

Guidelines relating to the Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011 and the Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011

JULY 2011

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Published by the Australian Communications and Media Authority

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Introduction

- 1.1 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 relating to broadcasting, content and datacasting 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 On 24 March 2011, the ACMA determined the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011* and the *Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011* (together, **the 2011 Standards**). The 2011 Standards have been made under subsection 125(2) of the BSA.
- 1.3 The 2011 Standards replace the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2008* and the *Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2008* (together, **the 2008 Standards**). The main variation from the 2008 Standards is the addition of a new section 9, which prohibits the broadcast of programs that advocate the doing of a terrorist act. The 2011 Standards commenced on 1 July 2011.
- 1.4 Subsection 125(2) of the BSA provides that:
- (2) If:
- (a) no code of practice has been registered under section 123 for a matter referred to in subsection 123(2) in a particular section of the broadcasting industry; and
- (b) the ACMA is satisfied that it should determine a standard in relation to that matter;
- the ACMA must, by notice in writing, determine a standard in relation to that matter.
- 1.5 Compliance with relevant standards determined by the ACMA under section 125 of the BSA is a licence condition which applies to persons who provide subscription television narrowcasting services or open narrowcasting television services.
- 1.6 These guidelines are intended to inform licensees and the public about how the 2011 Standards operate. In particular, they should assist licensees to:
- a) determine whether any particular person or organisation is a listed terrorist at any particular time; and
- b) understand the practical application of the concepts:
- 'recruiting for a listed terrorist', at section 7,
 - 'financing terrorism', at section 8; and
 - 'advocates the doing of a terrorist act' at section 9 of the 2011 Standards.

¹ ACMA was established on 1 July 2005 following the merger of the functions of the Australian Broadcasting Authority and the Australian Communications Authority.

- 1.7 These guidelines also highlight the exceptions provided for in sections 10 and 11 of the 2011 Standards for the broadcast of programs of political opinion and bona fide reports or commentary on matters of public interest.

“Licensees”, for the purposes of the 2011 Standards, are service providers who provide a subscription television narrowcasting service or an open narrowcasting television service under a class licence determined under paragraph 117(c) or paragraph 117(e) of the BSA.

Intended Impact and Effect of the 2011 Standards

- 2.1 The intended impact of the 2011 Standards is to prevent the broadcasting of programs that advocate the doing of a terrorist act, or that encourage people to join or finance listed terrorists. ‘Listed terrorist’ is a term defined in the 2011 Standards to cover persons or organisations listed as terrorists under the *Criminal Code*, as set out in the Schedule to the *Criminal Code Act 1995*, or a proscribed person or entity listed in the *Gazette* by the Minister for Foreign Affairs pursuant to section 15 of the *Charter of the United Nations Act 1945* for their association with the commission of terrorist acts. ‘Terrorist act’ has the meaning given by section 100.1 of the *Criminal Code*.
- 2.2 The effect of the 2011 Standards is that licensees of subscription television narrowcasting services and open narrowcasting television services must not broadcast a program that:
- would be reasonably understood as directly recruiting persons to join, or participate in the activities of, a listed terrorist; or
 - would be reasonably understood as soliciting funds, or assisting in the collection or provision of funds, for a listed terrorist; or
 - advocates the doing of a terrorist act.
- 2.3 The 2011 Standards provide that a licensee will be in breach of the above provisions whether or not the licensee is aware that the program breaches the prohibitions in the 2011 Standards.
- 2.4 This makes it clear to licensees that each licensee is responsible for the program content broadcast on the relevant service and that it would be prudent for them to preview programs that might potentially breach the 2011 Standards, and make an assessment about their suitability for broadcast.
- 2.5 There is an exception to the prohibition so as to permit the broadcast of an excerpt from a program that would otherwise be prohibited, if it is included in a news report, current affairs program, documentary or other program, as part of a bona fide report or comment on a matter of public interest. Another provision of the 2011 Standards makes clear that the 2011 Standards would not be contravened by programs that merely gave information about the beliefs or opinions of a listed terrorist. These provisions are intended to ensure that freedom of expression is not unduly restricted.
- 2.6 Complying with the 2011 Standards does not abrogate the need for licensees to comply with other relevant anti-terrorism laws such as those set out in the *Criminal Code*.

Practical Application of the 2011 Standards

Determining who is a “listed terrorist”

- 3.1 The 2011 Standards confine the term ‘listed terrorist’ to those organisations listed in the *Criminal Code*, as amended from time to time, or to those persons and entities listed in the *Gazette* by the Minister for Foreign Affairs for their association with the commission of terrorist acts. In determining whether any particular person or organisation is a listed terrorist at a particular time (usually at the time of assessing a program prior to its broadcast) a licensee should consult the list in the *Criminal Code Regulations 2002* as well as the list of proscribed persons and entities designated by the Minister of Foreign Affairs in the *Gazette*.
- 3.2 The list of terrorist organisations in the *Criminal Code Regulations 2002* is available online at www.nationalsecurity.gov.au. Information about proscribed persons and entities designated as such by the Minister for Foreign Affairs is available from the Department of Foreign Affairs and Trade website (www.dfat.gov.au).
- 3.3 Licensees should be aware that, as well as being subject to the operation of the 2011 Standards, they may be affected by anti-terrorism provisions of broader application in other legislation, such as the *Charter of the United Nations Act 1945* and the *Criminal Code*.

Determining ‘Recruiting for a listed terrorist’

- 3.4 Section 7 of each of the 2011 Standards prohibits a licensee from broadcasting a program which would be reasonably understood as directly recruiting a person to join, or participate in the activities of, a listed terrorist. For the purposes of the 2011 Standards, the term ‘recruit’ is given a non-exhaustive meaning that includes: induce, incite and encourage.
- 3.5 The emphasis in section 7 is on directly recruiting, i.e. whether broadcast material directly encourages people to join, or become involved in the activities of, a listed terrorist. In assessing programs prior to their broadcast in Australia, a licensee should have regard to such matters as whether the program:
 - provides contact details of a listed terrorist;
 - informs viewers of meeting times and places;
 - refers viewers to training material and other information that could be used to prepare for participation in the activities of a listed terrorist.

Determining ‘Financing terrorism’

- 3.6 Section 8 of each of the 2011 Standards prohibits a licensee from broadcasting a program the content of which would be reasonably understood as soliciting funds, or assisting with fundraising, for a listed terrorist.
- 3.7 In assessing (prior to the broadcast of the program in Australia) whether program content promotes financing of a listed terrorist, a licensee should review whether the broadcast gives details of a bank account or address

where funds may be sent, or gives details of any other means of providing financial assistance to, or for the benefit of, a listed terrorist.

Determining programs that ‘Advocate the doing of a terrorist act’

3.8 Section 9 of each of the 2011 Standards prohibits a licensee from broadcasting a program that advocates the doing of a terrorist act. It replicates the wording of section 9A of the *Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act)* and should be interpreted in the same way.

3.9 Section 6 in each of the 2011 Standards provides that ‘terrorist act’ has the same meaning as the term is given in section 100.1 of the *Criminal Code*, namely:

“**terrorist act** means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.”

3.10 In assessing (prior to the broadcast of the program in Australia) whether program content advocates the doing of a terrorist act, a licensee should consider whether the broadcast:

- merely informs the audience of the activities, beliefs or opinions of a listed terrorist (see section 3.11 below) [a non-breach]; or
- goes beyond merely providing information in connection with a listed terrorist and any terrorist act by advocating that act, as covered under section s.9(3) of each of the 2011 Standards [a breach].

Simply reporting on the activities of a listed terrorist will, generally, not amount to directly or indirectly counselling or urging the doing of a terrorist act. However, the ACMA will consider the content, tone and circumstances of each impugned broadcast in order to distinguish between mere presentation of the beliefs or objectives of a listed terrorist [non breach] and the presentation of terrorist acts as a valid means to advance those beliefs or objectives [a breach].

3.11 As the wording of section 9 of the 2011 Standards is taken verbatim from section 9A of the Classification Act, the ACMA also intends to have regard to explanatory material and guidance which explains the meaning of that corresponding section.

For example, according to the *Explanatory Memorandum to the Classification (Publications, Films and Computer Games) Amendment Bill 2007*:

...material, which does *no more than* contribute to public discussion or debate or provide entertainment or satirical comment, is *not* material which

should be classified as RC under this provision. Examples could include investigative journalists' work, historical analyses, material that might appear to glorify war or battle (including 'factional' or fictional accounts of war, insurgency or resistance), satirical pieces, and popular culture movies.

- 3.12 Further guidance may be found in the discussion paper drafted by the Classification Policy Branch of the Australian Attorney-General's Department released in 2007 before the commencement of the amendments to the Classification Act. In explaining the intended operation of the provisions, including section 9A, the Discussion Paper, *Material that advocates terrorist acts*, stated:

Material would have to be specifically about advocating committing a terrorist act, not merely expressing generalised support for a cause.

The ACMA intends to administer section 9 of each of the 2011 Standards in line with this approach.

Material not prohibited by the Standards

- 3.13 To ensure freedom of expression is not unduly restricted, section 10 in each of the 2011 Standards does not prohibit broadcasts of informative program content (news, current affairs, documentary programs) that merely inform viewers about the activities, beliefs or opinions of listed terrorists, and that do not solicit funds, directly recruit for a listed terrorist or advocate the doing of a terrorist act.
- 3.14 Further, section 11 of each of the 2011 Standards enables a licensee to broadcast an excerpt of a program which would otherwise be prohibited by section 7, 8 or 9 in each of the 2011 Standards if:
- the excerpt is part of a news report, current affairs program, documentary or other program; and
 - the excerpt is included as part of a bona fide report or comment on a matter of public interest.
- 3.15 Sections 10 and 11 of each of the 2011 Standards are effectively unchanged from the defences which have applied to corresponding earlier standards since 2006. The ACMA intends that these defences should continue to provide broad protection for material that is broadcast in the interests of public information and not in the interests of promoting terrorism or terrorist activity.

Liability for Breaches

- 4.1 A licensee will be in breach of the 2011 Standards if it broadcasts a program that breaches section 7, 8 or 9, regardless of whether or not the licensee is aware that the program is in breach. A licensee may also be subject to prosecution or civil penalty proceedings under the BSA.
- 4.2 To minimise their potential exposure under the 2011 Standards, licensees should formulate and implement measures that address the risk of broadcasting programs that do not comply with the 2011 Standards. Such measures would assist licensees to make an informed assessment about programs before they are broadcast. Appropriate measures may include reviewing and vetting programs before broadcast, especially programs from sources likely to involve a greater risk of breaching the 2011 Standards.

- 4.3 The licensee bears responsibility for the content of its narrowcasting service and it is appropriate that the licensee is obliged to be aware of the content of programs before they are broadcast.

Enforcing compliance with the Standards

- 5.1 Where the ACMA determines that the 2011 Standards have been breached and the program advocates the doing of a terrorist act, or can be reasonably understood to encourage people to join or finance listed terrorists, the ACMA may use its enforcement powers under the BSA to address the breach.
- 5.2 Subsection 5(2) of the BSA requires the ACMA to use its powers in a manner that is, in the ACMA's opinion, commensurate with the seriousness of the breach concerned. The ACMA's current enforcement options in the event of a breach of the 2011 Standards include:
- accepting an enforceable undertaking by the licensee to ensure future compliance with the BSA;
 - issuing a notice directing the broadcaster to take action to ensure that the service is provided in such a way as to comply with the requirements of the licence. It is an offence not to comply with a notice;
 - applying to the Federal Court for an order requiring the person providing the service to pay a civil penalty;
 - applying to the Federal Court for an order requiring the person providing the service to cease providing that service; and
 - if an offence has been committed under the BSA, referral of the matter to the Commonwealth Director of Public Prosecutions.

Procedural Fairness

- 6.1 Before making a finding that a licensee has breached the 2011 Standards, and before publishing a report that would, or would be likely to, adversely affect the interests of a person, the ACMA will provide affected persons with an opportunity to make submissions in relation to these matters.

Further information

- 7.1 The Standards can be downloaded from the ACMA website, www.acma.gov.au.
- 7.2 Licensees wishing to discuss the application of the 2011 Standards may contact:

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