



Australian Government

**Department of Communications,
Information Technology and the Arts**

**PROPOSED REFORMS TO THE BROADCASTING
REGULATORY POWERS OF THE AUSTRALIAN
COMMUNICATIONS AND MEDIA AUTHORITY**

ISSUES PAPER

NOVEMBER 2005

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Background

The Australian Government considers there is a case for enhancing the enforcement powers of the communications regulator, the Australian Communications and Media Authority (ACMA), following the merger of the Australian Broadcasting Authority (ABA) and Australian Communications Authority (ACA). The purpose of this paper is to outline a number of possible reform options being considered by the Government and to seek the views of interested persons.

The former-ABA provided the Government with a report on the enforcement powers contained in the *Broadcasting Services Act 1992* (the BSA) in December 2004. The report concluded that current arrangements lack an appropriate gradation of powers to enable the regulator to address issues in a timely and proportionate manner.

Enforcement powers of regulators ideally comprise a hierarchy of integrated sanctions that escalate in severity in response to more serious contraventions of the law.

ACMA's broadcasting regulatory powers are generally concentrated at the higher end of the hierarchy (e.g., criminal sanctions and suspension or cancellation of a licence). Compared to other ACMA functions and other regulators, there is a lack of middle range sanctions to address regulatory issues and contraventions of the BSA, particularly where they are not serious enough to warrant the imposition of a criminal penalty or suspension or cancellation of a licence.

The constraints of ACMA's broadcasting powers (previously those of the ABA) have been apparent in some high profile cases (such as the Commercial Radio Inquiry in 2000) and have previously led to criticisms of the regulator. Its ability to ensure there was compliance with the requirements of the BSA and to maintain the confidence of the public were called into question.

The objective of any changes to ACMA's powers would be to enable a more responsive regulatory approach, generating more confidence on the part of both broadcasting audiences and industry, and encouraging better industry compliance. In the Government's view, this can be done by broadening the suite of possible regulatory responses and introducing a middle range of civil sanctions. This will enable ACMA to deal more effectively, flexibly and in a more timely fashion with compliance issues under the BSA. ACMA will also have a greater ability to set compliance strategies, negotiate outcomes and accept voluntary solutions.

Strengthening ACMA's capacity to effectively deal with regulatory breaches, including in key areas covered by broadcaster codes of practice and licence conditions, will assist in ensuring the continued integrity of the regulatory framework following media ownership reform.

Comments on the paper should be received at the Department of Communications, Information Technology and the Arts by **9 December 2005**. Questions and comments should be directed to:

Mr Gordon Neil
General Manager
Licensed Broadcasting
Department of Communications,
Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2601

Telephone: 02 6271 1712

Fax: 02 6271 1717

Submissions will be made public on the Department's website unless otherwise specified. Persons providing a submission should indicate clearly whether any aspect of the submission should not be made public. Where confidentiality is requested, submitters are encouraged to provide a public version of submissions that can be made available on the Department's website.

While the Department will consider the views presented in submissions received after 9 December 2005, the Government's intention to finalise a set of proposed reforms in early 2006 will mean that there will be limited scope to consider views in submissions lodged late.

1. Civil penalties

ACMA does not currently have power to seek or impose civil penalties, but must rely on criminal penalties. This is one-dimensional and heavy-handed and contrasts starkly with the suite of enforcement powers conferred upon other significant Commonwealth regulators such as the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).

The criminal penalties in the BSA can be disproportionately punitive given the nature of most compliance issues. Because enforcement of criminal penalties requires referral to the Director of Public Prosecutions, ACMA has no capacity to work on a more targeted strategic response with industry and no direct capacity to determine the future handling of the case.

Moreover, the criminal standard of proof is an unrealistic burden for enforcement of compliance in the broadcasting sector and can result in a need for extensive evidence gathering, longer court hearings, disruption to business and the subsequent associated cost burdens. Suspending or canceling a licence is an arguably draconian and inappropriate response in all but the most serious of cases, and punishes consumers as well as the providers of a broadcasting service.

The Government is therefore considering amending the BSA to allow ACMA to seek civil monetary penalties for non-compliance with a range of regulatory requirements such as:

- providing an open narrowcast service contrary to the conditions of the relevant class licence;
- breaching those licence conditions that are currently subject to a criminal penalty (subclauses 7(1), 8(1), 9(1), 10(1) and 11(1) of Schedule 2, and sections 103P, 103Q, 103S, 103T, 103V, 103W, 103Y and 103Z);
- breach of additional licence conditions (sections 43, 87, 87A, 92J, 99(2) and 120(2));
- failure to comply with a notice issued pursuant to s 137 (a direction to cease provision of a broadcasting service without an appropriate licence); and
- failure to comply with a notice issued pursuant to s 141 (a direction to cease breaches of licence conditions and certain codes of practice).

Assuming other regulatory responses were considered insufficient and ACMA considered it appropriate to seek the imposition of civil penalties, proceedings would be taken in the Federal Court. The Court would determine whether a breach has occurred and, if so, the penalty that should apply.

It is proposed that criminal penalties be retained for those breaches for which civil monetary penalties are proposed (although 'double jeopardy' would be excluded).

It will likely be appropriate to require ACMA to formulate guidelines for industry about the approach it will take on decisions to commence civil proceedings as opposed to criminal proceedings. Guidelines will help to ensure that the industry understands the regulatory approaches and has confidence in the consistency and transparency of application.

2. Injunction to prevent breach of civil penalty provisions

The BSA currently provides that ACMA can seek injunctions in certain circumstances. In particular, in relation to:

- Part 7 of Schedule 4 (relating to approved implementation plans for digital television and the transmitter access regime);
- Part 6 of Schedule 5 (relating to online provider rules);
- Part 8 of Schedule 6 (relating to datacasting licences); and
- section 144 (provision of subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services other than in accordance with the relevant class licence).

More targeted injunction powers have been canvassed previously and would provide ACMA with the ability to take more effective action to prevent conduct that is breaching a range of the regulatory rules, rather than allowing the offending conduct to continue.

In particular, ACMA has had ongoing difficulties responding effectively where entities provide commercial broadcasting services when they are not licensed to do so.

One option would be to amend the BSA to enable ACMA to move quickly and approach the Federal Court for an injunction where commercial broadcasting services are being provided without an appropriate licence.

The Federal Court would decide whether to grant an injunction and the terms of any injunction granted. ACMA would need to establish that injunctive relief was warranted.

3. Enforceable undertakings

ACMA, as the broadcasting regulator, currently does not have the power to accept enforceable undertakings from regulated entities. However, it has previously received voluntary undertakings from licensees.

Enforceable undertakings form part of the regulatory framework of other regulators such as the ACCC, ASIC and the former-ACA areas of ACMA, and the Government has moved recently to expand ACMA's powers to accept enforceable undertakings in relation to the enforcement of telecommunications competition and consumer protections.

The Government is considering the option of giving ACMA power to accept enforceable undertakings in connection with any matter in relation to which ACMA has a function or power under the BSA. Enforceable undertakings of this kind would give ACMA greater flexibility in responding to regulatory issues and allow industry and ACMA to resolve issues in a voluntary and more timely, consultative and effective fashion.

Enforceable undertakings would also allow the regulator and licensee or regulated entity to agree on an approach to prevent future breaches, encouraging ongoing compliance. Enforceable undertakings offer a regulatory response which saves time and financial costs for the regulator and industry, allows compromise and flexibility, and provides industry with an opportunity to negotiate with the regulator about the outcome of the process.

It is proposed that where a regulated entity complies with an enforceable undertaking accepted by ACMA, the regulator would be precluded from taking further action in relation to the specific conduct in respect of which the undertaking was offered.

In keeping with the usual status of enforceable undertakings, it is proposed that if ACMA considered that an undertaking had been breached, it could apply to the Federal Court for a range of orders including:

- an order directing compliance with the undertaking;
- an order directing the person to pay compensation to a specified person;
- an order directing the person to pay a monetary penalty to the regulator; and
- any other order that the Court considers appropriate.

Expanding ACMA's ability to accept enforceable undertakings would be a key feature of the new suite of broadcasting regulatory options.

Consistent with the practice of both ASIC and the ACCC, it is intended that ACMA would be required to develop and publish guidelines relating to its use of enforceable undertakings.

4. On-air statements of ACMA investigation findings

The Government seeks views on giving ACMA power to require the broadcast of on-air statements of investigation findings. Comparable regulatory bodies in United Kingdom and New Zealand have similar powers available to them.

Typically, findings of investigations into potential breaches of industry codes of practice or standards and conditions of licence are published on the ACMA website and in ACMA's annual report. However, in some cases, it may also be appropriate for such findings to be made public by an on-air statement. Circumstances in which this may be appropriate could include where ACMA has found a serious breach of code requirements for fairness and accuracy in news or current affairs reporting, particularly when those findings relate to an individual or company affected by a broadcast, or to a matter of public interest.

Providing ACMA with the ability to require on-air statements would give the regulator an additional regulatory tool to deal with breaches without recourse to the courts. On-air statements can be targeted to a particular time slot or audience and may offer a more effective solution where consumers have been affected or have raised concerns. In addition, on-air statements can provide a real-time response to an issue, reducing or even possibly eliminating the need for other regulatory solutions.

This, in turn, can reduce the time and cost of resolving compliance issues, thereby benefiting broadcasters.

On-air statements can be a means of promoting the importance of licence conditions, codes of practice and complaints mechanisms. It would enhance public confidence in the quality of broadcasting and further strengthen perceptions around broadcasters' accountability and transparency.

Any decision by ACMA to require an on-air statement about findings of an inquiry would be subject to appeal to the Administrative Appeals Tribunal, including the specifications of the form and timing of the statement.

5. Infringement notices

The Government is considering the option of providing ACMA with power to issue infringement notices for breaches of various notification, reporting and licence fee payment requirements set out in the BSA. It would be similar to existing infringement notice schemes, such as the one currently available to ACMA in its role as telecommunications regulator.

Specifically, it is proposed that the regulator would have the power to issue a notice for breach of:

- section 62 (requires commercial broadcasting licensees and datacasting transmitter licensees to provide 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 and datacasting transmitter licensees to notify ACMA of any changes in control of the licence);
- section 65 (requires commercial broadcasting licensees to notify 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 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 ACMA each year with specific financial details).

Infringement notices would provide ACMA with a means of responding in a proportionate and timely manner to cases of non-compliance in these particular instances.

As discussed above, the existing criminal penalty provisions are often disproportionately harsh and for that reason may not be an appropriate way to proceed in relation to minor breaches. The fact that there are continuing breaches of these requirements indicates that a lower level penalty scheme, such as an infringement notice scheme, may be effective in addressing cases of non-compliance, particularly relatively minor ones.

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. However, it would be necessary to ensure that further proceedings could be taken by ACMA if there is non-compliance with the infringement notice.

It is also proposed to provide the regulator with the power to issue an infringement notice for late payment of licence fees by commercial broadcasters.