

Regulatory guide No. 4: Remedial directions

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Canberra

Red Building
Benjamin Offices
Chan Street
Belconnen ACT

PO Box 78
Belconnen ACT 2616

T +61 2 6219 5555
F +61 2 6219 5353

Melbourne

Level 32
Melbourne Central Tower
360 Elizabeth Street
Melbourne VIC

PO Box 13112
Law Courts
Melbourne VIC 8010

T +61 3 9963 6800
F +61 3 9963 6899

Sydney

Level 5
The Bay Centre
65 Pirrama Road
Pyrmont NSW

PO Box Q500
Queen Victoria Building
NSW 1230

T +61 2 9334 7700 or 1800 226 667
F +61 2 9334 7799

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Written enquiries may be sent to:

Manager, Editorial Services
PO Box 13112
Law Courts
Melbourne VIC 8010
Email: info@acma.gov.au

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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 is empowered to issue remedial directions under the *Broadcasting Services Act 1992* (BSA), *Interactive Gambling Act 2001* (IGA), *Radiocommunications Act 1992*, *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act).¹ While there are certain statutory differences between the various provisions under which remedial directions can be made, the ACMA will seek to take a consistent approach in its exercise of this power.
- 1.2 The purpose of this guide is to explain the ACMA's approach to giving a remedial direction under these Acts.
- 1.3 This regulatory guide should be read in conjunction with *Regulatory guide No. 6: Publication of investigations and enforcement actions* and the [ACMA compliance and enforcement policy](#).
- 1.4 This guide does not constitute legal advice – the ACMA recommends obtaining professional advice about the consequences of it giving a remedial direction.

2. Overview of the ACMA's power to give a remedial direction

- 2.1 Generally, before a remedial direction may be issued, the ACMA must be satisfied that a particular event has occurred or a situation exists (for example, a contravention of a civil penalty provision, licence condition, code, standard or service provider rule, or the existence of an unacceptable media diversity situation).²
- 2.2 The ACMA may issue a written direction that specifies the action that is required to be taken to ensure that the relevant event/situation ceases or makes it unlikely that it will occur.³
- 2.3 All remedial directions must be given in writing.⁴
- 2.4 The Act under which the remedial direction is made specifies the effect of a breach of the remedial direction. A breach of any remedial direction given by the ACMA has potentially significant consequences. For example, a person who breaches a remedial direction may be ordered by the court to pay a civil penalty⁵ or be found guilty of an offence.⁶ A breach may also result in the ACMA suspending or cancelling a licence.⁷

¹ Cf. the ACMA's power to issue a direction to comply with a registered industry code under section 121 of the Telecommunications Act.

² See, for example, subsections 121FJB(1), 141(1), (3), (4) and (6); clause 53 of Schedule 6 of the BSA; section 268 of the Radiocommunications Act; sections 69, 102 and 295S of the Telecommunications Act; section 56 of the IGA and section 118 of the TCPSS Act.

³ Subsection 118(2) of the TCPSS Act also empowers the ACMA to give a provider a written direction requiring them to take such action as will ensure that the extent of their compliance with the standard in force under section 115 or 117D 'reaches or exceeds a specified goal or target'.

⁴ In some instances, the legislation empowers the ACMA to issue formal warnings (for example, sections 70 and 103 of the Telecommunications Act). The issue of a formal warning is not a precondition to a remedial direction.

⁵ See subsections 68(3) and 101(3) of the Telecommunications Act; sections 61AR and 142A, subclause 53(7) of Schedule 6 of the BSA; subsection 268(4) of the Radiocommunications Act and subsection 118(5) of the TCPSS Act. The ACMA may commence civil penalty proceedings (see section 205G of the BSA and section 571 of the Telecommunications Act).

⁶ Sections 61AQ and 142, subclause 53(4) of Schedule 6 of the BSA; and subsection 56(4) and section 57 of the IGA. Prosecution of an offence is a matter for the discretion of the Commonwealth Director of Public Prosecutions.

⁷ Section 143 and clause 54 of Schedule 6 of the BSA.

3. Discretionary factors

- 3.1 In determining whether a remedial direction is an appropriate enforcement response, the ACMA considers a range of factors including, but not limited to:
- > the nature and seriousness of the conduct
 - > whether the conduct was deliberate, reckless or inadvertent
 - > what, if any, action was taken following the ACMA bringing the issues of concern to the person's attention (for example, through a formal warning)
 - > whether the remedial direction will promptly and effectively redress and address the conduct and issues of concern to the ACMA
 - > the impact of issuing the remedial direction on other enforcement action in progress or that may be taken by the ACMA.

4. Guiding principles

- 4.1 While the ACMA may have a number of possible compliance and enforcement options available to it, a remedial direction is one of its most significant and effective enforcement powers. It often may provide the most timely and effective remedy.
- 4.2 In some circumstances, a remedial direction may address all the issues or matters of concern to the ACMA. A remedial direction may therefore be the preferred and only compliance and enforcement remedy used by the ACMA.
- 4.3 However, it is not uncommon for there to be a number of issues of concern to the ACMA. Accordingly, the remedial direction may address some, but not all, issues of concern. In these circumstances, the ACMA may consider that, in addition to giving the direction, other enforcement and compliance action is required. What, if any, additional action is required will turn on the facts of the matter.

5. Subject matter of a remedial direction

- 5.1 The action that the ACMA may direct must be taken is determined in light of the facts and terms of the relevant provision, and the nature and circumstances of the breach or other event that has caused the remedial direction.
- 5.2 The provision under which a remedial direction is given may set out non-binding examples of action that the ACMA may direct must be taken.⁸ Those examples are not exhaustive but are illustrative.
- 5.3 The action that the ACMA directs must be taken may involve more than one step.
- 5.4 The action specified by the ACMA in the remedial direction will be:
- > proportionate to the impact of the conduct or risk of future contraventions
 - > expressed in clear and unambiguous language
 - > reasonably capable of implementation within any time specified for compliance
 - > capable of being measured or tested objectively.
- 5.5 The ACMA will not issue a direction that merely requires the person concerned to comply with their pre-existing legal obligations.

⁸ See sections 69 and 102 of the Telecommunications Act, section 268 of the Radiocommunications Act and section 61AN of the BSA.

- 5.6 The broad remedial directions powers enable the ACMA to tailor the direction to fit the case. The kinds of remedial directions that the ACMA might give include:
- > the development and implementation of compliance procedures and systems; for example, an administrative system to monitor compliance with licence conditions/service provider rule/s
 - > the introduction of specified practices or procedures; for example, conduct of periodic audits, holding of management/committee meetings, provision of training, scheduling of particular programs/items
 - > the provision of reports/information to the ACMA; for example, periodic reports on the measures implemented to ensure compliance with licence conditions/service provider rule/s provided to the ACMA and/or board, copies of the schedule of programs/meetings
 - > revision/amendment or removal of information; for example, taking down incorrect or misleading information/amending information published on a website, reviewing and amending clauses of the constitution of an incorporated association concerning its objects and membership.

6. Timeframe for compliance

- 6.1 The ACMA will specify the time within which action must be taken. This will be determined in light of the facts, including the complexity and commercial sensitivity of the action that the ACMA directs must be taken.⁹
- 6.2 The time specified will:
- > enable sufficient time for the specified action to be taken
 - > reflect the impact or egregiousness of the conduct or risk (for example, the greater the detriment to the public and/or risk of ongoing detriment, the greater the need for prompt action to be taken to minimise or ameliorate that detriment)
 - > be expressed in clear and unambiguous language.

7. Requests for an extension of time

- 7.1 In some instances, the relevant Act expressly allows the recipient of the direction to seek an extension of time in which to comply.¹⁰
- 7.2 In the absence of such an express power, the ACMA will nevertheless consider an application for additional time.
- 7.3 As a breach of a remedial direction may result in the ACMA commencing further enforcement action, any application for an extension should be made before the compliance date specified in the remedial direction (see below).¹¹
- 7.4 The basis for the request, as well as the extended period of time sought for compliance, should also be set out.
- 7.5 Any request should be made in writing and forwarded to the ACMA officer who issued the direction.
- 7.6 Whether the application will be granted will turn on the facts.

⁹ The time specified in a direction issued under section 61AN of the BSA cannot be more than 2 years (see subsection 61AN(6)).

¹⁰ See, for example, section 61AP of the BSA.

¹¹ An application for an extension of time to comply with a remedial direction issued under section 61AN of the BSA must be made within the prescribed time (within 3 months before the end of the time specified but not less than one month before the end of that period).

8. Requests for revocation and/or variation of a remedial direction

Statutory right of reconsideration

- 8.1 A statutory right to seek reconsideration by the ACMA exists where a remedial direction is made under sections 69 or 102 of the Telecommunications Act or section 268 of the Radiocommunications Act. A right to seek further review by the Administrative Appeals Tribunal (AAT) follows where the decision upon reconsideration is to affirm or vary the decision.¹² There is no comparable right under the other Acts.
- 8.2 In giving the direction under these provisions, the ACMA will set out the procedures for seeking reconsideration, including to whom the application should be sent.

No statutory right of reconsideration

- 8.3 In the absence of a statutory right of reconsideration, a person may have a right to seek external review (for example, in the Federal Court). A request to revoke or vary a direction should ordinarily be dealt with under the external review processes. If, however, exceptional circumstances exist, the ACMA may, in the exercise of its discretion, consider a request to revoke or vary the remedial direction.
- 8.4 Exceptional circumstances may exist where:
- > a jurisdictional error has been made (for example, the direction was given to the incorrect entity)
 - > factors outside the control of the recipient exist that make compliance with the direction impossible (for example, illness or change in financial circumstances).
- 8.5 A request should be made in writing and forwarded to the ACMA officer who issued the direction. The request should be made as soon as practicable.

9. Breach of a remedial direction

- 9.1 In the event of a breach, the ACMA will consider its enforcement options. This may include an action for breach of the remedial direction (see section 2) as well as recourse to other enforcement remedies that may be available.
- 9.2 The ACMA will determine what action should be taken in light of the facts of the case, including:
- > the nature and seriousness of the conduct that was the subject of the direction
 - > the nature and extent of compliance with the direction
 - > the explanation for non-compliance given by the recipient of the direction
 - > whether the person has been the subject of previous enforcement action and the outcome of that action
 - > what, if any, impact the institution of proceedings may have on action already in progress or that the ACMA is contemplating.

¹² Part 29 of the Telecommunications Act and Part 5.6 of the Radiocommunications Act.

10. Publication

- 10.1 The ACMA's policy is set out in *Regulatory guide No. 6: Publication of investigations and enforcement actions*.
- 10.2 In summary, the ACMA will publicise the giving of a remedial direction subject to any public interest reasons not to do so. When taking a decision to publicise a remedial direction, the ACMA will have regard to the person's right to seek reconsideration by the ACMA or review by the AAT and, where appropriate, may include a statement relating to these rights.