

Regulatory guide No. 2: Purpose of an investigation under the *Broadcasting Services Act 1992*

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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 *Broadcasting Services Act 1992* (the BSA) gives the ACMA a broad discretion to conduct investigations and imposes an obligation on the ACMA to conduct investigations, when directed by the Minister.
- 1.2 The purpose of this regulatory guide is to provide guidance to those who make a complaint to the ACMA or who may be asked to assist the ACMA in, or are the subject of, an investigation. It explains the nature and purpose of investigations undertaken by the ACMA under the BSA.
- 1.3 This guide does not constitute legal advice.
- 1.4 This guide should be read in conjunction with *Regulatory guide No. 6: Publication of investigations and enforcement actions*.

2. When will an investigation be commenced?

- 2.1 Section 170 of the BSA confers a broad discretion on the ACMA to conduct investigations for the purposes of the performance or exercise of any of its broadcasting, content and datacasting functions (and related powers).
- 2.2 It follows that the ACMA may, on its own motion, commence an investigation under section 170 of the BSA if it considers that it is appropriate to do so. Whether an investigation will actually be commenced will turn on the specific circumstances.
- 2.3 In particular, the ACMA may investigate complaints made under sections 149 or 151 of the BSA, if the ACMA thinks that it is desirable to do so.
- 2.4 The Minister may also direct the ACMA to conduct an investigation (section 171 of the BSA).

3. Purpose of an investigation

- 3.1 In summary, the purpose of an investigation is to enable the ACMA to:
 - > seek to establish the facts relevant to the issue in question
 - > form a view about the subject matter of the investigation
 - > determine what, if any, action should be taken.
- 3.2 In conducting its investigations, the ACMA may gather information, documents and other evidence from a range of sources. It may also seek responses to specified questions and/or ask for submissions on particular issues.
- 3.3 'Evidence' basically means information, documents and any other material that can be used to demonstrate the existence of a fact or the truth of something. In some instances, it is the absence of information, documents or other material that may provide 'evidence'. A person's view or opinion on a particular issue is not 'evidence'.
- 3.4 While the ACMA may ask for evidence on a voluntary basis it also has power to compel the production of evidence. For example, section 173 of the BSA provides that the ACMA may issue a notice requiring the production of documents and information. The ACMA may also issue a notice requiring a person to attend before a delegate of the ACMA to answer questions (as contemplated within sections 173 to 176 of the BSA). Failure to comply with a compulsory notice may have serious criminal or civil consequences (section 202).

4. Evidential standard

- 4.1 There is no 'onus of proof' or 'burden of proof' in investigations undertaken by the ACMA under the BSA. These are concepts which arise in judicial processes. Judicial processes are typically adversarial in nature. The courts have established rules and procedures, which include rules of evidence, that apply to their proceedings.
- 4.2 The ACMA is an administrative decision-maker. The investigations it conducts are inquisitorial in nature. The ACMA therefore inquires and obtains evidence, often from range of sources, for the purpose of its investigations.
- 4.3 In undertaking an investigation the ACMA seeks to gather relevant and logically probative evidence. Logically probative evidence is material that tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future relevant event.
- 4.4 As an administrative decision-maker, the ACMA is entitled to take into account material that, as a matter of reason, has probative value. What weight should be given to that material is a matter for the ACMA to determine.
- 4.5 Whether the evidence is of sufficient probative value to enable the ACMA to be reasonably satisfied about the issue in question is assessed by the ACMA in light of the facts and circumstances of the case, including the nature and gravity of the consequences of the finding in question.
- 4.6 If, of course, the outcome of the investigation results in civil or criminal proceedings being commenced (see the discussion below at **Outcome of an investigation**), the nature of the evidence presented must be sufficient to satisfy the relevant evidential burden in those proceedings. Who bears the evidentiary burden will also depend on, among other things, the nature of the proceedings and the relevant statutory provision/s in question. The burden may shift. For example, subsection 205PAA(3) of the BSA provides that a person wishing to rely on mistake of fact to avoid liability in civil penalty proceedings commenced by the ACMA under subsection 205G(1) bears an evidential burden in relation to that matter.

5. What to expect

- 5.1 The issues involved in an investigation vary, in seriousness and in complexity. It follows that the processes adopted by the ACMA must be flexible. What evidence is sought or needed will turn on the issues which are the subject of the investigation.
- 5.2 Where, for example, an investigation is commenced as a consequence of a complaint under a code of practice (section 148 of the BSA), the complainant will usually have provided the ACMA with a copy of correspondence to, and received from, the broadcaster. If they have not, the ACMA may write to the broadcaster requesting this correspondence as well as a copy of the relevant broadcast. In some instances, this evidence alone will be sufficient to enable the ACMA to form a view as to the substance of the complaint.
- 5.3 In other more complex investigations, the issues may require the ACMA to obtain evidence from a range of sources. The ACMA may seek responses to specified questions and/or ask for submissions on particular issues. As noted above, the ACMA may do so on a voluntary basis or it may issue a notice compelling the production of evidence.

6. Assisting the ACMA

- 6.1 The ACMA is required to complete its investigations within reasonable timeframes. As a consequence, the ACMA will specify a time within which a response to its inquiries is required.
- 6.2 The ACMA will make its decisions concerning an investigation based on the information and evidence before it.
- 6.3 The assistance you provide, whether as the subject of the investigation or as a person who may have relevant information and evidence, will enable the ACMA to make informed decisions in a timely manner. As noted above, in some circumstances the absence of evidence can also have probative value. It is important that interested parties provide any relevant evidence they have to the ACMA while the opportunity to do so exists. If deadlines for the provision of evidence or submissions pass, the ACMA is entitled, and may proceed, to make its decision without that evidence or those submissions.

7. Outcome of an investigation

- 7.1 Whether it is necessary or appropriate to take any enforcement action will turn on the facts and circumstances of the case.
- 7.2 The ACMA's compliance and enforcement approach is to take action that is commensurate with the seriousness of the conduct concerned which includes consideration of the nature and consequences of the conduct (section 5 of the BSA).
- 7.3 The ACMA's enforcement powers under the BSA include:
 - > giving an infringement notice, accepting an enforceable undertaking, giving a remedial direction, imposing, varying or revoking licence conditions, suspending or cancelling a licence—administrative action
 - > instituting civil proceedings to obtain injunctive relief, civil penalty orders, and orders to enforce compliance with an enforceable undertaking—civil action
 - > referral to the Commonwealth Director of Public Prosecutions for prosecution of an offence—criminal action.
- 7.4 Not all of these enforcement powers are available for every contravention of the BSA or subordinate instruments. See too *Regulatory guide No. 6: Publication of investigations and enforcement actions*.

Reports on an investigation

- 7.5 Where an investigation has been commenced at the direction of the Minister, the ACMA must prepare a report to the Minister on the investigation (subsection 178(1)). In all other instances, the preparation of a report is at the discretion of the ACMA (subsections 153(1) and 178(1)).
- 7.6 For investigations commenced as a consequence of receipt of complaints under sections 149 and 151 of the BSA, it is the ACMA's general practice to prepare a report on the investigation.
- 7.7 The power to publish a report on an investigation commenced at the direction of the Minister lies with the Minister. With other investigations, the decision to publish a report is, subject to subsection 179(3) and section 180 of the BSA, entirely a matter for the ACMA.
- 7.8 For investigations commenced by the ACMA in relation to sections 149 and 151 of the BSA, it is also the ACMA's general practice to publish the reports prepared on the investigation.

7.9 Published reports are ordinarily available on the ACMA's website. For further information on complaint handling and broadcasting investigation reports see www.acma.gov.au. See too *Regulatory guide No. 6: Publication of investigations and enforcement actions*.