more than one significant viewpoint on the issue of the operation and administration of NSW native vegetation laws.

Were reasonable opportunities given to present significant viewpoints?

As indicated above, in the ACMA's view, the 'reasonable opportunities' limb requires consideration of the nature of the opportunities created by the licensee for third parties to present another significant viewpoint. To comply with clause 2.2(c), such opportunities must be 'reasonable'. Again, by way of example only, these opportunities might include responding to a particular person's contact by distilling and presenting their different viewpoint; interviewing such a person; putting a particular talk-back caller on air; or simply providing talkback opportunities that enable callers to articulate other significant viewpoints. Whether the opportunities given by the licensee in this regard are 'reasonable' will depend on the specific facts and circumstances of each case.

In this case, there is no evidence that the licensee gave any genuine opportunity to third parties to present another significant viewpoint, beyond the claimed generic 'talk back' opportunity available to spontaneous callers.

In this case the claimed opportunity to 'phone in' cannot be characterised as 'reasonable' when set against the backdrop of pre-production that characterised the

Segments. Such opportunities may be appropriate when the controversial issue(s) of public importance are raised spontaneously by another caller, although this will be a matter to be considered on a case-by-case basis. However, in this program the strong editorial opinions expressed by Mr Jones formed a key element of the program in respect of which research had been conducted and interviews pre-arranged.

In those circumstances, on the evidence before it, the ACMA finds that the licensee did not give reasonable opportunities to present more than one significant viewpoint on the issue of the operation and administration of native vegetation laws in NSW.

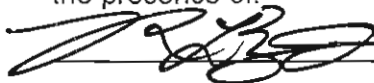
The licensee has therefore breached clause 2.2(c) of the Codes.

The Australian Communications and Media Authority determines for the above reasons that the licensee of 2GB, Harbour Radio Pty Limited, in relation to the broadcast of *The Alan Jones Breakfast Show* on 8 February 2010 and 11 February 2010:

- did not breach clause 1.3(a) of the *Commercial Radio Australia Codes of Practice 2004*.
- breached clause 2.2(a) of the *Commercial Radio Australia Codes of Practice 2004*;
- breached clause 2.2(c) of the *Commercial Radio Australia Codes of Practice 2004*;

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

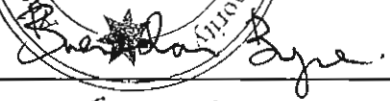




Signature of Member
Richard Lancelot Bean

RICHARD BEAN

Name (please print)



Signature of General Manager

BRENDAN BYRNE.

Name (please print)

Dated this 29th day of September 2011

Attachment A

Transcript of Segment 1 – broadcast on 8 February 2010 at approximately 8.10 a.m.

Commentary by Alan Jones

Just in relation to this debate, I don't think it's a debate yet. It's very one-sided over farmers being entitled to clear their land. I'll have a lot to say about that shortly when I pull all the material together.

But I did get a letter from a farmer that the farmer had received from the Department of Environment and Climate Change. And this is how bad it is, Department of Environment and Climate Change. What a joke that lot are. Now I can't give too much away or I'll identify to whom the letter was written, but suffice to say that he's been sent the letter to show cause, he the farmer must show cause to the Department of Environment and Climate Change who have discovered that he cleared a strip of land on his property at Bodalla. Now Bodalla as you may or may not know is about halfway between Moruya and Narooma down there on the south coast. The strip as identified by the sleuths at the Department of Environment and Climate Change, all these scumbags that run around preying on productive people, was 150 metres long and 26 metres wide, so about one and a half football fields long and only half as wide as a football field, just a little tiny ribbon and not much. He's been asked to show cause. And the letter said, quote "The maximum penalty for clearing native vegetation in contravention of the Act is \$1.1 million with a further maximum daily penalty of \$100,000". You can kill people, that doesn't happen to you. You can drive like hell on the roads and wipe people out, that doesn't happen to you. 1.1 million. No wonder farmers are walking off their land.

Let's put this into perspective. This bloke lives in the Eurobodalla Shire, which comprises 87% national parks and forests and crown land. So that just leaves 13% of the entire shire as freehold land and that includes the townships. So this poor coot clears a block of land not much bigger than a football field and only half the width and he's facing fines of over \$1 million.

The outfit that should be fined and run out of business are the mob in the Department of Environment and Climate Change. We haven't finished with them yet. We'll be looking at them in the days ahead.

[end]

Summary of Segment 2 – broadcast on 11 February 2010 at approximately 7.45 a.m.

Interview between Alan Jones and a property owner

Alan Jones begins the segment by providing some background information regarding a farmer (referred to in this summary as Mr B) who had purchased a property in 1999 that had once belonged to his family. Prior to this the property had been neglected

and unworked, but after purchasing the farm Mr B had cleaned it up by mending fences, putting in roads etc.

Mr Jones then introduces Mr B and they discuss the following sequence of events:

- In 2006 Mr B had received a Stop Work Order from the Department of Environment and Climate Change (DECC). However, after a hearing at the Land and Environment Court in 2007 Mr B was told to work with the Catchment Management Authority on a Property Vegetation Plan (PVP).
- After some twelve months Mr B was provided with a PVP which he found unacceptable, but was nevertheless told to sign it or the DECC would lock up his property and not allow him to do any more work on it.
- An officer from the DECC then came out to Mr B's property and informed him that a road he was constructing on his property exceeded the maximum allowable width of six metres. Mr B pointed out to the officer that most of his machinery was more than six metres wide but was told that this was not the DECC's problem.
- Mr B was then issued with a Remedial Direction by the DECC requiring that he lock up a portion of his property, remove all livestock, fence it off, maintain it and report to the DECC every four months for a period of 15 years.

Alan Jones then refers to the volume and incomprehensibility of the Remedial Direction, which Mr B says he is unable to comply with because of the cost involved.

Alan Jones also refers to what he perceives to be the unjustness of a situation whereby a property owner can be told what he can and can't do on his own land.

He then names the DECC officer referred to earlier and opines that the DECC should be wound up and the officer sacked.

Mr B states that he will be meeting with the DECC officer in a few days to try and sort something out. He states that he has found the whole situation frustrating and stressful, particularly as, in his opinion, the work he has done on the property so far has helped the environment and prevented further erosion.

Alan Jones finishes the segment by stating that he will be following up on the story and that it is 'just the beginning'.

[end]

Transcript of Segment 3 – broadcast on 11 February 2010 at approximately 8.46 a.m.

Discussion between Alan Jones and a phone-in caller

Alan Jones (AJ): [first name of caller, referred to in this transcript as G] Hello.

Caller (G): Good morning Alan, how are you?

AJ: Well, thanks.

G: Good. Look, spot on, I was listening to your interview with [name of farmer interviewed in Segment 2, referred to in this transcript as Mr B]

AJ: Mr B, the farmer. Unbelievable!

G: It is unbelievable. And um, and um, I mean, the poor guy. Well, he's almost out of his wits, (judging) by what you were saying.

AJ: Wouldn't you be! I've got in front of me here, G, hang on, one, two, three, four, five, six, seven, eight, nine; nine tightly-knit pages, typed pages, of absolute, unadulterated rubbish, which is called, I quote, Remedial Direction issued under section 38 of the *Native Vegetation Act 2003* in respect of [name of property], there they are. And you can't understand it no matter how hard you try.

G: Well and also too, as a side issue, what business has the Federal Government interfering in anything of this nature? The Federal Government has no jurisdiction over land, any land that's held under the various law of property

AJ: Well, what has happened here, just to interrupt you there, this isn't a Federal Government issue, this is a State Government issue. But the State Government of course, under the COAG, when they come together, say to the States, we'll give you money if you implement these native vegetation laws. Now in NSW and Queensland, under the native vegetation laws and the Constitution, you don't pay compensation. Under the Commonwealth law you do pay compensation. So these things are done to a farmer with no compensation! And here are these Directions to carry out remedial work, repair damage caused by the clearing, rehabilitate the land affected by the clearing. I [name of DECC employee] Manager of Compliance, require that [name of Mr B] perform the following remedial works on the property, within the time specified, or where no time is specified, for a period of fifteen years, and this turkey [name of DECC employee] has listed this stuff!

G: Unbelievable.

AJ: It's beyond belief, and I'll tell you what, we'll find an answer to it G, make no mistake.

G: Let's hope so.

AJ: And [name of DECC employee] better start checking the nearest, the address of the nearest Centrelink Office, because it's not Mr B who should be out of a job, but [name of DECC employee].

[end]

Attachment B

News and Current Affairs programs - Factual accuracy

In determining whether or not a statement complained of was compliant with the licensee's obligation to present factual material accurately (having regard to the circumstances at the time of preparing and broadcasting the program), the ACMA generally has regard to the following considerations:

- The meaning conveyed by the relevant statement is assessed according to what an 'ordinary, reasonable listener/viewer' would have understood the program concerned to have conveyed. Courts have considered an ordinary, reasonable listener/viewer to be:
 - A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person 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.⁶
- The ACMA must assess whether the relevant statement would have been understood by the ordinary reasonable listener/viewer as a statement of fact or an expression of opinion.
- The primary consideration would be whether, according to the natural and ordinary meaning of the language used and the substantive nature of the message conveyed, the relevant material presents as a statement of fact or an expression of opinion.
 - In that regard, the relevant statement must be evaluated in its context, i.e. contextual indications from the rest of the broadcast (including tenor and tone) are relevant in assessing the meaning conveyed to the ordinary reasonable listener/viewer.
 - The use of language such as 'it seems to me', 'we consider/think/believe' tends to indicate that a statement is presented as an opinion. However, a common sense judgment is required as to how the substantive nature of the statement would be understood by the ordinary reasonable listener/viewer, and the form of words introducing the relevant statement is not conclusive.
- Inferences of a factual nature made from observed facts would usually still be characterised as factual material (subject to context); to qualify as an opinion/viewpoint, an inference reasoned from observed facts would usually have to be an inference of a judgmental or contestable kind.
- While licensees are not required to present all factual material available to them, if the omission of some factual material means that the factual material actually broadcast is not presented accurately, that would amount to a breach of the clause.
- In situations where witnesses (to an event or circumstance) give contradictory accounts and there is no objective way of verifying the material facts, the obligation for the reporter is to present factual material accurately will ordinarily require that the competing assertions of fact be presented accurately as competing assertions.
- The identity of the person making the statement would not in and of itself determine whether the statement is factual material or opinion, i.e. it is not possible to conclude that because a statement was made by an interviewee, it was necessarily a statement of opinion rather than factual material.

Statements in the nature of prediction as to future events would nearly always be characterised as statements of opinion.

⁶ *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp.164-167.

Attachment C

Summary of additional broadcast material received by the ACMA

1. *Mornings with Ben Fordham – 24 December 2009*

The (then) NSW Premier Kristina Keneally is a guest on Ben Fordham's program. A caller asks Ms Keneally if she thinks that the *Native Vegetation Act* is contributing to the problems currently facing farmers. The related questions and responses are set out below:

Caller: My understanding is that a contributing factor is the *Native Vegetation Act* which prevents farmers from using their land...like Peter Spencer and the clearing of land to prevent fire.

KK: These issues were raised on our draft and I had the Minister for Primary Industries there with me. A number of suggestions were made and we are in fact looking at those because we can give money, and we can give emotional support and counselling but we actually need to give some practical support that makes it sustainable into the future.

BF: What's it like going bush, do you like it?

KK: I do like it and ... it's so amazing when you sit with families who have 100 dams on their properties, 97 of which are bone dry. What they go through in terms of the dust, in terms of the tedium ... anger and depression. It's really amazing that their whole life is about the farm and the land and the history on the land and they want to pass it on to future generations.

2. *Mornings with Ben Fordham – 30 December 2009*

Ben Fordham interviews National Party Senator Barnaby Joyce, who says that the Government has taken an asset from property owners, namely trees and vegetation, and is preventing property owners from clearing their own land without paying them any compensation. They then discuss a number of other topics including farmer and hunger-striker Peter Spencer, the Emissions Trading Scheme (ETS) and its potential effect on households, and the dangers of using trucks to transport large amounts of fuel. The segment includes the following comment by Senator Joyce:

BJ: ... Peter and a whole range of other people have had their asset taken off them, an asset basically thieved off them by the government where the government took the trees and vegetation from their properties which they used to own and never paid them for it and then said, 'Well, not only are we not going to pay for it but you're going to keep it on your place and you're not allowed to touch it which is like stealing something from you then putting it back in the house...'

3. *News Bulletin – 2 January 2010*

A rally outside Parliament House in Canberra has shown support for hunger-striker Peter Spencer and has called for a Royal Commission on native vegetation laws, the

rights of landowners and compensation for Government use of their land. A sound grab of Peter Spencer (sounding very tearful and emotional) is included:

PS: I haven't been home because like you all, I've been served a notice that on the 12th they take possession, so I have a week left and I can't go back and see it ... and it's all because (indistinct) ... no value..'

4. *The Alan Jones Breakfast Show – 5 January 2010*

Alan Jones talks about his address to a rally at Parliament House and how Barnaby Joyce has instituted a Senate Committee to look at land clearing and environmental laws that protect native vegetation without compensating farmers. He then briefly discusses the ETS and the fact that it may become law. Alan Jones's comments include:

AJ: And so yesterday a Senate Committee was formed to investigate land clearing and environmental laws that prompted farmers to be there at Parliament House. Farmers claim they can't turn a profit because of laws that protect native vegetation to reduce green house gas emissions and don't compensate farmers...basically, land is being stolen from them.'

5. *Mornings with Ben Fordham – 5 January 2010*

Ben Fordham interviews journalist Michael Duffy about Peter Spencer. Mr Duffy opines that Peter Spencer's problems are not related to climate change or the Kyoto Agreement but to state native vegetation laws introduced in 1995. These laws prevent farmers from clearing their own land but do not provide for any adequate compensation. In effect these laws have 'nationalised' those sections of a farmer's land that have not been cleared.

PD: I think it all started in 1995 when Bob Carr introduced a series of laws that prevented farmers from clearing their land...'

Regarding the issue of compensation to farmers, Peter Duffy's comments included:

PD: It wasn't offered for a very long time. In more recent years, a certain amount has been offered but it's been pretty modest and it's been for farmers, as I understand it, that have been particularly badly affected. In Peter's case, I understand the compensation offer was based on the value of the property now, after the native vegetation laws came in.

Ben Fordham asks Peter Duffy why there is a difference between State and Federal legislation:

BF: You say if the Federal government takes something from you it has to pay compensation but the State government doesn't, why not?

PD: It's all down to the Constitution. And, the Federal Constitution is better and I think that this is one of the reasons that this issue of climate change has come up because as you know this native vegetation that wasn't cleared has become a carbon sink under the Kyoto Agreement. And, the Australian government, in a sense all of us, have benefited from that because the rest of us were able to keep producing carbon while farmers, in a sense, carried the can for the rest of us. Now under the

Federal government Constitution, the Federal government has to pay compensation if they take something from you

6. *Drive with David Oldfield – 7 January 2010*

David Oldfield discusses landowner and hunger-striker Peter Spencer and interviews a friend of Mr Spencer. The interview mainly focuses on Peter Spencer's physical and mental health and the effect his hunger strike is having on his family and friends. During this segment Mr Oldfield says:

But Peter Spencer is adamant he is going to stay there until he gets a commitment from Kevin Rudd that he will be compensated for the fact that most of his property has been sequestered as a carbon sink by the Federal Government under the state native vegetation laws. Yes, they make the law and take your land to cover what it is that they've legislated.

7. *Drive with David Oldfield – 8 January 2010*

David Oldfield talks with a caller who says he has been threatened with fines by the Federal Government for 'over-grazing' on his land. Mr Oldfield asks whether this is 'as a consequence' of the *Native Vegetation Act* brought in by the NSW State Labour government', to which the caller answers, 'yes'. Mr Oldfield ends the segment by encouraging the caller to send in relevant correspondence, noting that he would make sure that 'Alan gets it when he gets back ... as this is something that he is pushing, appropriately so, very heavily...'

8. *Mornings with Ben Fordham – 11 January 2010*

Ben Fordham interviews the Mayor of the Hills Shire, who is at the farm of Peter Spencer and who states that the Government has tightened up the *Native Vegetation Act* which has affected farmer's rights over their own property. The Mayor's comments include:

Mayor: I'm at Peter Spencer's farm and I just can't explain how heartbreaking it is to see an Australian citizen at the end of his means ... to go to such extraordinary lengths... it is really very un-Australian this whole thing ... It makes you very angry at our Federal politicians who don't have the time, it seems, to come and listen ... If Australia wants to satisfy its Kyoto Agreements, well that's one thing, then the government's tightened up the *Native Vegetation Act*...(indistinct)

9. *News Bulletin – 13 January 2010*

Farmer Peter Spencer, who has been 'protesting against vegetation laws which prevent him from clearing trees on his property near Cooma', has ended his hunger strike. Senator Barnaby Joyce has invited Mr Spencer to join him in Parliament.

10. *Drive with David Oldfield – 13 January 2010*

David Oldfield announces that Peter Spencer has ended his hunger strike, commenting that:

(Peter Spencer) has made a huge impact and dramatically increased both his own profile and that of this cause... the iniquitous *Native Vegetation Act* among other things...Kyoto and the locking up of farmer's land, their land, not the government's land

but the government using farmer's land to fulfil their promises, their commitments to overseas, to foreigners to the U. N.

There follows a lengthy interview with Liberal Party Senator Bill Heffernan, who had previously criticised Peter Spencer's approach. Senator Heffernan say

the best way to start for anyone who has got a grievance against the land-clearing laws or against the impact on farmers on restrictions on their farms is that we will deal with exposing those issues through the Select Committee of Agriculture in the Senate.

Senator Heffernan comments on the implications, for farmers, of the Kyoto Protocol, the Emissions Trading Scheme, and the system of 'carbon credits'. The interview concludes with David Oldfield asking Senator Heffernan about the protection afforded to American farmers by their Government relative to the protection afforded to Australian farmers.

11. Breakfast with Andrew Moore – 14 January 2010

Andrew Moore reports that Peter Spencer has ended his hunger strike after 52 days. He had been protesting against the *Native Vegetation Act 2003*, 'which allowed the government to control parts of his land yet offer no compensation'. Mr Moore states that 'the State Government enacted these laws but the Federal Government is also involved, in order to meet its Kyoto Protocol Greenhouse Gas Emission Targets'. Mr Moore goes on to report that under the Constitution the State Government, unlike the Federal Government, does not have to compensate farmers for taking their land.

12. Mornings with Ben Fordham – 15 January 2010

Ben Fordham says that in the Wollombi Valley in the Lower Hunter region of NSW, Cessnock City Council will introduce a Local Environment Plan recommending 'draconian' changes that will have a 'devastating impact on land rights, property values and the local economy'. Mr Fordham interviews a local real estate agent, who says that the NSW Department of Planning is requiring all local councils to revise and rewrite their Local Environment Plans and that the State Government does not allow for any compensation to be paid to landowners when their rights and entitlements are removed. Mr Fordham compares this issue to the one that Peter Spencer has been protesting about.

The exchange between Ben Fordham and the Real Estate Agent include:

BF: No compensation offered whatsoever?

REA: In essence, when you buy a property you pay a price which supposedly reflects what you are able to do with that property. At a market value. And then some time later, without a chance of compensation or recompense you could lose the value of that property when certain rights and entitlements are removed.

BF: Now we've been watching Peter Spencer...have you been listening to his story and thinking, 'now, hand on a minute, this is all sounding very very familiar?'

REA: Very familiar, and in some regards we even look at a tougher situation here because there is no compensation paid at state level.