Submission 013
Received 10 May 2013

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10 May 2013

Committee Secretary
Joint Select Committee on Broadcasting Legislation
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Joint Select Committee on Broadcasting Legislation

I refer to your recent telephone conversation with Kathleen Silleri.

As foreshadowed, I enclose, for the Committee's consideration, a submission from the Australian Communications and Media Authority (the ACMA).

While the ACMA stands available to assist the Committee with information on all the issues currently under consideration, the attached submission focuses on the Committee's consideration of:

> *"on air reporting of ACMA findings regarding Broadcasting regulation breaches".*

This is an issue on which the ACMA has previously engaged publicly. It is also one in relation to which previous ACMA research may offer some insights.

The ACMA would be happy to provide any further advice or assistance to the Inquiry.

Yours sincerely

Jennifer McNeill
General Manager
Content, Consumer and Citizen Division
Australian Communications and Media Authority

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ACMA submission to the Joint Select Committee on Broadcasting Legislation

On-air reporting of ACMA findings regarding broadcasting regulation breaches

MAY 2013

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Summary

The Australian Communications and Media Authority (ACMA) thanks the Joint Select Committee for Broadcasting Legislation for the opportunity to make a submission regarding on-air reporting of ACMA findings regarding broadcasting regulation breaches.

The ACMA is a regulatory agency with a remit spanning broadcasting, radiocommunications, telecommunications, and the internet. Relevantly, for this Inquiry, its role includes the investigation of complaints about compliance with rules governing broadcast content.

For some time, the ACMA has had concerns about the lack of flexible and proportionate enforcement responses available to it when it finds breaches of broadcasting regulations – including those contained in broadcasting codes of practice. The ACMA has been consistently public about those concerns.

As a power within the ACMA's regulatory discretion, the power to require on-air reporting of ACMA findings would be used only in appropriate cases. It is considered that enabling the ACMA to compel a broadcaster to make on-air statements about breach findings would:

> improve the ACMA's ability to respond proportionately to breaches of broadcasting regulations;

> improve compliance incentives for licensees;

> facilitate more relevant and responsive regulatory outcomes; and

> better align with public expectations of the broadcasting regulatory regime.

In this latter regard, the ACMA notes research that shows viewers believe on-air corrections are an appropriate response to most breaches.

The ACMA also notes a similar power exists, and works well in other jurisdictions including the United Kingdom and New Zealand.

In addition to the power to compel on-air statements the ACMA can see the benefit of a complementary power to direct broadcasters to publish online statements. However, this submission deals with on-air statements only.

Background

Broadcasting regulation and the ACMA's role

The *Broadcasting Services Act 1992* (the BSA) establishes a framework that combines direct regulation through standards and legislation with co-regulation through the development and registration of industry codes of practice.

Codes of practice

Some aspects of program content are governed by codes of practice that are developed by industry groups representing the various broadcasting sectors. Codes of practice are registered by the ACMA if it is satisfied that:

> The code provides appropriate community safeguards for the matters that it covers;

> The code is endorsed by a majority of providers of broadcasting services in that section of the industry; and

> Members of the public have been given an adequate opportunity to comment.

National broadcasters notify their codes to the ACMA.

The various codes of practice typically contain community safeguards in relation to matters such as fairness and accuracy in factual programs, privacy, vilification, advertising, classification and decency and complaints-handling.

Program standards

Program standards are determined by the ACMA as required by the BSA (in the case of the Australian Content Standards and Children's Television Standard) or where a code of practice fails or no code of practice has been developed by industry with respect to an issue of particular concern.

There are currently program standards covering:

> Australian content on commercial television.

> Commercial influence on commercial radio current affairs programs;

> Children's programming on commercial television; and

> Anti-terrorism on narrowcast services.

Compliance with a program standard is a licence condition under the BSA.

Licence conditions

The BSA includes a number of licence conditions made by the Australian Parliament including those relating to compliance with program standards, captioning, tobacco advertising, political and election matter, material classified 'refused classification', local content and local presence.

The ACMA also has the power to impose additional licence conditions on individual licensees.

Investigations

Part of the ACMA's role is to conduct investigations into broadcasters' compliance with the relevant codes of practice, licence conditions and program standards. Generally, investigations are initiated in response to a complaint. However, the ACMA may initiate its own investigations (although it only does so in exceptional circumstances) and conduct investigations at the direction of the Minister.

Under the BSA, a complaint about a broadcaster's compliance with a code of practice can be made to the ACMA if the complainant has complained to the broadcaster and either:

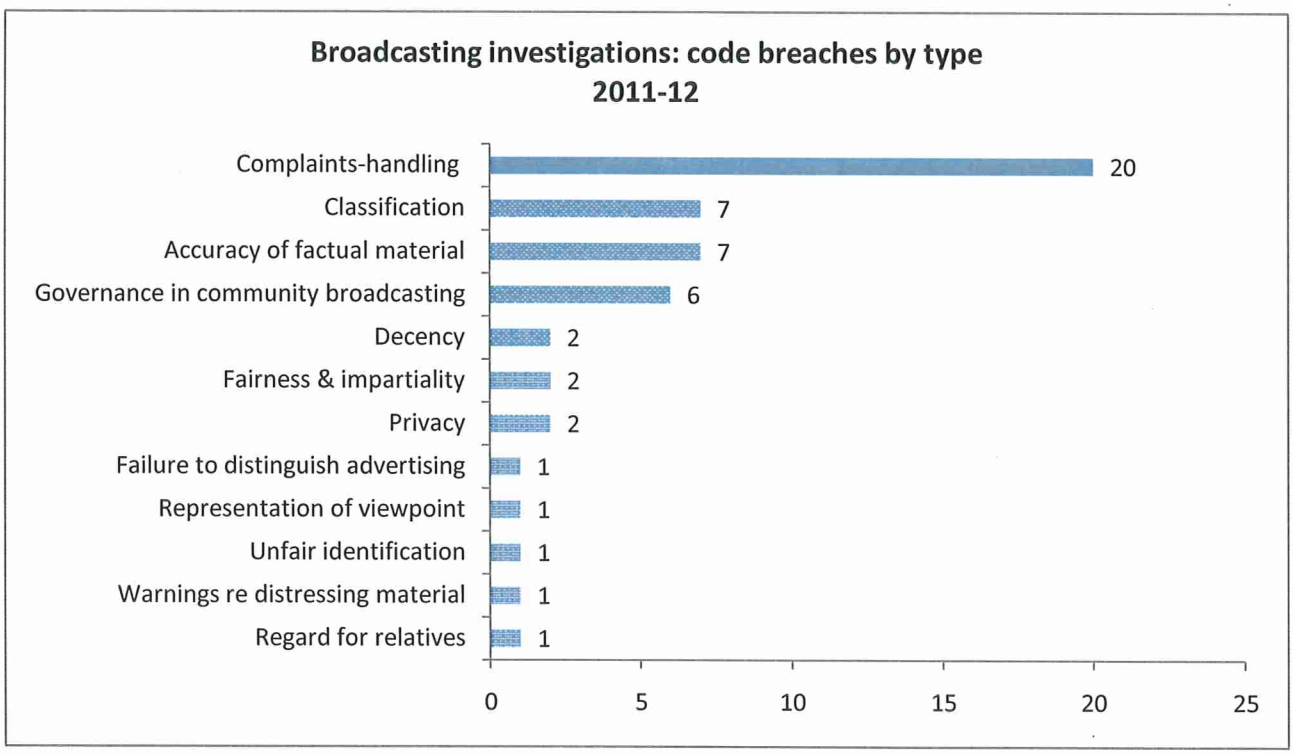
> not received a response within 60 days after making the complaint; or

> received a response within that period but considers the response to be inadequate.

The ACMA investigates complaints made directly to it if they are about a licensee's compliance with a licence condition or a program standard.

In 2011-12 (the last full financial year for which statistics are available) the ACMA conducted 232 investigations into complaints about commercial, national, subscription and community broadcasters' compliance with broadcasting content regulations. Seventy-one of these investigations resulted in 107 breach findings[1], including 51 breaches of a code of practice. Figure 1 below provides an overview of the types of code breaches.

Figure 1 Broadcasting investigations: Code breaches by type 2011-12



The ACMA's existing powers in relation to breaches of broadcasting regulation

Where a broadcaster (other than the ABC or SBS) is found to be in breach of a code of practice, the ACMA may:

> agree to accept measures proposed by the licensee to improve compliance. These measures can include educating staff or changing procedures to improve compliance with the code;

> accept an enforceable undertaking offered by the licensee for the purpose of securing future compliance with the code; or

[1] The ACMA's investigations may consider several issues and therefore result in multiple breach findings.

> impose an additional licence condition.

Where there has been a breach of a licence condition, including a program standard, the ACMA may:

> agree to accept measures proposed by the licensee to improve compliance;
> accept an enforceable undertaking offered by the licensee for the purpose of securing future compliance with the licence condition;
> issue a remedial direction directing a licensee to take action to ensure that the licensee complies with the licence condition or is unlikely to breach that licence condition in the future;
> vary or revoke a licence condition, or impose an additional licence condition;
> suspend a licence for a specified period;
> cancel a licence;
> pursue a civil penalty in the Federal Court; or
> refer the matter to the Director of Public Prosecutions (DPP).

Adequacy of the current powers / the ACMA's use of the current powers

For some time, the ACMA has had concerns about the lack of flexible and proportionate enforcement responses available to it when it finds breaches of broadcasting regulations – including those contained in broadcasting codes of practice. The ACMA has been consistently public about those concerns.

While the ACMA has some 'high end' powers suitable for use in serious but rare cases (such as the ability to impose a licence condition or cancel or suspend a licence), it is lacking what are sometimes called 'mid-tier' powers, particularly with respect to code breaches.

The ACMA considers that the power to compel an on-air statement is an appropriate 'mid-tier' power that not only encourages future compliance but publicly acknowledges past conduct.

Currently, in negotiating remedial measures for a breach of a broadcasting regulation, the ACMA relies heavily on the goodwill of broadcasters. While some broadcasters are very receptive to the ACMA's findings, the need to promote an internal compliance culture and even the merits of 'remedying wrongs', that is not invariably the case.

While the acceptance of an enforceable undertaking can be an effective 'mid-tier' regulatory tool, such an undertaking cannot be accepted by the ACMA unless it is first offered by the broadcaster. Typically, enforceable undertakings are forward-looking in the sense of improving behaviour or effecting process changes going forward, rather than offering to remedy a specific 'wrong' associated with the breach found.

The incentives on a broadcaster to offer an enforceable undertaking in respect of a code breach are low. The only alternative action open to the ACMA (and which does not depend on the cooperation and goodwill of the broadcaster) is the imposition of an additional licence condition. The ACMA regards the imposition of an additional condition as a serious outcome that is best suited to high-end breaches or to damaging, repetitive conduct. Moreover, the imposition of an additional licence condition can be a lengthy and highly contested process and is constrained by sections 4 and 5 of the BSA and administrative law more generally. Recently, the Administrative Appeals Tribunal of Australia noted in a case dealing with this enforcement power:

> In exercising the power to impose a condition on the licence held by Today FM, we must do so in a manner which, in our opinion, will produce regulatory arrangements

that are predictable and stable, and deal effectively with breaches of the Code (s 5(1) of the Act). That power must be also exercised in a manner which, in our opinion, enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on Today FM and is commensurate with the seriousness of the subject breach (ss 4(2) and 5(2) of the Act)[2].

[2] *Today FM Sydney Pty Ltd and Australian Communications and Media Authority* [2012] AATA 544 (22 August 2012) at paragraph 39.

Proposed reform

When to compel an on-air statement and what should it look like?

When?

Accuracy remains the leading broadcasting code issue investigated by the ACMA. In 2011-12 investigations concerning the accuracy provisions of the codes of practice accounted for 22% of the ACMA's broadcasting investigations and 14% of code breach findings.

While the on-air statement is of particular utility in factual accuracy matters, the ACMA can also see its usefulness as a remedy in response to some other types of code breaches.

For example, in relation to the broadcast of content that offends standards of decency, or provokes or perpetuates violence, intense dislike or severe ridicule against a person or group of persons, it may be appropriate for a broadcaster to acknowledge the offending content on-air. In 2011-12, such matters accounted for 20% of investigations and 4% of code breaches.

The ACMA does not consider that the power to compel on-air statements would be necessary or appropriate in response to every breach finding, or even (for abundant clarity) every accuracy breach finding. In all cases, the decision to compel an on-air statement would be made having regard to the facts including the nature of the breach and its potential impact.

In the case of factual inaccuracy, consideration would be given to whether the error was significant to the story reported or materially misled the viewer, and the potential impact of the broadcast. However, where a breach of the privacy provisions has occurred, notwithstanding the adverse effect on an individual, an on-air statement may be less appropriate given the nature of the breach.

Of the 51 code breaches found in 2011-12, the ACMA would likely have considered the appropriateness of an on-air statement in respect of around 30% of those breaches, if it had had the power to compel such statements.

What?

The terms of the on-air statement broadcast would be determined by the ACMA following consultation with the relevant broadcaster. The on-air statement need not be very detailed or long but should at a minimum:

- Adequately identify the 'offending' broadcast including the date and program name; and, if appropriate, acknowledge that a complaint was made;
- Acknowledge the nature of the ACMA's breach finding; and
- As appropriate,
  - correct the error; or
  - acknowledge offence caused; or
  - both.

In exercising any power to compel the broadcast of an on-air statement, the ACMA would not direct a broadcaster to apologise for content but, rather, seek to ensure the viewer or listener is made aware of the ACMA's findings. This approach is consistent with the findings of the Ramsay report which is discussed in further detail.

Some examples of how an on-air statement could look are set out below.

> Following a viewer complaint, the ACMA has found that our program [program name] broadcast on [date] breached the [relevant code of practice] as it did not [for example, present factual material accurately and in context]. We wish to clarify that [XYZ]. A copy of the ACMA's finding has been published on our website.
>
> Or
>
> The ACMA has found that our program [program name] broadcast on [date] breached the [relevant code of practice] by broadcasting content that offended generally accepted standards of decency when [description] was broadcast. We regret any offence caused. A copy of the ACMA's finding has been published on the [ACMA or broadcaster's] website.

Accountability

As with its other powers, the ACMA would expect accountability measures to accompany this additional power. For example, currently, where the ACMA imposes a licence condition in response to a broadcasting code breach:

- its breach finding is subject to judicial review; and
- its decision to impose a licence condition is reviewable in the Administrative Appeals Tribunal.

Moreover, the ACMA would expect to develop 'Guidelines' similar to the kind mentioned in section 215 of the BSA with respect to the use of this power to provide clear guidance as to how and when the ACMA may use this power.

ACMA's response to submissions made to the JSC

The ACMA takes this opportunity to respond to some of the arguments made by submitters to the Joint Select Committee on Broadcasting Legislation against on-air statements.

Current codes already provide for on-air correction

The commercial broadcasters have noted that the current commercial codes allow for corrections/clarifications to be considered as a defence to accuracy breaches – where a broadcaster takes appropriate action to correct an error within a reasonable timeframe of being made aware of it, then no code breach with respect to the error will be found.

The ACMA values these provisions and their role in promoting a licensee's compliance culture. However, the ACMA notes that in 2011-12 only two broadcasters successfully relied on this 'defence':

- in investigation 2606, Commercial Radio station 3AW was found not to have breached the accuracy provisions of the code because it had acknowledged the reporting error on-air;
- in investigation 2672, the ABC was found not to have breached the accuracy provisions of its code of practice because it took appropriate action (online) to clarify the error within a reasonable timeframe.

In the seven breaches of factual accuracy found in 2011-12, none of the broadcasters concerned sought to rely on this 'defence'.

In terms of the use of such statements after the ACMA has made accuracy breach findings, in 2011-12 only one broadcaster addressed the findings on the internet and none broadcast an acknowledgment of the finding or related correction on-air.

Since the reporting year 2011-12, there have been two occasions on which broadcasters have made on-air statements about the ACMA's findings namely:

> the ABC with respect to a breach finding about *Media Watch*; and

> commercial radio station 5AA with respect to a 'decency' breach finding about *The Bob Francis Show*.

While the ACMA commends these actions, they can fairly be described as atypical and they were dependent almost entirely upon the goodwill of the broadcasters involved and not upon the regulatory framework supporting code compliance.

On-air statements will take up too much air-time

The ACMA does not accept that on air statements or correction would take up too much air time. As noted above, the ACMA considers the statements would be quite short – perhaps typically taking not more than thirty seconds.

In any event, the 'expense' of the air time required to broadcast the statement would serve as an appropriate compliance incentive to deter future breaches.

Viewers don't want to watch/listen to on-air statements while watching/listening to their favourite program

The ACMA notes the research (set out below) which shows that, even taking a tiered approach to the severity of breaches, viewers believe on-air corrections are appropriate in most cases.

The statements would be made too long after the original broadcast

The ACMA notes broadcasters' concerns in this regard and acknowledges that there will be some cases in which the lapse of time between the offending broadcast and the on-air statement will be such that the broadcast of the statement will not be seen as an effective enforcement option. The ACMA considers that a complementary power enabling the ACMA to direct broadcasters to publish online statements about the ACMA's findings could be useful in these cases.

In any event, as outlined above, the use of such an enforcement power would be discretionary and a decision regarding the most effective enforcement option would be taken (as is current practice) on a case by case basis. The ACMA's use of the power could be dealt with in the 'Guidelines' suggested above.

ACMA research and previous considerations of the issue

ACMA Research

Community attitudes to the presentation of factual material and viewpoints in commercial current affairs programs

In 2008 the ACMA commissioned community attitudes research regarding current affairs programming on free to air television. The research, *Community attitudes to the presentation of factual material and viewpoints in commercial current affairs programs*, published by the ACMA in 2009, comprised quantitative and qualitative studies.

The quantitative research showed that the overwhelming majority (97%) of respondents agreed that broadcasters should make a correction of fact as soon as they became aware of a factual error being made. When asked about the form that such a remedy should take, 92% agreed that on-air corrections were an appropriate response to factual errors.

Respondents to the qualitative research were of the view that the responses required to inaccuracies broadcast should be sufficiently strong to deter broadcasters from making errors in the first place. It was considered that an effective remedy would be one that:

> Makes viewers aware that an error has been made, so as to improve awareness that the programs do on occasion contain errors and thus manage the viewers' expectations with respect to those programs; and

> Rectifies the potential harm that the error may have caused to a person or company, whether it be personal or financial.

Respondents took a tiered approach to remedies and were of the view that the remedy applied should reflect the perceived seriousness of the breach:

> 'Level 1' errors were considered most serious and were those that the respondents felt should not be allowed to have occurred in the first place including, for example, errors caused by conscious omissions or distortions of key facts;

> 'Level 2' errors included inaccuracies or unfair representations resulting from the reporting techniques of sensationalist journalism, such as 'ambushing' interviewees, and the use of hidden cameras and unreliable sources; and

> 'Level 3' errors, being the by-product of poor journalism such as inadequate research.

Notably, respondents considered an on air correction could be an appropriate remedy in relation to each tier. However, in relation to Level 3 errors respondents considered that where the error has some impact on the story line, then a correction should be made publicly on air, otherwise it could be done privately for example, through a letter to the affected party.

A copy of the research can be found on the ACMA's website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311852.

Previous considerations of the issue

Productivity Commission: *Broadcasting Inquiry Report* (Report No. 11)

In 2000, the Productivity Commission published its Broadcasting Inquiry Report (Report No. 11) which recommended that:

> Licensees found to be in breach of a relevant licence condition be required to broadcast an on-air announcement of the breach finding and subsequent action during the relevant program or timeslot; and

> The ACMA's predecessor organisation , the ABA, be given the power to issue directions for action to broadcasters found in breach of a relevant licence condition.

Professor Ian Ramsay: *Reform of the broadcasting regulator's enforcement powers*

In 2004-5 at the request of the ABA, Professor Ian Ramsay of the Melbourne University examined the effectiveness of the ABA's enforcement powers. Professor Ramsay found that factual accuracy in news and current affairs programs was a concern and recommended that the regulator be provided with the power to order on air statements for a breach of a licence condition or a code of practice.

An extract of the Ramsay Report is at **Appendix 1**.

Appendix 1

Extract from *Reform of the broadcasting regulator's enforcement powers*, Professor Ian Ramsay, November 2005, pp 117-124

On-air statements of ABA investigation findings

The issue of whether the ABA should have the power to order broadcasters to make on-air statements of findings by the ABA in relation to its investigations has been considered over the course of several years. This part of the report:

> outlines the existing power of the ABA in relation on-air statements;

> summarises the history of the consideration of this issue;

> outlines the rationale for such a power;

> outlines the power other broadcasting regulators have to order on-air statements; and

> recommends that the ABA be given the power to order on-air statements of findings of ABA investigations relating to breaches of codes of practice and licence conditions.

Existing power of the ABA in relation to on-air statements

There is no specific provision in the BSA which permits it to order commercial broadcasters to make on-air statements. However, there is specific provision in the BSA in relation to on-air statements and national broadcasters (the ABC and the SBS). Section 152 of the BSA provides that if, having investigated a complaint, the ABA is satisfied that:

> the complaint is justified; and

> the ABA should take action to encourage the ABC or the SBS to comply with the relevant code of practice;

the ABA may, by notice in writing to the ABC or the SBS, recommend that it take action to comply with the relevant code of practice and take such action in relation to the complaint as specified in the notice.

Section 152(2) further provides that "other action may include broadcasting or otherwise publishing an apology or retraction". Section 153 provides that if the ABC or the SBS, as the case may be, does not, within 30 days after the recommendation is given, take action that the ABA considers to be appropriate, then the ABA may give the Minister a written report on the matter. The Minister must cause a copy of the report to be laid before each House of Parliament within 7 sitting days of that House after the day on which the Minister received the report.

Previous consideration of this issue

In 2000, the Productivity Commission published its report titled *Broadcasting Inquiry Report* (Report No 11). In this report, the Productivity Commission recommended that:

> licensees found to be in breach of a relevant licence condition be required to broadcast an on-air announcement of the breach finding and subsequent action during the relevant program or timeslot; and

> the ABA be given the power to issue directions for action to broadcasters found in breach of a relevant licence condition.

In the August 2000 report of the ABA titled *Commercial Radio Inquiry* there is a section titled "The Need for Legislative Change". One of the recommendations in this section of the report is that the ABA have the power to require on-air corrections or the findings of ABA investigations to be broadcast. It is stated in the report:

> This remedy would give the Authority the power to direct a licensee to broadcast any breach findings by the Authority and to disclose relevant available facts to listeners, where this had not already been done. It may also be an appropriate remedy in respect of other breaches of Codes, for example, where factual material has been presented inaccurately.

In early 2001, the Department of Communications, Information Technology and the Arts published a discussion paper titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*. One of the issues raised for discussion in the paper is broadcasting on-air statements. The discussion paper states:

> The ABA could be given 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. It is intended that this power would only be used for serious breaches of a code. For consistency, this power would also be available where a particular code has been replaced by an ABA standard. It could also apply to both commercial and national broadcasters, replacing the existing report to Parliament process for the national broadcasters.
>
> The ABA would have the power to specify:
> - the wording of the statement;
> - when the statement is to be made; and
> - how often it is to be repeated.
>
> To protect the legal rights of the licensee, it is proposed that this power only be available for the ABA to use:
> - when findings have been made as a result of an investigation conducted by the ABA;
> - when the on-air statement is confined to a statement of the findings of that investigation; and
> - subject to the licensee having appeal rights to the AAT from a decision of the ABA to require such a statement, including the ABA's specifications of the form and timing of the statement.

The Department received several submissions which commented upon this particular proposal. The Federation of Australian Radio Broadcasters (FARB) stated that:

> In principle, the commercial radio industry accepts that where a station has been found to have committed a serious breach of the Act, or a serious and sustained breach of a Code of Practice, on-air disclosure may be appropriate.

However, FARB stated that it would not endorse unfettered ABA powers in this regard and that any amendments to the BSA must contain the limits included in the Department's discussion paper. In addition, FARB stated that the scheduling of any statement should have regard to the time and nature of the offence and the ABA should not have the power to make an order that extends beyond 5 days. The time should be subject to agreement between the ABA and the licensee and the announcement itself should not occupy more than one minute of airtime.

The Federation of Australian Commercial Television Stations (FACTS) stated in its submission that it "strongly opposes" giving the ABA the power to order that on-air statements be broadcast. FACTS stated that the proposal would:

- impinge upon freedom of speech;
- intrude upon the independence of media operators from government agencies in relation to the determination of media content; and
- raise significant legal issues relating to defamation proceedings. According to FACTS, a broadcaster will generally not broadcast a correction unless it is in settlement of all claims so that the broadcaster can be assured that it will not be used against it in any future litigation. FACTS stated that if a correction is broadcast it may remove defences to defamation proceedings that might otherwise be available.

In addition, FACTS stated that there exists already significant publicity for breaches by licensees of codes of practice and licence conditions. FACTS noted in its submission that the ABA publishes findings on its website, in its annual report and, in relation to serious breaches, issues a media release.

The ABA and SBS also made submissions to the Department and both supported the existing power of the ABA to make recommendations to the national broadcasters and opposed the ABA being given the power to order the national broadcasters to make on-air statements. The ABC stated in its submission:

> The independence of the ABC carries with it substantial responsibilities of transparency and accountability. These place obligations on the ABC which are different from those of commercial broadcasters, and which require the ABC to be answerable to the Parliament and the people of Australia in more profound and visible ways than any commercial broadcaster. Broadcasting legislation acknowledges this.

On 7 August 2001, the General Manager of the ABA wrote to the Department of Communications, Information Technology and the Arts, commenting upon the submissions that had been received in relation to the Department's discussion paper. In relation to on-air statements, the General Manager wrote:

> The ABA agrees that a statutory power to order on-air statements needs to be clearly drafted and specific in its application. On this basis, the ABA proposes that the power to order such statements should be limited to investigation findings of a breach of the relevant industry code or a condition of licence. The legislative provisions could set out the types of matters for which this remedy would be available, together with the form that the statement should take. For example, it could provide that the broadcaster be required to state briefly the nature of the complaint; the particular code or condition against which the breach finding has been made; the nature of the finding; and the action (if any) the broadcaster proposes to take. In addition, the statute could provide guidance to the ABA on the times of day the statement should be made and the number of times it should be made. In terms of safeguards for broadcasters, the ABA supports the provision of a review mechanism – specifically, merits review by the AAT.

Rationale for on-air statements

In its 2000 report, the Productivity Commission notes that on-air statements enhance accountability and transparency on the part of broadcasters. The Commission also observes that on-air statements promote the importance of codes of practice as well as complaints mechanisms and to allow the ABA to direct broadcasters to make on-air statements is an appropriate remedy for breaches of licence conditions.[31]

In addition, where a mistake in a public broadcast has resulted in a breach of a code of practice or a license condition, it is appropriate there be a public correction by the

broadcaster. The fact that the results of ABA investigations of breaches of codes of practices and conditions of licences are reported in the ABA annual report and on the ABA website may not sufficiently remedy the mistake that has been broadcast. Furthermore, the ability to have mistakes in public broadcasts corrected can be viewed as a way of maintaining and increasing public confidence in the quality of broadcasting.

Powers of other broadcasting regulators to order on-air statements

Section 5 of the report provides an overview of the enforcement powers of other broadcasting regulators. Two of these regulators – Ofcom (the UK regulator) and the Broadcasting Standards Authority (the New Zealand regulator) have the power to order on-air statements by broadcasters.

In the case of the Broadcasting Standards Authority (BSA), s 13(1) of the *Broadcasting Act 1989* provides that if, in the case of a complaint referred to the BSA under s 8 of the Act, the BSA decides the complaint is justified, in whole or part, the BSA may make an order:

> Directing the broadcaster to publish, in such manner as shall be specified in the order, and within such period as shall be specified, a statement that relates to the complaint and that is approved by the BSA for the purpose.

Section 13(4) of the Act further provides that a statement broadcast pursuant to an order of the BSA under s 13(1) is deemed for the purposes of the New Zealand *Defamation Act 1992* to be a notice published on the authority of a court (which means it is a publication protected by qualified privilege).

Ofcom also has the power to order on-air statements pursuant to the *Communications Act 2003* (s 236), and the *Broadcasting Act 1990* (ss 40 and 109). Section 236 of the Communications Act provides that if Ofcom is satisfied:

- that the holder of a licence to provide a television licensable content service has contravened a condition of the licence; and
- that the contravention can be appropriately remedied by the inclusion in the licensed service by a correction or a statement of findings (or both);

Ofcom may direct a licence holder to include a correction or a statement of findings (or both) in the licensed service.

Section 236 further provides:

- Ofcom may determine the form of the correction or statement of findings and what programs and at what time or times the statement is to be broadcast;
- Ofcom cannot give a person a direction unless the person has been given a reasonable opportunity of making representations to Ofcom; and
- where the holder of a licence includes a correction or a statement of findings in the licensed service pursuant to a direction of Ofcom, the person may announce that this is done in pursuance of a direction of Ofcom.

Recommendation

It is recommended that the ABA have the power to require a licensee to broadcast an on-air statement which reports the results of an ABA investigation which has found a breach of a licence condition or a code of practice. The justifications for granting this power to the ABA include, as stated above, enhancing the accountability of broadcasters, promoting the importance of codes of practice, and maintaining and increasing public confidence in the quality of broadcasting.
It is further recommended that:

- the ABA have the power to determine the wording of the on-air statement and the time or times when the statement is to be broadcast;
- the on-air statement may, at the discretion of the holder of the licence, include a statement that it is being made at the direction of the ABA; and
- the decision of the ABA to require an on-air statement, including the ABA's specifications of the form and timing of the statement, be subject to review by the AAT (as previously indicated by the ABA in its correspondence with the Department of Communications, Information Technology and the Arts).

It is not recommended that the amendment to the BSA granting this power to the ABA contain detailed provisions as to matters such as the wording of the on-air statement. This is not the approach that has been taken where other broadcasting regulators have this power. In addition, it can be expected that the wording of the statement will be the subject of negotiations between the ABA and the holder of the licence. This is the approach adopted by Ofcom based on correspondence received from that regulator. Flexibility should be permitted in relation to the wording of the on-air statement which reflects the nature of the findings of the ABA investigation and also the negotiations between the ABA and the holder of the licence. Prescribing a particular format for on-air statements can unduly limit the flexibility required in this situation and may result in the broadcasting of on-air statements that, according to either or both of the holder of the licence and the ABA, are not as suitable to deal with the findings of the ABA investigation as they otherwise could be.

It is not recommended that the power to order on-air statements apply to the national broadcasters. There are several reasons for this. First, evidence from the ABA indicates that ABA investigations of the national broadcasters are very few in number when compared to investigations of other broadcasters. Second, the national broadcasters are subject to accountability mechanisms to Parliament that do not exist in relation to other broadcasters. Given that one purpose of granting the ABA the power to order on-air statements is to enhance accountability, the national broadcasters are already subject to accountability mechanisms that do not apply to other broadcasters. Third, the national broadcasters are subject to legislation which ensures their independence from directions by or on behalf of the government and allowing the ABA to order on-air statements by the national broadcasters may be in conflict with these provisions. Finally, under the existing provisions of the BSA which apply to the national broadcasters (and which would remain in operation if the recommendation in this report relating to on-air statements is implemented), if a national broadcaster does not follow a recommendation of the ABA to broadcast a statement, including an apology or retraction, the Minister is to be advised and a written report of the ABA relating to the matter is to be tabled in each House of Parliament. The result is that a decision by a national broadcaster not to follow an ABA recommendation is subject to the scrutiny of Parliament.

One of the objections of FACTS to this recommendation, when it was raised publicly in the discussion paper of the Department of Communications, Information Technology and the Arts, was that if there is a threat of defamation proceedings, a broadcaster will generally not broadcast a correction unless it is in settlement of all legal claims because a correction or apology may remove defences to defamation proceedings that might otherwise be available. I believe there are three responses to this concern. First, the recommendation does not include granting to the ABA the power to order a broadcaster to broadcast an apology. The recommendation is limited to an order to broadcast the findings of a breach of a licence condition or a code of practice. Second, it was noted above that in the case of New Zealand, where the Broadcasting Standards Authority orders a broadcaster to publish a statement, the statement is deemed to be a notice published on the authority of a court for the purposes of the New Zealand Defamation Act 1992 and the statement therefore receives the protection of qualified privilege. A similar approach could be considered for Australia.

Third, few ABA investigations raise issues relating to defamation. Where they do, the fact that defamation proceedings are underway or threatened could be a factor the ABA considers in deciding whether to make an order to broadcast an on-air statement.