
Meeting	Senate Legal and Constitutional Affairs Committee inquiry into the National Classification Scheme
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Date	1 April 2011
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Title of brief	Response to questions taken on notice
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Background

The ACMA took four questions on notice as follows:

1. What is the constitutional power on which regulation of the internet relies?
2. Did the ACMA receive any complaints about the Martin Bryant Facebook page, and if so what action was taken?
3. Why does the ACMA seek enforceable undertakings instead of proceeding directly to financial penalties for breaches of the TV codes?
4. Please provide detailed information on the TV codes of practice, including details of any enforcement penalties.

1. What is the constitutional power on which regulation of the internet relies?

Section 51(v) of the *Commonwealth of Australia Constitution Act 1900* provides that Parliament shall have the power to make laws for the peace, order and good government of the Commonwealth with respect to postal, telegraphic, telephonic, and other like services. This power enables the Commonwealth to regulate broadcasting, telecommunications and the internet. The regulation of content provided on the internet is contained in Schedules 5 and 7 of the *Broadcasting Services Act 1992*.

2. Did the ACMA receive complaints about the Martin Bryant Facebook page and, if so, what action was taken?

The ACMA has not, to date, received any complaints about the Martin Bryant Facebook page.

Contact officer

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3. Why does the ACMA seek enforceable undertakings instead of proceeding directly to financial penalties for breaches of the TV codes?

Under section 5 of the *Broadcasting Services Act 1992* (the BSA), the ACMA is to use its functions and powers in a manner that, in the opinion of the ACMA, produces regulatory arrangements that are stable and predictable, and deal effectively with breaches of the rules established by the BSA.

The ACMA has options under the BSA to deal with breaches of registered codes of practice that include imposing an additional licence condition or varying an existing licence condition; or, accepting an enforceable undertaking aimed at ensuring specified, targeted action to prevent future breaches of registered codes of practice. (Note that the Australian Broadcasting Service (ABC) and Special Broadcasting Service (SBS) do not register codes of practice with the ACMA – the BSA sets out specific provisions for dealing with codes of practice breaches for these broadcasters, as noted in Table 2 below.)

Under the BSA, financial penalties are not available for code of practice breaches in the first instance. However, if an enforceable undertaking is in force and the ACMA considers that the undertaking has been breached, the ACMA may apply to the Federal Court for an order that may encompass directions for a person to pay the ACMA, on behalf of the Commonwealth, an amount up to the amount of any financial benefit that the person has obtained directly or indirectly that is reasonably attributable to the breach.

How the ACMA uses its enforcement powers is outlined in the *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992*. Essentially, the ACMA uses its enforcement powers guided by a number of principles, including:

- enforcement action should be proportionate to the impact of the breach or risk of future breach;
- any enforcement action should, so far as possible, seek to address any systemic or ongoing element that may give rise to future breaches.

In light of the above, the ACMA considers that enforceable undertakings are often an appropriate and commensurate response to codes of practice breaches, which also provide flexibility to achieve tailored outcomes which may not be available by other means (for example, if a breach relates to the classification of a particular program, the enforceable undertaking can require the licensee to classify all future series of the program and related or similar content at an appropriate level).

The ACMA's experience has shown that enforceable undertakings related to classification breaches of registered codes of practice under the BSA have been an effective measure in ensuring ongoing compliance in relation to specific matters. The ACMA's view is informed by the lack of subsequent breaches on the substantive matters covered by, and reporting mechanisms built into, specific enforceable undertakings.

4. Please provide detailed information on the TV codes of practice, including details of any enforcement penalties

Table 1: Overview: Classification provisions for television broadcasts

Code of Practice	Section of Code	TV Broadcaster / Licensee	Overview of provisions relating to classification, including interaction with National Classification Scheme
Commercial Television Industry Code of Practice 2010	Section 2.3: Classification of Films Section 2.4: Classification of Other Material	All free-to-air networks	<ul style="list-style-type: none"> Films are classified in accordance with the <i>Guidelines for the Classification of Films and Computer Games 2005</i>, except films classified MA 15+ based on the level of violence depicted which is accommodated at the AV 15+ classification instead. Program classifications are broadly aligned with the <i>Guidelines for the Classification of Films and Computer Games 2005</i>: <ul style="list-style-type: none"> Contain different classifiable elements to those in the Guidelines, and contains a greater level of detail about the classifiable elements at each classification. Specifies time zones during which programs of particular classifications can be shown.
ASTRA Codes of Practice 2007	Section 3.1. Program Classifications	FOXTEL/AUSTAR and other subscription services	<ul style="list-style-type: none"> Reproduces the <i>Guidelines for the Classification of Films and Computer Games 2005</i> for the classification of films and drama programs. The ASTRA Code does not currently apply to reality TV or documentaries. The ASTRA Code is currently under review.
Community Television Code of Practice	Code 5: Program Classification and Identification	Community TV Licensees	<ul style="list-style-type: none"> Reproduces the <i>Guidelines for the Classification of Films and Computer Games 2005</i>: <ul style="list-style-type: none"> Specifies time zones during which programs of particular classifications can be shown.
ABC Code of Practice March 2007	Section 6: Television program classifications	ABC	<ul style="list-style-type: none"> The classification provisions of the ABC Code are based on the <i>Guidelines for the Classification of Films and Computer Games</i>, and: <ul style="list-style-type: none"> Specifies time zones during which

			<p>programs of particular classifications can be shown.</p> <ul style="list-style-type: none"> ○ Requires that consideration is given to the likely and intended audience when classifying material. ○ Does not make reference to an impact test in regard to the classification of material. ○ Contain a greater level of detail about the classifiable elements at each classification compared to the Guidelines. <ul style="list-style-type: none"> • The ABC applies classifications to all domestic television programs with the exception of news, current affairs and sporting events. • A new ABC Code is due to be released on 11 April 2011.
SBS Codes of Practice 2006	Section 4: Television Classification Code	SBS	<ul style="list-style-type: none"> • The classification provisions of the SBS Codes is based on the <i>Guidelines for the Classification of Films and Computer Games 2005</i>, and: <ul style="list-style-type: none"> ○ Although the Code does not list classifiable elements, it requires that special attention be given to levels of violence, sex, nudity and use of language. ○ The Code specifies time zones during which programs of particular classification may be shown. These time zones are however only for recommended placement of programs are not a hard and fast rule. ○ The Guidelines are reproduced as an appendix to the Codes. • Code 1 specifically notes that Suicide is a legitimate subject for programming, but it should be portrayed with a high degree of sensitivity. • SBS is commencing a review of its Code in 2011.

Table 2: Details of possible enforcement actions available to the ACMA following a breach of a Code of Practice

Enforcement Mechanism (including reference to Broadcasting Services Act 1992)					
	Enforceable Undertakings Part 14D (Section 205V)	Impose additional licence conditions Sections 43, 87 and 99(2)	Remedial direction Section 141	Encourage compliance / Reporting Sections 152 and 153	Determine Program Standards Section 125
	<ul style="list-style-type: none"> May include such targeted actions as: <ul style="list-style-type: none"> Training with the Classification Board Multiple classifiers to classify certain content Regular reporting to the ACMA on complaints received/ training undertaken Reclassify future broadcasts in line with the ACMA's decision Circulate a copy of the ACMA's findings to the Licensee's classifiers and management Media Release / Web announcement regarding breach and action taken 	<ul style="list-style-type: none"> The ACMA may, by notice in writing, vary or revoke a condition of the licence or impose an additional condition on the licence. 	<ul style="list-style-type: none"> A direction to implement effective administrative systems for monitoring compliance with a licence condition; or, A direction that a person implement a system designed to give a person's employees a reasonable knowledge and understanding of a licence condition. 	<ul style="list-style-type: none"> The ACMA may, by notice in writing, recommend that a broadcaster take action to comply with the relevant code of practice and to take such other action in relations to the complaint as is specified in the notice. The ACMA may by notice in writing recommend that the broadcaster publish an apology or a retraction. If the ACMA has made a recommendation to the ABC or SBS under section 152, and if, within 30 days, the ABC or SBS has not taken action on the recommendation, the ACMA may give the Minister a written report on the matter. 	<ul style="list-style-type: none"> The ACMA may determine a program standard where codes of practice fail or no code of practice is developed or operating to provide appropriate community safeguards.
Commercial TV	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ASTRA (Subscription Television)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Community Broadcasting	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ABC ¹	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
SBS ¹	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

¹ Section 13(5) of the BSA includes that "except as expressly provided by this Act, the regulatory regime established by this Act does not apply to national broadcasting services".

