



**Submission by
Free TV Australia Limited**

Australian Communications and Media
Authority

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

17 January 2007

Executive summary

- Free TV supports the preparation of guidelines relating to ACMA's enforcement powers under the *Broadcasting Services Act 1992* for the purpose of determining the circumstances in which enforcement powers are pursued by ACMA.
- All enforcement powers granted to ACMA should only be used for serious breaches and in certain limited circumstances. As such the Draft Guidelines should provide greater detail including express statements on the procedural aspects of administering the new enforcement powers.

Civil penalties and Enforceable Undertakings

- ACMA's use of civil penalties and enforceable undertakings should only be in serious cases where the conduct of the broadcaster is wilful, reckless or in flagrant or repeated and serious disregard of the licence condition.
- As intended by the Government, the Draft Guidelines should include a section on the circumstances in which ACMA will seek civil penalties.
- Section 5 of the Draft Guidelines should contain more detail. If enforceable undertakings are to be pursued, broadcasters need certainty regarding their use and acceptance. Section 5.4(b) is unclear and should be removed.

Injunctions

- Free TV supports section 2.3 of the Draft Guidelines that provides for injunctive relief to ACMA where a person has failed to comply with a notice issued under s.137 of the BSA (providing a broadcasting service without the appropriate licence).
- The Draft Guidelines should provide that licensees whose licence areas are affected by infringing services conducted without a licence or not in accordance with the terms of their licence have standing to pursue an infringing entity for an injunction in the Federal Court.
- ACMA's powers in relation to seeking injunctions for unacceptable media diversity or preventing an unacceptable three way control situation arising should be used only in very clear and serious situations, where no other means of resolution are available.

Referral to the CDPP

- Free TV supports section 3 and section 4 of the Draft Guidelines that provide for the matters ACMA must consider when considering referring a matter to the CDPP.

Infringement notices

- Infringement notices should only be used in relation to serious breaches and in certain circumstances, including where the conduct of the broadcaster is wilful, reckless or in flagrant or repeated and serious disregard of the licence condition.
- Decisions in relation to the use of infringement notices should take into account whether the broadcaster has taken all reasonable steps to rectify the breach.

Procedural Fairness and other Public Law mechanisms

- While ACMA may fulfil its obligations with respect to procedural fairness in practice, we consider the Draft Guidelines should contain an explicit recognition of ACMA's obligations with respect to procedural fairness and any relevant public law obligations.

Introduction

Free TV Australia (**Free TV**) is the peak body representing all commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to make a submission in response to the guidelines relating to ACMA's enforcement powers under the *Broadcasting Services Act 1992* (**Draft Guidelines**) that were produced by the Australian Communications and Media Authority (**ACMA**).

Free TV understands that the purpose of the Draft Guidelines is to expand on the provisions of the BSA (both existing and amended) in order to provide certainty and clarity about the way that ACMA will apply its new powers. We appreciate that ACMA will need to consider issues on a case by case basis, and does not wish to be unduly fettered, however the Draft Guidelines do not provide sufficient detail to achieve this objective as they largely reiterate the existing principles (provisions) in the Communications Legislation Amendment (Enforcement Powers) Act 2006 (Cth) Act (the "**Act**").

1. General Comments

In this section we provide some general comments and suggested amendments which could be worked into Sections 1-3 of the Draft Guidelines. These suggested amendments are:

- a) Legal Status
- b) Factors to take into account when assessing the seriousness of the breach
- c) Minimum procedural requirements
- d) Consultation with broadcaster

(a) Legal Status

The new Act requires ACMA to develop guidelines in relation to the use of some of its powers. As such the guidelines will be a legislative instrument that ACMA abides by. The Draft Guidelines should contain such a statement or commitment. Rather, the Draft Guidelines contain statements indicating that "guidelines are not prescriptive or limiting", and "ACMA will exercise its discretionary powers in a flexible manner". Broadcasters would like to see greater certainty as to the circumstances in which the Draft Guidelines will be applied.

(b) Factors to take into account when assessing the seriousness of the breach

The Draft Guidelines pick up on a key principle in the BSA: that enforcement action should be commensurate to the seriousness of the breach. It would be helpful for the Draft Guidelines to outline the factors that ACMA will take into account when assessing the seriousness of the breach. For example:

- Was the breach wilful or reckless, or merely accidental?
- Was this a first time breach, or a repeated breach of the same provision?
- Was the breach an isolated incident, or part of a systemic series of breaches?
- Was the licensee in a position to avoid the breach?
- To what extent should the licensee reasonably have known that the action was likely to be a breach? For example, had ACMA previously made findings on the same provision or issued guidance as to the provision's interpretation?
- What was the impact and magnitude of the breach?

(c) Minimum procedural requirements

It is Free TV's view that ACMA's enforcement powers should only be used in circumstances where there is a reasonable prospect that the penalty will be secured. This concept is stated in clause 2.5 of the CDPP Prosecution Policy and adherence to this approach by ACMA should ensure that ACMA's resources are used as efficiently as possible.

The Draft Guidelines should provide greater detail including express statements on the procedural aspects of administering the new enforcement powers (civil penalties, infringement notices as well as enforceable undertakings). For example, it would be useful if the Draft Guidelines referred to natural justice requirements (regarding matters of fact and draft submissions), consultation processes, assessment and selection (choice), application of enforcement powers, mitigating factors and procedural rights.

There should be further guidance on circumstances or criteria in which the particular enforcement powers will be used. The Draft Guidelines refer to 'minimum power' and a 'graduated approach' to the enforcement powers but there is no guidance on thresholds/criteria when one power would be applied over another. For example, when would civil penalties be applied vis a vis criminal, or enforceable undertakings vis a vis infringement notices.

The Draft Guidelines should require ACMA to consider the following when exercising its discretion in using its enforcement powers:

- whether any enforcement action should be taken by ACMA or another regulatory body; and
- the nature of the action that should be undertaken.

Section 3.2 of the Draft Guidelines provides some governing principles in relation to how ACMA intends to use its enforcement powers, including that enforcement decisions should not be influenced by bias, conflicts of interest or irrelevant considerations such as gender, race, religion, political views or affiliation. Free TV notes the reference to political neutrality contained in the DPP Prosecution Policy and submits the Draft Guidelines may benefit from the inclusion of political neutrality as a relevant consideration.¹

The Draft Guidelines should require ACMA to provide reasons for its decisions regarding application of an enforcement power. For example, if ACMA rejects voluntary/enforceable undertakings in favour of another power, reasons should be provided as to why.

The Draft Guidelines should also contain guidance on timeframes for consultation/assessment of enforcement powers.

(d) Consultation with Broadcasters

The Draft Guidelines should contain explicit requirement for ACMA to consult with an affected party in assessing/applying enforcement powers. While this may occur in practice, it is appropriate to include in the proposed Guidelines

2. Civil penalties

It was clearly the Government's intention that the Draft Guidelines include guidance on civil penalties. Section 215(5) of the Act provides that ACMA must ensure that guidelines are in force in relation to, among others, Parts 14B of the BSA which deals with civil penalties. Free TV is of the view then that the Draft Guidelines should be amended to include guidelines as to the circumstances in which ACMA can apply to the Federal Court for a civil penalty order.

¹ This concept is similar to section 2.3 of the DDP Prosecution Policy that prohibits a decision to be made that is influenced by any notions of possible political advantage or disadvantage to the Government or any political party.

In light of commercial broadcasters' record of compliance and positive approach to licence conditions, civil penalties should be exercised only in serious cases where the broadcaster has received prior warning and/or the conduct of the broadcaster is wilful, reckless or in flagrant or repeated and serious disregard of the licence condition. The Draft Guidelines should reflect this.

The Draft Guidelines should be amended to provide that proceedings should only be considered where:

- there are repeated breaches by a particular broadcaster of a licence condition;
- where the broadcaster has received a prior warning of likely action in the event of further breach;
- where a further breach has occurred in circumstances which suggest a wilful, reckless or flagrant approach.

Civil penalties should not be pursued for inadvertent breaches in response to which a licensee has put steps in place to ensure further breaches are avoided.

3. Enforceable Undertakings

Having regard to broadcasters' strong record of compliance, enforceable undertakings should be sought only in very limited serious cases where the conduct of the broadcaster is wilful, reckless or in flagrant or repeated and serious disregard of the licence condition.

Section 5 of the Draft Guidelines on Enforceable Undertakings should contain further detail on the limited circumstances in which the undertakings will be sought.

Free TV proposes that the Draft Guidelines should include more detail along the lines of the ACMA Guidelines for the Use of Enforceable Undertakings – Telecommunications Obligations (Telecommunications Guidelines). Free TV therefore submits that the following aspects from the Telecommunications Guidelines should be included in the Draft Guidelines:

- an explanation, by way of introduction, that an enforceable undertaking is a document signed by both parties which can be used by ACMA as a basis for seeking a court order without ACMA having to establish, in court, a contravention of the relevant legislation or regulation;
- conditions and circumstances upon which an enforceable undertaking will be accepted;
- examples of undertakings that may be accepted, and terms that are likely to be unacceptable;
- a recognition that enforceable undertakings are part of a suite of regulatory options and will not be used where other regulatory action is more appropriate;
- a statement that the acceptance of enforceable undertakings can be used as an alternative, or in addition to, the exercise of other enforcement powers;
- an express acknowledgement that ACMA will seek to use only the minimum power or intervention necessary to achieve a sustained and ongoing commitment of compliance from regulated entities;
- the principle that ACMA will not accept any enforceable undertakings in which a broadcaster seeks to deny liability, impose conditions on ACMA to prevent the commencement of proceedings, state that an undertaking is not an admission regarding action by third parties, or attempt to establish defences for possible non-compliance;
- a section on varying, withdrawing or cancelling enforceable undertakings.

Free TV is very concerned with the inclusion of Section 5.4(b) in the Draft Guidelines. We understand that this requirement mirrors the considerations that the Australian Securities and Investments Commission (ASIC) must take into account when deciding whether to

accept an enforceable undertaking under Practice Note 69. We are of the view that this consideration could be regarded as requiring an admission of liability or contrition and is an unnecessary requirement. A broadcaster may demonstrate a positive commitment to abide by an undertaking without an admission of liability or remorse.

In our view, the guidelines published by the Australian Competition and Consumer Commission (**ACCC**) in respect of s87B undertakings under the *Trade Practices Act 1974* (Cth) is more appropriate. That section specifically states that companies providing undertakings will not be required to admit a breach of the Act. However, undertakings will not be included if they include a denial of liability. The ACCC guidelines also contain further factors that should be considered, including:

- the nature of the alleged breach, for example in terms of its impact on third parties and the community at large and the size of the business or businesses involved;
- the history of complaints against the business or businesses and of complaints involving the practice, the product or the industry generally and any relevant previous court or similar proceedings;
- the cost-effectiveness for all parties of pursuing an administrative resolution instead of court action;
- prospects for rapid resolution of the matter; and
- the apparent good faith of the corporation.

We are of the view that ACMA should take the ACCC's guidelines into account, and not limit its consideration to the ASIC Practice Note.

4. Injunctions

Broadcasting without a licence is a fundamental and serious matter that warrants immediate and preventative legal action. Free TV supports section 2.3 of the Draft Guidelines that grants ACMA injunctive relief where a person has failed to comply with a notice issued under section 137 of the BSA (providing broadcasting service without the appropriate licence).

The Guidelines should contain a separate section dealing with injunctions.

Specifically the Draft Guidelines should include a support mechanism for other licensees whose licence areas are affected by infringing services conducted without a licence or not in accordance with the terms of their licence. Free TV suggests that this mechanism could include granting licensees standing in the Federal Court to pursue an infringing entity for an injunction if ACMA determines that it does not wish to pursue a prosecution for whatever reason.

Injunctive relief to ACMA in cases involving an unacceptable media diversity situation or an unacceptable three way control situation should be used only in very clear and limited situations where no other means of regulation are available. This is because injunctive relief can potentially cause market distortion, such as prevent the sale or acquisition of media assets.

In Free TV's experience, it would be rare, if not unheard of, for a party to enter into a transaction that is clearly in breach of broadcasting ownership legislation. Usually questions or concerns in relation to a transaction can be addressed through discussions and various other mechanisms, such as a request for undertakings or remedial directions.

5. Referral to the CDPP

Free TV supports section 4 of the Draft Guidelines. This states that ACMA will often be required to assess whether a matter should be referred to the CDPP for prosecution, or dealt with under an alternative enforcement power. Section 3 of the Draft Guidelines provide the

matters ACMA will take into account in making such determinations, one of which includes the consideration of the CDPP Prosecutions Policy.

6. Infringement notices

Free TV submits that before any infringement notice is issued a broadcaster should be given a written warning and be given the opportunity to make submissions. This accords with the requirements of procedural fairness as outlined below. Where reasonable grounds are given or the breach is inadvertent, an infringement notice should not be issued. For example, it is sometimes difficult to immediately detect changes in foreign interest, due to the complex nature of institutional shareholdings and the dynamic nature of electronic share trading.

Furthermore, considerations as to the use of infringement notices should include whether the broadcaster has taken all reasonable steps to rectify the breach.

It is our view that infringement notices should only be used in relation to serious breaches and in certain circumstances. Any provisions introducing infringement notices should stipulate the circumstances in which they may be issued, for example in cases of flagrant or intentional breaches and should also require that decisions in relation to their use should take account of whether the broadcaster has taken all reasonable steps to rectify the breach.

Free TV submits that ACMA, in exercising its power to issue infringement, should take into account each of the recommendations of the Australian Law Reform Commission (**ALRC**) set out in Professor Ramsay's Report.² The Draft Guidelines contains some but not all of the ALRC's recommendations. In particular we are of the view that the following recommendations be included in the draft Guidelines:

- *ALRC Recommendation 12-5: Requirements for a record of the issue of an infringement notice.*

Although section 6.6 of the Draft Regulations states that an infringement notice constitutes no more than an allegation of a breach and that payment of the penalty under the infringement notice does not contain an admission for any purpose, there is no requirement for a record of the infringement notice to expressly note this requirement. We consider that this is of concern as a commercial broadcaster may assume that the payment of such a fine does in fact constitute an admission, and may cause further delay and expense in resolving an issue of infringement.

Furthermore, there is no provision in either the BSA or Draft Regulations that provides for periodic review and FOI access and correction. It is important that a record of an infringement notice contains correct information.

- *ALRC Recommendation 12-8: This recommendation provides a model scheme for the design and use of infringement notice schemes in federal regulatory law.*

Parts (a), (e) – (g) and (k) – (m) of this recommendation have not been included in the Draft Guideline.

In particular the BSA and the Draft Guidelines do not include a provision granting ACMA the power to issue an informal warning (Part (a)). We note that while ACMA does have this discretion, and in fact it is current ACMA policy to issue informal warnings, we are of the view that this recommendation should be included in the Draft Guidelines as there is no guarantee that the ACMA policy will not change in future. Furthermore, the formal inclusion of the recommendation in the Draft Guidelines may require and/or encourage ACMA to use this form of enforcement

² Professor Ian Ramsay, *Reform of the Broadcasting Regulator's Enforcement Powers*, Sydney, November 2005, at page 112–114.

mechanism in the first instance as opposed to immediately issuing an infringement notice to a broadcaster.

The consequence of failing to pay an amount set out in an infringement notice should be action to seek a penalty for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation (Part (e)). The suspension or cancellation of a licence is not proportionate to a failure to pay a penalty in an infringement notice.

The Guidelines should provide detail on how ACMA will exercise their discretion to issue, withdraw and correct infringement notices (Part (f)). Broadcasters require predictability in the provision of penalties, as well as reassurance that procedural fairness requirements are fulfilled.

Only one infringement notice should be issued if the broadcaster's conduct amounts to different offences or contravention (Part (g)).

Although section 6.4 of the Draft Regulations provides that there is a right to apply for the withdrawal of a notice, there is no express provision permitting a recipient to demonstrate the factual basis on why the infringement notice may be erroneous. We are of the view that this is a concern as this right is an important aspect of procedural fairness that should be recognised by the Draft Guidelines as recommended in Part(k) of the ALRC's recommendations.

In accordance with principles of procedural fairness a written copy of any information considered relevant in making the decision to issue the infringement notice should be required (Part (l)).

Extension of time to pay or requests to pay in instalments should also be permitted and reflected in the Draft Guidelines (Part (.m)).

7. Procedural Fairness and other Public Law Mechanisms

Free TV submits that the Draft Guidelines would benefit from a statement recognising ACMA's compliance with its obligations with respect to procedural fairness and any relevant public law obligations.

While Free TV has no doubt that ACMA is well aware of its public law obligations, such a statement in the Draft Guidelines would provide a useful reminder to all involved in the enforcement process.

Free TV Australia
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