

SUBMISSION

BY

MEDIA, ENTERTAINMENT & ARTS ALLIANCE

TO THE

**DEPARTMENT OF COMMUNICATIONS, INFORMATION TECHNOLOGY AND
THE ARTS**

**PROPOSED REFORMS TO THE BROADCASTING REGULATORY POWERS OF
THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY**

DECEMBER 2005

Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Executive Summary

The Alliance appreciates the opportunity to comment on the proposed reforms to the broadcasting regulatory powers of the Australian Communications and Media Authority (ACMA).

ACMA has a very limited range of sanctions available to it with which to address compliance breaches. As the Department of Communications Information Technology and the Arts (DCITA) Issues Paper notes, the suite of powers available to ACMA in respect of the regulation of broadcasting is in stark contrast with the suite of powers conferred on other regulators such as the Australian Competition and Consumer Association (ACCC) and the Australian Securities and Investments Commission (ASIC).¹

ACMA does not have the power to impose civil penalties. Consequently, as the criminal penalties in the *Broadcasting Services Act 1992* (the BSA) are disproportionate to most compliance issues confronted by ACMA, too often the regulator operates as little more than a toothless tiger, forced to respond with such limp sanctions as announcements that it will more closely monitor performance.

Further, it has enforcement tools that it is little able to use. Its predecessor, the Australian Broadcasting Authority, used its power to suspend or cancel a licence only once. Resorting to this power is little used around the world for the very good reason that, in punishing a breach of the broadcaster, the audience is also punished. Except in the most exceptional circumstances, it is a power that is not commensurate with the breach it seeks to address.

Professor Ian Ramsay listed ACMA's concerns with the shortcomings in its suite of powers in his report, *Reform of the broadcasting regulator's enforcement powers*:

- “Lack of flexible remedies inhibits the [ACMA's] capacity to engage in negotiations that might produce better compliance by licensees, particularly in relation to the rules about categories of broadcasting services and industry codes of conduct.
- “The subjective elements of many of the more important offences under the BSA make successful criminal prosecution problematic. The consequence is that it is not clear that the existence of criminal sanctions has a better deterrent effect than might be achieved with other non-criminal sanctions.
- “The moral culpability of many of the offences under the BSA is relatively low, so that criminal sanctions are not clearly appropriate. The absence of clear moral culpability tends to reduce willingness to enforce criminal penalty provisions.
- “There is a lack of useful small penalties for minor breaches, so that there are insufficient incentives for compliance with reporting requirements under the BSA.”²

Professor Ramsay noted that the regulator “regards the lack of appropriate remedies for code breaches as one of the main weaknesses of the regulatory scheme given the relatively large number of code breaches, and the pattern of recurring breaches that occurs with some licensees.”³

The report identified several enforcement powers that would provide ACMA with more flexibility and with more effective enforcement capacity, namely:

- “the introduction of enforceable undertakings;
- “an expanded injunctive power;
- “the introduction of civil penalties;
- “the introduction of infringement notices; and
- “allowing [ACMA] to order on-air statements of [ACMA] investigation findings.”⁴

¹ *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority, Issues Paper*, Department of Communications, Information Technology and the Arts, November 2005, page 4.

² *Reform of the broadcasting regulator's enforcement powers*, Professor Ian Ramsay, Australian Communications and Media Authority, November 2005, page 31.

³ *Reform of the broadcasting regulator's enforcement powers*, Professor Ian Ramsay, Australian Communications and Media Authority, November 2005, page 32.

The Alliance believes that for ACMA to be an effective regulator it needs a suite of powers appropriate to its functions and the BSA needs amending accordingly.

Finally, the Alliance considers that in order for ACMA to be an effective regulator it needs to more actively monitor regulatory compliance rather than, as is often the case, relying on the declarations of broadcasters and others. For example, in respect of compliance with the Australian content standard for television commercials, ACMA relies on the information submitted in CAD documentation being true, rather than undertaking regular audits to ensure the veracity of the information provided.

The Alliance believes ACMA can play a central role in the development of broadcasting policy. The development of good policy is reliant on quality data and analysis. To that end, along with an improved suite of enforcement powers, the Alliance considers ACMA needs to be adequately resourced to undertake on-going analysis of trends in broadcasting.

Civil Penalties

ACMA does not have the power to seek or impose civil penalties. Rather, it must rely on the heavy-handed alternative of criminal penalties.

Consequently, the Alliance supports DCITA's proposal that, in addition to its existing powers to impose criminal penalties when appropriate, ACMA be granted the power to impose civil penalties. So doing would enable ACMA to respond to breaches in a proportionate and flexible manner. Guidelines setting out breaches and the penalties that would apply would need to be developed.

Injunction to prevent breach of civil penalty provisions

The Alliance supports the proposal to amend the BSA to enable ACMA to seek injunctive relief through the Federal Court in circumstances where commercial broadcasting services are provided without an appropriate license.

Enforceable undertakings

The Alliance supports ACMA being given the power to accept enforceable undertakings from regulated entities. Enforceable undertakings have the advantage of the regulator and the offending licensee or regulated entity being able to agree on an approach to prevent future breaches. The introduction of enforceable undertakings where the Federal Court is able to make orders in the event of a breach will bring ACMA into line with the capacity of other regulators like the ACCC and the former Australian Communications Authority (ACA).

On-air statements of ACMA investigation findings

The Alliance supports the proposal that ACMA be given the power to require the broadcast of on-air statements of the findings of investigations, in line with powers held by comparable regulatory authorities overseas including Ofcom in the United Kingdom and the Broadcast Standards Authority on New Zealand.

Currently the results of investigations are published on ACMA's website and in its annual report – neither of which are regularly accessed by many members of the viewing public.

On-air statements would enhance ACMA's credibility as a regulator and, given the negative impression it is likely to have on consumers when a finding goes against a broadcaster, is likely to act as an effective deterrent.

⁴ *Reform of the broadcasting regulator's enforcement powers*, Professor Ian Ramsay, Australian Communications and Media Authority, November 2005, page 76.

Infringement notices

The Alliance considers that the introduction of a power to issue infringement notices, in line with the power currently available to ACMA as telecommunications regulator, is appropriate. Financial penalties for breaches of notification, reporting and licence fee payment requirements set out in the BSA, along with penalties for late payment of licence fees, are appropriate remedies for such breaches of obligations.