Investigation report no. BI-566

| Summary |  |
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| **Licensee** | Radio 3AW Melbourne Pty Ltd |
| **Finding**  | No breach of 2.1.4 [Incite hatred, or serious contempt, or severe ridicule because of race] |
| **Relevantcode** | Commercial Radio Code of Practice 2017(revised in 2018) (the Code) |
| **Program** | *3AW Drive with Tom Elliott* |
| **Date of broadcast** | 17 June 2020 |
| **Date finalised** | 3 November 2020 |
| **Type of service** | Commercial - radio |
| **Attachments** | **A** – relevant extracts of the broadcast**B** – extracts of the complaints **C** – extracts of the licensee’s response and submissions **D** – relevant Code provisions and the ACMA’s process for assessing compliance |

Background

In August 2020, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* (the **BSA**) into *3AW Drive with Tom Elliott* (the **program**).

The program was broadcast on 3AW 693 News Talk by Radio 3AW Melbourne Pty Ltd on 17 June 2020 at 3.00 pm.

The ACMA received a complaint alleging that comments made by the presenter of the program incited hatred and belittled Indigenous Australians and peoples of colour.

The ACMA has investigated the licensee’s compliance with 2.1.4 of the Code (extracts at **Attachment D**).

Issue: Incitement of hatred, serious contempt or severe ridicule because of race

The program and complaint

The program included a discussion about a number of recent online news reports published in the context of debates generated by the Black Lives Matter movement (the **BLM**). The news reports related to calls to rename places and products regarded as racist and offensive. These included reports that:

* a former Victorian MP had called for the State of Victoria to be renamed because of the association with Queen Victoria
* a Melbourne based bottle-shop had ceased stocking beer and cider made by an Australian brewery following customer feedback that the name of its products were degrading to Aboriginal and Torres Strait Islander (**ATSI**) peoples
* a former British MP had suggested that the marketing of Kellogg’s Coco Pops was racist in displaying a brown-skinned monkey on its packaging.

It also included an exchange with a caller to the program:

[Caller]: I wanted to talk to you as a man of particular colour about this furore over Coon cheese issue. It concerns me greatly that such a pejorative cheese name is able to sit on the shelf and every time I see it I feel physically sick reading it. And I just want something done about it. I am not talking about Coon I am talking about a far more insidious name Cracker Barrel. As a white man ‘cracker’ is a pejorative for a white man and I’m just beside myself every time I go to Woolies mate. Can you please do something about this? Get onto [the former Victorian MP] or something for me.

[Presenter]: So you go to the supermarket and you are triggered by the sight of Cracker Barrel packaging?

[Caller]: It’s all I can do to not top myself mate I just feel like the world’s against me.

[Presenter]: Alright [name of caller] I will do my best to get onto [the former Victorian MP] now Aboriginal activist and see if we can have Cracker Barrel cheese removed alongside Coon. Pretty soon we’ll be left with Bega and Kraft and that will be about it.

The complainant expressed concern that the comments made by the presenter of the program amounted to the incitement of hatred, serious contempt and ridicule against people of colour and First Nation people.

I’m deeply concerned about Tom Elliot’s views about BLM (Black Lives Matter), and his racial profiling of others. I think [the] show is inciting hate/belittling the plight of peoples of colour.

[the broadcast] caused more angst towards First Nations people through ‘generalisations’ and that the host ‘made it into an us, them session. Belittling First Nation people’.

The licensee submitted:

[…] the Broadcast did not present any individual or group negatively on the basis of an attribute protected by Code 2.1.4, including ethnicity, nationality, or race. As the ACMA has stated in past investigations, the phrase 'because of' requires an identifiable causal link between a protected attribute and the action complained of. In this instance, the discussion in the Broadcast was not presented as a criticism aimed at any specific race or ethnicity on the basis of that racial or ethnic background, but rather it was aimed at the nature, scope, and impact of the calls for rebranding on the basis of perceived racist undertones.

[…] the Broadcast did not direct criticism towards persons of indigenous heritage on the basis of that indigenous heritage and it certainly did not call for the negative treatment of persons of indigenous heritage.

Finding

The licensee did not breach 2.1.4 of the Code.

Reasons

To assess compliance with 2.1.4, the ACMA addressed the following questions:

* Did the program identify a person or group of persons on a relevant basis?
* In all the circumstances, was the program likely to incite in a reasonable listener, hatred against, or serious contempt for, or severe ridicule of the relevant person or group on that basis?

***Did the program identify a person or group of persons on a relevant basis?***

Comments concerning a former Victorian MP

On four occasions during the program, the presenter made comments about a former Victorian MP’s calls to rename the State of Victoria and, on three of these occasions, mentioned that she was Indigenous.

The ACMA considers the ordinary, reasonable listener would have understood from the comments made by the presenter that the former Victorian MP was the subject of the relevant comments because she advocated changing the name of the State of Victoria and that her viewpoint was related to her ATSI background. Accordingly, the ACMA considers that the program identified the former Victorian MP on the basis of her viewpoint and on the basis of her race.

The presenter’s comments about the former Victorian MP are included in a transcript of the broadcast at **Attachment A**.

Comments concerning ATSI peoples more generally

The presenter identified Indigenous people as a group of persons that support the calls for renaming products and places:

[Presenter]: Again though, this obsession with what Indigenous people think , I mean I just treat everybody the same, I don’t care what colour or background people are, but , we just need to remember that Indigenous people are about three percent of the population, and the idea you know that the tail can wag the dog here, the three per cent of the population dictates everything from the name of states to what things can be banned in shops and so forth is frankly speaking it’s ludicrous.

The presenter also identified ‘Indigenous people’ as a group of persons who benefit unfairly from government policies:

[Presenter]: Yes we do things like reserve jobs for Indigenous people or give Indigenous people different treatment at schools or at hospitals and it just breeds resentment.

The ACMA considers that the ordinary reasonable listener would be aware that a primary focus for BLM protests in Australia has been the history of deaths of ATSI peoples in the custody of police and prisons and that calls to rename products and places in Australia have been motivated in part to address the offence caused to ATSI people.

The comments outlined above identified Indigenous people as a group of persons who supported the renaming of products and places perceived to be racist and offensive and as a group of persons who benefit unfairly from certain government policies. Accordingly, the ACMA considers that the program identified ATSI peoples as a group of persons on the basis of race.

**In all the circumstances, was the program likely to incite in a reasonable listener, hatred against, or serious contempt for, or severe ridicule of, the relevant person or group on that basis?**

‘Likely’, ‘in all of the circumstances’

Use of the words, ‘likely’ and ‘in all of the circumstances’ imposes an objective test and implies a real and not remote possibility; something which is probable.

‘Incite’

To assess whether the program was likely to ‘incite’, the ACMA asks if the segment was likely to have urged a reasonable person to share feelings of hatred, contempt or ridicule on the basis of a number of relevant factors, including race. Material that merely conveys negative feelings or connotations towards a person or group will not be enough to incite or provoke those same feelings in an ordinary reasonable viewer. There must be something more than an expression of opinion; rather, there must be something that is positively stimulatory of that reaction in others.

This incitement or provocation can be achieved through comments made about a person or group; there is no requirement that those comments include a specific call to action. There is no need for proof of intention to incite or that anyone was in fact incited.

Hatred, serious contempt, severe ridicule

The inclusion of the term ‘hatred’, and of the adjectives ‘serious’ and ‘severe’ contemplates the incitement of a very strong reaction in the listener. It is not sufficient that the broadcast induces a mild or even a strong response.

‘Because of’

The incitement to hatred, serious contempt or severe ridicule, must occur on a basis specified in 2.1.4. The phrase ‘because of’ requires that there be an identifiable causal link between the prohibited ground (for example, race) and the action complained of (for example, serious contempt or severe ridicule).

***Discussion***

Comments concerning the former Victorian MP

The comments made about the former Victorian MP were focused on her calls to rename the State of Victoria – they made light of the MP’s calls and may well have been interpreted, by some listeners, as including an element of ridicule. However, as outlined above, the inclusion of the word ‘severe’ contemplates a very strong reaction and, in this context, did not meet the high threshold.

Comments concerning ATSI peoples more generally

The ACMA accepts that some listeners to the program would have found certain comments in the broadcast offensive. In this regard the ACMA notes:

* The presenter’s remarks that Indigenous people comprise ‘about three percent of the population, and use of the metaphor of a ‘tail wagging a dog’ marginalised consideration or discussion of ATSI peoples’ viewpoints.
* In the context of the broader discussion about BLM, the caller feigning distress and suicidal thoughts, as a white person confronted by the packaging of Cracker Barrel cheese, could be perceived as trivialising the views and experiences of ATSI persons.

However, the ACMA considers, when applying the test set out in the code, the broadcast is not likely, in all the circumstances, to reach the high thresholds of inciting, in a reasonable listener, serious contempt for, or severe ridicule of ATSI peoples generally. This is because:

* The ordinary reasonable listener is likely to have understood the caller’s reference to the word ‘cracker’ as being tongue in cheek, and the exchange with the presenter being made in a similar, light-hearted but mocking vein to the exchanges with other callers during the program.
* Overall, the program was an expression of the presenter’s and callers’ viewpoints about calls to rename products and places perceived to be racist and offensive to ATSI communities.
* Although the presenter could be heard laughing and agreeing with the callers’ comments, the program was not likely to incite listeners because the presenter did not make any comments that were ‘positively stimulatory’ or that explicitly urged listeners towards such sentiments.

Accordingly, the licensee did not breach 2.1.4 of the Code.

Attachment A

**The presenter’s comments about [the former Victorian MP]**

[Presenter]: You might of seen that [the former Victorian MP], she is also Indigenous, …. She wants our entire state Victoria to be re-named, because she says Queen Victoria was responsible for murders or something like that, anyway (laughter) if we re-name the state of Victoria what else has to be re-named? VB Victoria Bitter? That can’t keep its name? Victoria Park – its gotta go.

[…]

[Caller] This is just another case of the minority rules, in Victoria. I’ve got a second point too. I’m sitting on the highway surrounded by cars. Every single car, on their numberplate, has ‘Victoria the place to be’. So at six million people, let’s say five million cars or whatever, about thirty bucks for a set of numberplates, who foots the bill to change all them? And the licences and the passports and everything that goes with it all.

[Presenter] No I agree. I don’t know if [the former Victorian MP] and now Aboriginal activist, has thought through this. She is the one who is saying that because Queen Victoria, when she ruled the British Empire up until 1901 , because she started and fought wars, not personally but she was, it was her face on the coins and that sort of thing, so we have to rename this State. Probably NSW has to be renamed, Wales is part of the UK and the UK apparently is the source of all of our problems.

[…]

[Caller] I was just wondering if [the former Victorian MP] is highly offended by her own Anglo-Saxon name and will she be demanding of herself that she change her name?

 [Presenter] (laughs) Well possibly she has two version of herself where one demands to the other – ‘I don’t like that name. Change it!’

[…]

[Caller] I wanted to talk to you as a man of particular colour about this furore over Coon cheese issue. It concerns me greatly that such a pejorative cheese name is able to sit on the shelf and every time I see it I feel physically sick reading it. And I just want something done about it. I am not talking about Coon I am talking about a far more insidious name Cracker Barrel. As a white man ‘cracker’ is a pejorative for a white man and I’m just beside myself every time I go to Woolies mate (Presenter giggles) Can you please do something about this? Get onto [the former Victorian MP] or something for me.

[Presenter] So you go to the supermarket and you are triggered by the sight of Cracker Barrel packaging?

[Caller] It’s all I can do to not top myself mate I just feel like the world’s against me.

[Presenter] Alright (name of caller) I will do my best to get onto [the former Victorian MP] now Aboriginal activist and see if we can have Cracker Barrel cheese removed alongside Coon. Pretty soon we’ll be left with Bega and Kraft and that will be about it.

Attachment B

***Complaint to the ACMA dated 8 July 2020:***

I’m deeply concerned about Tom Elliot’s views about BLM (Black Lives Matter), and his racial profiling of others. I think (the) show is inciting hate/belittling the plight of peoples of colour.

(the broadcast) caused more angst towards First Nations people through ‘generalisations’ and that the host ‘made it into an us, them session. Belittling First Nation people’.

Attachment C

**Extracts of the licensee submissions to the ACMA dated 17 September 2020**

[…]

The Broadcast contained a discussion of issues surrounding contemporaneous calls to rename products and titles deemed racially insensitive by some individuals and groups in the wake of the Black Lives Matter movement. The discussion involved comments from the Broadcast's presenter (the Presenter), as well as callers from the public. At the commencement of the Broadcast, the Presenter outlined the topic being discussed and provided some examples of products which had been perceived by some individuals and groups to be racially insensitive such that there had been public outcry for their names to be changed. These examples included the mascots for Coco Pops and Rice Bubbles cereal; Margaret River brewery, Colonial Brewing Company; the states of Victoria and Queensland; and black-coloured compression sports garments known as 'Skins'. During the discussion, the Presenter indicated that his opinion was in opposition to such calls for rebranding.

Over the course of three hours, the Presenter fielded dozens of calls in which callers provided further examples of potential rebranding which could be captured by the line of argument laid out in the aforementioned examples.

The issue of rebranding on the basis of perceived racial insensitivity was the subject of intense public debate during the week of the Broadcast following a Twitter post about Coon cheese by comedian […],[[1]](#footnote-1) a bottle shop franchise's decision the previous day to stop selling Colonial Brewing beer,[[2]](#footnote-2)and comments by a [the former Victorian MP] to consider renaming Queensland and Victoria.[[3]](#footnote-3)

In articulating his viewpoint on the characterization of these names and brands as being racist and the sentiment behind same, the presenter opined that such demands for rebranding:

* did not given any consideration to the context in which the names and titles were being used;
* were, in themselves, divisive actions which contributed to an 'Us and Them' mentality;
* did little to alleviate real socio-economic disadvantage being experienced in some indigenous communities;
* were often driven by activist groups who used social media campaigns which had the potential to drive customers away from particular brands;
* had received a disproportionate amount of media coverage and public discussion when compared to issues of global conflict;
* amounted to rewriting history;
* took focus away from the real issues of racism and disadvantage in our society; and
* constituted reverse racism.

The Licensee has identified the following remarks which reflect some of these issues of public interest:

00:16 4 "Well not a day goes by now without a new bit of racist madness going on. I'm not going to say racist. We're talking about things that aren't actually racist, which are now being deemed racist."

16:31 "We are seeing an attempt to wipe out bits of our culture to rewrite history, to ban the use of words irrespective of their context. It's just nuts."

18:47 "Trust me, if you want to find racism, it's everywhere. I'm talking about racism of the stupid kind, not actual racism."

21:14 "I began the program today by saying we are obsessed with ridiculous claims of racism and, like, extending it to cans of beer and boxes of breakfast cereal...meanwhile on the other side of the globe something genuinely real is going on, something that is genuinely dangerous. Chinese and Indian troops are fighting each other."

***Incitement of hatred, contempt or ridicule on the grounds of race (Code 2.1.4)***

[…]

At the outset, the Licensee submits that the Broadcast did not present any individual or group negatively on the basis of an attribute protected by Code 2.1.4, including ethnicity, nationality, or race. As the ACMA has stated in past investigations, the phrase 'because of' requires an identifiable causal link between a protected attribute and the action complained of. In this instance, the discussion in the Broadcast was not presented as a criticism aimed at any specific race or ethnicity on the basis of that racial or ethnic background, but rather it was aimed at the nature, scope, and impact of the calls for rebranding on the basis of perceived racist undertones, as the following remark from the Presenter illustrates:

28:53 "/ tell you what the problem is: The mob these days tends to gather in social media and of course, with protests like the Black Lives Matter protests a week and a half ago, they have the ability to bring businesses down. So take the Colonial Brewing Company. We spoke to its CEO yesterday. I mean I think he'll probably be forced to change the name of the beer because if enough people just give in to the all the idiots on Twitter, and either don't stock it or customers don't buy it because they're embarrassed to be seen drinking it, then this mob mentality on social media can have real consequences. Think of it as o form of bullying, which is what it is".

While the discussion during the Broadcast was at times light-hearted in tone, the central topic of the Broadcast was still focused on a serious issue of public interest which again was not presented as a criticism of a particular racial or ethnic group. Indeed, the Presenter stated:

16:28 "I'm treating this as a joke because it is. But it's actually quite serious. We are seeing an attempt to wipe out bits of our culture, to rewrite history, to ban the use of words irrespective of their context."

The Licensee further submits that the Broadcast lacked the necessary stimulation or urgency to meet the high threshold of inducing the 'serious' or 'severe' responses specified in Code 2.1.4. The threshold test for a breach of Code 2.1.4 requires a real possibility that the content would incite very strong reactions in a reasonable listener. The ACMA has stated in past findings that 'it is not sufficient that the broadcast induces a mild or even a strong response' and that 'material that merely conveys negative feelings or connotations towards a person or group will not be enough to incite or provoke those same feelings in an ordinary reasonable listener. There must be something more than an expression of opinion. There must be something that positively stimulates that reaction in others'. In this regard, the Licensee again notes that the Broadcast did not direct criticism towards persons of indigenous heritage on the basis of that indigenous heritage and it certainly did not call for the negative treatment of persons of indigenous heritage.

Contrary to the complainant's assertions that the Broadcast was 'Belittling' towards First Nation peoples and was 'creating hate speech towards people of colour', the Licensee maintains the Broadcast did not seek to trivialize, condemn, or ridicule important issues facing persons of colour and some indigenous communities. Rather, the Broadcast raised the notion that calls for rebranding due to perceived racial undertones had little practical impact on addressing the broader issues of racial inequality and social disadvantage in our community. Indeed, the Broadcast also contained comments which denounced divisiveness and the 'us against them' mentality on the basis of race or ethnic heritage. The Licensee has identified the following remarks which address the specific issues raised above:

35:16 "When you use more racism to try and cure earlier racism, the two don't cancel each other out. So we do things like reserve jobs just for indigenous people, or give indigenous people different treatment at schools or at hospitals and it just breeds resentment. Reverse racism, as it's often called, does not cure original racism. It just adds to the whole problem. The sooner as a country we say: 'This is Australia. Those of us who are descended from European settlers or convicts, we're not going away. We don't have another country.' Every place on earth has been fought over by different groups of people. Nothing new there. The sooner we all embrace our mixed but shared identity as Australians, the better off we will be. At the moment, all this 'Black versus White' is not good. It's tearing us apart, and it's not good."

48:42 "There's severe problems in the Aboriginal community and indigenous politician after indigenous politician have acknowledged this to a greater or lesser degrees. But by having stupid debates about whether Coco Pops are racist because there's a monkey on the front of the box just trivialises the issue. That was a British politician, she left the parliament in 2018 ... Now that just makes people laugh at her ... lf repeated in Australia, does it do anything to try and reduce Aboriginal disadvantage? Of course it doesn't."

1:08:09 "I just treat everybody the same. I don't care what colour or background people are. We just need to remember that indigenous people are about three per cent of the population, and the idea that the tail can wag the dog here, that three per cent of the population dictates everything, from the names of states, to what things can be banned in shops and so forth is, frankly speaking, it's ludicrous. We might end up with a specific new part of the Constitution to try and recognise indigenous people, which a) it won't achieve anything material to increase the living standards of Aboriginal people; but, b) it creates a real 'Us and Them' mentality."

[…]

Attachment D

**Relevant Code provisions**

1. **Material not suitable for broadcast**

2.1. A Licensee must not broadcast a Program which in all of the circumstances:

[…]

2.1.4. is likely to incite in a reasonable listener, hatred against, or serious contempt for, or severe ridicule of, any person or group of persons because of age, ethnicity, nationality, race, gender, sexual preferences, religion, transgender status or disability;

[…]

2.5. Nothing in 2.1 and 2.4 prevents a Licensee from broadcasting a Program of the kind or kinds referred to in those provisions if the material is presented:

2.5.1. reasonably and in good faith for academic, artistic (including comedy or satire), religious instruction, scientific or research purposes, or discussion or debate about any act or matter in the public interest; or

2.5.2. in the course of a broadcast of a fair report of, or fair comment on, a matter of public interest

**The ACMA’s process for assessing compliance**

The ordinary reasonable listener

When assessing content, the ACMA considers the meaning conveyed by the material that is the subject of the complaint, including the natural, ordinary meaning of the language, context, tenor, tone and any inferences that may be drawn. This is assessed according to the understanding of an ‘ordinary reasonable’ listener.

Australian 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. 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.[[4]](#footnote-4)

Once the ACMA has ascertained the meaning of the material that was broadcast, it then assesses compliance with the Code.

**The assessment of the Incitement of hatred, serious contempt or severe ridicule because of race.**

To assess compliance with 2.1.4, the ACMA addressed the following questions:

* Did the program identify a person or group of persons on a relevant basis?
* In all the circumstances, was the program likely to incite in a reasonable listener, hatred against, or serious contempt for, or severe ridicule of the relevant person or group on that basis?
* If so, was the conduct in the program said or done reasonably and in good faith, while also satisfying 2.5.1 or 2.5.2 Code?
1. Twitter, 14 June 2020 at <https://twitter.com/JoshThomas87/status/1271972388255576064> [↑](#footnote-ref-1)
2. https://www.smh.com.au/national/margaret-river-s-colonial-beers-ripped-from-shelves-over-name-controversy-20200616-p5531a.html [↑](#footnote-ref-2)
3. <https://www.news.com.au/national/victoria/politics/former-greens-mp-on-why-victoria-queensland-should-consider-changing-names/news-story/e4f0aa0e0da7308308c77e06aed1a496> [↑](#footnote-ref-3)
4. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-4)