



Communications Legislation Amendment (Enforcement Powers) Bill 2006

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Communications Legislation Amendment (Enforcement Powers) Bill 2006

Date introduced: 14 September 2006

House: The House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: The operative provisions of the Communications Legislation Amendment (Enforcement Powers) Bill 2006 commence on receiving Royal Assent. Schedule 1 will commence on a day to be fixed by Proclamation or no later than the day after three months from Royal Assent.

Purpose

The Bill amends the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to broaden the range of enforcement powers available to the Australian Communications and Media Authority.

Background

The creation of the Australian Communications and Media Authority

The Australian Communications and Media Authority (ACMA) is an amalgamation of the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA). This took effect on 1 July 2005. In this digest, both 'ABA' and 'ACMA' are used depending on the context. Where 'ABA' is used, it can generally be read as referring to the ACMA, as it now is.

Initially, the ABA and the ACA together shared the responsibility for the regulation of broadcasting, telecommunications and, to a limited degree, the internet, with the:

- ACA being responsible for regulating telecommunications and radiocommunications, including managing the radiocommunications spectrum other than the broadcasting services bands (BSB), and
- ABA being accountable for planning and regulating broadcasting services bands within the radiofrequency spectrum, broadcast licensing, and online and Australian content functions.

The idea of merging the two regulators was first floated by the Productivity Commission in its Inquiry Report No. 11 *Broadcasting* which was released by the Australian

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Government in April 2000.¹ This ‘regulatory convergence’ was a response to convergence of the previously separate technologies, markets and industry participants brought about by digital technologies. It was thought that a single agency would be more likely to deliver improved coordination of regulatory functions and greater flexibility for industry, while meeting the expectations of viewers and listeners and maintaining high levels of quality and diversity.²

The powers and functions of the Australian Communications and Media Authority

ACMA was established by the *Australian Communications and Media Authority Act 2005* (the ACMA Act). It is an independent statutory body with powers to regulate telecommunications, spectrum, broadcasting, content and datacasting (Division 2 of the ACMA Act).

In addition, ACMA is charged with the responsibility to monitor the broadcasting, datacasting and internet industries. Under the *Broadcasting Services Act 1992* (the BSA), the ACMA has to assess whether the objects of the BSA are achieved consistent with the regulatory policy applicable to these industries. The objects of the BSA are set out in section 3 of the BSA. They specify the outcomes Parliament intended from the regulation of broadcasting in Australia, facilitate decision making consistent with the regulatory policy of the BSA and guide its administration.

Codes of Practice

Under the BSA, primary responsibility for industry rules that ensure programs reflect community standards, and for handling complaints about program content, rests with broadcasters.³ The BSA requires industry groups representing commercial, community and narrowcasting services to develop, in consultation with ACMA, Codes of Practice. Some of the aims of these Codes are to:

- promote accuracy and fairness in news and current affairs programs (paragraph 123(2)(d) of the BSA)
- cover broadcasting time devoted to advertising (subsection 123(2)(f) of the BSA), and
- deal with any other matters concerning program content that are of concern to the community (subsection 123(2)(l)).

ACMA monitors compliance with Codes of Practice and investigates unresolved complaints from the public.

The Commercial Radio Inquiry 2000 and subsequent events

As a result of a Commercial Radio Inquiry 2000⁴ (usually described as the ‘cash for comment’ inquiry), the ABA concluded its existing powers lack the flexibility and force to

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respond properly to serious Code breaches and that it lacked sanctions that could take immediate effect. Further, subsequent events helped to confirm these conclusions.

The Commercial Radio Inquiry 2000 arose after it was revealed that two prominent Sydney radio talkback hosts on Sydney radio station 2UE had been paid to provide favourable comment to companies without disclosing this arrangement to listeners. Though both hosts initially denied any wrongdoing, they later defended their actions, claiming as they were not employed as journalists, they had no duty of disclosure or of journalistic integrity. The ABA found the hosts and their radio station to have committed 90 breaches of the industry code and five breaches of the station's licence conditions.

As a result of the Commercial Radio Inquiry, the ABA imposed two new licence conditions as a result of these breaches. They were intended to encourage disclosure of sponsors and to foster a 'culture of compliance' with the regulatory regime.⁵

However, despite the imposition of further licence conditions, the ABA continued to have concerns about the conduct of various radio stations and their presenters. For instance,

- In November 2002, the ABA began investigating a public complaint from the Communications Law Centre which alleged that the radio station had breached the licence condition relating to disclosure and compliance.⁶
- In October 2003, the ABA released research that indicated there was strong community support for the requirement for on-air disclosure of commercial agreements by talkback presenters. More than three-quarters of commercial AM radio listeners said it is important to be informed by radio presenters about their personal sponsors.⁷
- In December 2003, the ABA concluded that the radio station had breached the broadcasting disclosure standard⁸ on 19 occasions and the special licence condition, imposed after Commercial Radio Inquiry, six times. ACMA noted that listeners are entitled to know if relationships exist between radio presenters and third parties.⁹
- The ABA announced it would refer the matter to the Commonwealth Director of Public Prosecutions (DPP) for its consideration.¹⁰ Additionally, it proposed to impose a further licence condition on the radio station.¹¹
- In June 2004, the ABA received advice from the DPP that there would be no reasonable prospect of convicting the licensee in relation to breaches of the commercial radio disclosure standard and that the matter would not be approved for prosecution.¹² Acting ABA chair, Lyn Maddock, commented:

The burden of proof in criminal cases is much higher than in civil cases and for a successful prosecution in this case it would have to be proven that Radio 2UE engaged in the conduct with the requisite criminal intention.

This outcome highlights how difficult it is for the ABA to impose appropriate sanctions when it finds breaches of licence conditions and program standards.

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The only civil law-based remedies available to ABA are imposition of further licence conditions (which must not be punitive), or suspension or cancellation of the broadcaster's licence. The ABA has imposed a stringent monitoring condition on Radio 2UE, but would always be extremely reluctant to deprive the public of a popular service by suspending or cancelling the broadcaster's licence.

The present case demonstrates the forensic difficulty of mounting a criminal prosecution under the existing law.¹³

To remedy this situation, the final report of the Commercial Radio Inquiry made several recommendations, including giving ACMA powers to:

- impose advertising free periods
- designate a period of time a presenter is prohibited from broadcasting
- require on-air corrections or the findings of ACMA investigations to be broadcast
- impose a civil penalty, and
- approach the Federal Court for an injunction.¹⁴

Further proposals for changes to assist in the prevention and/or enforcement of future breaches of Codes of Practice were identified in the *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*, prepared in 2001 by the Department of Communications, Information Technology and the Arts (DCITA). These recommendations were not well received by the industry.¹⁵

Ramsay Report¹⁶

While acknowledging that the regulatory framework in the BSA had generally operated well, experiences such as the case at the heart of the Commercial Radio Inquiry had led the ABA to conclude that its 'lack of flexibility in enforcement measures' and, in particular, a lack of graduated powers, prevented it dealing effectively with a variety of non compliance issues.¹⁷

According to ACMA, the major areas of concern were:

- regulating the categories of services in the BSA, in particular open narrowcasters providing commercial broadcasting services
- the lack of remedies for breaches of codes of practice, and
- lack of appropriate sanctions for licence condition breaches, including breaches of standards.¹⁸

Therefore, in 2004, the ABA commissioned Professor Ian Ramsay to examine the effectiveness of its existing enforcement powers and to suggest options which would allow it to act more effectively in dealing with the broadcasting industry.

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In his Report, Professor Ramsay agreed that the ABA's enforcement powers were deficient in a number of respects. In particular, he concluded that the Authority lacks access to flexible, 'middle range' administrative powers and civil penalties. Such powers and penalties are available to other regulators in Australia and overseas, including a number of measures available to the ACA under the *Telecommunications Act 1997*.

Inadequacy of the ABA's powers

Professor Ramsay noted several areas of concern in relation to the ABA's powers. These included:

- **Codes of Practice**—a lack of effective enforcement mechanisms for serious and/or repeated breaches of Codes by commercial radio and television licensees. Existing sanctions are of limited use, as they often result in punishment of not only the licensee but also indirectly of the public which is deprived of a broadcast
- **licence conditions**—enforcement powers available are not only limited but are also very severe in that they involve either a referral to the DPP to instigate a criminal prosecution or the cancellation or suspension of the licence
- **enforcing the categories of broadcasting services**—open narrowcasters operate under a class licence, so the ABA cannot suspend or cancel their licences. Criminal penalties can be imposed for provision of a commercial broadcasting service without a licence as well as provision of other types of broadcasting services without an appropriate licence. The BSA also provides for the issue of notices requiring a person found to be providing an unlicensed service to desist from providing that service and there are criminal penalties for breaching a notice. However, the ABA has found its penalty powers to enforce the categories of broadcasting services ineffective in those cases where a service provider has not complied
- **notification provisions**—licensees are often late in notifying the ABA about who controls licences and who are the directors of the licensee companies. Criminal penalties can apply for breaches of these notification provisions. However, criminal penalties can be inappropriate if the breach is inadvertent
- **annual financial returns**—licensees are often late in lodging annual financial returns. A breach of the provisions requiring lodgement of annual financial returns can lead to the imposition of criminal penalties. However, the imposition of such penalties may be inappropriate for inadvertent breaches, and
- **payment of licence fees**—licence fees for both commercial television licensees and commercial radio licensees are due on 31 December of each year (section 6 of the *Television Radio Licence Fees Act 1964*). According to information received from the ABA, on average 14 commercial broadcasting licensees pay their licence fee after the due date each year. The penalty for non-payment of licence fees is an additional fee.¹⁹ In the case of very small commercial radio licensees, which pay only small licence fees, this does not serve as an incentive for compliance.²⁰

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The Ramsay Report's Recommendations for Reform

To enhance the ABA's enforcement powers, Professor Ramsay proposed that the ABA should:

- have the power to:
 - accept enforceable undertakings in connection with a matter in relation to which it has a function or power under the BSA, and
 - seek injunctive relief from the court for a breach of section 137 of the BSA²¹
- retain the right to refer sufficiently severe breaches of the BSA to the DPP for criminal prosecution²²
- be given the power to issue infringement notices for breaches of the control notification provisions of the BSA and the requirement in the BSA to lodge annual financial reports
- have the power to impose a penalty as an additional fee or issue an infringement notice specifying payment of \$1500 where commercial television and radio licensees pay licence fees late,²³ and
- be given the power to order a licensee to broadcast a statement relating to the findings of an ABA investigation finding a breach or breaches of a code of practice or a licence condition. This power of the ABA to order on-air statements by broadcasters would not apply to national broadcasters.

In addition, Professor Ramsay recommended that breaches of certain provisions of the BSA be subject to civil monetary penalties. In particular, civil monetary penalties—to be imposed by a court of competent jurisdiction—should apply where:

- an open narrowcaster provides a service
- this service is not in accordance with the relevant class licence, and
- there is a breach of specified licence conditions.²⁴

Position of significant interest groups

In November 2005, DCITA issued a discussion paper, seeking comments on the recommendations in the Ramsay Report. DCITA received the following submissions:

Australian Broadcasting Corporation

The Australian Broadcasting Corporation (ABC) argued against any increased powers for ACMA in relation to national broadcasters as they were potentially in conflict with the provisions of the *Australian Broadcasting Corporation Act 1983* (ABC Act).

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The ABC considered that the current system worked well, arguing that it simultaneously provides for ACMA investigations of alleged breaches of the ABC's Code of Practice, while reflecting the ABC's editorial independence and accountability to the Australian Parliament and the people of Australia. In addition, the ABC noted it established:

an effective, multi-tiered complaints-handling process to deal with concerns expressed by members of the public about its programming, and publishe[d] the results of those contacts on a quarterly basis.²⁵

Australian Film Commission

The Australian Film Commission (AFC) was supportive of enhanced regulatory powers enabling ABA to introduce a middle range of sanctions for breaches of the BSA. The AFC considered it:

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.²⁶

Free TV

Free TV supported retention of the existing co-regulatory approach considering it:

flexible, responsive to community views, transparent and accessible for viewers. Broadcasters have a constructive and transparent relationship with the ABA, characterised by high levels of compliance with the Code, Standards and Licence Conditions, and a non-litigious approach to resolving disputes. Broadcasters would be concerned if the introduction of stronger enforcement powers changed the cost-effective and efficient nature of co-regulation and led to the more interventionist approach that characterised the pre-1992 regulatory system.²⁷

Commercial Radio Association

The Commercial Radio Association (CRA) argued that, if implemented, the proposed reforms would:

take broadcast regulation back to the over-regulated, highly litigious regime that existed prior to the [BSA]. Under the previous regime, the Australian Broadcasting Tribunal (ABT) used a highly interventionist and legalistic approach to regulation of the broadcast sector. That regime has been widely discredited.²⁸

Arguments against the reform of the enforcement powers

Certain sectors of the industry are not fully convinced that increasing ACMA's powers will be beneficial. As indicated above, there is concern that introducing more regulatory

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options will represent a return to the regulatory regime that existed prior to the passage of the BSA in 1992.²⁹

Arguments in favour of the reform of the enforcement powers

Generally the introduction of more flexible sanction options will allow ACMA to impose a range of penalties more appropriate to offences and to negotiate with licensees to produce better compliance outcomes.

Criminal prosecution for offences under the current regulation is difficult. Currently, to prosecute a matter ACMA must refer a brief to the DPP which may not agree that particular conduct warrants prosecution. In addition, the prosecution process can be lengthy and resource-intensive. Furthermore, breaches of the BSA must be proved to the criminal standard of proof, that is, beyond reasonable doubt.

It is evident that criminal sanctions may be inappropriate for minor infringements. It is probable that the existence of criminal sanctions, which essentially amount to a threat rather than a reality, do not actually constitute an effective deterrent. It is likely that graduated non criminal sanctions will be more effective as they will be more easily and quickly applied.

The introduction of a more flexible regime will also be more likely to:

remedy the wrong to audiences affected by a code breach, and they would enhance the credibility of the regulatory scheme because audiences would be more likely to see that codes breaches are being detected and sanctioned.³⁰

A more flexible regulatory regime would allow more options to deal with the following types of conduct cited in the Ramsay report:

Case studies – breaches of Codes of Practice

Commercial television

Unfair identification of individuals in news and current affairs programs

The complaint concerned a segment on chroming (inhaling aerosol spray from a plastic bag) on 'A Current Affair' program broadcast by GTV9 Melbourne. The segment included interviews with two clearly identifiable teenage 'chromers'. In respect of the two young people interviewed, the ABA found that the segment breached clause 4.3.7 of the code in that it unfairly identified them when commenting on the behaviour of a group. The ABA took the view that the two young people were unfairly identified as: they were minors; they were substance affected at the time they were interviewed; and prior to the segment going to air they had requested that their identities not be disclosed during the program.

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Failure to represent viewpoints fairly, unfairly identifying a single person when commenting on the behaviour of a group of persons

The complaint concerned a segment on ‘A Current Affair’ concerning the medical treatment provided by a plastic surgeon to a former patient. Particular issue was taken with the licensee’s conduct in broadcasting a story damaging to the professional reputation of a medical practitioner who had been cleared by the court of negligence and breach of contract some six weeks before the broadcast.

The ABA found that the report did not do justice to the doctor’s viewpoint, particularly as it related to the matter of negligence. By presenting only a very small portion of the doctor’s evidence, his views were not presented in their entirety. The ABA also upheld the complaint that the doctor was unfairly singled out as an individual. The report juxtaposed generalised comment about the behaviour of the cosmetic surgery industry with a focus on a single doctor who was identified by name. The report conveyed an unfair impression that the doctor was not a good surgeon, when the judgment of the court indicated that the doctor had a reputation for being a highly skilled surgeon.

Commercial radio

Failure to meet contemporary standards of decency

The complaint concerned a contest called ‘Don’t Tell Us Your Name, Tell Us Your Secret’ broadcast by Radio 2WFM. The complainant was concerned that the prize was awarded to a caller who disclosed the ‘secret’ that he had arranged for the alleged boyfriend of his wife to be ‘beaten up’. The ABA determined that the broadcast breached clause 1.5(a) of the code as elements of it did not meet community standards of decency having regard to the likely characteristics of the audience. A caller was rewarded for publicising an account of his involvement in criminal conduct, an assault. Further, the presenters failed to indicate to the audience that the behaviour described by the caller was unlawful or in any way unacceptable.³¹

Positions and commitments of political parties represented in the Australian Federal Parliament

While the Government’s overall media package has received significant media coverage and elicited comment from all political parties, this Bill has not specifically been commented upon.

However, there have been comments in relation to controversy about the Big Brother program screened on Ten Network. In July 2006 two male housemates were removed from the Big Brother house on the Gold Coast following a sexually offensive incident involving a fellow housemate. Footage was streamed live over the Internet on the Big Brother website, but was not broadcast on Channel 10.

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ACMA found that because Channel 10 did not broadcast the footage of the incident on TV the television codes did not apply. According to Internet regulations the production company which administers the Big Brother website had also not breached any rules. Because the Internet footage was streamed live as a webcast and not actually stored, it was not technically considered broadcasting.

In commenting on the incident, Family First Senator Steve Fielding considered that ACMA should be empowered to respond to these particular types of programs and fine broadcasters heavily.³² Labor communications spokesperson, Senator Stephen Conroy, said the Government was warned two years ago by the regulator that the BSA had inadequate remedies. Senator Conroy said that ‘any changes to the law will be just window-dressing unless ACMA is given the power to uphold community standards of decency’.³³

Financial implications

The Explanatory Memorandum notes that there will be no significant financial impact for the Commonwealth arising from this Bill.

Main provisions

Item 48 inserts into the BSA a **new Part 14B** which deals with civil penalties, **new Part 14C** which deals with injunctions, **new Part 14D** which deals with enforceable undertakings and **new Part 14E** which deals with infringement notices.

Item 52 inserts a **new Part 5.8** into the *Radiocommunications Act 1992* (Radcom Act) that provides for enforceable undertakings.

These new enforcement powers are dealt with in turn.

Civil Penalties

The difference between a criminal and a civil penalty

The procedure by which a penalty is imposed determines whether the penalty is a criminal or a civil penalty.³⁴ The current criminal penalties in the BSA require ACMA to:

- refer prosecutions to the Commonwealth Director of Public Prosecutions (DPP),
- establish the breach beyond reasonable doubt (the criminal standard of proof), and
- demonstrate that there was the requisite intention to breach.³⁵

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In contrast, the proposed new civil penalties will enable ACMA itself to commence proceedings in the Federal Court and establish the breach on the balance of probabilities (the civil standard of proof). The civil penalties in the Bill will be additional or alternative enforcement options to the criminal penalties which are already in the legislation.

The proposed amendments with respect to civil penalties

Proposed Division 2 of Part 14B of the BSA outlines civil penalty orders. **New section 205EA** explains that ‘Pecuniary penalties are payable for contraventions of civil penalty provisions.’

The Bill creates a number of new civil penalty provisions.

Providing broadcasting services without a licence

Unlicensed international broadcasting services

Item 20 inserts **new subsections 121FG(3) and (4)** in the BSA which make it a civil penalty provision for a person to provide an international broadcasting service if the person does not have a licence to provide that service.

Item 21 inserts **new sections 121FH, 121FHA and 121FHB** in the BSA. ACMA will be empowered to give remedial directions in relation to the unlicensed provision of an international broadcasting service (**new section 121FH**). **New subsection 121FHB(2)** makes it a civil penalty provision for a person to comply with such remedial directions. **New subsection 121FHA(1)** provides that failure to comply with such remedial directions is an offence with a penalty of 20,000 penalty units.³⁶

Other unlicensed broadcasting services

Item 27 inserts a **new Division 1A** in **Part 10** of the BSA that outlines civil penalty provisions relating to unlicensed services.

It is a civil penalty provision for a person to provide:

- a commercial television broadcasting service
- a subscription television broadcasting service
- a commercial radio broadcasting service
- a community television broadcasting service with the use of the broadcasting services bands, or
- a community radio broadcasting service with the use of the broadcasting services bands

if the person does not have a licence to provide that service.

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Item 28 inserts **new sections 137, 138 and 138A** in the BSA. ACMA will be empowered to give remedial directions in relation to the unlicensed provision of the above mentioned broadcasting services (**new section 137**). **New subsections 138A(1) and (2)** make it a civil penalty provision for a person to comply with such remedial directions. **New section 138** provides that failure to comply with such a notice is an offence with a penalty of:

- 20,000 penalty units for the provision of an unlicensed commercial television broadcasting service
- 2,000 penalty units for the provision of an unlicensed subscription television broadcasting service or unlicensed commercial radio broadcasting service, and
- 50 penalty units for the provision of an unlicensed community television broadcasting service or an unlicensed community radio broadcasting service.

Breaching conditions of licences and classes of licences

Item 22 inserts **new sections 121FJA, 121FJB, 121FJC and 121FJD** in the BSA. **New subsections 121FJA(1) and (2)** make it a civil penalty provision for an international broadcasting licensee to breach a licence condition. ACMA will be empowered to give remedial directions in relation to the relevant licence condition (**new section 121FJB**). **New subsections 121FJD(1) and (2)** make it a civil penalty provision for a person to comply with such remedial directions. **New section 121FJC** provides that failure to comply with such a notice is an offence with a penalty of 2,000 penalty units.

Item 33 inserts a **new section 140A** in the BSA which outlines civil penalty provisions relating to breach of *licence conditions* by:

- commercial television broadcasting licensees
- subscription television broadcasting licensees
- commercial radio broadcasting licensees
- community broadcasting licensees, and
- temporary community broadcasting licensees.

This section also outlines civil penalty provisions relating to the breach of *conditions of class licences* by persons providing:

- subscription radio broadcasting services
- subscription narrowcasting services, or
- open narrowcasting services.

Section 139 of the BSA makes it a criminal offence to breach these conditions of licences and class licences.³⁷ Accordingly:

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[w]here a licensee breaches one or more of the specified licence conditions, the licensee could be prosecuted for an offence under section 139, or the ACMA could commence an action in the Federal Court seeking the imposition of a civil penalty for a breach of new section 140A.³⁸

Item 34 repeals sections 141 and 142 and inserts **new sections 141, 142 and 142A**. ACMA will be empowered to give remedial directions in relation to licence conditions relating to commercial, community or subscription services, class licences or codes of practice as the case may be (**new section 141**). **New subsections 142A(1) and (2)** make it a civil penalty provision for a person to comply with such remedial directions. **New section 142** provides that failure to comply with such a notice is an offence with a penalty. The number of penalty units varies, from 50 to 20,000 penalty units, depending on the class of licence or type of broadcasting licence.

A failure to comply with one of ACMA's new remedial directions powers (referred to above; directed towards ensuring that unlicensed services are not provided or licence conditions or certain codes of practice are not breached) would incur either a civil or criminal penalty.³⁹

Civil penalty orders

New subsection 205G(1) provides that only ACMA may apply for a civil penalty order.⁴⁰ **New subsections 205F(1) and (2)** provide that if the Federal Court is satisfied that a person has contravened a civil penalty provision it may order the person to pay the Commonwealth a pecuniary penalty (known as a civil penalty order). **New subsection 205F(4)** provides that the maximum pecuniary penalty for contravention of a civil penalty provision is the maximum pecuniary penalty that could have been imposed for contravention of the equivalent criminal offence.⁴¹ **New subsection 205F(8)** outlines civil enforcement of the penalty.

New sections 205L, 205M and 205N outline the relationship between civil proceedings and criminal proceedings for conduct that could constitute both a civil penalty provision and an offence. In sum, proceedings for a civil penalty order will be stayed if:

- criminal proceedings are started but can be resumed if the person is not convicted (**new section 205M**), or
- criminal proceedings can be started regardless of whether a civil penalty order has been made against the person (**new section 205N**) but if a person has been convicted of an offence then the Federal Court must not make a civil penalty order against the person (**new section 205L**).

New section 205PAA provides for a defence of mistake of fact in relation to the contravention of a civil penalty provision other than in **new subsections 202(1A) and (2AA)** (which relate to requirements to give evidence or to produce documents at a

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hearing). This provision is based on the mistake of fact provision in clause 9.2 of the Criminal Code.⁴²

Assessment of suitability to hold a licence

Any prior civil penalty orders made against a company or relevant person will be considered in ACMA's assessment of whether they are suitable to be allocated or to hold a broadcasting licence (changes made by **items 9–10, 12–19** of the Bill).

Injunctions

New Part 14C of the BSA stipulates amendments relating to injunctions. **New section 205PA** provides that 'The Federal Court may grant injunctions in relation to contraventions of subsection 121FG(3) or section 136A, 136B, 136C, 136D or 136E (which deal with the provision of unlicensed services).' The Explanatory Memorandum explains that:

Injunctions to prevent unlicensed broadcasts are principally aimed at licensees outside commercial broadcasting categories, such as narrowcasters (which are licensed to provide only niche services) that provide commercial broadcasting services.⁴³

New section 205Q provides that ACMA may apply to the Federal Court for an injunction if a person has engaged, is engaging or is proposing to engage, in conduct that constitutes unlicensed broadcasting. The Federal Court may grant an injunction restraining the person from engaging in conduct and, if the court considers it desirable, requiring the person to do something. **New subsection 205R(1)** provides that the Federal Court may grant an interim injunction before considering the application for an injunction. The granting of an interim injunction is not to be conditional upon the applicant (presumably ACMA) giving an undertaking as to damages (**new subsection 205R(2)**).

New section 205U confirms that the powers conferred on the Federal Court under Part 14C are additional powers of the court.

Enforceable undertakings

Undertakings under the *Broadcasting Services Act 1992*

New Part 14D of the BSA provides for enforceable undertakings. **New section 205V** explains that 'A person may give ACMA an enforceable undertaking about compliance with this Act or a registered code of practice.'

ACMA may accept written undertakings that a person will:

- take specified action in order to comply with the BSA (**new paragraph 205W(1)(a)**) or a registered code of practice (**new paragraph 205W(1)(d)**)

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- refrain from taking specified action in order to comply with the BSA (**new paragraph 205W(1)(b)**) or a registered code of practice (**new paragraph 205W(1)(e)**), and
- take specified action directed towards ensuring that the person does not contravene the BSA (**new paragraph 205W(1)(c)**) or a registered code of practice (**new paragraph 205(1)(f)**).

An undertaking may only be withdrawn or varied with ACMA's consent (**new subsection 205W(3)**). ACMA may cancel the undertaking (**new subsection 205W(4)**).

New section 205X provides for the enforcement of undertakings. ACMA may apply to the Federal Court for an order (**new subsection 205X(1)**). The Federal Court may make any or all of the orders specified in **new subsection 205X(2)** if it is satisfied that a person has breached an undertaking.

Undertakings under the *Radiocommunications Act 1992*

Item 52 of the Bill inserts a **new Part 5.8** into the Radcom Act that provides that a person may give ACMA an enforceable undertaking about compliance with the Radcom Act. The sections on acceptance of undertakings (**new section 298C of the Radcom Act**) and enforcement of undertakings (**new section 298D of the Radcom Act**) are drafted in similar terms to **new sections 205W** and **205X** of the BSA as outlined above.

Infringement notices

New Part 14E of the BSA provides a regime of infringement notices for contraventions of designated notice provisions (**new section 205XAA**). The Bill creates a number of new designated notice provisions.

Item 11 of the Bill inserts **new section 65B** which makes sections 62, 63, 64 and 65 of the BSA designated notice provisions. Sections 62, 63, 64 and 65 are the notification provisions in Part 5 (control of commercial broadcasting licences and datacasting transmitter licences) which require a number of changes, for example, in relation to the control and directorships of broadcasters, to be communicated to ACMA. Note that section 65 provides that a person in control of a commercial television broadcasting licence or a commercial radio broadcasting licence must notify ACMA of newspaper interests.

Items 30 and 32 of the Bill insert **new subsections 139(1A), (1B) and (1C)** and **new subsections 139(3A), (3B) and (3C)**. These new provisions provide that if a:

- commercial television broadcasting licensee (**new subsection 139(1A)**), or
- commercial radio broadcasting licensee (**new subsection 139(3A)**)

breaches the standard licence condition to keep accounts (section 205B), they commit an offence. **New subsections 139(1B) and (3B)** make these strict liability offences. **New**

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subsections 139(1C) and (3C) make new subsections 139(1A) and (3A) designated infringement notice provisions.

If an authorised infringement notice officer has reasonable grounds to believe that a person has contravened a designated infringement notice provision they may give them a written notice warning that they may be given an infringement notice (**new section 205XA**) or they may give the person an infringement notice (**new section 205Y**). However, **new subsection 205Y(4)** provides that an infringement notice cannot be given unless the person has previously been given a formal warning under **new section 205XA** relating to that contravention or a similar contravention. An authorised infringement notice officer in exercising power under Part 14E is to have regard to any relevant guidelines that are in force relating to ACMA's enforcement powers (**new subsection 215(2)**).

New section 205Z outlines the matters that are to be included in an infringement notice, including a statement to the effect that if the penalty specified is paid to ACMA (on behalf of the Commonwealth) within the requisite period that proceedings will not be brought in relation to the alleged contravention (**new paragraph 205Z(d)**). **New subsection 205ZC(2)** provides that any liability for the alleged contravention will be discharged if the penalty is paid in accordance with the infringement notice. **New section 205ZA** outlines the amount of the penalty (a pecuniary penalty equivalent to 60 penalty units for a commercial or subscription television broadcasting licensee and in any other case a pecuniary penalty equivalent to 10 penalty units). **New section 205ZB** provides that an infringement notice may be withdrawn within 28 days and if the penalty had been paid that the Commonwealth is liable to refund the penalty.

New section 205ZD outlines the effect of **new Part 14E** on criminal proceedings. Proceedings can be brought against a person for an alleged contravention of a designated infringement notice provision if an infringement notice is not given to the person, or where it is given but is later withdrawn, or where the person does not comply with the infringement notice (**new paragraph 205ZD(b)**).

Guidelines

Item 50 inserts a **new section 215** which provides that ACMA is to formulate guidelines relating to the ACMA's powers in relation to breaches of licensing provisions, information gathering, civil penalties, injunctions, enforceable undertakings, giving infringement notices, and referring matters to the DPP.

The Explanatory Memorandum states:

The guidelines are not intended to be prescriptive or limiting. The ACMA is to retain the discretion to seek the sanctions it considers appropriate in light of the particular circumstances of the case.⁴⁴

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New subsection 215(4) provides that the guidelines must be in the form of a legislative instrument and the Note to the subsection refers the reader to Part 3 of the *Legislative Instruments Act 2003* (LIA). Part 3 of LIA concerns consultation before making legislative instruments. Section 17 of the LIA outlines the circumstances in which rule-makers should consult before making legislative instruments. Possible forms of consultation include:

notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.⁴⁵

New subsections 215(5) and (6) require ACMA to ensure that guidelines in regard to the powers conferred on the ACMA by:

- Division 4 of Part 8B (remedies relating to international broadcasting licences)
- Part 10 (breach of licensing provisions)
- **new Part 14B** (civil penalties)
- **new Part 14D** (enforceable undertakings), and
- the powers conferred on an authorised infringement notice officer by **new Part 14E**

are in force at all times after the commencement of **new section 215**.

New section 215 is to commence on a day to be fixed by Proclamation or no later than the day after three months from the date of Royal Assent. Accordingly, finalisation of the guidelines – including consultation – in relation to the enforcement powers specified in new subsections 215(5) and (6) must occur within a period just over three months. Paragraph 18(2)(b) of the LIA provides that a rule-maker may be satisfied that consultation is unnecessary or inappropriate if an instrument is required as a matter of urgency. Further, section 19 of that Act provides that the fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument.

Concluding comments

If implemented the amendment will provide ACMA with greater flexibility to respond to breaches of the BSA and, to a lesser extent, the Radcom Act. In particular, the amendment will establish a civil penalty regime for breaches of the BSA with the key features being that:

- ACMA will assume the prosecutorial discretion to prosecute breaches attracting civil penalties itself in the Federal Court, and

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- the standard of proof for these prosecutions is the civil standard of proof, that is, on the balance of probabilities.

Little in this Bill is particularly contentious.

Endnotes

1. Productivity Commission, *Broadcasting Inquiry Report No 11*, [Report](#), AusInfo, Canberra, 3 March, 2000.
2. Department of Communications, Information Technology and the Arts, *Proposal for new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority*, Canberra, August 2003.
3. Only in the case of commercial television, and only then in the areas of Australian content and children's television, has the BSA required ACMA to determine mandatory program standards.
4. Australian Broadcasting Authority, Commercial radio inquiry (commonly referred to as "Cash for comment"), [Report](#), June 2001.
5. The first licence condition provided that the radio station was to maintain a regime of on-air and off-air disclosure of commercial agreements between presenters and their sponsors. It also called for the station to conduct a compliance program which required presenters and staff to undertake training concerning the obligations imposed BSA, the Commercial Radio Codes of Practice and licence conditions. The second licence condition requires that advertisements be distinguished from other program matter. Commercial radio inquiry, *ibid*.
6. Australian Broadcasting Authority, *ABA to Refer 2UE Breaches of Disclosure Standard to DPP*, [press release](#), NR90/2003, 4 December 2003.
7. *ibid*.
8. The finding was that 2UE had breached s 7(1) of the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000*.
9. Australian Broadcasting Authority, *ABA to Refer 2UE Breaches of Disclosure Standard to DPP*, *op. cit*.
10. *ibid*.
11. This additional licence condition will require 2UE to engage an approved independent third party to monitor and report on the John Laws program, for limited periods. ACMA considered this would provide an ongoing incentive to ensure compliance with the disclosure requirements.
12. Australian Broadcasting Authority, *2UE prosecution not to proceed*, [press release](#), NR66/2004, 29 June 2004.
13. *ibid*.

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14. Australian Broadcasting Authority, *Commercial Radio Inquiry*, [Final Report](#), Sydney, August 2000.
15. *ibid.*. The discussion paper outlined a number of legislative options proposed by the ABA to strengthen its enforcement powers and sought comments on these proposals. The proposals included the:
 - introduction of sanctions against presenters for non-disclosure of arrangements under which they or any other person are entitled to receive a benefit in return for any on-air conduct
 - granting the ABA the power to require a licensee to broadcast an on-air statement of ABA findings with regard to any statutory, licence or code breaches by that licensee
 - granting the ABA wider powers to seek injunctions from the court, and
 - granting the ABA the power to direct advertising free periods for a specified period of time.
16. I. Ramsay, *Reform of the broadcasting regulator's enforcement powers*, [Report](#), Sydney, Australian Communication and Media Authority, November 2005.
17. Lyn Maddock, Foreword to report of I Ramsay, *of the broadcasting regulator's enforcement powers*, [Report](#), Sydney, Australian Communication and Media Authority, November 2005.
18. Ramsay, *op. cit.*, p. 5.
19. The fee is due and payable at the rate of 20 per cent per annum, calculated on the amount unpaid.
20. Ramsay, *op. cit.*
21. Section 137 BSA provides that if ACMA is satisfied that a person is providing a commercial television broadcasting service, a commercial radio broadcasting service, a subscription television broadcasting service, or a community broadcasting service, without a licence to provide that service, ACMA may issue a written notice to the person directing them to cease providing that service.
22. The sections to which these recommendations relate are currently subject to criminal penalties. In the case of the recommendation relating to a breach of additional licence conditions—the sections to which this recommendation relates are not currently subject to criminal penalties—Professor Ramsay recommend that this should not change.
23. The fee is due and payable at the rate of 20 per cent per annum, calculated on the amount unpaid.
24. The licence conditions are those conditions which, if breached, are currently subject to criminal penalties under section 139 BSA.
25. Australian Broadcasting Corporation, *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority*, [Submission to the Department of Communications, Information and the Arts](#), December 2005

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26. Australian Film Commission, *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority*, [Submission to the Department of Communications, Information and the Arts](#), December 2005
27. Free TV Australia, *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority*, [Submission to the Department of Communications, Information and the Arts](#), December 2005
28. Commercial Radio Association, *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority*, [Submission to Department of Communications, Information and the Arts](#), December 2005
29. See summary of submissions in previous section.
30. Ramsay, *op. cit.*, p. 38.
31. Ramsay, *op. cit.*, pp. 36–39.
32. A. Moses and D. Humphries, ‘House incident triggers review of regulation’, *Sydney Morning Herald*, 6 July 2006.
33. *ibid.*
34. Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, [Report](#), No. 95, Sydney, 2003, par 2.2.
35. [Explanatory Memorandum](#) to the Communications Legislation Amendment (Enforcement Powers) Bill 2006, p. 1.
36. A penalty unit equates to \$110 according to section 4AA *Crimes Act 1914*.
37. [Explanatory Memorandum](#), *op. cit.*, p. 36.
38. *ibid.*
39. [Explanatory Memorandum](#), *op. cit.*, p. 1.
40. Note new subsection 205G(2) provides that subsection 205G(1) does not exclude the operation of the *Director of Public Prosecutions Act 1983* (Commonwealth).
41. Refer to the table detailing the corresponding existing criminal offences and new civil penalty provisions and the relevant maximum penalties in the Explanatory Memorandum, pp. 41–42.
42. [Explanatory Memorandum](#), *op. cit.*, p. 43.
43. *ibid.*, p. 2.
44. *ibid.*, pp. 50–51.
45. Subsection 17(3) of the *Legislative Instruments Act 2003* (Cth).

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