

Review of the Broadcasting Regulatory Powers of ACMA

Submission to the Department of Communications, Information Technology and the Arts on the Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority

CMCL – Centre for Media and Communications Law
University of Melbourne

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Background on CMCL

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1 Overview

The Australian Government may wish to enhance the powers of the Australian Communications and Media Authority ('ACMA') by amending the *Broadcasting Services Act 1992* (Cth) ('BSA') to enable the regulator to impose a range of penalties that vary in severity according to the gravity of the contravention.

Currently, ACMA's enforcement powers are confined to heavy penalties: criminal sanctions and the suspension or cancellation of a broadcasting licence. This limits ACMA's ability to respond to compliance issues with sanctions that are not unduly harsh. ACMA is often unable to deal with breaches of BSA requirements adequately and breaches may proceed without consequence. This undermines ACMA's role in ensuring regulatory compliance and calls into question the public's confidence in ACMA to fulfil its function. It also undermines the model of co-regulation for the broadcasting sector that was ushered in by the BSA, and means that licence holders are not adequately protected from competing licensees that breach aspects of the regulatory regime.

In November 2005, the Department of Communications, Information Technology and the Arts (DCITA) released an Issues Paper outlining the Government's proposals and a number of possible reform options. These followed from a report prepared by Professor Ian Ramsay, *Reform of the broadcasting regulator's enforcement powers*.

The Issues Paper and Ramsay report suggest that ACMA be vested with a gradation of powers that would enable a response to certain regulatory infractions in a more timely and proportionate manner, with a particular focus on giving ACMA access to certain middle-range powers, including:

- 1) **civil monetary penalties** for non-compliance with certain existing regulatory requirements;
- 2) **injunctions** to prevent breach of certain provisions;
- 3) the power to receive **enforceable undertakings** from regulated entities;
- 4) the power to issue **infringement notices** for breaches of various regulatory requirements; and
- 5) the power to compel broadcasters to make an **on-air statement** of an ACMA investigation finding in certain circumstances.

The CMCL supports providing to ACMA the first four of the graduated powers listed above. It is worth emphasising that the proposed powers seek to improve the ability of ACMA to achieve compliance with *existing* broadcast regulation. These reforms will not increase the ambit of ACMA's regulation over broadcasters, but merely will enhance the regulator's ability to seek compliance with existing requirements and obligations under the BSA. Importantly, the reforms will assist ACMA in fulfilling its mandate as defined under s 5 of the Act, namely to 'deal effectively with breaches of the rules' in a manner 'commensurate with the seriousness of the breach concerned'. In the past, as outlined usefully in the Ramsay report, ACMA has experienced difficulties in fulfilling this vital role due to the limited enforcement powers that exist under the BSA.

The additional powers will remedy deficiencies in the regulatory framework by enhancing ACMA's ability to apply more fitting and proportionate penalties for regulatory breaches than are currently available under the BSA. The reforms will have a net public benefit by encouraging greater regulatory compliance and increased transparency in the regulation and conduct of the broadcasting industry. And the reforms will bring ACMA's powers in line with other industry regulators, such as the ACCC and ASIC, and with ACMA's existing powers in relation to telecommunications.

However, the CMCL does not support the final proposed reform listed above. The broadcasting of on-air statements at the compulsion of the regulator directly raises concerns about free speech in a way in which the other proposed powers do not. The role of the media in relation to public discussion in Australia makes this proposed power significantly different from similar powers in relation to the regulation of other sectors of Australian industry. This difference warrants a cautious approach in any legislative reform at this stage and suggests the need for more detailed examination of how similar provisions operate in the UK and New Zealand (and of why they do not exist at all in some other comparable countries). In the Australian context, any such power may need to be focussed on limited situations – such as repeated breach of particular disclosure requirements that have been applied with the commercial radio sector – rather than being of general scope in relation to all aspects of broadcasting codes and licences. Earlier reports and submissions discussed in the Ramsay report suggest that many of actors in the sector are aware of the need for any power to be carefully structured. As the Ramsay report suggests, on-air statements offer important potential benefits to the co-regulatory scheme. But their introduction would be a significant change to Australian broadcast regulation and it deserves more detailed examination than it has yet received.

The CMCL recommends that the other proposed powers be introduced in an appropriate form and then the situation be reviewed in relation to any option for on-air statements. The other powers will substantially address many of the concerns set out in the Issues Paper and the Ramsay report, and the value in introducing some form of compelled on-air statement should be examined only once the other powers are enacted.

2 Options for Reform

In general, the CMCL supports the first four of the options for reform, listed above, and considers that it would be beneficial to introduce them into the BSA as a group of middle-level enforcement powers. Because of the particular potential for regulation in this sector to affect freedom of speech and the public discussion of social, political and artistic value, it will be very important to provide ample opportunity for public comment and debate about the precise form of any proposed legislation. Several of the proposed powers are considered below.

Injunctions

The CMCL supports that a power be given to ACMA to seek an injunction in circumstances where a person has failed to comply with a notice issued under s 137 (providing a commercial, subscription or community television or radio broadcast

without a licence). This is an important way in which altered powers for the regulator would support the existing framework of different classes of licensees and services under the BSA. The proposed injunction power is quite limited in scope, which is appropriate given the way in which the power can act as a prior restraint on speech.

Enforceable undertakings

Enforceable undertakings are currently used by a range of regulators, including ASIC and the ACCC. Likewise, ACMA should be given similar powers to negotiate enforceable undertakings with broadcasters.

One of the key benefits identified in the Ramsay report was that enforceable undertakings are believed to provide a greater ability to ensure regulatory compliance by fostering a commitment on the part of the entity subject to regulation. It also minimises litigation and the costs it can pose to the sector and public. In essence, enforceable undertakings promote a working relationship between the regulated and the regulator and accords with the co-regulatory model of the BSA.

Infringement notices

The CMCL supports the use of infringement notices by ACMA to deal with relatively minor breaches of the BSA. This would provide a proportionate, low cost and speedy method of dealing with less significant breaches, such as the lodgement of annual financial returns and the late payment of licence fees.

On-air statements

As noted above, the CMCL does not support the proposal to grant ACMA the power to order broadcasters to make on-air statements, at this stage. The other reforms should be introduced, after further public consultation on detailed statutory proposals, and their effect should be reviewed. That review should be combined with detailed examination of these sorts of provisions internationally in order to determine the value in regulating for compelled on-air statements. The focus should be on the UK and New Zealand, with some consideration also given to other European and North American jurisdictions. While the matter has already been considered over some years in Australia, as outlined in the Ramsay report, the appropriate detailed and comparative research on the form and operation of possible provisions has not been undertaken.

Matters that need closer examination include: the wider legal and constitutional framework in those countries and in Australia, including the varied protections for freedom of speech existing in each country; the statutory basis of the regulator, its composition, and the availability of judicial or other review of its decisions; the scope of actions in relation to which the regulator can compel statements to be broadcast; the permissible content of the orders in relation to matters such as timing, frequency, and prominence; the interaction of compelled on-air statements with other laws; the interaction of compelled on-air statements with other regulatory powers (particularly enforceable undertakings and civil penalties); and carefully studying all the circumstances surrounding the instances in which orders have been made in other countries. None of this is to say such a power is not worth examining, and a suitably

targeted and contained power may be a useful addition to the regulator's powers. However, because of the free speech concerns involved in media regulation – which create a marked difference from other industry sectors – the possibility needs close and detailed study that takes into account the context in which such a power has operated, and how it interacts with other mid-range regulatory powers.

Civil penalties

Finally, in relation to the proposal for civil penalties, one matter which may be helpful in developing the proposal is worth noting. Some penalties in the UK have been substantially higher than £250,000 (which is a figure mentioned at several points in the underlying documents). This is because the UK regulator can impose a penalty that is based on a percentage of a broadcaster's annual revenue (as that revenue is calculated under a particular statutory formula). Under the Independent Television Commission (the relevant regulator before Ofcom began operation in the UK), penalties of up to £2 million were reportedly imposed for serious breaches of requirements in relation to current affairs television. However, as noted in the Ramsay report and the Issues Paper, the Australian approach to civil penalties differs somewhat from the UK in its involvement of courts which may also affect what range of amounts is considered appropriate.