

Regulatory guide—No. 6

Publication of investigations and enforcement actions

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Overview

The Australian Communications and Media Authority (ACMA) issues regulatory guides to assist both industry and the community by:

- > giving practical guidance (for example, guidance about the ACMA's approach to a particular issue or describing the steps of a process)
- > describing the principles underlying the ACMA's approach in particular areas
- > explaining the ACMA's view on the interpretation of the law or its application to a regulated industry
- > explaining when and how the ACMA will exercise specific powers under the legislation it administers.

A regulatory guide does not constitute or replace legal advice on obligations under the relevant legislation.

1. Purpose of this guide

- 1.1. The ACMA regulates communications and media to maximise the economic and social benefits for Australia. To that end we actively encourage compliance with, and where necessary take action to enforce, the various statutes and other instruments we administer, including the:
 - > Broadcasting Services Act 1992 (BSA)
 - > Radiocommunications Act 1992 (Radcomms Act)
 - > Telecommunications Act 1997 (Telco Act)
 - > Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS Act)
 - > Spam Act 2003 (Spam Act)
 - > Do Not Call Register Act 2006 (DNCR Act)
 - > Interactive Gambling Act 2001 (IGA)
 - > related codes, standards and other instruments.
- 1.2. The ACMA is accountable to government and the public for its investigations and enforcement actions arising from those investigations. Openly communicating our enforcement work is important to tell those to whom we are accountable and the businesses and individuals we regulate what action we are taking and why. More specifically, transparency:
 - > informs and educates members of the regulated community about the standards required by the law
 - > serves to deter illegal conduct and encourage compliance by highlighting the consequences of breaking the law
 - > helps the regulated community better understand their obligations and to conduct themselves in a way that minimises the need for the ACMA to intervene
 - > informs and educates members of the public about their legal rights, what the ACMA is doing to ensure compliance with the law and how they can act to benefit from those rights
 - > promotes confidence in the law as the law is seen to work in the public interest through enforcement action.
- 1.3. Public comment or publicity about investigations and enforcement action must weigh the importance of transparency with fairness to the individuals and businesses who are the subject of those investigations as well as competing public interest concerns (such as national security).
- 1.4. The purpose of this guide is to explain the ACMA's approach to public comment and publicity of its investigations and enforcement actions.
- 1.5. This regulatory guide should be read in conjunction with the [ACMA compliance and enforcement policy](#).

2. The ACMA's approach to publication

- 2.1. At a broad level, and subject to the exceptions and clarifications set out below (including consideration of the public interest as set out in paragraph 2.2 below), the ACMA will:
- > not publicise the commencement of an investigation and will avoid commenting on an ongoing investigation
 - > publicise the outcome of investigations where it has found a contravention of the law
 - > publicise enforcement action it takes in consequence of a finding that there has been a contravention of the law
 - > publicise the fact that it has commenced court proceedings with a brief outline of the proceedings
 - > report and comment on investigations and enforcement outcomes in a manner that is factually accurate and balanced and seeks to inform in a way that serves to promote compliance and enhance public confidence in the regulation of communications and media.
- 2.2. When deciding whether to publicise or comment on its investigation and enforcement actions, the ACMA will be guided by the public interest. The ACMA will consider a number of factors in assessing whether publication or comment is or is not in the public interest, including:
- > whether information about the investigation is in the public domain
 - > the nature and seriousness of the issues
 - > whether disclosure is desirable to address public concerns or protect the public from further harm or loss
 - > whether the investigation will be served by publicity, for example to encourage submissions or the provision of evidence in the investigation
 - > fairness to the subject/s of the investigation
 - > protection of any private, confidential or sensitive information
 - > any potential adverse impact public comment may have on the conduct of the investigation or any subsequent court proceedings, including on a person's right to a fair trial.

3. Investigations

- 3.1. The ACMA has a broad discretion to conduct investigations under the laws it administers.¹ The Minister may also direct the ACMA to conduct an investigation in certain circumstances.²
- 3.2. An investigation aims to gather facts and evidence to determine if there has been a contravention and what, if any, action is appropriate. An investigation does not mean there has been a breach of the law and may or may not lead to a breach finding or enforcement action

¹ See, for example, sections 149, 151 and 170 of the BSA, section 510 of the Telco Act and section 21 of the IGA.

² Sections 61CR and 171 of the BSA and subsection 510(3) of the Telco Act.

- 3.3. While a matter is being investigated the ACMA will balance the public interest in transparency against the rights of those who are the subject of the investigation, including privacy rights and the right to a fair hearing. To ensure investigations are conducted fairly and efficiently the ACMA will generally not make any public comment on the commencement or conduct of an investigation, unless it is in the public interest to do so (see paragraph 2.2 above). Where an investigation has been made public the ACMA will usually make a statement to report the outcome at its conclusion.

4. Investigation outcomes

- 4.1. Where the ACMA concludes an investigation with a finding that there has been contravening conduct, it will publicise that outcome and any enforcement action it takes, subject to the public interest factors in paragraph 2.2 above. Conversely, the ACMA will not generally publicise an investigation outcome where it has found no contravening conduct, unless it is in the public interest to do so.
- 4.2. In some circumstances the public interest will be served by the ACMA publicising an investigation outcome even where there is no finding of a contravention. For example, in broadcasting compliance investigations there is often value in releasing the investigation report even where there is no breach finding as this provides guidance on the standards imposed on broadcasters and how the ACMA will interpret those standards. Accordingly, the ACMA will generally publicise broadcasting compliance investigation outcomes, unless there is a public interest not to do so (see paragraph 2.2 above).
- 4.3. At the conclusion of some investigations the ACMA will prepare a report setting out its findings in the investigation. Where an investigation is commenced at the direction of the Minister the ACMA must prepare a report to the Minister on the investigation.³ The Minister may direct the ACMA to publish any such report.⁴
- 4.4. In all other instances, the preparation of a report is at the ACMA's discretion as is the decision on whether to publish any such investigation report.⁵
- 4.5. The ACMA will usually only publish an investigation report where it has found contravening conduct. As noted in paragraph 4.2 above, for broadcasting compliance investigations the ACMA will generally publish the report, unless there is a public interest not to do so.
- 4.6. Where publication of an investigation report would be likely to adversely affect the interests of a person, the ACMA will first give the person an opportunity to make representations on the matter.⁶
- 4.7. Published reports are ordinarily available on the ACMA's website. For further information on complaint handling and investigation reports see <https://www.acma.gov.au/investigations-and-compliance>.

³ Subsection 178(1) of the BSA and subsection 516(2) of the Telco Act.

⁴ See subsections 179(1) and (2) of the BSA and subsection 517(3) of the Telco Act.

⁵ Subsection 178(1) and sections 179 and 180 of the BSA and sections 516-518 of the Telco Act.

⁶ See the ACMA's statutory obligations to do so if publication of a matter in a report or part of a report would, or would be likely to, adversely affect the interests of a person (section 180 of the BSA and section 518 of the Telco Act).

5. Compliance and enforcement outcomes

- 5.1. Where the ACMA finds a contravention of the law it may pursue a number of potential compliance and enforcement actions.⁷ They include:
- > administrative action (e.g. suspension and cancellation of licences; imposition, variation or revocation of licence conditions; acceptance of an enforceable undertaking; issuing a formal warning, an infringement notice, a remedial direction or a direction to comply with an industry code)
 - > court proceedings which may either be criminal prosecution⁸ or civil proceedings, to obtain penalties, declaratory and injunctive relief.

Administrative action

- 5.2. Where the ACMA takes administrative action, it will publicise the action it has taken, subject to any public interest reasons not to do so. Specifically, the ACMA will publicise:
- > a formal warning given by the ACMA where it considers a person has contravened a legal obligation
 - > an outcome where a person has paid the penalty specified in an infringement notice given by the ACMA (see too *Regulatory guide—No 5: Infringement notices*)
 - > a remedial direction given by the ACMA (see too *Regulatory guide—No 3: Remedial directions*)
 - > a direction to comply with an industry code registered under the Telco Act
 - > the acceptance by the ACMA of an enforceable undertaking.⁹ The ACMA will not accept an enforceable undertaking on a confidential basis but may consider a request that it not publish particular terms of an enforceable undertaking if those terms would disclose sensitive private, commercial or confidential information (see too *Regulatory guide—No 1: Enforceable undertakings*)
 - > licensing action (including suspension or cancellation of a licence; or imposition, variation or revocation of licence conditions) the ACMA may take under the BSA, the Radcomms Act and the Telco Act.¹⁰
- 5.3. Some of the administrative actions the ACMA may take are subject to rights of reconsideration by the ACMA and review by the AAT. Those rights apply to remedial directions, directions to comply with an industry code and (with some exceptions) licensing action. The ACMA will have regard to these review rights when it takes decisions to publicise these actions and where appropriate may include statements relating to these rights

⁷ Not all actions are available for all contraventions.

⁸ The decision to prosecute is made by the Commonwealth Director of Public Prosecutions. See the *Prosecution Policy of the Commonwealth*.

⁹ An enforceable undertaking is a negotiated binding agreement that can be enforced in court by the ACMA. The ACMA may accept an enforceable undertaking under the Telco Act, the TCPSS Act, the DNCR Act, the BSA, the Spam Act or the Radcomms Act.

¹⁰ The ACMA may have a statutory obligation to publish (e.g. subsections 43(2) and (3) of the BSA).

Court proceedings

- 5.4. If court proceedings are commenced, the ACMA will generally only comment and publicise the action it is taking after:
 - > charges have been laid, or
 - > the civil proceedings have been filed.
- 5.5. Once proceedings are on foot, the ACMA will generally make no further comment about the subject matter of the litigation until the proceedings have concluded.
- 5.6. Where the ACMA has publicised the laying of charges or commencement of civil proceedings, the ACMA will publicise the outcome of the litigation, including any settlement, and if an appeal has been lodged, the outcome of the appeal.

6. Form of publicity and public comment

- 6.1. The form of publicity and public comment made by the ACMA about its compliance and enforcement actions and outcomes may include:
 - > media releases and briefings
 - > inclusion of the matter in a register on the ACMA website including links to the formal document incorporating any administrative outcome (such as a formal warning, remedial direction, enforceable undertaking or infringement notice)
 - > publication of reports, updates and guides on the ACMA website
 - > social media posts
 - > public presentations and speeches.
- 6.2. The ACMA is also accountable to the Commonwealth Parliament through parliamentary committees. The ACMA may be obliged, or it may otherwise be appropriate, to answer questions or provide information to parliamentary committees in relation to the ACMA's activities, including investigations. Where the ACMA does so these disclosures will form part of the public record.