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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**COMMUNICATIONS LEGISLATION AMENDMENT
(ENFORCEMENT POWERS) BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Helen Coonan,
Minister for Communications, Information Technology and the Arts)

COMMUNICATIONS LEGISLATION AMENDMENT (ENFORCEMENT POWERS) BILL 2006

OUTLINE

The Government considers that the range of enforcement powers available to the Australian Communications and Media Authority (the ACMA) to regulate the broadcasting industry do not provide an appropriate range of enforcement options, and therefore are not adequate to enable it to fulfil the objects of the *Broadcasting Services Act 1992* (BSA). The Bill will not create new offences, but will enhance the ACMA's broadcasting regulatory powers under the BSA by providing the ACMA with key new powers:

- civil penalties;
- injunctions;
- enforceable undertakings; and
- infringement notices.

The Bill will also require the ACMA to develop guidelines relating to the exercise of its broadcasting enforcement powers.

Civil Penalties

Currently breaches of many provisions of the BSA, or of basic licence conditions established by the BSA, are subject only to criminal penalty, requiring the ACMA to refer prosecutions to the Commonwealth Director of Public Prosecutions (DPP), establish the breach to the criminal standard of proof and demonstrate intent to breach. The Bill will establish civil penalties in relation to a number of breaches of the BSA and licence conditions, enabling the ACMA to initiate Federal Court action against licensees and requiring a lower (civil) standard of proof.

The Bill also replaces the existing powers in sections 137 and 141 of the BSA with new powers to issue remedial directions. Sections 137 and 141 of the BSA empowered the ACMA to issue notices requiring broadcasters to cease providing unlicensed services and to cease breaching licence conditions and certain codes of practice. These powers will be replaced with powers for the ACMA to issue remedial directions. The new remedial directions powers enable the ACMA to direct licensees to take action directed towards ensuring that they do not provide unlicensed services or breach licence conditions or certain codes of practice in the future, and are more consistent with other powers the ACMA has under clause 53 of Schedule 6 of the BSA and the *Telecommunications Act 1997* (Tel Act). A failure to comply with such a direction would incur either a civil or criminal penalty.

Civil penalties imposed in the past will also be added to those matters that the ACMA will take into account in determining suitability to hold a licence.

Injunctions

The ACMA will be granted a further power to seek an order from the Federal Court to prevent unlicensed broadcasting. Injunctions to prevent unlicensed broadcasts are principally aimed at licensees outside commercial broadcasting categories, such as narrowcasters (which are licensed to provide only niche services) that provide commercial broadcasting services.

Enforceable Undertakings

The Bill will provide the ACMA with a general power to accept enforceable undertakings in relation to its broadcasting, content or datacasting regulatory functions. The ACMA can currently accept voluntary undertakings in these areas but they are not enforceable; in contrast, the ACMA can accept enforceable undertakings in relation to telecommunications matters, and other regulators such as the Australian Competition and Consumer Commission (ACCC) use enforceable undertakings as a key regulatory tool. Undertakings will remain voluntary, but breaches of undertakings, once made, will lead to potential Federal Court action.

The ACMA will also be granted a similar power to accept enforceable undertakings in relation to regulatory obligations under the *Radiocommunications Act 1992* (Radcom Act).

Infringement Notices

The Bill will provide the ACMA with the power to issue infringement notices in relation to the following types of breaches:

- failure to report changes of control and directorships; and
- failure to submit annual financial returns, keep records and make records available to the ACMA.

These are currently areas of regular non-compliance, and infringement notices will give the ACMA additional flexibility in pursuing breaches. The infringement notice scheme would be implemented in accordance with the Australian Law Reform Commission (ALRC) guidelines.

Guidelines

The ACMA will also be required to develop guidelines, in consultation with industry, regarding the appropriate use of enforceable undertakings, infringement notices and civil penalties. In developing such guidelines, the ACMA can also issue guidelines in relation to its exercise of existing enforcement powers, such as referral for criminal prosecution or suspension or cancellation of licences.

FINANCIAL IMPACT STATEMENT

The amendments contained in the Bill have no significant financial impact.

REGULATION IMPACT STATEMENT

BACKGROUND

1. The Australian Communications and Media Authority (the ACMA) is an independent statutory authority established under section 6 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act).¹ The ACMA's functions include broadcasting, content and datacasting regulation (s. 10). A significant number of the ACMA's functions are provided for in the *Broadcasting Services Act 1992* (the BSA).

2. The objects of the BSA are contained in section 3 and include:
 - to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
 - to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs;
 - to encourage diversity and control of the more influential broadcasting services;
 - to ensure that Australians have effective control of the more influential broadcasting services;
 - to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity;
 - to promote the provision of high quality and innovative programming by providers of broadcasting services;
 - to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance;
 - to encourage providers of broadcasting services to respect community standards in the provision of program material; and
 - to encourage the provision of means for addressing complaints about broadcasting services.

3. It is stated in section 5 of the BSA that Parliament “charges the ACMA with responsibility for monitoring the broadcasting industry, the datacasting industry and the internet industry” and that Parliament confers on the ACMA a range of functions and powers that will:
 - produce regulatory arrangements that are stable and predictable; and
 - deal effectively with breaches of the rules established by the BSA.

Where the ACMA uses its powers to deal with a breach of the BSA or regulations, the ACMA must use its powers in a manner that is “commensurate with the seriousness of the breach concerned.”

¹ The ACMA was established on 1 July 2005 following the merger of the Australian Broadcasting Authority and the Australian Communications Authority. For convenience, “the ACMA” is used throughout this Regulation Impact Statement, including when discussing the actions of the Australian Broadcasting Authority.

4. Section 4 of the BSA identifies the regulatory policy underpinning the BSA. It is stated in section 4 that:

(1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.

(2) The Parliament also intends that broadcasting and datacasting services in Australia be regulated in a manner that, in the opinion of the ACMA:

(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services; and

(b) will readily accommodate technological change; and

(c) encourages:

(i) the development of broadcasting technologies and datacasting technologies and their applications; and

(ii) the provision of services made practicable by those technologies to the Australian community.

5. For some time, the ACMA has been concerned that its enforcement powers are not sufficient to enable it to fulfil the objects of the BSA in a manner consistent with this regulatory policy. It has argued that its powers should be amended to enable it to deal more effectively with breaches of the rules established by the BSA.

6. In the ACMA's final report in relation to the *Commercial Radio Inquiry* (August 2000) the ACMA identified a number of proposals that it said might assist in the prevention and/or enforcement of future breaches of codes of practice. The proposals identified in the report included additional administrative remedies (such as advertising-free periods) and the introduction of sanctions against presenters.

7. In early 2001, the Department of Communications, Information Technology and the Arts issued a discussion paper titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*. The discussion paper outlined a number of legislative options proposed by the ACMA to strengthen its enforcement powers. The submissions that were received in response to the paper, particularly the submissions received from the Federation of Australian Commercial Television Stations (FACTS – now FreeTV) and the Federation of Australian Radio Broadcasters (FARB – now Commercial Radio Australia), were generally critical of the proposals, and none of the proposals was implemented at that time.

8. Since that time, further events have prompted renewed consideration of whether the ACMA has adequate enforcement powers. For example, the experience of the ACMA in its attempt to prosecute the licensee of commercial radio service 2UE for multiple breaches of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 indicates some of the difficulties confronted by the ACMA

because of its limited enforcement powers. There was also controversy in 2005 over the ACMA's response to a breach of the commercial television industry's code of practice by the Ten Network on the *Big Brother* program.

9. In 2004, the ACMA asked Professor Ian Ramsay to examine the effectiveness of the ACMA's existing enforcement powers and consider whether any reforms were needed in relation to these powers. His report has formed the basis of the Government's consideration of reforms to the ACMA's broadcasting regulatory powers.²

10. In summary, Professor Ramsay's report recommended amendments be made to the BSA to provide the ACMA with:

- a power to accept enforceable undertakings;
- a power to seek an injunction in circumstances where a person has failed to comply with requirements relating to the provision of broadcasting services without a licence;
- a power to seek civil penalties for certain breaches of the BSA, breaches of either licence conditions provided in the BSA or imposed on licensees by the ACMA, or breaches of notices to cease providing an unlicensed broadcasting service or to cease breaching a licence condition or certain code of practice, all of which are currently subject to criminal penalties in certain circumstances;
- a power to issue infringement notices for breaches of the control notification provisions of the BSA, non-compliance with the annual financial returns requirements of the BSA, and the late payment of licence fees; and
- a power to require on-air statements of ABA investigation findings.

11. The ACMA endorsed the recommendations of the report and forwarded it to the Minister for Communications, Information Technology and the Arts (the Minister).

CONSULTATION

12. On 9 November 2005, the Government released a discussion paper on the reform of the ACMA's broadcasting regulatory powers for public comment. The paper sought comments on the recommendations made by Prof Ramsay. Submissions closed on 9 December, and twelve submissions were received. The submissions are briefly summarised at Attachment A.³ The Government has since undertaken further consultations with industry and the ACMA.

² The Ramsay Report is available from the ACMA website:
http://www.acma.gov.au/acmainterwr/aba/newspubs/radio_tv/investigations/documents/enforcementpowers.pdf.

³ The submissions can be seen at the DCITA website:
http://www.dcita.gov.au/broad/policy_reviews/proposed_reforms_to_the_broadcasting_regulatory_powers_of_the_australian_communications_and_media_authority.

PROBLEM

13. Attachment B describes the ACMA's broadcasting and regulatory functions and powers in detail. In summary, the ACMA has the following range of broadcasting enforcement powers:

- to make recommendations to national broadcasters in relation to breaches of national broadcasters' codes of practice;
- to issue notices requiring compliance with certain industry codes of practice, licence conditions or industry standards;
- to impose an industry standard or licence condition;
- to require the cessation of the provision of an unlicensed service;
- to seek criminal penalties for certain breaches of the BSA, licence conditions or standards, or for non-compliance with notices to comply; or
- to suspend or cancel licences.

14. The Ramsay Report discusses how enforcement powers of regulators are ideally described in terms of a hierarchy of integrated sanctions which escalate in severity in response to more serious contraventions of the law. The ACMA's concerns centre on the existing concentration of its powers at the higher end of the hierarchy (eg criminal sanctions, and suspension or cancellation of a licence) and a lack of middle range penalties to address those breaches which are not considered serious enough to warrant the imposition of a criminal penalty or suspension or cancellation of a licence.

15. Of key concern has been the adequacy of the ACMA's enforcement powers in relation to:

- enforcement of licence conditions;
- enforcement of codes of practice;
- enforcement of the categories of broadcasting services; and
- enforcement of reporting and notification requirements.

Enforcement of licence conditions

16. Currently, breaches of those licence conditions set out in subclauses 7(1), 8(1), 9(1), 10(1) and 11(1) of Schedule 2 to the BSA, which identify the general conditions applicable to commercial, community and subscription television and radio licensees, are subject to criminal penalties under section 139. In relation to other licence conditions, the ACMA can issue notices directing licensees to comply with licence conditions, and a failure to comply with such a notice is a criminal offence (ss. 141 and 142).

17. The ACMA has indicated its concerns about use of the criminal penalty provisions currently available to it:

- criminal sanctions may be disproportionately punitive given the nature of the breach;
- criminal sanctions require referral to the Director of Public Prosecutions (DPP). Not only will this require use of DPP resources, but the DPP itself may not consider that the circumstance warrants the imposition of a penalty; and

- the process of establishing sufficient evidence to prove the elements of an offence to the criminal standard of proof is also problematic.

18. The difficulties associated with criminal sanctions were highlighted following the ACMA's findings in December 2003 that the licensee of Sydney commercial radio service 2UE had breached the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 on 19 occasions. Compliance with program standards is a condition of a commercial radio broadcaster's licence under subclause 8(1) of Schedule 2, breach of which is a criminal offence. On 29 June 2004, the ACMA announced that it had received advice from the DPP that on the evidence available there would be no reasonable prospect of a conviction of 2UE in relation to breaches of the disclosure standard, and that the matter would not be approved for prosecution.

19. The ACMA also has the power to suspend or cancel a licence in certain circumstances. Subsection 143(1) provides that the ACMA may suspend or cancel a licence if a commercial television broadcasting licensee, a commercial radio broadcasting licensee, a subscription television broadcasting licensee or a community broadcasting licensee:

- fails to comply with a notice issued under section 141 requiring compliance with a condition of a licence; or
- breaches a condition of the licence (regardless of whether a breach of that condition is a criminal offence or not).

20. However, suspension or cancellation of a licence is a severe penalty which impacts on consumers of the service, as well as broadcasters, who would be expected to suffer significant economic loss as a consequence of such a penalty. The ACMA has never used this power in respect of breaches by commercial broadcasters.

Enforcement of codes of practice

21. The BSA requires the ACMA to investigate complaints regarding compliance with codes of practice on satisfaction of certain preconditions (including prior complaint to the broadcaster).

22. If the ACMA is satisfied that a subscription or open narrowcasting service has been provided 'in deliberate disregard' of a relevant code of practice, the ACMA may issue a notice directing that action is taken to ensure compliance (s. 141(2)). Failure to comply with such a notice is an offence (s.142).

23. However, there are no specific provisions in the BSA relating to code non-compliance for commercial services, community services or subscription television broadcasting services. Currently, if the ACMA is satisfied that a code of practice is not operating to provide appropriate community safeguards, it may, pursuant to subsection 125(1), determine an industry standard in relation to that matter. However, the imposition of a standard affects the whole sector and is thus of limited use in responding to breaches by individual licensees. General provisions do permit the ACMA to impose additional conditions on licences, including conditions relating

to code compliance (ss. 43, 44, 87, 92J and 120). However, if an additional licence condition is breached, this does not constitute an automatic criminal offence.⁴ The ACMA must issue a notice requiring compliance with the additional condition pursuant to s.141. Only a failure to comply with such a notice (i.e. a third breach) is an offence pursuant to s.142.⁵

Enforcement of the categories of broadcasting services

24. The BSA provides significant criminal penalties for provision of a commercial broadcasting service without a licence, as well as criminal penalties for provision of other types of broadcasting service without an appropriate licence (ss. 131 – 135). The BSA also provides for the ACMA to issue ‘stop notices’, requiring a person found to be providing an unlicensed service to desist from providing that service (s.137). The criminal penalties for breaching a stop notice are the same as for a breach of the substantive offence (s.138).

25. However, the ACMA has found its penalty powers to enforce the categories of broadcasting services ineffective in those cases where a service provider has not complied with a ‘stop notice’; a particular area of difficulty has been open narrowcasters providing commercial services. A ‘stop notice’ can only be issued in relation to a service that the ACMA is satisfied is an unlicensed commercial service. A change of programming on the relevant service – even relatively slight – may be sufficient to mean that a new, different service is being provided. As a result, any complaint relating to the service must be the subject of a fresh investigation to determine whether it remains a commercial service.

26. Further difficulties have been experienced with the remaining sanctions available to the ACMA in such circumstances – suspension or cancellation of a licence, or criminal sanctions. Open narrowcasters operate under a class licence, so the ACMA is not empowered to suspend or cancel a licence as a means of enforcement.⁶

27. As noted above, the ACMA has also experienced practical difficulties in effectively utilising the criminal sanctions provided in the BSA. Criminal penalties are provided in ss.131 and 133 for operating a commercial broadcasting service without a licence. In the period 1993 to 2003, 43 investigations were conducted in relation to narrowcasters operating outside the terms of their licence, 36 of which related to the operation of a commercial service. A breach was detected in 17 of these cases. However, to date, the ACMA has not referred a matter to the DPP concerning the operation by an open narrowcaster of a commercial broadcasting service; the ACMA has not been satisfied that it could provide a sufficient brief of evidence to the DPP that would make out a case of an offence of providing a commercial broadcasting service without a licence.

⁴ Breaches of “basic” licence conditions (subclauses 7(1), 8(1), 9(1), 10(1) and 11(1) of Schedule 2) are subject to criminal penalties.

⁵ The ACMA may also suspend or cancel the licence pursuant to s 143.

⁶ However, s 144 enables the ACMA to apply to the Federal Court for an order to have a person cease providing a subscription radio or narrowcasting service.

Enforcement of notification and reporting requirements

28. The ACMA has indicated that on average, 10 (out of 261) commercial radio licensees lodge annual financial returns late. The returns are required by 31 December each year pursuant to s 205B of the BSA. Failure by a commercial television licensee or commercial radio licensee to report will result in a breach of the licence conditions at clauses 7(1)(ia) and 8(1)(ha) of Schedule 2 respectively.

29. Commercial radio and television licensees are also required to provide the ACMA with details of persons in a position to control the licence, the names of directors of the licensee, and, in the case of commercial television or radio broadcasting licensees, the name of each foreign director (s. 62). Commercial radio and television licensees and persons assuming control of these licences are required to notify the ACMA of changes in control within seven days of becoming aware of them occurring (ss. 63 and 64).

30. There is also a requirement for persons who control commercial television and radio licences to notify the ACMA annually of any interests they hold in a newspaper associated with the licence area (s. 65) and for subscription television broadcasting licensees to notify the ACMA of foreign persons with company interests exceeding 20% in the licensee (s. 112). Breaches of these provisions attract criminal penalties.

31. The ACMA estimates that each year there are around 20 late notifications under the control and foreign interest notification requirements, and 30 incomplete notifications. Referral of such matters to the DPP would be disproportionate and unlikely to be warranted on public interest grounds.

Conclusion

32. These problems have several consequences for the ACMA's capacity to effectively regulate the broadcasting sector:

- breaches of licence conditions, failures to comply with the ACMA notices and the provision of unlicensed services are not prosecuted due to concerns about criminal penalties, which are thus of limited value as deterrents to non-compliant behaviour;
- breaches of codes of practice or additional licence conditions by commercial or community broadcasters have no direct sanction, and may only be addressed through a complex process potentially leading to criminal prosecution;
- The ACMA's capacity to engage in negotiations with industry that might produce better compliance by licensees is hampered by a lack of regulatory alternatives to criminal penalties. Both the ACMA and industry face additional costs from a regulatory framework that relies on prosecution, in the absence of alternative options; and
- the credibility of the ACMA with the public, Parliament and industry is undermined when the ACMA is unwilling or unable to pursue sanctions for or refer for prosecution mid-range breaches, particularly when breaches have attracted public attention. This is particularly the case in relation to breaches of industry codes of practice, for which there is currently no direct sanction, unless the ACMA chooses to impose a licence condition on the licensee

responsible for the breach, or impose a standard on the relevant industry as a whole.

OBJECTIVES

33. Sections 4 and 5 of the BSA require that the regulation of broadcasting services by the ACMA should enable public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on broadcasters, and that, in dealing with breaches by licensees, the ACMA should use its powers “in a manner that, in the opinion of the ACMA, is commensurate with the seriousness of the breach concerned”. The current structure of powers available to the ACMA in relation to broadcasting does not enable the regulator to fully meet the requirements of these sections or operate in accordance with their intent.

34. It is intended to provide the ACMA with a more appropriate gradation of regulatory sanctions, particularly in relation to unlicensed broadcasting, mid-range breaches of licence conditions, minor reporting, notification and fee payment breaches, and in relation to breaches of industry codes of practice. It is also intended to provide the ACMA with alternatives to sanctions where they may lead to better compliance outcomes and better serve the public interest.

35. This will enable the ACMA to more effectively meet the requirements of sections 4 and 5 of the BSA.

Options

36. Options for each of the Ramsay Report recommendations are considered separately.

Enforceable undertakings

37. The Ramsay Report recommended that the ACMA be given a power to accept enforceable undertakings in relation to its broadcasting regulatory functions. The ACMA may currently accept non-enforceable undertakings. Enforceable undertakings would not directly provide additional sanctions for the ACMA, but provide an alternative regulatory tool for achieving compliance.

38. Three options have been considered:

- Option A: no amendment to the ACMA’s powers;
- Option B: give the ACMA a power to accept enforceable undertakings in relation to some of its powers; or
- Option C: accept the recommendation.

Option A

39. In their submission to the November 2005 discussion paper, both FreeTV and CRA argued that the current framework under which the ACMA has the power to accept unenforceable undertakings is operating effectively, and that enforceable undertakings will lead to increased litigation.

40. The ACMA agrees that unenforceable undertakings are working relatively effectively and that, to date, there have been few breaches of undertakings by any licensees. The option of enforceability is intended to operate *in addition to* the current framework, and enforceable undertakings would only be used in circumstances where the ACMA has concerns about the capacity or willingness of the undertaking party to fulfil the undertaking, and where enforcement via an agreement is desirable and proportionate to the breach that has occurred and in circumstances where a more punitive approach is not appropriate.

41. Changes to the media regulatory framework currently proposed by the Government may provide further opportunities for the use of enforceable undertakings, such as in relation to media transactions. A general power to accept enforceable undertakings would potentially be valuable in providing the ACMA and industry with a means to guarantee future conduct that may not be addressed by current provisions of the BSA and which, in absence of enforceability, the ACMA may be unwilling to approve.

42. Enforceable undertakings will also remain voluntary in the sense that a person cannot be compelled to offer enforceable undertakings. However, once enforceable undertakings are accepted, they would be binding.

Option B

43. It is not clear that there are advantages in limiting the ACMA's power to accept enforceable undertakings to specific areas of its functions. While non-enforceable undertakings from broadcasters currently mostly relate to code of practice or licence condition breaches, they are also used in relation to licence renewals to facilitate certain changes in the operations of a licensee. As noted above, a deregulated media ownership framework may provide opportunities for the use of enforceable undertakings in other areas of the ACMA's activities. Limiting the areas in which enforceable undertakings may be accepted would potentially forestall the development of enforceable undertakings as a regulatory tool in areas restricted from their use, would limit the benefits which both the regulator and industry can obtain from undertakings, and add complexity to undertakings which may address a range of compliance issues across both enforceable and non-enforceable areas.

Option C

44. Industry has not been able to identify specific disadvantages of enforceable undertakings, merely that the current system is operating effectively. However, there is evidence that industry benefits from enforceable undertakings. A review of the ACCC's use of enforceable undertakings demonstrated that undertakings "provided a quicker and more cost-effective mechanism for resolution than court proceedings."⁷ The Australian Law Reform Commission (ALRC) has stated:

⁷ D Watt, 'Evaluation of the Use of s 87B Undertakings' (1998) 13 ACCC Journal 7, cited in ALRC 95 *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*.

Undertakings are... popular with the regulated community. It was observed in one consultation that enforceable undertakings for corporations are ‘a nice way’ of warning and giving the regulated entity ‘another chance’. It was also stated that enforceable undertakings encourage greater candour and promote compliance.⁸

45. The Ramsay report separately identifies other advantages of enforceable undertakings:

It has also been said that the advantages of negotiated settlements, such as enforceable undertakings, include:

- saving time, financial costs and court resources;
- allowing compromise;
- allowing flexibility and the opportunity for change;
- encouraging learning;
- allowing defendants a say in the outcome;
- strengthening an organisation’s internal compliance systems;
- encouraging regulatory cooperation; and
- allowing internal discipline systems to work.⁹

46. Industry has argued that, should the ACMA be given the power to accept enforceable undertakings, guidelines should be prepared by the ACMA for its exercise of that power. The ACMA already has in place guidelines in relation to enforceable undertakings in the telecommunications sector, and is currently consulting with industry on guidelines for enforceable undertakings guidelines in broadcasting, pending Parliament’s consideration of these proposals. Guidelines would be broad in nature and intended to provide industry with an understanding of the ACMA’s general approach to the use of undertakings.

47. Option C is thus recommended. There are separate measures associated with this recommendation, discussed at paragraphs 92-93.

Civil Penalties

48. The Ramsay Report recommended that breaches of certain provisions of the BSA, breaches of licence conditions, or breaches of the ACMA notices, that are currently subject to criminal penalties (or suspension or cancellation of licence) be subject to civil monetary penalties. The Report did not recommend that all criminal offences in the BSA be made subject to civil penalties, but only those offences where

⁸ ALRC 95 *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* 16.59.

⁹ C Dellit and B Fisse, “Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement” in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994), 602-603, cited in Ramsay.

an ongoing compliance problem has been identified. Civil monetary penalties – which would be imposed by the court – would thus apply where:

- (a) an open narrowcaster provides a service that is not in accordance with the relevant class licence¹⁰;
- (b) there is a breach of standard licence conditions which, if breached, are currently subject to criminal penalties under s 139:
 - subclause 7(1) of Schedule 2 (relating to commercial television broadcasting licences);
 - subclause 8(1) of Schedule 2 (relating to commercial radio broadcasting licences);
 - subclause 9(1) of Schedule 2 (relating to community broadcasting licences);
 - subclause 9(1) of Schedule 2, other than paragraph 9(1)(h) of Schedule 2 (relating to temporary community broadcasting licences);
 - subclause 10(1) of Schedule 2 and a number of other provisions of the BSA (relating to subscription television broadcasting licences); and
 - subclause 11(1) of Schedule 2 (relating to subscription radio broadcasting services, subscription narrowcasting services and open narrowcasting services provided under class licences).
- (c) there is a breach of an additional licence condition imposed by the ACMA pursuant to ss. 43, 87, 87A, 92J, 99(2) or 120(1)¹¹;
- (d) there is a breach of s 137 (this section provides that if the ACMA is satisfied that a person is providing a commercial television broadcasting service, a commercial radio broadcasting service, a subscription television broadcasting service, or a community broadcasting service, without a licence to provide that service, the ACMA may issue a written notice to the person directing them to cease providing that service);
- (e) there is a breach of s 141(1) (this section provides that the ACMA may, by notice in writing given to a person, direct the person to take action to ensure that a service is provided in a way that conforms to the requirements of the relevant licence or class licence);
- (f) there is a breach of s 141(2) (this section provides that if a subscription or open narrowcasting service or subscription radio broadcasting service is provided “in deliberate disregard” of a relevant code of practice, the

¹⁰ This is not explicitly an offence under the current provisions of the BSA; rather, the ACMA may issue a “stop notice” in response to such behaviour (see para 46(d) below). However, the circumstances addressed by the Ramsay Report are addressed in ss 131-135, which prohibit any person from providing a commercial, subscription or community broadcasting service unless licensed to do so. Accordingly, it is proposed to provide for civil penalties in addition to the criminal penalties currently provided under sections 131-135.

¹¹ Currently the ACMA may respond to a breach of an *additional* licence condition by issuing a “stop notice”) or suspending or cancelling the relevant licence; such a breach is not currently subject to criminal penalties.

ACMA may issue a notice directing that action is taken to ensure compliance).

49. Three options have been considered:

- Option A: no amendment to the BSA;
- Option B: accept the recommendation; or
- Option C: accept the recommendation, and extend civil penalties to all criminal offences identified in the BSA.

Option A

50. CRA and FreeTV both argued in their submission against the inclusion of civil penalties in the BSA on the basis that the current enforcement regime works effectively.

51. In fact there is considerable evidence that the current enforcement regime is not operating as effectively as possible. In 2004-05, the number of total breaches found by the ACMA was higher than in any year since 2001-02. This included a substantial rise in codes of practice breaches. Breaches by commercial broadcasters of codes of practice in relation to accuracy and fair representation were also higher than at any point in the previous five years.

52. While licence condition breaches are relatively rare at this time, it is likely that a greater number of enforcement actions will be undertaken under a reformed set of the ACMA powers, as licence condition and other regulatory breaches which the ACMA has previously been unable or unwilling to pursue are addressed. The ACMA will also have access to more options for pursuing breaches of additional licence conditions, or industry standards, imposed on licensees in response to serious code of practice breaches.

Option B

53. There are benefits both for the regulator and industry in providing the option of civil penalties. Criminal sanctions require proof of the offence 'beyond reasonable doubt'; civil penalties will require proof to 'the balance of probabilities' standard, making sanctions potentially more accessible for the regulator. However, criminal sanctions may be disproportionate in their potential impact, in the event of a conviction, and expose industry to a potentially draconian and inappropriate sanction given the nature of the offences. Similarly, cancellation or suspension of a licence is likely to cause significant economic loss to a licensee far in excess of that merited by a breach.

54. Civil penalties would also complement enforceable undertakings by providing two further mid-range enforcement options for the ACMA and industry to consider in the event that a breach has been committed. Civil penalties would also bring the ACMA's broadcasting regulatory functions into alignment with the sanctions available to other regulators such as the ACCC and ASIC, which have access to both civil and criminal penalties, and to the ACMA itself in relation to telecommunications matters.

Option C

55. While a range of other criminal offences are identified in the BSA, neither the Ramsay Report nor the ACMA have identified compliance or prosecution concerns in relation to those offences. In the absence of a clear reason for extending civil penalties to these offences at this time, Option B is preferable.

56. Option B is thus recommended. However, in order to provide greater certainty to industry about the impact of civil penalties and their potential use by the ACMA, it is intended that the ACMA should be legislatively required to develop guidelines on the use of civil penalties and their interaction with criminal penalties.

57. In drafting the Communications Legislation Amendment (Enforcement Powers) Bill 2006, the Government will also replace the ACMA's existing powers in ss 137 and 141 of the BSA with new powers to issue remedial directions. Sections 137 and 141 of the BSA empowered the ACMA to issue notices requiring broadcasters to cease providing unlicensed services and to cease breaching licence conditions and certain codes of practice. The new remedial directions powers will (similar to the powers they will replace) enable the ACMA to direct licensees to take action directed towards ensuring that they do not provide unlicensed services or breach licence conditions or certain codes of practice in the future, and are more consistent with other powers the ACMA has under clause 53 of Schedule 6 of the BSA and the *Telecommunications Act 1997*. A failure to comply with such a direction would incur either a civil or criminal penalty.

58. During drafting, and following advice from the ACMA, it was decided to amend s 202 to provide for criminal penalties. Currently s.202 of the BSA requires a penalty of imprisonment for one year for failure to comply with a request by the ACMA for evidence or information, which is an inappropriately draconian sanction given the nature of the breach. Consistent with Cabinet's decision that the BSA be amended to allow for civil penalties for some criminal offences in the Act, provision of a civil penalty for s.202 would provide a more appropriate and flexible sanction.

59. The Bill also adds civil penalties to those matters that the ACMA will take into account in determining the suitability of licensees. Currently, under s 41, the ACMA must take into account whether a company or person controlling a licence has been convicted of an offence against the Act or associated regulations in assessing whether they are a suitable licensee. The Bill will add civil penalties as matter that must be considered.

Injunctions

60. The Ramsay Report recommended that the ACMA be given a power to seek an injunction in circumstances where a person has provided a commercial, subscription or community broadcasting services without a licence. This would be achieved by giving the ACMA a power to seek an injunction in relation to ss 131-135.¹²

61. Two options have been considered

¹² As discussed in paragraph 48(a) and footnote 9, ss 131-135 will also be the subject of civil penalties.

- Option A: no amendment to the BSA; or
- Option B: accept the recommendation.

Option A

62. As discussed above, the ACMA's capacity to prevent unlicensed broadcasts, particularly the broadcast of commercial services by licensees in other categories, is restricted by the current drafting of the BSA and the ease with which broadcasters providing an unlicensed commercial service may alter the service, in effect re-commencing the enforcement process each time.

63. The provision of unlicensed commercial radio services potentially has a significant impact on commercial licensees within the affected licence area. Commercial radio licences are allocated via auction and, particularly in metropolitan areas, may cost tens of millions of dollars. This imposes substantial costs on licensees, and any loss of revenue to a competitor unburdened by the cost of a commercial licence or associated financing may significantly affect the commercial viability of the licensee. The provision of unlicensed services is also inconsistent with the administrative moratorium placed on the allocation of new commercial radio licences by the ACMA, and the moratorium on the allocation of new commercial television licences until the end of 2006.

64. Option A would therefore continue the current, unsatisfactory circumstance of the ACMA being unable to fulfil its regulatory role in relation to preventing unlicensed broadcasts.

Option B

65. Industry supports providing the ACMA with an injunctive power in circumstances covered by s.137.

66. Option B is recommended as the best means to address an ongoing problem in the BSA of preventing the potentially harmful provision of unlicensed commercial broadcasting services.

Infringement notices

67. The Ramsay Report recommended that the ACMA be given a power to issue infringement notices for breaches of:

- section 62 (requires commercial broadcasting licensees and datacasting transmitter licensees to provide the ACMA each financial year with details of controllers and directors of the licence, and in the case of commercial broadcasting licensees, the details of foreign directors);
- sections 63 and 64 (requires commercial broadcasting licensees, datacasting transmitter licensees and persons in a position to control those licences to notify the ACMA of any changes in control of the licence);
- section 65 (requires persons in control of commercial broadcasting licences to notify the ACMA of any interests held in a newspaper that is associated with the licence area of the relevant licence);

- section 112 (requires subscription television broadcasting licensees to provide the ACMA each financial year with details of controllers of the licence; requires notification of any changes in control of the licence; requires notification each financial year of foreign interests in the licence); and
- section 205B (requires commercial broadcasting licensees to provide the ACMA each year with specific financial details).

68. Two options have been considered

- Option A: no amendment to the BSA; or
- Option B: accept the recommendation.

Option A

69. As discussed above, there is a minor but ongoing problem of late notification of information required under the BSA to the ACMA, and late reporting of financial results and payment of licence fees.

70. These are minor regulatory requirements, and (correctly), the ACMA has in the past judged that pursuing criminal penalties for such breaches would be an inappropriate use of resources, and be unlikely to be supported by the DPP. This clearly demonstrates the poor structure of the ACMA's currently regulatory options.

Option B

71. Infringement notices would provide the regulator with a regulatory alternative to address late notification and reporting that would preserve the existing rights of industry.

72. It is proposed that upon payment of the specified penalty, liability would be discharged and the licensee would not be regarded as having been convicted of the non-compliance (although the original requirement to report would remain). However, it would be necessary to ensure that further proceedings could be taken by the ACMA if there was non-compliance with the infringement notice.

73. Industry supports the proposal, on the condition that the ACMA adheres to guidelines developed by the ALRC for infringement notices, and that the ACMA issues a written warning prior to issuing the notice. The provision of a written warning, while adding an additional layer of process, would ensure that inadvertent breaches by licensees of reporting requirements were not subject to sanction.

74. Accordingly, Option B is recommended.

75. ALRC guidelines for infringement notices are discussed at length in the Ramsay Report.¹³ The Government considers the guidelines appropriate for the infringement notice scheme proposed for the ACMA.

¹³ The guidelines, and a discussion on the merits of infringement notices, can be found at http://www.austlii.edu.au/au/other/alrc/publications/reports/95/12.Infringement_notices.html#heading0.

Impact Analysis

76. The four proposals for amendments to the BSA would provide a more appropriate gradation of regulatory powers. However, they would not create additional offences, but rather provide additional regulatory options for the ACMA in relation to existing offences.

Civil penalties

77. As noted above, none of the proposals will establish new offences under the BSA, but relate to existing offences. The provision of civil penalties for the offences that currently attract criminal penalties will increase the possibility of successful sanctions being imposed on licensees. However, by providing alternatives to the use of arguably draconian criminal penalties, it may reduce the impact of sanctions on licensees.

Injunctions

78. As with civil penalties, injunctive powers in relation to the provision of unlicensed broadcasts will not establish new offences, but increase the possibility of successful action by the ACMA to address breaches of existing requirements. In doing so, the ACMA will be better placed to minimise or eliminate the impact of unlicensed commercial services on the viability of commercial broadcasters.

Infringement notices

79. Infringement notices will enable the ACMA to better address an ongoing lack of compliance with reporting and notification requirements. To the extent that such requirements are not enforced fully at this time, infringement notices will impose a heavier regulatory burden on the small number of licensees responsible for ongoing breaches. However, it is anticipated that, given the nature of the breaches, the maximum quantum of penalties levied via infringement notices would be small, and licensees could elect to contest the notices in any event.

Enforceable undertakings

80. The provision of enforceable undertakings will add no regulatory burden to licensees as undertakings will remain voluntary. Rather, the addition of enforceability will enable both the regulator and industry to consider alternatives to sanctions more widely than currently, potentially lightening the regulatory burden on industry when undertakings are used in place of criminal or civil penalties. Enforceability will also enable the ACMA to employ undertakings in areas beyond their current use, including in relation to media transactions that may occur following liberalisation of the cross-media ownership restrictions proposed elsewhere by the Government.

Implementation and Review

81. The ACMA will be required under legislation associated with the proposals to consult with industry in preparing guidelines for the use of enforceable undertakings, civil penalties and infringement notices.

Enforceable undertakings

82. Preliminary consultation has been undertaken with industry on guidelines for the ACMA's use of undertakings (both enforceable and unenforceable) in broadcasting regulation. The ACMA currently has enforceable undertakings guidelines in relation to its telecommunications regulatory powers.

Civil penalties

83. The ALRC¹⁴ has discussed the need for guidelines in relation to the administration of civil (and thus by extension criminal) penalties in the Australian regulatory environment.

84. The ACMA is currently considering the development of guidelines on to how it will assess cases to determine whether to pursue civil or criminal penalties, and associated issues such as its relationship with the DPP, and the role of regulatory alternatives (in particular, enforceable undertakings).

Infringement notices

85. The Ramsay Report discusses ALRC guidelines relating to infringement notices. It is considered that these provide a sound basis for guidelines the ACMA will be required to develop, in consultation with industry. As with guidelines in relation to previous proposals, these would be broad in nature and intended to provide industry with an understanding of the ACMA's general approach to its enforcement options.

86. The Bill intends that the ACMA should not be prevented from developing a comprehensive enforcement policy covering not merely the three areas discussed above, but all of the ACMA's enforcement options.

Associated measures

87. As a consequence of other reforms to the digital broadcasting regulatory framework, it is proposed that licences for new digital services using datacasting spectrum will be allocated from 2007. In order to ensure that licensees that may commence services from 2007 or later are not disadvantaged compared to broadcasting licensees, it is proposed that the ACMA also be given the power to accept enforceable undertakings in relation to its datacasting regulatory functions. This will enable datacasting licensees to benefit from the additional regulatory flexibility provided by undertakings.

88. The ACMA's broadcasting and datacasting regulatory functions are described in section 10 of the *Australian Communications and Media Authority Act 2005*, which also describes the ACMA's internet regulatory functions. The emergence of online content provision, both by established content providers such as broadcasting licensees, and by others outside the traditional broadcasting regulatory framework, has

¹⁴ ALRC 95: *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, 2002.

posed challenges for that framework. Given the growing provision of content by a single provider over both broadcasting spectrum and online, it is appropriate that a power to accept enforceable undertakings also be extended to the ACMA's internet regulatory functions as described in section 10. This will ensure a level of consistency in relation to the use of enforceable undertakings in relation to both traditional and emerging forms of content provision.

Summary of submissions to *Proposed Reforms To The Broadcasting Regulatory Powers Of The Australian Communications And Media Authority, November 2005*

ABC and *SBS* oppose any reform that would permit the ACMA to require the broadcast of on-air statements by them (this was not proposed in the discussion paper).

The *Australian Caption Centre (ACC)*, *Friends of the ABC (WA)*, the *Media, Entertainment & Arts Alliance* and *Young Media Australia (YMA)* all support the proposals. The *Australian Narrowcast Radio Association (ANRA)* supports the proposed reforms, subject to seeing the Bill implementing them. The *Australian Film Commission (AFC)* supports the proposals but suggests that the class of breaches which would be subject to on-air statements be stipulated.

The *Centre for Media and Communications Law (CMCL)* supports all the reform proposals except on-air statements. The submission recommends an examination of on-air statements in the UK and New Zealand.

The *Screen Producers' Association of Australia (SPAA)* submission primarily focused on local content issues rather than the proposed reforms. SPAA claims the current regulatory framework is operating effectively and that any additional compliance burden, such as fines, may be pushed by broadcasters onto producers.

Commercial Radio Association (CRA)

Both CRA and FreeTV's submissions make arguments that are similar to those raised in relation to possible reform options considered in 2001 following the Commercial Radio Inquiry.

CRA opposes the proposals, except for injunctions in relation to the provision of unlicensed services, and infringement notices. CRA's submission argues that the current regulatory framework operates effectively, reflected in the low level of breach findings and audience satisfaction with radio services, and that the proposals represent a significant departure from the existing approach to broadcasting regulation. CRA also argues for a more restrictive legislative definition of narrowcast services (ANRA has expressed concern about this, but has not responded in detail as it was outside the scope of the paper).

Free TV Australia

FreeTV supports injunctions in relation to providing unlicensed services, and infringement notices. FreeTV also supports the application of civil penalties in relation to the provision of a service without a licence, and the provision of an open narrowcast service contrary to the conditions of the class licence. The submission argues that otherwise the current regulatory framework operates effectively.

Overview of the ACMA's functions and powers

Establishment

The Australian Broadcasting Authority (ABA) was established by s.154(1) of the *Broadcasting Services Act 1992* (BSA), and began operations on 5 October 1992. On 1 July 2005 the ABA and the Australian Communications Authority (ACA) were merged to form the Australian Communications and Media Authority (ACMA).

The ACMA is an independent statutory authority established under section 6 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act), and it is responsible through the Minister for Communications, Information Technology and the Arts to the Parliament.

Functions

The primary functions of the ACMA are set out in ss.7-11 of the ACMA Act. The ACMA's broadcasting, content and datacasting functions are set out in section 10:

10 ACMA's broadcasting, content and datacasting functions

- (1) The ACMA's *broadcasting, content and datacasting functions* are as follows:
 - (a) to regulate broadcasting services, Internet content and datacasting services in accordance with the *Broadcasting Services Act 1992*;
 - (b) to plan the availability of segments of the broadcasting services bands on an area basis;
 - (c) to allocate, renew, suspend and cancel licences and to take other enforcement action under the *Broadcasting Services Act 1992*;
 - (d) to conduct investigations or hearings relating to the allocating of licences for community radio and community television services;
 - (e) to conduct investigations as directed by the Minister under section 171 of the *Broadcasting Services Act 1992*;
 - (f) to design and administer price-based systems for the allocation of commercial television broadcasting licences and commercial radio broadcasting licences;
 - (g) to collect any fees payable in respect of licences;
 - (h) to conduct or commission research into community attitudes on issues relating to programs and datacasting content;
 - (i) to assist broadcasting service providers and datacasting service providers to develop codes of practice that, as far as possible, are in accordance with community standards;
 - (j) to monitor compliance with those codes of practice;
 - (k) to develop program standards relating to broadcasting in Australia;
 - (l) to monitor compliance with those standards;
 - (m) to monitor and investigate complaints concerning broadcasting services (including national broadcasting services) and datacasting services;
 - (n) to inform itself and advise the Minister on technological advances and service trends in the broadcasting industry, Internet industry and datacasting industry;

- (o) such other functions as are conferred on the ACMA by or under:
 - (i) the *Australian Broadcasting Corporation Act 1983*; or
 - (ii) the *Broadcasting Services Act 1992*; or
 - (iii) the *Interactive Gambling Act 2001*; or
 - (iv) the *Radio Licence Fees Act 1964*; or
 - (v) the *Special Broadcasting Service Act 1991*; or
 - (vi) subsection 158F(1) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or
 - (vii) the *Television Licence Fees Act 1964*;
- (p) such other functions as are conferred on the ACMA by or under the following provisions of the *Radiocommunications Act 1992*:
 - (i) paragraph 102B(b), 109A(1)(g) or (ga), or 131ACA(b);
 - (ii) subsection 106(6A), 109A(1A) or (1B), 114(3C) or (3E), or 128C(1);
 - (iii) section 128D;
- (q) to report to, and advise, the Minister in relation to the broadcasting industry, Internet industry and datacasting industry;
- (r) to monitor, and to report to the Minister on, the operation of each Act specified in paragraph (o) or (p), to the extent it is so specified;
- (s) to do anything incidental to or conducive to the performance of any of the above functions.

For the purpose of exercising its powers and functions under the BSA, the ACMA is obliged to take account of:

- the objects of the BSA and the regulatory policy set out in the BSA;
- any directions given to the ACMA by the Minister; and
- Australia's obligations under the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement.

Overview of the ACMA's current enforcement powers in relation to broadcasting¹⁵

Codes of practice

Industry-developed codes of practice cover most areas of program content except those dealt with by program standards (i.e. Australian content and children's programs on commercial television, and the three Commercial Radio Standards). The code framework is co-regulatory in the sense that industry develops codes but the ACMA has a role in assessing and approving them.

Subsection 123(1) of the BSA provides that it is the intention of Parliament that radio and television industry groups representing:

- commercial broadcasting licensees;
- community broadcasting licensees (with some exceptions);
- providers of subscription broadcasting services;
- providers of subscription narrowcasting services; and

¹⁵ This overview draws significantly on the Ramsay Report.

- providers of open narrowcasting services;

develop, in consultation with the ACMA, codes of practice that are to be applicable to the broadcasting operations of each of those sections of the industry. Subsection 123(2) provides that codes of practice may cover a broad range of matters such as:

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast;
- methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority;
- promoting accuracy and fairness in news and current affairs;
- methods of handling complaints from the public about program content or compliance with codes of practice and reporting to the ACMA on complaints so made;
- in the case of codes of practice developed by commercial broadcasting licensees – broadcasting time devoted to advertising time; and
- in the case of codes of practice developed by commercial radio broadcasting licensees – the broadcasting of Australian music.

Codes of practice developed under s.123 must be included in the Register of codes of practice maintained by the ACMA. The requirements for inclusion in the Register include that:

- the code provides appropriate community safeguards for the matters covered by the code;
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code: s.123(4).

The ACMA may determine program standards if it is satisfied that a registered code of practice is not providing appropriate community safeguards for a matter referred to in s.123(2) or if no code of practice has been registered for a matter referred to in s.123(2): s.125. The ACMA must determine a standard in relation to the matter if, in addition to the above, it is satisfied that it should determine a standard in relation to the matter: s.125.

The ACMA is also required to determine program standards for commercial television broadcasting licensees that relate to programs for children and the Australian content of programs (s.122).

Investigations into programming matters – overview

If the ACMA receives a complaint about a possible breach of the BSA or of a licence condition, it must, subject to certain conditions, investigate the complaint. The ACMA may itself initiate investigations into breaches of the BSA or of licence conditions or codes under s.170 of the BSA. The ACMA has information gathering powers under Part 13, Division 1 of the BSA and investigation powers under Part 13, Division 2 of the BSA.

The breach of *some* standard licence conditions is an offence (s.139). This applies primarily to the subclause (1) conditions in Schedule 2 which set out the general licence conditions for the various types of licences.

Where a breach of a licence condition is an offence, the ACMA may refer the matter to the DPP for prosecution. If prosecution is successful, monetary penalties apply.

Breaches of other licence conditions, including an additional licence condition imposed on a commercial radio or television broadcaster under s.43, are not automatic offences.

However, in relation to *all* licence conditions, the ACMA could suspend or cancel the licence if a breach was found by the ACMA (s.143). Alternatively in both cases, the ACMA can issue a notice that the person take action within a stated period (of no more than one month), to comply with the licence condition (s.141(1)). Failure to comply with a s.141 notice is an offence (s.142).

If the person does not comply with the notice, the ACMA then has the option of referring the failure to comply to the DPP for prosecution (s.142), or of suspending or cancelling the licence (s.143).

The BSA requires the ACMA to investigate complaints regarding compliance with codes of practice on satisfaction of certain preconditions (including prior complaint to the broadcaster). The ACMA must notify the complainant of the results of the investigation (ss.148, 149, 150, 151 and 152). The position with regard to enforcement mechanisms differs somewhat according to broadcaster type.

Subscription or open narrowcasting services; subscription radio broadcasting services

If a service is provided ‘in deliberate disregard of’ a relevant code of practice, the ACMA may issue a notice directing that action is taken to ensure compliance (s.141(2)). Failure to comply with such a notice is an offence (s.142).

Commercial services; community services; subscription TV broadcasting services

There are no specific provisions in the BSA relating to code non-compliance. General provisions permit the ACMA to impose conditions on licences including conditions relating to code compliance (ss 43, 44, 87, 92J, 99 and 120). The ACMA, may under s.125, determine program standards where it is satisfied that codes of practice are not providing appropriate community safeguards or where no codes of practice have been developed.

National broadcasters

The ACMA has only limited powers in relation to breaches by the national broadcasters. They are not affected by the proposals addressed in this Statement.

Other breaches of the BSA¹⁶

Some breaches of the BSA carry criminal penalties and must be referred to the DPP for prosecution. Breaches of the BSA include breaches of control provisions and of licensing provisions.

Examples of Criminal Penalties under the BSA, not taking into account the amendments in this Bill

Offences concerning control of commercial TV/ commercial radio and datacasting transmitter licences			
Offence	Max. Penalty Units	Max. Penalty Units	Provision of BSA
NB 1 penalty unit = \$110	commercial TV broadcasting/ datacasting licence	commercial radio broadcasting licence	
Failure to notify the ACMA of control and directorships	500	50	62
Failure by licensee to notify changes in control	500	50	63
Failure by person who obtains control of licence to notify the ACMA of that position	500	50	64
Failure by person in control of a licence to notify newspaper interests	500 (commercial TV broadcasting licences only)	50	65
Breach of control/ audience reach/ foreign control/ cross-media rules	20,000	2,000	66
Breach of notice under s.67 specifying time to rectify breach of control etc rules	20,000	2,000	69

¹⁶ This overview draws significantly on the Ramsay Report.

Breach of notice under s.70 specifying time to rectify breach of control etc rules	20,000	2,000	72
Offences concerning Pay TV broadcasting licences			
Offence	Maximum Penalty Units (1 unit = \$110.00)	Provision of BSA	
Failure by licensee to lodge annual return concerning eligible drama expenditure	1,000	103ZA	
Failure by channel provider or part-channel provider to lodge annual return concerning eligible drama expenditure	1,000	103ZB	
Breach of control etc rules relating to subscription TV broadcasting services	20,000	111	
Breach of notification provisions relating to control of subscription TV broadcasting services	500	112	
Offences concerning International broadcasting licences			
Offence	Maximum Penalty Units (1 unit = \$110.00)	Provision of BSA	
Providing an international broadcasting service without a licence	20,000	121FG	
Failure to comply with a notice directing a person to cease providing service without a licence	20,000	121FH	
Breach of condition of international broadcasting licence	2,000	121FJ	
Breach of conditions of nominated broadcaster declaration	2,000	121FLF	

Other offences		
Offence	Max Penalty	Provision
Intentional or reckless contravention of anti-hoarding rule	2,000 penalty units	146F BSA
Disruption of the ACMA hearing	1 year imprisonment	201 BSA
Non-compliance with requirement to give evidence	1 year imprisonment	202 BSA
Breach of online provider rules	50 penalty units	Sch 5, cl 82 BSA
Breach of direction to comply with online provider rules	50 penalty units	Sch 5, cl 83 BSA
Misleading or deceptive conduct		Criminal Code cl 136.1 Criminal Code cl 137.1

NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides for the citation of the *Communications Legislation Amendment (Enforcement Powers) Act 2006* (the Act).

Clause 2 - Commencement

Schedule 1 of this Bill commences on a single day to be fixed by Proclamation. However, if any of the provisions do not commence within the period of 3 months beginning on the day on which the Act receives Royal Assent, they commence on the first day after the end of that period. All other sections of this Bill commence on the day on which the Act receives Royal Assent.

Clause 3 - Schedule(s)

By virtue of this clause, provisions of the *Broadcasting Services Act 1992* (BSA) and *Radiocommunications Act 1992* (Radcom Act) are amended as set out in the Schedules to the Bill.

Schedule 1 – Amendments

Part 1 – Amendments

Broadcasting Services Act 1992

Item 1 – Subsection 6(1)

Item 1 inserts a new definition of “authorised infringement notice officer” in subsection 6(1) of the BSA.

This Item is related to Item 48, which inserts new Part 14E of the BSA. New Part 14E provides for the issue of infringement notices by the Australian Communications and Media Authority (the ACMA). Item 1 ensures that the Chair is authorised to issue infringement notices under Part 14E. Further, where a member of staff is appointed by the ACMA under new section 205ZE to be an authorised infringement notice officer, that staff member may issue infringement notices under new Part 14E.

Item 2 – Subsection 6(1)

Item 3 – Subsection 6(1)

Items 2 and 3 insert new definitions of “civil penalty order” and “civil penalty provision” in subsection 6(1) of the BSA. These Items are consequential to Item 48, which inserts new Part 14B. New Part 14B introduces procedural machinery to support civil penalties for certain contraventions of the BSA.

Item 4 – Subsection 6(1)

Item 4 inserts a new definition of “designated infringement notice provision” in subsection 6(1) of the BSA.

This Item is consequential to Item 48, which inserts new Part 14E. New Part 14E provides for infringement notices and formal warnings to be given for contraventions of a designated infringement notice provision under the BSA.

Item 5 – Subsection 6(1)

Item 5 inserts a new definition of “evidential burden” in subsection 6(1) of the BSA. This new definition is consistent with the definition of “evidential burden” in subsection 13.3(6) of the *Criminal Code Act 1995* (Criminal Code).

This Item is consequential to Items 42 and 48. Item 42 inserts new subsection 202(2B), which provides that a person who wishes to rely on subsection 202(2A) in proceedings for a civil penalty order bears an evidential burden in relation to that matter. Item 48 inserts new Part 14B, which provides, under new section 205Q, that a person who wishes to rely on subsections 205Q(1) or (2) in proceedings for a civil penalty order bears an evidential burden in relation to that matter. New Part 14B also inserts new subsection 205PAA(3), which provides that a person who wishes to rely on subsections 205PAA(1) or (2) in proceedings for a civil penalty order bears an evidential burden in relation to that matter.

Item 6 – Subsection 6(1)

Item 6 inserts a new definition of “infringement notice” in subsection 6(1) of the BSA.

This Item is consequential to Item 48, which inserts new Part 14E of the BSA. New Part 14E provides for infringement notices and formal warnings to be given for contraventions of a designated infringement notice provision under the BSA.

Item 7 – Subsection 6(1)

Item 7 inserts a new definition of “penalty unit” in subsection 6(1) of the BSA. This definition relies on section 4AA of the *Crimes Act 1914*, which currently provides that one penalty unit equates to \$110.

Item 8 – Subsection 6(1)

Item 8 inserts a new definition of “registered code of practice” in subsection 6(1) of the BSA.

This Item is consequential to Item 48, which inserts new Part 14D. New Part 14D empowers the ACMA to accept enforceable undertakings in relation to compliance with the BSA and codes of practice registered under the BSA for the broadcasting, Internet and datacasting industries.

Item 9 – After paragraph 41(2)(a)**Item 10 – At the end of subsection 41(3)**

Currently, past criminal convictions for breaches of the BSA are relevant to a person's suitability to hold a licence. These Items amend section 41 so that past civil penalties will also be relevant to suitability.

Item 11 – At the end of Division 6 of Part 5

Item 11 inserts new sections 65A and 65B of the BSA. New section 65A provides that an offence against sections 62, 63, 64 and 65 of the BSA is an offence of strict liability. Offences against these provisions will be offences of strict liability, which means that there will be no requirement to prove a fault element (eg intention) for any of the physical elements of these offences. However, the defence of mistake of fact in addition to the general defences will be available.

The offences covered by new section 65A (sections 62-65 of the BSA) relate to requirements to report changes of control of commercial television, commercial radio and Associated Newspapers to the ACMA.

As breaches of sections 62, 63, 64 and 65 of the BSA are offences, prior to this amendment, subsection 5.6(1) of the Criminal Code applied, by default, as these offence provisions did not specify a fault element. Subsection 5.6(1) of the Criminal Code operates so that if a law creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. This Item removes the requirement to prove a fault element (ie intention) for these offences.

Under the proposed Broadcasting Services Amendment (Media Ownership) Bill 2006, which will implement the Government's decisions in relation to changes to the media ownership regulatory framework, the ACMA will be required to establish a Register of Controlled Media Groups, which will be the primary vehicle for the implementation of the diversity protection measures that will replace the cross-media rules (the "5/4 test"). The Register of Controlled Media Groups will rely heavily on sections 62-65 of the BSA, as timely and accurate reporting of changes in control will be critical to both the ACMA's and the media industry's understanding of the level of media diversity in each licence area, and therefore whether media transactions may proceed.

The sections all require notification to the ACMA and non-compliance therefore would relate to a failure to notify the ACMA (or inaccurate notification of the ACMA). In both cases, proof of intent to fail to notify, or to notify inaccurately, may be difficult to obtain. In effect it would only be where a person consciously decided not to comply with the notification obligations that there would be an offence. This would perversely reward those with inadequate governance and compliance systems in place. The onus will be on media operators to put systems in place to ensure they comply.

New section 65B declares sections 62, 63, 64 and 65 as designated infringement notice provisions. This Item is consequential to Item 48, which inserts new Part 14E.

Part 14E provides for infringement notices and formal warnings to be given for contraventions of a designated infringement notice provision under the BSA. The ACMA is required by new section 215 (Item 50) to develop guidelines in relation to the use of its enforcement powers, including in relation to issuing formal warnings and infringement notices.

Item 12 – After paragraph 83(2)(a)

Item 13 – At the end of subsection 83(3)

Item 14 – After paragraph 92D(2)(a)

Item 15 – At the end of subsection 92D(3)

Item 16 – After paragraph 98(2)(a)

Item 17 – At the end of subsection 98(3)

Item 18 – After paragraph 121FC(1)(a)

Item 19 – At the end of subsection 121FC(2)

These Items make amendments to the suitability provisions for other categories of broadcasting licences, that correspond to the amendments made to section 41 by Items 9 and 10 above.

Item 20 – At the end of section 121FG

Item 20 inserts new subsections 121FG(3), (4) and (5) of the BSA. Currently, section 121FG provides that a person is guilty of an offence if that person intentionally provides an international broadcasting service without an international broadcasting licence to provide that service, and is reckless as to that fact.

This Item introduces a separate civil penalty where a person provides an international broadcasting service without an international broadcasting licence to provide that service. By introducing civil penalties for breaches of particular provisions of the BSA where criminal offences already exist for those breaches, the ACMA will be able to determine the most appropriate sanction for that particular breach. In addition, it will not be necessary for the ACMA to prove the element of fault in taking action under the new civil penalty provisions.

The ACMA is required by new section 215 (Item 50) to develop guidelines in relation to the use of its enforcement powers under Division 4 of Part 8B of the BSA, including in relation to commencing civil penalty proceedings.

Item 21 – Section 121FH

Item 21 repeals section 121FH and substitutes new sections 121FH, 121FHA and 121FHB of the BSA.

New section 121FH allows the ACMA, where a person provides an international broadcasting service without a licence, to give a notice directing that the person take action towards ensuring that they do not provide that service without a licence in the future.

This amendment allows the ACMA to give remedial directions in relation to breaches of new subsection 121FG(3). The remedial directions provisions have been modelled on the remedial directions provisions in clause 53 of Schedule 6 of the BSA and the *Telecommunications Act 1997* (the Tel Act) (eg sections 69 and 102). This ensures that the ACMA's powers in relation to these types of notices are consistent.

This amendment is also consequential to Item 20. Item 20 inserts new subsection 121FG(3), which provides that a person must not provide an international broadcasting service if that person does not have a licence to provide that service. Item 20 also inserts new subsection 121FG(4), which provides that new subsection 121FG(3) is a civil penalty provision.

By introducing civil penalty provisions and remedial directions for particular breaches of the BSA, the ACMA will have more flexibility regarding what action they choose to take in relation to these breaches.

The power to give remedial directions in relation to a breach is in addition to separate action which may arise as a result of the actual breach itself, either imposing a civil penalty or prosecuting an offence under section 121FG.

This Item inserts new section 121FHA, which is consequential to the repeal of section 121FH. New section 121FHA is equivalent to old subsections 121FH(2), (3) and (4).

This Item also inserts new section 121FHB, which introduces a separate civil penalty where a person does not comply with a notice given under section 121FH.

Item 22 – After section 121FJ

Item 22 inserts new sections 121FJA, 121FJB, 121FJC and 121FJD of the BSA.

Section 121FJ provides that a person is guilty of an offence if that person is an international broadcasting licensee and the person engages in conduct which breaches a condition of the licence.

New section 121FJA introduces a civil penalty where an international broadcasting licensee breaches a condition of the licence.

New section 121FJB allows the ACMA, where an international broadcasting licensee breaches a condition of the licence, to give a remedial direction by notice in writing, directing that the person take action towards ensuring that they do not breach that condition in the future.

The remedial directions provisions have been modelled on the remedial directions provisions in clause 53 of Schedule 6 of the BSA and the Tel Act (eg sections 69 and

102). This ensures that the ACMA's powers in relation to these types of notices are consistent.

New subsection 121FJB(2) provides examples of the kinds of directions that may be given to a licensee under subsection (1). These examples are not an exhaustive list of the kinds of directions the ACMA may give in a subsection 121FJB(1) remedial direction (see section 15AD of the *Acts Interpretation Act 1901*).

New section 121FJC provides that a breach of a section 121FJB notice is an offence. Making non-compliance of a section 121FJB notice, which deals with breaches of licence conditions, an offence is consistent with the offence provision in new section 142 for non-compliance of notices given in relation to breaches of licence conditions under new section 141 of the BSA. The penalty of 2,000 penalty units in new section 121FJC is also consistent with the penalty for an offence under section 121FJ of the BSA.

New section 121FJD introduces a separate civil penalty where a person does not comply with a notice under new section 121FJB.

Item 23 – Subsection 132(1)

Item 23 omits the subsection number “(1)” from section 132 of the BSA.

This Item is a technical amendment consequential to Item 26, which repeals subsection 132(2) of the BSA.

Item 24 – Subsection 132(1)

Item 24 is a technical amendment to subsection 123(1) of the BSA. This amendment makes the formulation of the provision consistent with the other provisions in Division 1 of Part 10 relating to unlicensed services.

Item 25 – Subsection 132(1) (penalty)

Item 25 repeals the current penalty, which distinguishes between a service that is provided with the use of a satellite (20,000 penalty units) and any other subscription television broadcasting service (2,000 penalty units). This Item substitutes a standard penalty of 2,000 penalty units for all unlicensed subscription television broadcasting. The distinction between satellite and other subscription television broadcasting services is no longer important, so all subscription television broadcasting is to be treated the same.

Item 26 – Subsection 132(2)

Item 26 repeals subsection 132(2) of the BSA, which provides that a person must not, before 1 July 1997, provide a subscription television broadcasting service with the use of a satellite unless the service is provided through a subscription television satellite. Subsection 132(2) is now inoperative.

Item 27 – After Division 1 of Part 10

Item 27 inserts new Division 1A of Part 10 of the BSA, which provides civil penalties for unlicensed services.

New sections 136A-136E of the BSA create civil penalty provisions for the conduct covered by the existing criminal offences in Division 1 of Part 10 of the BSA (sections 131-136). Where a person provides a broadcasting service without an appropriate licence, the person could be prosecuted for an offence under the relevant provision of Division 1, or the ACMA could commence an action in the Federal Court seeking the imposition of a civil penalty for a breach of the relevant provision of new Division 1A.

Item 28 – Sections 137 and 138

Item 28 repeals sections 137 and 138 and substitutes new sections 137, 138 and 138A of the BSA.

New section 137 allows the ACMA, where a person breaches new section 136A, 136B, 136C, 136D or 136E, to give a remedial direction by notice in writing, directing that the person take action towards ensuring that they do not breach that section in the future. This amendment is consequential to Item 27, which inserts new Division 1A of Part 10 of the BSA (new sections 136A – 136E), which provides civil penalties for unlicensed services.

The power to give remedial directions in relation to a breach is in addition to separate action which may arise as a result of the actual breach itself, either imposing a civil penalty or prosecuting an offence under new sections 136A, 136B, 136C, 136D or 136E and sections 131, 132, 133, 134 and 135 respectively.

New section 138 amends the wording of the current offence provision for breaches of a section 137 notice to reflect the amendment of section 137.

New section 138A introduces a separate civil penalty where a person does not comply with a notice under section 137.

Item 29 – Paragraph 139(1)(c)**Item 30 – After subsection 139(1)****Item 31 – Paragraph 139(3)(c)****Item 32 – After subsection 139(3)**

Section 139 is a general offence for breach of certain standard licence conditions. These Items make special provision for breach of the licence conditions relating to financial records and reporting (paragraphs 7(1)(ia) and 8(1)(ha) of Schedule 2).

Paragraphs 7(1)(ia) and 8(1)(ha) of Schedule 2 provide that a commercial television broadcasting licensee and commercial radio broadcasting licensee respectively must comply with the requirements set out in section 205B.

Section 205B sets out the requirements relating to keeping and maintaining financial accounts in relation to the service provided under commercial television broadcasting and commercial radio broadcasting licences.

These Items amend section 139 so that:

- a breach of these licence conditions will be an offence of strict liability, with a lower maximum penalty; and
- those licence conditions will be designated infringement notice provisions.

Item 33 – After section 140

Item 33 inserts new section 140A, which is a civil penalty provision that mirrors the existing criminal offences in section 139.

Under section 139, it is a criminal offence for a licensee to fail to comply with certain specified licence conditions. Where a licensee breaches one or more of the specified licence conditions, the licensee could be prosecuted for an offence under section 139, or the ACMA could commence an action in the Federal Court seeking the imposition of a civil penalty for a breach of new section 140A.

Item 34 – Sections 141 and 142

Item 34 repeals sections 141 and 142 and substitutes new sections 141, 142 and 142A of the BSA.

This Item inserts new section 141, which gives the ACMA the power to give remedial directions in relation to breaches of licence conditions for commercial, community and subscription services, breaches of class licences and breaches of codes of practice for a subscription radio broadcasting service, a subscription narrowcasting service or an open narrowcasting service.

New subsection 141(1) allows the ACMA, where a commercial television broadcasting licensee, a commercial radio broadcasting licensee, a community broadcasting licensee or a subscription television broadcasting licensee breaches a condition of the licence, to give a notice directing that the person take action towards ensuring that they do not breach that condition in the future.

New subsection 141(3) allows the ACMA, where a person who is in a position to exercise control of a commercial television broadcasting licence or a commercial radio broadcasting licence has caused the licensee to breach a condition of the licence, to give a notice directing that the person take action towards ensuring that there is no further breach of that condition.

New subsection 141(4) allows the ACMA, where a person who provides a subscription radio broadcasting service, a subscription narrowcasting service or an open narrowcasting service breaches a condition of the relevant class licence, to give a notice directing that the person take action towards ensuring that they do not breach that condition in the future.

New subsection 141(6) allows the ACMA, where a person who provides a subscription radio broadcasting service, a subscription narrowcasting service or an open narrowcasting service breaches a registered code of practice that applies to that service, to give a notice directing that the person take action towards ensuring that they do not breach that code of practice in the future.

The remedial directions provisions have been modelled on the remedial directions provisions in clause 53 of Schedule 6 of the BSA and the Tel Act (eg sections 69 and 102). This ensures that the ACMA's powers in relation to these types of notices are consistent.

By introducing civil penalty provisions and remedial directions for particular breaches of the BSA, the ACMA will have more flexibility regarding what action they choose to take in relation to these breaches.

The power to give remedial directions in relation to a breach is in addition to separate action which may arise as a result of the actual breach itself, either imposing a civil penalty or prosecuting an offence under new section 140A and section 139 respectively.

New subsections 141(2), 141(5) and 141(7) provide examples of the kinds of directions that may be given to a licensee under subsections 141(1), (4) and (6) respectively. These examples are not an exhaustive list of the kinds of directions the ACMA may give in a subsection 141(1), (4) or (6) remedial direction (see section 15AD of the *Acts Interpretation Act 1901*).

New section 142 amends the wording of the current offence provision for breaches of a section 141 notice to reflect the amendment of section 141. The references to "satellite subscription television broadcasting licensee" in section 142 have been removed as it is intended that all subscription television broadcasting is to be treated the same.

Item 34 inserts new section 142A, which is a civil penalty provision that mirrors the existing criminal offence in section 142.

Item 35 – Division 5 of Part 10

Item 35 repeals Division 5 of Part 10 (sections 145 and 146) because the provisions are redundant.

Section 145 of the BSA deals with continuing offences and declares that section 4K of the *Crimes Act 1914* applies to the obligations under Part 10 to comply with a notice, other than a notice under section 137. Sections 136 and 140 and new subsections 138(4), 142(5) and 142A(3) of the BSA provide for continuing offences in relation to each individual offence under Part 10, which is consistent with the current operation of section 145. As continuing offence provisions are now dealt with specifically under each offence provision, section 145 is redundant and is no longer needed.

Section 146 of the BSA provides that a prosecution for an offence under Part 10 against a person in relation to a matter cannot be commenced if the ACMA has given the person a notice under section 141 in relation to the matter and the time for compliance with the notice has not expired.

Currently subsection 141(3) of the BSA provides that a notice given under section 141 is to specify a period, not exceeding one month, during which the relevant action must be taken. Item 34 repeals section 141 and substitutes a new section 141, which no longer stipulates that the notice must specify a period during which action must be taken. Notices given under new section 141 may direct the person to take action towards ensuring that they do not breach the condition in the future. It is a matter for the ACMA as to whether they specify a period in the notice during which time action must be taken.

Item 34 also repeals and substitutes section 142 of the BSA. New section 142 sets out the various offences in relation to a breach of a requirement in a section 141 notice. Prosecution can only commence in relation to a breach of a section 141 notice if an offence has been committed under new section 142 (ie if the person's conduct contravenes a requirement in the section 141 notice). If the ACMA specifies a time for compliance with a section 141 notice, proceedings can only be commenced once this time period has lapsed, as the person will not have committed an offence under new section 142 until the time requirement in the notice has been contravened. For these reasons, section 146 is redundant.

Item 36 – After paragraph 147(a)

Item 37 – After subparagraph 149(2)(b)(i)

These Items amend the complaints provisions, so that a person may complain to the ACMA about a breach of a civil penalty provision.

Item 38 – After subsection 202(1)

Item 38 inserts new subsections 202(1A) and (1B) of the BSA.

Subsection 202(1) makes it a criminal offence for a person who is required to give evidence or to produce documents at a hearing to:

- fail to attend as required by the notice; or
- fail to appear and report from day to day unless excused or released from further attendance.

These Items introduce a separate civil penalty that mirrors the existing criminal offence in subsection 202(1).

Item 39 – After subsection 202(2)

Item 39 inserts new subsections 202(2AA) and (2AB) of the BSA.

Subsection 202(2) provides that a person required to answer a question, to give evidence or to produce documents under Part 13 of the BSA must not:

- when required to take an oath or make an affirmation, refuse or fail to take the oath or make the affirmation;
- refuse or fail to answer a question that the person is required to answer; or
- refuse or fail to produce a document that the person is required to produce.

These Items introduce a separate civil penalty that mirrors the existing criminal offence in subsection 202(2)..

Item 40 – Subsection 202(2A)

Item 40 inserts references to subsections 202(1A) and (2AA) in 202(2A) of the BSA, which extends the defence of reasonable excuse to the new civil penalty provisions under new subsections 202(1A) and (2AA).

Item 41 – Subsection 202(2A) (note)

Item 41 amends the note to subsection 202(2A) to clarify that a defendant in criminal proceedings bears an evidential burden when relying on the defence in subsection 202(2A) in relation to offences under subsection 202(1) and (2).

Item 42 – After subsection 202(2A)

Item 42 inserts new subsection 202(2B), which provides that a person who wishes to rely on subsection 202(2A) in proceedings for a civil penalty order bears an evidential burden in relation to that matter. Where civil penalties have been introduced for particular breaches of the BSA and there is a defence of reasonable excuse or mistake of fact provided for under the BSA, placing the burden of proving either defence on the defendant is consistent with the position in relation to the criminal offences.

Item 43 – At the end of section 205B

Item 43 inserts a note at the end of section 205B which explains how section 205B is enforced. This Item is consequential to Items 30 and 32.

Item 44 – Subsection 205D(1)

Item 45 – Subsection 205D(2)(e)

Under section 205D, if a licensee has not paid the relevant licence fee by the due date, the licensee is subject to an additional fee equal to 20% per annum on the amount unpaid.

These Items amend section 205D to provide, in addition to the 20% penalty, an additional \$1,500 fee. This additional flat fee will apply irrespective of the amount of the unpaid licence fees.

Item 46 – After subsection 205D(6)

Item 46 inserts new subsection 206D(6A). New subsection 206D(6A) clarifies that an additional fee payable under new subsection 205D(1) or (2) is a debt due to the Commonwealth and can be recovered in court. This complements existing subsection 205D(6), which provides that the amount of the unpaid licence fee may be recovered in court.

Item 47 – Paragraphs 205D(7)(c) and 8(c)

Item 47 is consequential to Items 44 and 45.

Item 48 – After Part 14A

Item 48 inserts new Parts 14B, 14C, 14D and 14E of the BSA.

New Part 14B – Civil penalties

New Part 14B of the BSA introduces machinery provisions to support the new civil penalties introduced by other Items (in particular Items 20, 21, 22, 27, 28, 33, 34, 38 and 39).

Division 1 of new Part 14D provides for ancillary contraventions of the civil penalty provisions.. Under new section 205E of the BSA, an ancillary contravention includes:

- (a) an attempt to contravene a civil penalty provision;
- (b) aiding, abetting, counselling or procuring a contravention by another person;
- (c) inducing another person to contravene a civil penalty provision (eg. by threatening the person);
- (d) being knowingly concerned in or party to a contravention; and
- (e) conspiring with others to contravene a civil penalty provision.

The ancillary contravention provisions in new section 205E are equivalent to the provisions of Division 11 of Part 2.4 of the Criminal Code (Schedule to the *Criminal Code Act 1995*). This ensures parity between the existing criminal offences under the BSA and the new civil penalty provisions.

New section 205E is itself a civil penalty provision. Accordingly, if a person commits an ancillary contravention of a civil penalty provision, the person may be subject to a civil penalty order under Division 2 of Part 14B (see below).

New section 205EA is a simplified outline of Division 2 (containing sections 205EA-205PAA).

Under new section 205F, the Federal Court may order a person to pay a pecuniary penalty for a contravention of a civil penalty provision, known as a civil penalty order (new subsections 205F(1) and (2)). In determining the pecuniary penalty, the Federal Court is required to consider all relevant matters, including but not limited to the nature and extent of the contravention and any loss or damage suffered as a result, the circumstances of the contravention and any previous contraventions (new subsection 205F(3)).

The maximum pecuniary penalty that may be imposed as a civil penalty is the maximum penalty that could have been imposed for a conviction under the corresponding criminal offence (new subsection 205F(4)). The following table sets out the corresponding existing criminal offences and new civil penalty provisions, and the relevant maximum penalties.

Conduct	Criminal offence	Civil penalty provision	Maximum penalty
Providing an unlicensed commercial television service	s.131	s.136A	20,000 penalty units
Providing an unlicensed subscription television service	s.132	s.136B	2,000 penalty units
Providing an unlicensed commercial radio service	s.133	s.136C	2,000 penalty units
Providing an unlicensed community television service	s.134	s.136D	50 penalty units
Providing an unlicensed community radio service	s.135	s.136E	50 penalty units
Failure to comply with a notice directing the person to cease providing an unlicensed service	s.138	s.138A	<ul style="list-style-type: none"> • 20,000 penalty units for unlicensed commercial television services; • 2,000 penalty units for unlicensed commercial radio and subscription television services; or • 50 penalty units for unlicensed community broadcasting services.
Breach of a licence condition in subclause 7(1) of Schedule 2 (other than paragraph 7(1)(ia)) by a commercial television licensee	s.139(1)	s.140A(1)	2,000 penalty units
Breach of a licence condition in paragraph 7(1)(ia) of Schedule 2 by a commercial television licensee	s.139(1A)	s.140A(1)	60 penalty units
Breach of a licence condition in ss.103P, 103Q, 103S, 103T, 103V, 103W or subclause 10(1) of Schedule 2 by a subscription television licensee	s.139(2)	s.140A(2)	1,000 penalty units
Breach of a licence condition in subclause 8(1) of Schedule 2 (other than paragraph 8(1)(ha)) by a commercial radio licensee	s.139(3)	s.140A(3)	500 penalty units
Breach of a licence condition in paragraph 8(1)(ha) of Schedule 2 by a commercial radio licensee	s.139(3A)	s.140A(3)	60 penalty units
Breach of a licence condition in subclause 9(1) of Schedule 2 by a community broadcasting licensee (other than a temporary community broadcasting licensee)	s.139(4)	s.140A(4)	50 penalty units

Conduct	Criminal offence	Civil penalty provision	Maximum penalty
Breach of a licence condition in subclause 9(1) (other than paragraph 9(1)(h)) of Schedule 2 by a temporary community broadcasting licensee	s.139(5)	s.140A(5)	50 penalty units
Breach of a licence condition in subclause 11(1) of Schedule 2 by a subscription radio broadcaster, a subscription narrowcaster or an open narrowcaster	s.139(6)	s.140A(6)	50 penalty units
Failure to comply with a notice directing the person to comply with a licence condition or certain codes of practice	s.142	s.142A	<ul style="list-style-type: none"> • 20,000 penalty units for a commercial television licensee, a person in control of a commercial television licensee; • 2,000 penalty units for a subscription television licensee; • 500 penalty units for a commercial radio licensee or a person in control of a commercial radio licensee; or • 50 penalty units in any other case.

Similarly, where a person commits an ancillary contravention under new section 205E(1), the maximum pecuniary penalty that may be imposed is the maximum penalty applicable to the corresponding civil penalty provision and criminal offence (new subsection 205F(5)). For example, if a person conspired with others to provide an unlicensed commercial television service, the person will have contravened new paragraph 205E(1)(e). The maximum pecuniary penalty that could be imposed by the Federal Court is the maximum penalty applicable to the civil penalty provision and the criminal offence for providing an unlicensed commercial television service, which is 20,000 penalty units.

If a person has engaged in conduct that contravenes 2 or more civil penalty provisions, proceedings may be instituted in relation to each contravention. However, the person can only be subject to a single pecuniary penalty for that conduct (new subsection 205F(6)). This provision ensures that a person subject to a civil penalty cannot receive a disproportionate punishment for the wrongdoing where the same conduct contravenes multiple civil penalty provisions.

A pecuniary penalty is a civil debt payable to the Commonwealth. The Commonwealth may take action to recover a debt if a person fails to pay a penalty in accordance with a civil penalty order (new subsection 205F(7)).

New subsection 205G(1) provides that only the ACMA has standing to apply to the Federal Court for a civil penalty order. However, new subsection 205G(2) clarifies that subsection 205G(1) does not exclude the Commonwealth Director of Public Prosecutions (DPP) from prosecuting criminal offences under the BSA.

Part 14B also provides for the following procedural matters:

- the Federal Court may direct that 2 or more proceedings for civil penalty orders are to be heard together (new section 205H);
- proceedings for a civil penalty order must be started no later than 6 years after the contravention (new section 205J);
- the Federal Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order (new section 205K);
- the Federal Court must not make a civil penalty order against a person if the person has been convicted of an offence that is substantially the same as the conduct constituting the contravention of the civil penalty provision (new section 205L);
- civil penalty proceedings against a person must be stayed if criminal proceedings are commenced, or have already commenced, against that person for a criminal offence constituted by conduct that is substantially the same as the conduct alleged to constitute the civil penalty contravention. Proceedings may be resumed if the person is not convicted of the offence, otherwise, the proceedings are dismissed (new section 205M);
- criminal proceedings may be started against a person for conduct which is substantially the same as conduct constituting a civil penalty contravention regardless of whether a civil penalty order has been made against the person (new section 205N); and
- evidence of information given or documents produced by a person is not admissible in criminal proceedings against that person if the person gave the evidence or produced the documents in civil penalty proceedings and the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the civil penalty contravention. However, this does not apply to criminal proceedings in respect of the falsity of the evidence given by the person in the civil penalty proceedings (new section 205P).

New section 205PAA provides a person the defence of mistake of fact for contraventions of a civil penalty provision, other than subsections 202(1A) or (2AA). The mistake of fact defence provision in new section 205PAA is modelled on the mistake of fact provision in clause 9.2 of the Criminal Code.

Accordingly, a person is not liable to have a civil penalty order made against them for a contravention of a civil penalty provision (other than subsection 202(1A) or (2AA)) if at or before the time of the conduct constituting the contravention, the person considered whether or not facts existed and was under a mistaken (but reasonable belief) about those facts, and had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

New subsection 205PAA(2) deals with whether a person may be regarded as having considered whether or not facts existed.

New subsection 205PAA(3) provides that a person who wishes to rely on new subsections 205PAA(1) or (2) in civil proceedings bears an evidential burden in relation to that matter.

The ACMA is required by new section 215 (Item 50) to develop guidelines in relation to the use of its enforcement powers, including in relation to commencing civil penalty proceedings.

New Part 14C – Injunctions

Part 14C enables the Federal Court to grant injunctions in relation to contraventions or proposed contraventions of the provisions in the BSA which deal with unlicensed broadcasting.

This Part is largely based on Part 30 of the Tel Act.

New section 205PA provides a simplified outline of Part 5 to assist readers.

New section 205Q provides that if a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of new subsection 121FG(3) or new sections 136A, 136B, 136C, 136D or 136E of the BSA (the new civil prohibitions on providing unlicensed broadcasting services), the ACMA will be able to apply to the Federal Court for an injunction to restrain the person from engaging in the conduct. If, in the Federal Court's opinion, it is desirable to do so, the Court will also be able to require the person to do something (new paragraph (205Q(b))).

It is anticipated that injunctions could be used in addition to a civil proceeding under new Part 14B of the BSA, where the ACMA wishes not only to apply for a civil penalty order for a breach, but also wants an order which could prevent a person from contravening the provision in the future. Alternatively, an injunction may be sought instead of a prosecution. This could be, for example, if the ACMA is of the view that a person has been involved in a minor breach of the BSA and wishes to ensure that they do not do so in the future.

New section 205R allows the Federal Court to grant interim injunctions before the Court considers an application for a final injunction (new subsection 205R(1)). For an injunction under new section 205Q, the Federal Court will not be able to require an applicant, as a condition of granting an interim injunction, to give any undertakings as to damages (new subsection 205R(2)).

New section 205S provides that the Federal Court may discharge or vary an injunction granted under new Part 14C.

New section 205T provides that the power of the Federal Court to grant an injunction restraining a person from engaging in conduct will be able to be exercised:

- where the Court is satisfied that the person has engaged in conduct of that kind - whether or not it appears to the Court that the person intends to engage again, or continue to engage, in conduct of that kind; or

- where it appears to the Court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind - whether or not the person has previously engaged in conduct of that kind and whether or not there is imminent danger of substantial damage to any person.

New section 205U provides that the powers conferred on the Federal Court under Part 14C will not limit any other powers of the Court, whether conferred by the BSA or otherwise.

New Part 14D – Enforceable undertakings

New Part 14D gives the ACMA the ability to accept undertakings to ensure compliance with the BSA and registered codes of practice. Once accepted by the ACMA, undertakings would be enforceable by the Federal Court.

This Part is based on Part 31A of the Tel Act.

Currently, the ACMA has a range of enforcement and compliance powers for dealing with breaches of registered codes of practice, including:

- the power to refer matters to the DPP in relation to offences;
- the power to impose standards under section 125 of the BSA, which becomes a licence condition under Schedule 2; and
- the power to impose additional licence conditions on individual licensees (eg under section 43 of the BSA).

This Bill will provide additional enforcement and compliance powers for dealing with circumstances in which the ACMA believes a person has breached the BSA:

- the power to give notices and remedial directions under new Part 14B;
- the power to impose civil penalties under new Part 14C;
- the power to apply to the Federal Court to grant an injunction under new Part 14D; and
- the power to give formal warnings and infringement notices under new Part 14E.

The power to accept enforceable undertakings would complement the ACMA's existing and new enforcement powers by providing the ACMA with a flexible and efficient means of addressing concerns about a person's current and future compliance with the BSA and registered codes of practice.

The acceptance of an undertaking could be used as an alternative, or in addition to, the exercise of other enforcement powers and would provide the ACMA with a flexible way of responding to breaches of the BSA and codes of practice and ensuring ongoing compliance with those obligations into the future.

Providing the ACMA with the power to accept enforceable undertakings in relation to compliance with the BSA and codes of practice would be consistent with the enforcement regime that is available to the ACMA in its role under the Tel Act. That Act provides the ACMA with express powers to accept enforceable undertakings in connection with specified matters relating to telecommunications. In addition, giving the ACMA the power to accept enforceable undertakings would mirror the Australian Competition and Consumer Commission's (ACCC) enforcement regime under the *Trade Practices Act 1974* (TPA). Section 87B of the TPA allows the ACCC to accept enforceable undertakings.

New section 205V provides a simplified outline of the new Part 14D. New Part 14D provides that a person may give the ACMA an enforceable undertaking about compliance with the BSA or a registered code of practice.

New section 205W sets out the types of undertaking that the ACMA may accept from a person. The ACMA may accept a written undertaking given by a person that the person will:

- take specified action in order to comply with the BSA (new paragraph 205W(1)(a)); or
- refrain from taking specified action in order to comply with the BSA (new paragraph 205W(1)(b)); or
- take specified action directed towards ensuring that the person does not contravene the BSA, or is unlikely to contravene the BSA, in the future (new paragraph 205W(1)(c)); or
- take specified action in order to comply with a registered code of practice (new paragraph 205W(1)(d)); or
- refrain from taking specified action in order to comply with a registered code of practice (new paragraph 205W(1)(e)); or
- take specified action directed towards ensuring that the person does not contravene a registered code of practice, or is unlikely to contravene a registered code of practice, in the future (new paragraph 205W(1)(f)).

The effect of proposed new subsection 205W(1) would be that the ACMA may accept an undertaking from a person that the person will rectify past conduct that was in breach of the requirements of the BSA or a registered code of practice (new paragraphs 205W(1)(a), (b), (d) and (e)). The ACMA could also accept an undertaking from a person relating to their compliance with the BSA and registered code of practice in the future, even where that person has not breached the requirements of the BSA or code of practice (new paragraphs 205W(1)(c) and (f)). The person who gives the undertaking may only withdraw or vary the undertaking with the ACMA's consent (new subsection 205W(3)). Permitting the ACMA to allow persons who give undertakings to the ACMA to vary or withdraw them will ensure that the enforceable undertakings scheme instituted by new Part 14D is a flexible enforcement mechanism. The requirement for the ACMA consent to the variation or

withdrawal of an undertaking will ensure effective oversight by the ACMA of compliance with the BSA and codes of practice.

The ACMA would be able to cancel an undertaking at any time by giving a written notice to the person (new subsection 205W(4)). This would allow the ACMA to cancel an undertaking when it is no longer required to be met by the person who gave it, or if it is no longer of any benefit. Equally, it will allow the ACMA to cancel an undertaking given by a person if that undertaking is no longer effective – this would mean that the relevant person could either give the ACMA a new undertaking or that the ACMA could pursue other enforcement action against that person, if necessary.

New subsection 205W(5) provides that the ACMA may publish on its Internet site an undertaking that it accepts from a person under new subsection 205W(1). Allowing publication of the undertakings accepted by the ACMA will permit appropriate public scrutiny of undertakings given by industry.

New section 205X would provide that undertakings under new section 205W are enforceable in the Federal Court. New subsection 205X(1) provides that the ACMA may apply to the Federal Court for an order if a person has given the ACMA an undertaking under new section 205W, and the undertaking has not been withdrawn or cancelled, and the ACMA considers that the person has breached the undertaking.

New subsection 205X(2) would provide for the sorts of orders that the Federal Court may make in relation to an application by the ACMA under new subsection 205X(1). These are the same types of orders provided for by subsection 572C(2) of the Tel Act and subsection 87B(4) of the TPA. If the Federal Court is satisfied that the person has breached the undertaking, it may make any or all of the following orders:

- an order directing the person to comply with the undertaking;
- an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court considers appropriate.

The ACMA is required by new section 215 (Item 50) to develop guidelines in relation to the use of its enforcement powers, including in relation to accepting enforceable undertakings.

New Part 14E – Infringement notices

Part 14E sets up a system of infringement notices for contraventions of designated infringement notice provisions established under Items 11, 30 and 32. Infringement notices will enable a more efficient means of dealing with minor contraventions as an alternative to instituting court proceedings for breach of a designated infringement notice provision. These amendments are consistent with the recommendations of the

Australian Law Reform Commission (ALRC) relating to infringement notices in its report “*ALRC 95 - Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*”.

This Part is largely based on Schedule 3 of the *Spam Act 2003*.

New section 205XAA provides a simplified outline of the new Part 14E.

New section 205XA provides that, if an authorised infringement notice officer (the Chair of the ACMA or a member of the staff of the ACMA appointed under new section 205ZE, see new definition in subsection 6(1)), has reasonable grounds to believe that a person has contravened a designated infringement notice provision, they may give that person a formal warning that:

- the conduct contravenes a designated infringement notice provision; and
- an infringement notice relating to the contravention may be given.

New section 205Y sets out when an infringement notice may be issued. It provides that an infringement notice may be issued by an authorised infringement notice officer if:

- he or she has reasonable grounds to suspect that a person has contravened a designated infringement notice provision of the BSA; and
- a formal warning has previously been given under section 205XA.

An infringement notice must be given within 12 months of the day that the contravention is alleged to have happened (new subclause 205Y(2)).

New section 205Z sets out the matters which must be included in an infringement notice. In particular it provides that an infringement notice must:

- set out the name of the person to whom the notice is given, that is the person who has allegedly contravened the designated infringement notice provision;
- set out the name of the person who gave the notice. It is anticipated that as a matter of administrative practice the authorised infringement notice officer would sign the notice;
- set out brief details of the alleged contravention and the date of when the contravention is alleged to have occurred;
- set out that the Federal Court will not deal with the matters in the alleged contraventions if the penalty is paid to the ACMA within the notified period (either 28 days after the notice is given or longer, if an extension of time for payment is granted by the ACMA);
- explain how the penalty may be paid;

- set out the effect of new section 205ZB (withdrawal of an infringement notice); and
- set out any other matters (if any) which are specified in the regulations.

New section 205ZA sets out the pecuniary penalties payable under an infringement notice. If the person is a commercial television broadcasting licensee or a subscription television broadcasting licensee, the penalty is 60 penalty units (currently \$6,600). In any other case, the penalty is 10 penalty units (currently \$1,100).

Section 205ZB allows an authorised infringement notice officer to withdraw an infringement notice that has been given to a person in relation to a contravention of a designated infringement notice provision. The withdrawal notice must be in writing and must be given to the person within 28 days after the infringement notice was given.

A withdrawal of a previously issued infringement notice may be considered for example where further evidence has come to light since the issuing of the infringement notice to suggest that a person has not contravened a designated infringement notice provision, or alternatively that further evidence suggests that the breach is more serious than initially believed and consequently would be more appropriately dealt with by a court rather than an infringement notice.

If an infringement notice is withdrawn after the penalty specified in the notice has already been paid, then the Commonwealth is liable to refund this amount. Section 28 of the *Financial Management and Accountability Act 1997* provides for the appropriation of the Consolidated Revenue Fund for the purposes of paying such a refund.

New section 205ZC provides that if a person has been given an infringement notice and the penalty has been paid in accordance with the notice, and the infringement notice is not subsequently withdrawn, then any liability of the person for the alleged contravention is discharged (new subclauses 205ZC(1) and (2)) and the ACMA cannot institute proceedings for the alleged contravention (new subclause 205ZC(3)).

New section 205ZD specifically provides that nothing in Part 14E:

- requires an infringement notice to be given in relation to an alleged contravention of a designated infringement notice provision. The decision whether or not to issue an infringement notice is at the discretion of the authorised infringement notice officer;
- affects the liability of a person to have proceedings brought against them for an alleged contravention of a designated infringement notice provision, if the person does not comply with an infringement notice, an infringement notice is not given to a person, or an infringement notice is withdrawn;
- limits the Federal Court's discretion to determine the amount of a penalty to be imposed on a person who is found in proceedings to have contravened a designated infringement notice provision.

New section 205ZE enables the ACMA to appoint, in writing, a member of the staff of the ACMA as an authorised infringement notice officer for the purposes of the BSA. An authorised infringement notice officer is able to issue formal warnings, infringement notices and may withdraw notices under Part 14E.

In addition to those staff specifically appointed as authorised infringement notice officers under new section 205ZE, the Chair of the ACMA is an authorised infringement notice officer for the purpose of this new Part 14E (see new definition of an authorised infringement notice officer in subclause 6(1)).

New section 205ZF provides that the regulations may make further provision in relation to infringement notices. A general regulation-making power is provided in section 217 of the BSA.

The ACMA is required by new section 215 (Item 50) to develop guidelines in relation to the use of its enforcement powers, including in relation to issuing formal warnings and infringement notices.

Item 49 – Subsection 214(1)

Section 214 provides for multiple charges for certain continuing offences to be heard together, and for a single penalty to be imposed.

Item 49 amends section 214 as a consequence of the amendments relating to the offence provisions for remedial directions in Items 21, 22, 28 and 34.

Item 50 – After section 214

Item 50 inserts new section 215 of the BSA. Section 215 requires the ACMA to develop, and have in force at all times, guidelines for the use of the new powers to:

- seek civil penalties under Division 4 of Part 8B, Part 10 and new Part 14B (eg providing industry with guidance as to the matters the ACMA will take into account in deciding whether to refer a matter to the DPP or to seek civil penalties);
- accept enforceable undertakings under new Part 14D; and
- issue formal warnings and infringement notices under new Part 14E.

The ACMA may also formulate guidelines for the use of its powers relating to injunctions (new Part 14C) and information gathering, investigations and hearings (Part 13).

The ACMA, and an authorised infringement notice officer, must have regard to any guidelines in force when exercising the relevant powers or when deciding whether to refer a matter to the DPP for action in relation to a possible offence against the BSA.

The guidelines are not intended to be prescriptive or limiting. The ACMA is to retain the discretion to seek the sanctions it considers appropriate in light of the particular

circumstances of the case. The guidelines may include general guidance on the ACMA's enforcement options and other matters that the ACMA considers relevant.

The ACMA is not required to have separate guidelines for each topic, rather the ACMA could produce a single set of guidelines. Where the ACMA is required to develop guidelines under this new section 215, these guidelines must be in the form of a legislative instrument. The ACMA is required to consult publicly before issuing the guidelines, to ensure that industry is able to contribute to the process, in accordance with Part 3 of the *Legislative Instruments Act 2003*.

Radiocommunications Act 1992

Item 51 – At the end of section 231

Item 51 inserts a reference to new Part 5.8 in section 231 of the Radcom Act. Section 231 of the Radcom Act provides an outline of Chapter 5 of that Act. This amendment is consequential to Item 52.

Item 52 – At the end of Chapter 5

Item 52 inserts new Part 5.8 of the Radcom Act. Part 5.8 gives the ACMA the ability to accept undertakings to ensure compliance with the Radcom Act. Once accepted by the ACMA, undertakings would be enforceable by the Federal Court.

This Part is based on Part 31A of the Tel Act and mirrors new Part 14D of the BSA which gives the ACMA the power to accept enforceable undertakings about compliance with the BSA and registered codes of practice (Item 48). The provisions in new Part 5.8 of the Radcom Act introduce the same regime as new Part 14D of the BSA (see notes on those provisions).

Currently, the ACMA has a range of enforcement and compliance powers for dealing with circumstances in which the ACMA believes a person has breached the Radcom Act.

The power to accept enforceable undertakings would complement the ACMA's existing and new broadcasting enforcement powers by providing the ACMA with a flexible and efficient means of addressing concerns about a person's current and future compliance with the Radcom Act. Given the relationship between broadcasting services and radiocommunications regulation (particularly relating to spectrum planning and apparatus licensing), it is important to extend the ACMA's new enforceable undertaking powers to compliance with the Radcom Act.

Part 2 – Application of amendments

Item 53 – Application – additional fees

Item 53 provides that the amendments of section 205D of the BSA (Items 44, 45 and 46) apply to an additional fee that relates to a licence fee if the due date for the licence fee is after the date on which this Item commences.

Item 54 – Application – infringement notices

Item 54 clarifies that the power to issue formal warnings and infringement notices (new Part 14E) may only be exercised by the ACMA in relation to a contravention that occurs after this Item commences.