



**Australian Government**  
**Australian Communications  
and Media Authority**

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Australia's regulator for broadcasting, the internet, radiocommunications and telecommunications

[www.acma.gov.au](http://www.acma.gov.au)

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# Guidelines relating to ACMA's enforcement powers under the *Broadcasting Services Act 1992*

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Pursuant to subsection 215(4) of the *Broadcasting Services Act 1992*, the Australian Communications and Media Authority makes the *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992*.

These guidelines commence on the day Schedule 1 of the *Communications Legislation Amendment (Enforcement Powers) Act 2006* commences.

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



*Signature of Member*

*Name (Please Print)*

LYN MADDOCK

*Signature of Member/  
General Manager*

*Name (Please Print)*

Nerida O'Loughlin

*Dated this 25<sup>th</sup> day of January 2007*

## 1. Introduction

- 1.1 The Australian Communications and Media Authority (ACMA) is an independent statutory authority established under section 6 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act).<sup>1</sup> ACMA's broadcasting, content and datacasting functions are set out at section 10 of the ACMA Act. The statutory framework supporting these functions is found in the *Broadcasting Services Act 1992* (the BSA).
- 1.2 These guidelines are formulated for the purpose of subsections 215(1), 215(2) and 215(3) of the BSA. Regard will be had to these guidelines in deciding whether to refer a matter to the Commonwealth Director of Public Prosecutions (CDPP) for action in relation to a possible offence against the BSA or when ACMA exercises a power conferred by the following provisions of the BSA:
- Division 4 of Part 8B;
  - Parts 10, 14B, and 14D; and
  - Part 8 of Schedule 6 (Remedies for breaches of licensing provisions – datacasting).
- Relevant parts of these guidelines will also be had regard to by authorised infringement notice officers when exercising a power conferred by Part 14E of the BSA. There is other enforcement action available to ACMA which is outside the scope of these guidelines, for example, ACMA has previously accepted undertakings which, while having no statutory backing, have been successfully employed. ACMA expects that it will continue to accept such undertakings in appropriate cases.
- 1.3 These guidelines are not prescriptive or limiting. ACMA retains the discretion to impose or seek the sanctions it considers appropriate in light of the particular circumstances of each case. These guidelines take into account the recommendations of the Australian Law Reform Commission in their report: *Principled Regulation: Civil and Administrative Penalties in Federal Government Regulation* and adopt those recommendations where relevant.
- 1.4 These guidelines inform industry and the public of the factors that ACMA intends to take into account in determining appropriate responses to contraventions. While these guidelines provide an indication of ACMA's general approach to enforcement in relation to broadcasting matters, ACMA will tailor its response to particular breaches to reflect the individual circumstances of the case. ACMA will exercise its discretionary powers in a flexible manner to seek proportionate sanctions for breaches of the BSA.
- 1.5 Section 5 of the BSA "charges the ACMA with responsibility for monitoring the broadcasting industry, the datacasting industry and the Internet industry" and states that Parliament confers on ACMA a range of functions and powers that will:
- produce regulatory arrangements that are stable and predictable; and

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<sup>1</sup> ACMA was established on 1 July 2005 following the merger of the Australian Broadcasting Authority and the Australian Communications Authority.

- deal effectively with breaches of the rules established by the BSA.
- 1.6 ACMA recognises that co-regulatory arrangements apply in relation to some industry sectors regulated by the BSA and that these enforcement guidelines will operate in that context when those arrangements apply.
- 1.7 Section 4 of the BSA sets out the regulatory policy underpinning the BSA. ACMA's capacity to effectively deal with regulatory breaches of the BSA assists in ensuring the continued integrity of the regulatory framework and public and industry confidence in the effectiveness of that framework.
- 1.8 ACMA has responsibility for regulating certain aspects of media diversity, as set out in the BSA. The Australian Competition and Consumer Commission has a role in regulating competition and assessing whether a merger will lead to a substantial lessening of competition. Where a matter requires enforcement action by both agencies, these processes will generally run in tandem, although this may vary depending on the circumstances of each individual case.

## **2. Types of action available to ACMA**

- 2.1 ACMA has a range of enforcement powers available under the BSA. Each enforcement power is not available in relation to every contravention. The BSA stipulates which enforcement actions are available in each instance of contravention.
- 2.2 Until 4 February 2007, ACMA's enforcement powers under the BSA were limited to the following:
- Referral of a matter for prosecution to the Commonwealth Director of Public Prosecutions for criminal prosecution;
  - Issue of a notice to conform;
  - Issue of a notice of intention;
  - Suspend or cancel a licence issued under the BSA;
  - Impose additional licence conditions on a licence issued under the BSA;
  - Issue a notice to cease;
  - Issue a notice to provide services in accordance with a code; and
  - Issue a notice to require a person or licensee to remedy a breach.
- 2.3 In addition, from February 2007, ACMA has enforcement powers to:
- pursue civil penalty orders (via the Federal Court);
  - accept enforceable undertakings in relation to certain matters;
  - seek injunction in circumstances where a person has failed to comply with requirements relating to the provision of broadcasting services without a licence;
  - seek injunctions to ensure that an unacceptable media diversity situation or an unacceptable three way control situation does not arise; and
  - issue infringement notices for certain contraventions occurring from 4 February 2007.

### 3. Exercising enforcement powers

3.1 For the purpose of exercising its enforcement powers, ACMA will take into account:

- any relevant objects at section 3 of the BSA;
- the regulatory policy at section 4 of the BSA;
- the role of ACMA as set out at section 5 of the BSA;
- any relevant directions given to the ACMA by the Minister<sup>2</sup>;
- any relevant matters set out in the BSA or any other Act;
- any relevant administrative law obligations; and
- Australia's obligations under the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement.

ACMA will also have regard to any other relevant considerations when exercising its enforcement powers.

3.2 In addition to the matters set out at 3.1, ACMA intends to use its enforcement powers in accordance with the following principles:

- ACMA recognises the importance of encouraging and facilitating compliance by all industry participants with statutory obligations;
- ACMA's compliance activities may be both proactive and reactive;
- enforcement decisions must not be influenced by bias, conflicts of interest or irrelevant considerations (such as gender, race, religion, political views or affiliation);
- enforcement action should be proportionate to the impact of the breach or risk of future breach;
- any enforcement action should, so far as possible, seek to address any systemic or ongoing element that may give rise to future breaches;
- an individual should only be personally liable for a regulatory contravention by a corporation where that individual failed to take reasonable steps to prevent the contravention occurring and was in a position to influence the conduct of the corporation in relation to the specific contravention; and
- The circumstances of each breach will be separately considered.

3.3 ACMA will use any enforcement powers available to it in a manner that is, in the opinion of ACMA, commensurate with the seriousness of the breach concerned. Generally, this involves using the minimum power or intervention necessary to achieve the desired result, consistent with the scale, risk and urgency of the breach. This graduated approach enables ACMA to choose whatever enforcement action it considers most appropriate to achieve compliance, given all the circumstances.

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<sup>2</sup> Note: Directions to ACMA by the Minister in relation to broadcasting, datacasting and internet content functions may be of a general nature only, unless otherwise provided for in the BSA: *Australian Communications & Media Authority Act 2005* s14(2)

- 3.4 ACMA will use its enforcement powers in a manner that, in the opinion of ACMA, is most likely to produce regulatory arrangements which are stable, predictable, and deal effectively with breaches of rules.
- 4. When will ACMA refer matters to the CDPP instead of using an ACMA enforcement power?**
- 4.1 ACMA will often be required to assess whether a matter should be referred to the CDPP for prosecution, or dealt with under an alternative enforcement power, such as a civil penalty or infringement notice. In making such determinations, ACMA will take into account the matters set out in section 3 of these guidelines.
- 4.2 In referring a matter to the CDPP, ACMA will act in compliance with the Prosecution Policy of the Commonwealth (<http://www.cdpp.gov.au/Prosecutions/Policy/Part1.aspx>) and any administrative arrangements which may be agreed between the CDPP and ACMA.
- 5. Enforceable undertakings**
- 5.1 ACMA may accept an enforceable undertaking instead of taking proceedings for a civil penalty order from a Court or taking other administrative action (eg imposing conditions on a licence) or referring a matter to other bodies (such as the CDPP). Enforceable undertakings are generally more versatile than the other enforcement powers available to ACMA. They may be used to achieve outcomes which might not be available by those means, and which are more focused on the particular circumstances of the individual case.
- 5.2 An enforceable undertaking may be offered to ACMA at any time. A person wishing to offer ACMA an enforceable undertaking should raise it with a relevant ACMA officer. However, that officer may not be authorised to accept the enforceable undertaking. Only certain senior ACMA officers are authorised to negotiate and accept enforceable undertakings. Every offer of an enforceable undertaking will be assessed on its merits.
- 5.3 ACMA's acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a precedent. An enforceable undertaking will not take effect until it is formally accepted by an ACMA officer with the appropriate delegation.
- 5.4 When deciding whether accepting an enforceable undertaking is an appropriate regulatory outcome, ACMA will consider matters including:
- (a) whether the party offering the undertakings is likely to comply with it (any history of previous breach findings against that party may be relevant);
  - (b) whether the party offering the undertakings acknowledges that ACMA has reason to be concerned about the alleged breach;
  - (c) the nature of the alleged breach and the regulatory impact of the undertaking compared to other available enforcement powers;

(d) the interests of any third parties, including factors such as the standing of third parties to bring an action against the party from whom ACMA is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by ACMA; and

(e) the prospects for an expeditious resolution of the matter.

5.5 ACMA will not accept an enforceable undertaking in which the regulated entity seeks:

- to deny liability;
- to impose terms or conditions on ACMA, including a specific requirement that ACMA will not in future institute proceedings in the particular matter;
- a statement that the undertaking is not an admission regarding action by third parties such as employees; or
- to establish defences for possible non-compliance.

5.6 The terms of an enforceable undertaking should:

- establish a relationship between the specified action and the contravention of the BSA or registered code of practice;
- be proportionate to the impact of the breach or risk of future breach;
- be readily understood;
- be capable of implementation;
- include action which is capable of being measured or tested objectively; and
- include a compliance monitoring and reporting framework.

5.7 Section 205W of the BSA sets out when an enforceable undertaking may be varied, withdrawn or cancelled. Section 205X of the BSA deals with the enforcement of undertakings if ACMA considers that the enforceable undertaking has been breached.

5.8 Unless exceptional circumstances are accepted by ACMA as applying, ACMA will publish enforceable undertakings on its internet site at [www.acma.gov.au](http://www.acma.gov.au). For example, ACMA may consider a request by the undertaking party that matters that are commercial-in-confidence or that disclose personal details of an individual not be published. ACMA may also consider whether disclosure is against the public interest.

## **6. Infringement Notices**

6.1 Part 14E of the BSA sets out the procedures ACMA must follow in issuing and administering infringement notices. Before issuing an infringement notice, ACMA must have reasonable grounds to believe that the alleged contravention or offence has occurred.

6.2 ACMA will keep a record of the issue of an infringement notice and payment or non-payment of the amount specified for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by ACMA in compliance with

all relevant Commonwealth policies and procedures. Any public reporting concerning the issue of infringement notices by ACMA (for example, in ACMA's annual report) will be on an aggregate basis only.

- 6.3 ACMA will not make any public announcements about the issue of an infringement notice to, or the payment or non-payment of an infringement notice by, an identifiable party.
- 6.4 Any infringement notice issued by ACMA will specify each of the matters set out at section 205Z of the BSA. In addition, an infringement notice issued by ACMA will also specify:
- (a) A unique form of identification (such as a notice number);
  - (b) The date on which it is issued;
  - (c) The date by which payment is due;
  - (d) The effect of non-payment;
  - (e) The right to request an extension of time to pay or to pay the amount payable under the notice by instalments (if applicable);
  - (f) The right to apply for withdrawal of the notice (including to whom an application for withdrawal should be made);
  - (g) The right to elect to contest liability in court;
  - (h) Information about what records (if any) will be kept by ACMA about the issue, payment or non-payment of the infringement notice;
  - (i) Contact details for further information; and
  - (j) Any other information appropriate in the circumstances.
- 6.5 Section 205ZB of the BSA deals with the withdrawal of an infringement notice. If an application is made for withdrawal of an infringement notice, the ACMA officer considering the application for withdrawal will be different from the ACMA officer who made the decision to issue the infringement notice.
- 6.6 An infringement notice constitutes no more than an allegation of a breach and payment of the penalty under the infringement notice does not constitute an admission for any purpose. Following payment under the infringement notice, any liability for the alleged contravention is discharged and proceedings may not be brought in relation to the alleged contravention.
- 6.7 Infringement notices may only be issued for contraventions taking place after 4 February 2007.