

EXPLANATORY STATEMENT

Legislative Instruments Act 2003 – Section 26

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

GUIDELINES RELATING TO THE ACMA'S ENFORCEMENT POWERS UNDER THE BROADCASTING SERVICES ACT 1992 (BSA)

On 26 August 2011 the Australian Communications and Media Authority (the **ACMA**) made the *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act 1992 (the Guidelines)*.

The Guidelines are made for the purposes of section 215 of the BSA. The Guidelines commence on the day after their registration on the Federal Register of Legislative Instruments (**FRLI**) and replace the *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992* dated 25 January 2007 (the **previous Guidelines**).

The Guidelines take into account the objects of the BSA set out in section 3 and the regulatory policy set out in section 4 of the BSA.

Guidelines

Under subsections 215(5) and 215(6) of the BSA, the ACMA must ensure that it has guidelines in place relating to the powers conferred on the ACMA by the following provisions of the BSA:

- Division 4 of Part 8B;
- Parts 10, 14B, 14D and 14E; and
- Part 8 of Schedule 6.

The Guidelines have been made to comply with that obligation.

Regard will be had to any of the Guidelines that are relevant and in force when the ACMA is exercising an enforcement power conferred on the ACMA that is covered by the Guidelines.

Likely impact and effect of the Guidelines

The Guidelines provide guidance to which the ACMA and its officers must have regard when exercising various powers under the BSA. They are substantively similar to the previous Guidelines with various minor changes to provide more, and more detailed, guidance about the matters which the ACMA will take into consideration in deciding on appropriate enforcement action under the BSA.

Consultation

Before making the Guidelines, the ACMA took the following steps by way of consultation:

- On 23 December 2010 the ACMA posted on its website a draft of the revised Guidelines together with a discussion paper, inviting public

comment. The period allowed for public consultation was 6 weeks. The closing date for submissions was 18 February 2011.

- The ACMA also wrote to various key stakeholders with information about the draft revised Guidelines, providing details of how to obtain a copy of the draft revised Guidelines and inviting public comment. The ACMA received three written submissions as a result of public consultation and made some variations to the draft revised Guidelines as a result.

Regulatory impact

The Office of Best Practice Regulation (**OBPR**) has considered the matter and formed the view that no regulatory impact analysis is required for the Guidelines. The OBPR reference number is ID 12849.

Description of the provisions of the Guidelines

The Guidelines outline the types of enforcement action available to the ACMA under the following provisions of the BSA:

- > Division 4 of Part 8B—remedies for breaches of international broadcasting licence provisions ;
- > Part 10—action for breaches of broadcasting licensing provisions;
- > Part 14B—civil penalty orders;
- > Part 14D—enforceable undertakings;
- > Part 14E—infringement notices; and
- > Part 8 of Schedule 6 of the BSA—remedies for breaches of datacasting licence provisions.

The Guidelines also discuss when the ACMA will refer a matter to the Commonwealth Director of Public Prosecutions (the **CDPP**).

The Guidelines highlight the discretionary factors which the ACMA generally considers in the exercise of these powers.

Further details about the particular clauses of the Guidelines are set out below.

Clause 1 – Name of the instrument

Sets out the name of the instrument.

Clause 2 – Commencement

States that the Guidelines commence on the day after they are registered on the FRLI.

Clause 3 – Definitions

This clause sets out a number of definitions used in the Guidelines, being for the following terms:

- ACCC;
- ACMA;

- ACMA Act;
- BSA;
- BSA code; and
- CDPP.

Clause 4 – Introduction

This section deals with a number of introductory matters including the functions of the ACMA under the ACMA Act and the ACMA's regulatory role under the BSA. Clause 4.3 notes that the Guidelines are made under subsection 215(4) of the BSA and that they replace the previous Guidelines made in 2007.

Clause 4.4 states that the Guidelines highlight the discretionary factors which the ACMA generally considers in the exercise of its powers conferred under various provisions of the BSA. Clause 4.5 states that the Guidelines take into account section 3 (objects) and section 4 (regulatory policy) of the BSA.

Clause 4.6 gives an overview of the ACMA's role in regulating media diversity. Clause 4.7 states that the ACMA retains the discretion to impose or seek remedies and sanctions which it considers appropriate in the light of the circumstances of each case.

Clause 5 – Types of action available to the ACMA

Clause 5 refers to the ACMA's diverse range of responsibilities. Clause 5.2 sets out the three broad categories of action available to the ACMA in responding to breaches of the BSA, being: administrative action, civil action and referral to the CDPP for prosecution for an offence. Clause 5.3 states that not all of the enforcement powers available to the ACMA are able to be used for every contravention of the BSA. Clause 5.4 describes the circumstances in which the ACMA may consider informal voluntary undertakings as an alternative to formal enforcement action.

Clause 6 – Exercising enforcement powers

Clause 6 refers to the co-regulatory arrangements which apply to some industry sectors regulated by the BSA and states that the Guidelines operate in that context. Clause 6.2 reiterates the ACMA's commitment to engaging with the regulated community to achieve, as far as possible, voluntary compliance. Clause 6.3 states that the ACMA adopts a graduated and strategic risk-based approach to compliance and enforcement and notes that decisions by the ACMA will always be made in light of the facts of the case and in accordance with the relevant objects and policy of the BSA.

Clause 6.4 sets out the ACMA's broad approach to compliance and enforcement, being to take action that is commensurate with the seriousness of the conduct. This clause also sets out the factors which the ACMA will take into account in determining the appropriate enforcement response.

Clause 6.5 states the ACMA's commitment to making enforcement decisions that are not influenced by bias, conflicts of interest or irrelevant considerations.

Clause 6.6 notes that the action which the ACMA may take to address and redress non-compliance may involve recourse to more than one enforcement option in appropriate circumstances.

Clauses 7 to 10 – Administrative action

Suspension or cancellation of a licence

Clause 7 sets out the circumstances in which the ACMA may consider it appropriate to take action to suspend or cancel a licence issued under the BSA and the circumstances in which the ACMA will publicise such action. The ACMA may also be directed by the Minister for Foreign Affairs to take specified action concerning international broadcasting licensees. Clause 7.4 explains the ACMA's approach to publication when it decides to suspend or cancel a licence.

Remedial directions

Clause 8 sets out when the ACMA may consider the issue of a remedial direction an appropriate enforcement outcome, either to address all or merely some aspects of the conduct, or issues of concern to the ACMA. Clause 8.2 cross-refers to clause 6 for the factors which the ACMA may consider in determining whether a remedial direction should be issued. Clause 8.3 states that the required action that the ACMA may specify in a remedial direction will turn on the facts of the particular matter. Clause 8.4 sets out the principles underlying the action that may be specified by the ACMA. Clauses 8.5 to 8.6 deal with the time for compliance with a remedial direction and the circumstances applying to an application for an extension of time in which to comply with a remedial direction. Clause 8.9 states that in the event of breach of a remedial direction, the ACMA may commence proceedings in the Federal Court. Breach of a remedial direction may also be a criminal offence. Clauses 8.10 and 8.11 deal with publishing the giving of a remedial direction. Generally, the ACMA will publicise the giving of a remedial direction, although, in reaching its view, the ACMA will consider a range of factors (clause 8.11).

Enforceable undertakings

Clause 9 deals with enforceable undertakings under section 205W of the BSA. Clauses 9.1 to 9.7 set out the formal requirements for an undertaking under the BSA. Clause 9.8 states that there is a range of factors which the ACMA may consider in determining whether an enforceable undertaking should be accepted and cross refers to the factors set out at clause 6. Clauses 9.9 to 9.11 discuss the terms of an undertaking. Clauses 9.12 to 9.15 discuss the process of offering the ACMA an undertaking. Clauses 9.16 to 9.17 state the ACMA's approach to publishing enforceable undertakings and note that it is the ACMA's practice to publish all enforceable undertakings on its website.

Infringement notices

Clause 10 sets out the circumstances when the ACMA may consider issuing an infringement notice. Only a limited number of provisions in the BSA are designated infringement notice provisions. The formal requirements for issuing an infringement notice under the BSA are set out in clauses 10.2 to

10.5. Clause 10.2 cross refers to the factors set out at clause 6 as relevant to the ACMA's decision whether to issue an infringement notice. Clause 10.8 sets out what details an infringement notice will include. Clause 10 also deals with requests for an extension of time in which to pay the penalty (clauses 10.9 to 10.10), withdrawal of an infringement notice (clauses 10.11 to 10.14), and the effect of withdrawal of an infringement notice (clauses 10.15 to 10.16). Clauses 10.17 to 10.20 explain the ACMA's approach to publication of infringement notices, in particular, the ACMA's view that generally, there should be no publication of the fact that an infringement notice has been given, but that publication of the fact of compliance with the notice may be appropriate.

Clause 11 – Civil litigation

Clause 11 discusses the circumstances in which the ACMA may consider instituting civil proceedings. Clause 11.1 notes that there is a range of factors the ACMA will consider in deciding whether it is appropriate to commence civil proceedings and cross-refers to clause 6 for those factors. Clause 11.2 states that if the ACMA considers it appropriate to commence such proceedings, the ACMA is bound by the Commonwealth model litigant rules. Clause 11.4 sets out the ACMA's approach to publication of the fact of commencing civil proceedings and notes that the ACMA will generally publish the outcome of civil proceedings including appeals (if any).

Clause 12 – Criminal

Clause 12 deals with the referral of matters to the CDPP. Not all matters involving an alleged offence will be referred to the CDPP by the ACMA. If, however, the ACMA does refer a matter to the CDPP, the ACMA will act in compliance with the Prosecution Policy of the Commonwealth (clause 12.2). Clauses 12.4 to 12.5 explain the ACMA's approach to publication regarding criminal matters. Generally, the ACMA will not publicise the referral of a matter to the CDPP but will usually publicise the outcome of any prosecution undertaken by the CDPP.