

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services – Enforcement Guidelines of the ACMA 2021

Authority

The Australian Communications and Media Authority (the **ACMA**) has made the *Broadcasting Services – Enforcement Guidelines of the ACMA 2021* (the **Guidelines**) under subsection 215(4) of the *Broadcasting Services Act 1992* (the **BSA**).

The Guidelines replace the *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992* (the **previous Guidelines**).

Purpose and operation of the instrument

Subsection 215(4) of the BSA provides that the ACMA may, by legislative instrument, formulate guidelines for the purpose of the ACMA's enforcement powers.

Under subsections 215(5) and 215(6) of the BSA, the ACMA must develop and have in force at all times guidelines 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;
- Part 8 of Schedule 6.

The Guidelines have been made to comply with that obligation.

The Guidelines are substantively similar to the previous Guidelines with some minor and technical amendments and the inclusion of:

- additional guidance on the ACMA's policy position regarding publicity and public comment on the exercise of the above enforcement powers;
- additional guidance on the form that publicity and public comment may take; and
- a clearer statement regarding the ACMA's policy position on acceptance of enforceable undertakings on a confidential basis.

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.

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.

A provision-by-provision description of the Guidelines is set out in the notes at **Attachment A**.

The Guidelines are a disallowable legislative instrument for the purposes of the *Legislation Act 2003* (the **LA**).

Documents incorporated by reference

The Guidelines do not incorporate any document by reference.

Consultation

Before the Guidelines were made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

On 7 May 2021, the ACMA placed a copy of the draft Guidelines, together with an accompanying consultation paper, on the ACMA's website for public comment by 18 June 2021. The ACMA received one written submission as a result of that public consultation and made some variations to the draft Guidelines as a result.

Regulatory impact assessment

The ACMA prepared a preliminary regulatory impact assessment on 29 April 2021, for the purposes of making the Instrument. On 3 May 2021, the Office of Best Practice Regulation (**OBPR**) considered that the changes have a minor regulatory impact and that no formal regulatory impact statement is required. A letter of certification was sent by the ACMA to OBPR on 14 July 2021. The OBPR reference number for this matter is 44037.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Broadcasting Services – Enforcement Guidelines of the ACMA 2021*

Clause 1 – Name of instrument

Clause 1 provides that the name of the Instrument is the *Broadcasting Services – Enforcement Guidelines of the ACMA 2021* (the **Guidelines**).

Clause 2 – Commencement

This clause provides that the Guidelines commence at the start of the day after they are registered on the Federal Register of Legislation.

Clause 3 – Authority

This clause identifies the provision that authorises the making of the Guidelines, namely subsection 215(4) of the BSA.

Clause 4 – Revocation

Clause 4 provides that the *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act 1992* dated 26 August 2011 are revoked.

Clause 5 - Definitions and interpretation

This clause defines terms used in the Guidelines.

Clause 6 - Introduction

This clause deals with a number of introductory matters including by providing a brief description of the ACMA's functions under the *Australian Communications and Media Authority Act 2005* (the **ACMA Act**) and its regulatory role under the BSA (subclause 6.1 and subclause 6.2). Subclause 6.3 notes that the Guidelines are made for the purposes of subsections 215(5) and (6) of the BSA.

Subclause 6.4 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 and the ACMA's approach to public comment and publication of enforcement action. Subclause 6.5 states that the Guidelines take into account section 3 (objects) and section 4 (regulatory policy) of the BSA.

Subclause 6.6 gives an overview of the ACMA's role in regulating media diversity and the interaction with the ACCC, which has a role in regulating competition, where a matter requires enforcement action by both agencies.

Subclause 6.7 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 7 - Types of enforcement action available to the ACMA

Subclause 7.1 refers to the diverse regulatory environment in which the ACMA operates and the range of the ACMA's responsibilities. Subclause 7.2 sets out the three broad categories of enforcement action available to the ACMA in responding to breaches of the BSA, being: administrative action, civil litigation and referral to the CDPP for prosecution for an offence.

Subclause 7.3 confirms that not all of these enforcement powers are able to be used for every contravention of the BSA and refers to the fact that certain enforcement decisions may only be made by the Authority.

Subclause 7.4 describes the circumstances in which the ACMA may consider informal voluntary undertakings as an alternative to formal enforcement action.

Clause 8 - Public comment and publication of enforcement action

The previous Guidelines included statements about the ACMA's position on public comment and set out the discretionary factors that the ACMA generally take into account when considering whether to publish certain enforcement action. The Guidelines now also contain an overarching statement about the ACMA's position with respect to public comment about, and publicity of, enforcement action it has taken, and describe the form of publicity that may be undertaken by the ACMA.

Subclause 8.1 acknowledges that the ACMA is accountable to the government and the public for its investigations and enforcement action arising from those investigations. It sets out the overarching principles that underpin the ACMA's general approach to public comment and publicity of enforcement action.

Subclause 8.2 confirms that when deciding whether to publicise or comment on enforcement action the ACMA is guided by the public interest and lists a number of factors that may be considered by the ACMA to determine whether publication is or is not in the public interest.

Subclause 8.3 explains that it is the ACMA's view that where there has been a contravention of the law, publication of the enforcement action taken will ordinarily be in the public interest.

Clause 9 - Exercising enforcement powers

Subclause 9.1 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. Subclause 9.2 reiterates the ACMA's commitment to engaging with the regulated community to achieve, as far as possible, voluntary compliance. Subclause 9.3 states that the ACMA adopts a 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.

Subclause 9.4 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 subclause also sets out the factors which the ACMA may consider in determining the appropriate enforcement response.

Subclause 9.5 states the ACMA's commitment to making enforcement decisions that are not influenced by bias, conflicts of interest or irrelevant considerations.

Subclause 9.6 notes that the action which the ACMA may take to address and redress non-compliance in a given case may involve recourse to more than one enforcement option, or may involve no formal enforcement action.

Clause 10 – Suspension and cancellation of licences

Subclause 10.1 and subclause 10.2 set out some matters associated with cases in which the ACMA may consider it appropriate to take action to suspend or cancel a licence issued under the BSA.

Subclause 10.3 reinforces that, in accordance with the ACMA Act, the decision to suspend or cancel licences must be made by the Authority. Subclause 10.4 notes that the ACMA may be directed by the Minister for Foreign Affairs to take specified action concerning international broadcasting licensees and that it must comply with those directions.

Subclause 10.5 sets out the ACMA's general approach to publication of the suspension or cancellation of a licence.

Clause 11 – Remedial directions

Clause 11 sets out when the ACMA may consider the issue of a remedial direction as an appropriate enforcement outcome, either to address all or merely some aspects of the conduct, or issues of concern to the ACMA. Subclause 11.2 cross-references to clause 9 for the factors which the ACMA may consider in determining whether a remedial direction should be issued.

Subclause 11.3 states that the required action that the ACMA may specify in a remedial direction will turn on the facts of the particular matter. Subclause 11.4 sets out the principles underlying the action that may be specified by the ACMA.

Subclauses 11.5 to 11.8 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. Subclause 11.9 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.

Subclause 11.10 sets out the ACMA's general approach to publication of the giving of a remedial direction.

Clause 12 – Enforceable undertakings

Clause 12 deals with enforceable undertakings under section 205W of the BSA.

Subclauses 12.1 to 12.5 set out some formal requirements associated with the acceptance of an undertaking under the BSA. Subclauses 12.6 to 12.8 state that there are a range of factors which the ACMA may consider in determining whether an enforceable undertaking should be accepted and cross refer to the factors set out at clause 9. Subclauses 12.9 to 12.12 discuss the terms of an undertaking. Subclauses 12.13 to 12.16 discuss the process of offering the ACMA an enforceable undertaking.

Subclauses 12.17 and 12.18 state the ACMA's general approach to publishing enforceable undertakings and note that it is the ACMA's practice to publish all enforceable undertakings on its website. Subclause 12.18 references subclause 12.11 which advises that the ACMA will not consider accepting an enforceable undertaking on a confidential basis but that it will consider a request for particular terms not to be made public if those terms disclose sensitive private, commercial or confidential information.

Clause 13 – Infringement notices

Clause 13 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 subclauses 13.2 to 13.5. Subclause 13.2 cross refers to the factors set out at clause 9 as relevant to the ACMA's decision whether to issue an infringement notice.

Subclause 13.8 sets out what details an infringement notice will include. Clause 13 also deals with requests for an extension of time in which to pay the penalty (subclauses 13.9 to 13.10), withdrawal of an infringement notice (subclauses 13.11 to 13.14), and the effect of withdrawal of an infringement notice (subclauses 13.15 to 13.16).

Subclauses 13.17 to 13.18 explain the ACMA's general 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 will generally be appropriate.

Clause 14 - Institution of civil proceedings

Clause 14 discusses the circumstances in which the ACMA may consider instituting civil proceedings. Subclause 14.1 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 9 for those factors. Subclause 14.2 states that if the ACMA considers it appropriate to commence such proceedings, the ACMA is bound by the Commonwealth model litigant rules. Subclause 14.4 sets out the ACMA's general 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 15 - Referral of matters to the CDPP

Clause 15 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 CDPP will determine if it is appropriate to commence a prosecution based on the Prosecution Policy of the Commonwealth and the ACMA will act in compliance with any administrative arrangements agreed between the CDPP and the ACMA (subclauses 15.1 and 15.2).

Subclause 15.3 reinforces that, in accordance with the ACMA Act, the decision to refer a matter to the CDPP must be made by the Authority.

Subclauses 15.4 and 15.5 deal with publication. Subclause 15.4 states that the ACMA will not publicise the referral of a matter to the CDPP. Subclause 15.5 explains the ACMA's general approach is the publication of the laying of charges and the outcome of any prosecution undertaken by the CDPP.

Clause 16 - Form of publicity and public comment

Clause 16 describes the possible forms of publication and public comment by the ACMA for enforcement action taken under the BSA.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Broadcasting Services – Enforcement Guidelines of the ACMA 2021

Overview of the Instrument

The *Broadcasting Services – Enforcement Guidelines of the ACMA 2021* (the **Guidelines**) are made under subsection 215(4) of the *Broadcasting Services Act 1992* (**BSA**). The Guidelines highlight the discretionary factors which the Australian Communication and Media Authority (the **ACMA**) generally considers in the exercise of its enforcement powers for remedies for breaches of international broadcasting licence provisions, remedies for breaches of broadcasting licensing provisions, civil penalties, enforceable undertakings, infringement notices, remedies for datacasting licence provisions and in deciding whether to refer a matter to the Commonwealth Director of Public Prosecutions (**CDPP**).

The Guidelines seek to provide guidance to the regulated community, while preserving the discretion of the ACMA to impose or seek remedies and sanctions which it considers appropriate in the light of the particular circumstances of the case. The Guidelines necessarily deal with a variety of factual scenarios and so are framed to give broad guidance without unduly restricting the ACMA's capacity to take appropriate action tailored to those facts and circumstances.

The Guidelines also describe the ACMA's approach to public comment and publication of enforcement action. In deciding whether to publicise or comment on enforcement action the ACMA is guided by the public interest. It is the ACMA's view that where it has found a contravention of the law, publication of the enforcement action taken will ordinarily be in the public interest. Factors that the ACMA may consider in determining whether or not it is in the public interest to publish or comment on the enforcement action include matters such as the nature and seriousness of the issues, whether the information is already in the public domain, fairness to the subject(s) of the investigation, and the protection of any private, confidential or sensitive information.

The ACMA considers that its enforcement powers should be exercised in a public manner. This assists in making its activities open to public scrutiny, assists the public to understand that the regulator is doing its duty, and assists industry participants to better understand their obligations.

The Guidelines fulfil the ACMA's legislative obligation to maintain and have regard to guidelines about enforcement powers under the BSA, the power of an authorised infringement notice officer to give an infringement notice and referral of matters to the CDPP in relation to a possible offence against the BSA.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

The Guidelines do not engage any of the applicable rights or freedoms.

Conclusion

The Guidelines are compatible with human rights as they do not raise any human rights issues.