



Broadcasting Services Act 1992 – Enforcement Guidelines of the ACMA

Broadcasting Services Act 1992

The AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY makes these Guidelines under subsection 215(4) of the *Broadcasting Services Act 1992*.

Dated 26th August 2011

Chris Chapman
[signed]
Member

Richard Bean
[signed]
Member/General Manager

Australian Communications and Media Authority

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

Contents

1	Name of Instrument	1
2	Commencement	1
3	Definitions	1
4	Introduction	2
5	Types of enforcement action available to the ACMA	3
6	Exercising enforcement powers	4
7	Suspension and cancellation of licences	5
8	Remedial directions	6
9	Enforceable Undertakings	7
10	Infringement Notices	9
11	Institution of civil proceedings	12
12	Referral of matters to the CDPP	12

1 **Name of instrument**

This instrument is the *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act 1992*.

2 **Commencement**

This instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

3 **Definitions**

In this Instrument:

ACCC means the Australian Competition and Consumer Commission

ACMA means the Australian Communications and Media Authority

ACMA Act means the *Australian Communications and Media Authority Act 2005*

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

BSA means the *Broadcasting Services Act 1992*

BSA code means an industry code of practice registered by the ACMA under the *Broadcasting Services Act 1992*

CDPP means the Commonwealth Director of Public Prosecutions

4 Introduction

4.1 The ACMA is an independent statutory authority established under section 6 of the ACMA Act. The ACMA's broadcasting, content and datacasting functions are set out at section 10 of that Act.

4.2 Section 5 of the BSA charges the ACMA with responsibility for monitoring the broadcasting industry, the datacasting industry and the Internet industry and states that Parliament confers on the ACMA a range of functions and powers that will:

- > produce regulatory arrangements that are stable and predictable; and
- > deal effectively with breaches of the rules established by the BSA.

4.3 The ACMA has made these guidelines under subsection 215(4) of the BSA which provides that the ACMA may formulate guidelines relating to its enforcement powers. These guidelines are in force for the purposes of subsections 215(5) and (6) of the BSA. They replace the *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992* dated 25 January 2007.

4.4 The guidelines highlight the discretionary factors which the ACMA generally considers in the exercise of its powers conferred under Division 4 of Part 8B—remedies for breaches of international broadcasting licence provisions, Part 10—remedies for breaches of broadcasting licensing provisions, Part 14B—civil penalties, Part 14D—enforceable undertakings, Part 14E—infringement notices and Part 8 of Schedule 6 of the BSA—remedies for breaches of datacasting licence provisions, and in deciding whether to refer a matter to the CDPP.

4.5 The guidelines take into account the objects of, and regulatory policy underpinning, the BSA (sections 3 and 4).

4.6 Under the BSA, the ACMA is responsible for regulating certain aspects of media diversity. The ACCC has a role in regulating competition and assessing whether a merger will lead to a substantial lessening of competition. Where a matter requires enforcement action by both agencies, these processes will generally run in tandem, although this may vary depending on the circumstances of each individual case.

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

4.7 While the guidelines seek to provide guidance to the regulated community, the ACMA retains the discretion to impose or seek remedies and sanctions which it considers appropriate in the light of the particular circumstances of each case.

5 Types of action available to the ACMA

5.1 The type of action available to the ACMA reflects the diverse and dynamic regulatory environment in which the ACMA operates as well as the range of the ACMA's responsibilities.

5.2 The enforcement powers conferred on the ACMA under the BSA include:

- > giving an infringement notice, accepting an enforceable undertaking, giving a remedial direction, and suspending or cancelling licences—administrative action
- > instituting civil proceedings to obtain injunctive relief, an order to cease, civil penalty orders, and orders to enforce compliance with an enforceable undertaking—civil litigation
- > referral to the CDPP for prosecution of an offence—criminal.

5.3 Not all of these enforcement powers are available for every contravention of the BSA. Certain enforcement decisions may only be made by the Authority (see subsection 53(2) of the ACMA Act).

5.4 The ACMA may, in the exercise of its discretion, accept informal voluntary undertakings given by a regulated entity. An undertaking of this kind may resolve and address the issues of concern to the ACMA and, as a consequence, recourse to formal enforcement powers would not be necessary.

6 Exercising enforcement powers

6.1 The ACMA recognises that co-regulatory arrangements apply to some industry sectors regulated by the BSA and that these enforcement guidelines will operate in that context when those arrangements apply.

6.2 The ACMA recognises the importance of encouraging and facilitating compliance by all industry participants with statutory obligations. The ACMA's compliance activities may be both proactive and reactive. In undertaking these activities, the ACMA engages with the regulated community to achieve, to the greatest extent possible, voluntary compliance.

6.3 The ACMA adopts a graduated and strategic risk-based approach to compliance and enforcement. The decision as to what, if any, enforcement action should be taken by the ACMA is made in the light of the facts of the matter and having regard to the objects the BSA and the regulatory policy underpinning it (sections 3 and 4 of the BSA).

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 6.4 The ACMA's compliance and enforcement approach is to take action that is commensurate with the seriousness of the conduct which includes consideration of the nature and consequences of the conduct (section 5 of the BSA). There is a range of factors which may be considered by the ACMA in determining the appropriate enforcement response including:
- > whether the conduct was deliberate, reckless or inadvertent
 - > whether the conduct has caused, or may cause, detriment to another person and the nature, seriousness and extent of that detriment
 - > whether the conduct involved indicates systemic issues which may pose ongoing compliance or enforcement issues
 - > whether the regulated entity/person has been the subject of prior compliance or enforcement action and the outcome of that action
 - > the compliance history and culture of the regulated entity
 - > the specific and general educative/deterrent effect of taking action
 - > the seniority and level of experience of the person/s involved in the conduct
 - > what, if any, action has been taken to remedy and address the consequences of the conduct
 - > whether the subject of the investigation has co-operated with the ACMA
 - > whether the issues involved require urgent action/intervention by the ACMA.
- 6.5 The circumstances of each contravention will be considered separately. In making enforcement decisions, the ACMA will not be influenced by bias, conflicts of interest or irrelevant considerations, such as gender, race, religion, political views or affiliation.
- 6.6 The action which the ACMA may take to address and redress non-compliance may involve recourse to more than one enforcement option. Equally, the ACMA may consider that, in the light of the factual circumstances, no formal enforcement action should be taken. For example, the ACMA may consider, having raised the issue of non-compliance with the regulated entity, that it has, or will, adequately address the issues in question without the need for further action and intervention by the ACMA.

Administrative action

7 Suspension and cancellation of licences

- 7.1 Under the BSA, the ACMA is empowered to suspend or cancel licences in certain circumstances. The relevant provisions set out the preconditions for the exercise of these powers. There is a range of factors which the ACMA may consider in determining whether suspension or cancellation of a licence is an appropriate enforcement response (see clause 6).

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 7.2 Where the ACMA has formed a view that it may be appropriate to take action to suspend or cancel a licence it will, among other things:
- > identify the issues of concern to the ACMA
 - > notify the relevant person of the proposed action that may be taken
 - > set out the time within which any representations concerning the proposed action should be provided to the ACMA.
- 7.3 The ACMA may also be directed by the Minister for Foreign Affairs to take specified action concerning international broadcasting licensees, including giving a formal warning to the licensee (Part 8B of the BSA). The ACMA must comply with the directions given by the Minister.

Publication

- 7.4 The ACMA will generally publicise the suspension or cancellation of a licence.

8 Remedial directions

- 8.1 Under the BSA, the ACMA is empowered to issue a remedial direction in certain limited circumstances.
- 8.2 There is a range of factors which the ACMA may consider in determining whether a remedial direction should be issued (see clause 6). In determining whether a remedial direction should be issued, the ACMA will generally also consider whether the remedial direction should address all or merely some aspects of the conduct or issues of concern to the ACMA.

Subject matter of a remedial direction

- 8.3 Many of the provisions under which a remedial direction may be issued under the BSA set out non-binding examples of action that the ACMA may direct must be taken. Those examples are not exhaustive. What action will be specified in the remedial direction will turn on the facts of each matter. The action specified may involve more than one step.
- 8.4 The action specified by the ACMA 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.

Time for compliance

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 8.5 The time specified in the remedial direction will turn on the facts of the case, including the complexity and commercial sensitivity of the action which the ACMA directs must be taken. The time specified will:
- > enable sufficient time for the recipient to take the specified action
 - > 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.

Applications for an extension of time

- 8.6 Section 61AP of the BSA expressly provides for applications for an extension of time in which to comply with a remedial direction issued by the ACMA under sections 61AN (unacceptable media diversity) and 61ANA (unacceptable three-way control situation).
- 8.7 While there is no express power permitting the ACMA to grant an extension of time for compliance with a remedial direction issued under the other provisions of the BSA, the ACMA will consider an application for an extension of time for compliance. Whether a request will be granted will turn on the facts.
- 8.8 An application for an extension of time should be made before the compliance date specified in the remedial direction. The basis for the request, as well as the extended period of time sought for compliance, should be specified. The application should be forwarded to the ACMA officer with whom the recipient of the direction has been dealing.

Non-compliance

- 8.9 The ACMA may commence proceedings in the Federal Court if the ACMA considers that the person has breached a remedial direction, or has failed to comply with a direction. Breach of a remedial direction may also be a criminal offence: see section 142 of the BSA.

Publication

- 8.10 The ACMA will generally publicise the giving of a remedial direction.
- 8.11 In determining whether publication should occur the ACMA considers a range of factors including:
- > the nature and seriousness of the conduct including whether the conduct is commercially sensitive or confidential

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- > whether the person's conduct has been the subject of public comment or interest
- > whether the giving of the direction is the primary remedy available to the ACMA
- > whether the direction deals with all of the issues of concern and not merely a discrete aspect of the investigation or conduct.

9 Enforceable undertakings

- 9.1 In appropriate circumstances, an enforceable undertaking can provide a flexible and effective remedy, in addition to, or in substitution for, other formal enforcement action that may be available to the ACMA.
- 9.2 Under section 205W of the BSA, the ACMA is empowered to accept a written undertaking given by a person that the person will:
- > take specified action to comply with the Act or a BSA code
 - > refrain from taking specified action to comply with the BSA or BSA code
 - > take specified action directed towards ensuring that the person does not contravene the BSA or BSA code, or is unlikely to contravene the Act or code in the future.
- 9.3 It is a requirement that the undertaking must be expressed as an undertaking under section 205W of the BSA.
- 9.4 The person may withdraw or vary the undertaking at any time, but only with the consent of the ACMA. However, the ACMA may cancel the enforceable undertaking by written notice.
- 9.5 The ACMA may commence proceedings in the Federal Court if the ACMA considers that the person has breached the undertaking.
- 9.6 An enforceable undertaking may be accepted if, in the opinion of the ACMA, it provides an effective regulatory outcome. In more complex matters, it is not uncommon for there to be a number of issues that may be the subject of concern. It is open to the ACMA to accept an enforceable undertaking with respect to certain aspects of the matter while pursuing other remedies.
- 9.7 Whether an enforceable undertaking will be accepted by the ACMA will turn on the facts of the particular matter. The acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a binding precedent for future action.

Discretionary factors

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 9.8 There is a range of factors which the ACMA may consider in determining whether an enforceable undertaking should be accepted (see clause 6). The ACMA will generally also consider whether:
- > the regulated person or entity is prepared to publicly acknowledge the ACMA's concerns about the conduct and the need for corrective action
 - > the terms of the undertaking will achieve an effective outcome for those who may have been disadvantaged by the misconduct (if any)
 - > it is likely that undertakings given will be fulfilled.

Terms of an undertaking

- 9.9 The ACMA will not consider accepting an enforceable undertaking that seeks to impose terms or conditions on the ACMA.
- 9.10 The ACMA will not consider accepting an enforceable undertaking where the regulated person or entity:
- > seeks to deny liability
 - > seeks to establish defences for breach of the relevant Act or BSA code
 - > merely undertakes to comply with the law.
- 9.11 The terms of an enforceable undertaking offered should:
- > establish a relationship between the specified action and the contravention of the BSA or BSA code
 - > be proportionate to the impact of the breach or risk of future contravention
 - > be readily understood
 - > be capable of implementation
 - > include action which is capable of being measured or tested objectively.

Offering an enforceable undertaking

- 9.12 The person offering the undertaking must have the requisite authority to negotiate and bind the regulated person or entity.
- 9.13 Once offered, it is then a matter for the ACMA to determine whether the undertakings offered provide, in the light of the facts of the case, an effective and appropriate regulatory outcome.
- 9.14 A person wishing to offer the ACMA an enforceable undertaking should generally raise it, in the first instance, with the ACMA officer with whom they have been dealing. While ACMA officers may be authorised to negotiate an undertaking, the decision to accept the terms of an undertaking is made by the Authority.

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 9.15 The person offering the enforceable undertaking must execute the undertaking first. The enforceable undertaking will only come into effect when the Authority has executed the undertaking given.

Publication

- 9.16 The acceptance of an enforceable undertaking will generally be publicised by the ACMA. As acceptance of an undertaking is made public, so too will the ACMA's decision to vary, withdraw or cancel an enforceable undertaking.
- 9.17 It is also the ACMA's practice to publish all enforceable undertakings on its website www.acma.gov.au (see subsection 205W(5)). If there are particular terms of the undertaking that may disclose sensitive commercial or confidential information, the ACMA may consider a request from the undertaking party that those matters not be published. The ACMA is under no obligation to grant any such request.

10 Infringement notices

- 10.1 Infringement notices are designed to provide a timely, cost-efficient enforcement outcome and an alternative to court proceedings. Only certain limited provisions of the BSA are designated as infringement notice provisions.
- 10.2 There is no obligation on the ACMA to issue an infringement notice (section 205ZD). There is a range of factors which the ACMA may consider in determining whether an infringement notice should be given (see clause 6). Matters where an infringement notice may not be appropriate include where:
- > the ACMA has previously taken action against the recipient for similar contraventions
 - > the contraventions have occurred over an extended period of time
 - > the recipient has, as a consequence of the contraventions, obtained a financial or other advantage, to the detriment of others
 - > the recipient's conduct is the subject of other compliance or enforcement action by the ACMA.
- 10.3 Before an infringement notice is issued, a formal warning must be given about the alleged contravention or a similar contravention (section 205XA and subsection 205Y(4)). The decision to issue a formal warning, and/or an infringement notice, must be made by the Chair or a person authorised by the ACMA under section 205ZE (authorised infringement notice officer).
- 10.4 Payment of the penalty within 28 days after the notice is given, or a longer period agreed to by the ACMA (section 205Z(d)), prevents the ACMA from commencing proceedings for the imposition of a civil penalty for the alleged

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

contravention. On payment, the liability of the person for that alleged contravention is discharged.

- 10.5 In the event that payment is not made within 28 days after the notice is given, or the longer period agreed to by the ACMA, the ACMA may take action, including commencing proceedings for the imposition of a civil penalty.

Formal warning

- 10.6 In giving the formal warning, the recipient is formally put on notice of the ACMA's view of the alleged conduct.
- 10.7 Whether it is necessary to proceed beyond the formal warning stage will turn on the facts. For example, the recipient may provide information about the conduct or further information may come to light which alters the ACMA's understanding of the issues.

Content of an infringement notice

- 10.8 An infringement notice issued by the ACMA under the BSA will, among other things:
- > state the date on which the notice is issued
 - > set out brief details of the alleged contravention
 - > set out the amount of the penalty imposed and an explanation as to how the penalty was calculated
 - > set out the date by which payment is due and to whom payment should be addressed (see discussion below concerning requests for extensions of time)
 - > state that the person to whom a notice is given has the right to request an extension of time to pay
 - > state that, following payment of the penalty, further proceedings will not be taken with respect to the alleged contravention, and that the liability of the person for that alleged contravention is discharged
 - > state that the person to whom a notice is given has the right to apply to the ACMA to have the notice withdrawn
 - > explain that the ACMA may withdraw the infringement notice within 28 days of giving the notice and, if the penalty has already been paid, must refund the penalty (see discussion below concerning applications for withdrawal)
 - > set out the name of the authorised infringement notice officer who issued the notice and the contact details of the person to whom enquiries concerning the notice may be directed.

Request for an extension of time in which to pay the penalty

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 10.9 Generally, the penalty is required to be paid within 28 days after the notice is given. However, the ACMA may extend the time for payment (section 205Z).
- 10.10 Requests for extensions of time must be received before the due date for payment and will be considered on a case-by-case basis. Requests should be directed to the contact officer specified in the infringement notice in the first instance.

Withdrawal of an infringement notice

- 10.11 As noted in paragraph 10.8 above, an infringement notice may be withdrawn by the ACMA. It may be withdrawn by the ACMA of its own volition or following a request for withdrawal from the recipient of the notice. To be effective, the withdrawal must occur within 28 days after the notice was given (subsection 205ZB(3)).
- 10.12 Factors that may have a bearing on whether a notice should be withdrawn include whether there is further information or evidence which suggests that:
- > the recipient of the notice did not breach the Act
 - > the conduct is more serious than initially believed and, as a consequence, the matter would be more appropriately dealt with by the court.
- 10.13 The decision as to who should consider an application for withdrawal of a notice will be made in light of the facts of the case including the basis/reasons for the request. In most cases it will be the authorised infringement notice officer who gave the notice who will be best placed to consider the request. As the issuing officer, she or he will be aware of the factual issues and will be in a position to make an informed decision within 28 days, taking into account the reasons for the request and any new information or facts presented, as to whether the information presented alters her or his belief that the person has contravened the relevant infringement notice provision.
- 10.14 Requests for withdrawal should therefore be directed to the officer specified in the notice, in the first instance.

Effect of withdrawal of an infringement notice

- 10.15 If the infringement notice is withdrawn after payment of the penalty, the penalty paid will be refunded.
- 10.16 If an infringement notice is withdrawn, the ACMA will consider whether further action is appropriate. That action may include the institution of civil penalty proceedings for the alleged contravention/s, the subject of the infringement notice (section 205ZD(b)(ii)). What further action is appropriate, if any, will turn on the facts of the case.

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

Publication

10.17 The ACMA's general approach to publication of infringement notices given under the BSA is that:

- > there should be no publication of the fact that an infringement notice has been given to an identified person
- > there should be no publication that an identified person has not complied with an infringement notice
- > publication of the fact of compliance by an identified person may be appropriate.

10.18 In the ACMA's view, publication of the fact of compliance may have an educative and deterrent effect.

10.19 In determining whether publication should occur, the ACMA considers a range of factors including:

- > the seriousness and significance of the contraventions
- > whether the conduct resulting in the infringement notice raises novel issues
- > whether the conduct resulting in the infringement notice has identified systemic or industry-wide issues.

10.20 The ACMA may also publish information from time to time concerning the issue of, and compliance with, infringement notices issued under the BSA aggregated, without identification of the recipients of the notices.

Civil litigation

11 Institution of civil proceedings

11.1 Under the BSA, the ACMA is conferred a discretion to institute civil proceedings in certain instances. Not all matters where civil proceedings may be commenced will be litigated. There is a range of factors which the ACMA may consider in determining whether the institution of civil proceedings is an appropriate enforcement response (see clause 6).

11.2 The ACMA is bound to comply with the Commonwealth's model litigant rules when contemplating or conducting litigation.

11.3 The decision to commence civil litigation is made in the light of the facts of the matter.

Publication

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.

- 11.4 The ACMA will generally publicise the institution of civil proceedings when those proceedings have been filed. Once filed, the ACMA will generally make no further public comment about the subject matter of the litigation until the proceedings have concluded.
- 11.5 The ACMA will generally publish the outcome of civil proceedings including appeals (if any).

Criminal

12 Referral of matters to the CDPP

- 12.1 Offences are prosecuted by the CDPP. Not all matters involving an alleged offence will be referred to the CDPP by the ACMA. On referral of a matter by the ACMA, the CDPP conducts an independent review of the evidence to determine whether, in the light of the Prosecution Policy of the Commonwealth, it is appropriate to commence a prosecution.
- 12.2 In referring a matter to the CDPP, the ACMA will act in compliance with the Prosecution Policy of the Commonwealth (<http://www.cdpp.gov.au/Prosecutions/Policy/Part1.aspx>) and any administrative arrangements which may be agreed between the CDPP and the ACMA.
- 12.3 Generally, two critical factors in the ACMA seeking a prosecution will be specific and general deterrence.

Publication

- 12.4 The ACMA will not publicise referral of a matter to the CDPP.
- 12.5 The ACMA may publicise the laying of charges and will usually publicise the outcome of any prosecution undertaken by the CDPP, including the withdrawal of charges, acquittal, successful prosecution and the outcome of an appeal (if any).

Note: All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.