



Australian Government



**Submission to the Department of
Communications, Information Technology
and the Arts on proposed reforms to the
broadcasting regulatory powers of the
Australian Communications and Media
Authority**

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Introduction

The Australian Film Commission (AFC) is an Australian Government agency, operating as part of the Commonwealth Film Program to ensure the creation, availability and preservation of Australian audiovisual content. The AFC aims to enrich Australia's cultural identity by fostering an internationally competitive audiovisual production industry, making Australia's audiovisual content and culture available to all, and developing and preserving a national collection of sound and moving image.

As the major collector and analyser of data about the industry, the AFC leads opinion, outlook and policy about the audiovisual industries and screen content in Australia

The AFC has considered the Government's proposed reforms to the Broadcasting Regulatory Powers of the Australian Communication and Media Authority, and is supportive of the proposal for enhanced regulatory powers such as would enable ACMA to introduce a middle range of sanctions for breaches of the Broadcasting Services Act 1992.

The AFC further notes that a necessary corollary of increased regulatory powers would be improved monitoring and reporting of data pertaining to the performance of broadcasters, without which it would be impossible to ensure consistent and reliable detection and correction of any breach.

Background

The existing capacity of the ACMA to respond to breaches is at the higher end of sanctions: criminal prosecution or suspension or cancellation of the licence.

By way of example, breaches of licence conditions such as the Australian Content Standard for commercial television, can be dealt with by the ACMA by issuing a notice under s.141. Failure to comply with such a notice is a criminal offence. Similarly, failure by a subscription television broadcaster to meet the eligible Australian drama expenditure requirement potentially renders them subject to criminal penalty.

There are a number of perceived disadvantages with the current provision for criminal prosecution. Criminal prosecution requires the ACMA to refer the matter to the Director of Public Prosecutions, who then evaluates whether or not there is a case that can be mounted in accordance with criminal standards of proof. In the event that a breach is proven, suspension or cancellation deprives the public of access to the service. Criminal prosecution may also be unnecessarily harsh and/or disproportionate to the breach in question.

Proposals

Civil Penalties

ACMA would be able to institute proceedings in the Federal Court for monetary damages for breaches of the Act, licence conditions and failure to comply with a breach notice. The AFC supports this as providing both a more flexible and proportionate means of responding to licensee behaviour that is inconsistent with regulation.

Injunction power

This would enable the ACMA to move more quickly to seek injunctions in the Federal Court where, for instance, a service was being provided without a licence. The AFC believes this is a reasonable amendment.

Enforceable undertakings

This would enable the ACMA to enter into an arrangement with a broadcaster that responds quickly and in a negotiated manner that encourages compliance and remedies breaches. These undertakings would be enforceable through the potential for the Federal Court to make orders where the undertaking had not been complied with. For example, an enforceable undertaking might make a more effective, timely and less costly response to a breach of a program standard than the measures referred to above. The AFC also supports this option.

On air statements of investigation findings

This would give the ACMA the power to require broadcasters to make on air statements of the results of ACMA investigations of such things as program standards or codes of practice. The chief attraction of this power is that it might in a public way provide some relief for an individual or an entity that has been affected by such a breach.

Currently the results of ACMA investigations are published in the ACMA newsletter and are rarely widely reported in the media. Whereas it has been common practice for newspapers to publish summaries of investigations by the Australian Press Council or to publish corrections or retractions, this is not common practice in broadcasting. On air statements such as those being proposed have the potential to generate negative perceptions of the broadcaster with their audience, and to cost the broadcaster money for possible advertising revenue forgone.

This measure therefore has the potential to act as a significant disincentive to breaches of licence conditions and may raise public confidence in the regulatory system. However, the higher stakes for broadcasters may also bring about an unacceptable level of legal involvement in the ACMA investigation process i.e. broadcasters are likely to be more rigorous in

defending an investigation, particularly for a matter dealt with under a code of practice.¹ On the other hand it may also encourage the broadcasters to be more proactive in resolving such matters.

While supportive of this option, the AFC would recommend that the ACMA publish guidelines stipulating the class of breach and the circumstances which would warrant such a sanction.

Infringement notices

This would allow the ACMA to impose a financial penalty for breaches of notification, reporting and licence fee payment requirements. The AFC supports this as a reasonable response to this class of breach.

Other powers

The AFC is of the view that enhanced regulatory powers, and the implied capacity to intervene expeditiously, also presuppose a degree of research, monitoring and analysis of broadcaster performance that is not currently being undertaken by the ACMA.

Currently the ACMA only gathers and publishes information on the broadcasting industry which is directly related to its compliance monitoring and fee collection responsibilities. Where once this information was collated, standardised and published in a 'Trends and Issues' paper, the ACMA no longer performs this function.

For example, in relation to Australian content on subscription television, information gathering relates strictly to compliance with the expenditure requirement. The AFC believes it would be a positive development for broadcasting regulation that the ACMA collect information on the overall level of Australian content on subscription television. This would make it possible to make a judgement about the contribution of the sector to meeting the object of the Act "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity."

Both the Australian Bureau of Statistics (ABS) and the AFC publish considerable relevant data. However, the AFC believes that at the heart of the ACMA and its approach to the industries it regulates should be a profound and complete understanding of the economic structure and performance of the broadcasting sector. Critical to this must be extensive and ongoing research into the broadcasting sector and its activities. Access to timely and comprehensive information is key to well-functioning, responsive decision-making and regulation.

¹ By definition, if the ACMA is investigating a breach of a code of practice it is because there has been a difference of opinion between the broadcaster and the complainant about whether a breach has occurred.

The AFC notes that one of the functions of the ACMA is “to report to, and advise, the Minister in relation to the broadcasting industry, Internet industry and datacasting industry.” The ACMA under s.168 may “inform itself in any manner it thinks fit ... on any matter relevant to its broadcasting, content and datacasting functions”.

The research and data analysis routinely undertaken by the British regulator OFCOM has facilitated effective regulatory intervention and has informed the development of well-targeted broadcasting policy.

The AFC is of the view that enhancing the information gathering and publication role of the ACMA would enable it to more effectively perform its regulatory role and respond appropriately to breaches of the Act, as well as productively inform policy development.