

**GOVERNMENT RESPONSE
INQUIRY INTO THE EFFECTIVENESS OF THE BROADCASTING CODES
OF PRACTICE**

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Australian Government

Senate Committee on Environment, Communications and the Arts

Inquiry into the effectiveness of the broadcasting codes of practice

Australian Government Response to the Committee's Report

July 2009

Introduction

On 20 March 2008, the Senate referred the matter of the effectiveness of broadcasting codes of practice to the Standing Committee on Environment, Communications and the Arts, for inquiry and report.

The terms of reference for the inquiry covered the frequency and use of coarse and foul language (swearing) in programs; the effectiveness of the current classification standards as an accurate reflection of the content contained in the program; and the operation and effectiveness of the complaints process currently available to members of the public.

The Committee received over 80 submissions including from representatives of the television and radio industries, as well as from family and community groups and the public. On 19 June 2008 the Committee tabled its report to the President of the Senate. The report makes 20 recommendations. The recommendations cover issues relating to the: complaints process; regulatory environment; compliance process; and enforcement process.

Co-regulation of television and radio broadcasting services

Commercial television and radio services are provided under a co-regulatory legal framework that recognises the importance of ensuring that content reflects community standards and provides a means by which the community can formally express its views to commercial broadcasters.

The *Broadcasting Services Act 1992* requires sections of the commercial broadcasting industry to develop self-regulatory codes of practice to deal with the content of television and radio programs and methods for handling complaints. The Australian Communications and Media Authority (ACMA) is responsible for registering these codes.

- The Commercial Television Industry Code of Practice includes classification guidelines for the broadcast of programs and advertising within particular time periods. The guidelines relate to a range of matters including adult themes, offensive language, violence, sex and nudity and are intended to be in accordance with prevailing community attitudes.
- The Subscription Broadcast Television Codes of Practice also includes guidelines for the classification of programs.
- The Commercial Radio Codes of Practice requires radio content to meet contemporary standards of decency having regard to the likely characteristics of the audience.

Additionally the Australian Content Standard requires minimum levels of Australian programming to be shown on commercial free-to-air television to ensure that commercial television services develop and reflect a sense of Australian identity, character and culture.

The Children's Television Standards (CTS) also sets out rules for the quantity, classification and scheduling of children's programming on commercial free-to-air television, including restrictions on advertising directed to children, to ensure that children have access to programming that is suited to their needs while also ensuring that children are protected from television content that is unsuitable for them.

Complaint handling

ACMA handles certain complaints about television and radio content. In the first instance, complaints about content should be submitted in writing to the relevant broadcaster within 30 days of the broadcast at issue. However, under the *Broadcasting Services Act 1992*, if a complaint is not answered within 60 working days of being received or satisfactorily dealt with, then the matter may be referred to the ACMA. Subscription television broadcasters have 60 days to respond. Complaints about issues covered by the Australian Content Standard and the CTS can be made in writing directly to ACMA.

A number of other issues related to broadcasting content are not handled by ACMA. Some other relevant agencies include:

- Australian Competition and Consumer Commission - for complaints about false, misleading and deceptive conduct in advertising;
- Advertising Standards Bureau - for complaints about the decency of advertisements, whether on television, radio, Internet, print or elsewhere; and
- Australian Press Council – for complaints about the print media, including articles in newspapers and magazines.

On 27 June 2008 the Australian National Audit Office (ANAO) released a performance audit titled *Regulation of Commercial Broadcasting*. The audit examined whether ACMA is effectively discharging its regulatory responsibilities under the *Broadcasting Services Act 1992* relating to commercial broadcasting services.

An effective complaints process is a central requirement for an effective co-regulatory environment and the ANAO audit found that the majority of broadcasting complaints have been actioned. However, both the ANAO audit report and the Senate Committee's report highlight areas where improvements can be made.

The two reports recommend that current complaints processes should improve tracking of complaints and accept complaints via a wider range of media, including email. The timeliness of complaint resolutions was also identified as a common issue.

ACMA are currently implementing ANAO recommendations and in 2008-09 their activities included:

- identification of ACMA 'best practice' investigations processes;

- production of an investigations manual that documents best practice processes, ensuring greater consistency across the breadth and diversity of ACMA's investigations; and
- creation of an ACMA forum to promote more efficient use of resources through information-sharing across teams.

Recommendations and Australian Government Response

The Australian Government has considered the Committee's report and is pleased to provide the following response. The Senate Committee's recommendations are addressed in turn below.

Recommendation 1

The Committee recommends that, no later than the end of 2010, the government considers a review of ACMA, with a focus on ACMA's role in the broadcasting co-regulatory system, to determine if ACMA is effectively working with relevant industry bodies to maintain a fair balance in Australia's broadcast media.

Australian Government Response

The Australian Government does not support this recommendation.

The effectiveness of ACMA in discharging its regulatory responsibilities under the *Broadcasting Services Act 1992* relating to commercial broadcasting services has only recently been examined by the Australian National Audit Office (ANAO). The ANAO performance audit titled *Regulation of Commercial Broadcasting* was released on 27 June 2008 and made a number of recommendations that ACMA has accepted and which are currently being implemented.

Recommendation 2

The Committee recommends that the provision of parental lock-out become an industry standard for digital televisions sold in Australia. The Committee also recommends that the feasibility of using datacasting to provide a more detailed description of program content and the reasons for a program's rating which could be accessed by the viewer.

Australian Government Response

The Australian Government supports this recommendation in principle, noting that the industry standard is currently under review by Standards Australia.

The current version of the television receiver standard is the voluntary industry standard *AS4933.1 – Digital television – Requirements for Receivers (Part 1: VHF/UHF DVB-T television broadcasts)*. The standard contains requirements in relation to the ability of a digital television receiver to act on parental guidance

information and enable parental guidance program lock-out. Consumer electronics suppliers certify that high definition televisions using the industry-licensed HD Tick logo mark are compliant with AS4933. The majority of integrated digital televisions sold in Australia are reported to be compliant with the industry standard.

The use of datacasting to provide additional information on television programs is a matter for broadcasters to consider. Implementation would require the cooperation of all broadcasters to supply the relevant information, and of receiver manufacturers to ensure that receivers can use and display the data.

Recommendation 3

The Committee recommends that ACMA investigate whether the inclusion of additional age-specific symbols in the G and PG categories offer any advantages over the current system.

Australian Government Response

The Government notes this recommendation and that a consistent approach is desirable between broadcasting industry codes of practice and the National Classification Scheme. This is because of the close linkages between the codes and the Scheme. Section 123(3A) of the *Broadcasting Services Act 1992* requires that, for the purpose of classifying films, television codes of practice are to apply the film classification system provided for by the *Classification (Publications, Films and Computer Games) Act 1995*. More generally, it is helpful for consumers that there is a degree of consistency between the classification markings used for broadcast material and those used by the National Classification Scheme.

The General (G) and Parental guidance recommended (PG) classification symbols used by the television codes of practice are consistent with the *Guidelines for the Classification of Films and Computer Games*. This enables viewers to make informed choices across entertainment media on the basis of consistent symbols.

The Minister for Home Affairs will ask the Standing Committee of Attorneys-General (Censorship) to consider whether changes to the G and PG symbols would offer advantages over the current classification markings used by the National Classification Scheme. ACMA will be consulted in consideration of this issue by Censorship Ministers.

Recommendation 4

Each industry code of practice should clarify terms used for classification and consumer advice as much as is practicable (eg. 'occasional', 'some' and 'frequent'). Codes should also contain a clear discussion on the principles for classification, such as 'impact', that may be used to determine a program's classification.

Australian Government Response

The Government agrees that codes of practice should be as clear as practicable on classification matters. At the same time codes should ensure they are flexible enough to allow content classifiers to make judgements about programs taking into account the context and other features of those programs.

The terms used in the industry codes of practice to classify television content should continue to be modelled on the *Guidelines for the Classification of Films and Computer Games*. Any clarification of the matters that determine the classification level of content, such as 'impact', should therefore be considered by the Standing Committee of Attorneys-General (Censorship). The Minister for Home Affairs will ask Censorship Ministers to consider the issues raised by the Committee.

The Government will ask ACMA to consider whether clarification of the terms used for consumer advice would offer advantages for the industry codes of practice.

Recommendation 5

The Committee recommends that ACMA and Free TV Australia investigate, as part of the current review of the Commercial Television Code of Practice, the issue of the appropriateness of the current evening time zones having regard to claims of changed patterns of television usage by children.

Australian Government Response

The Government notes this recommendation, but recognises that ACMA and Free TV Australia have undertaken research in this area which supports the continuation of the current evening time zones.

Free TV Australia has advised that recent ratings data indicates that the current classification time zones reflect child and adult viewing patterns, specifically that:

- from 8.30pm – 9pm, 15.0 per cent of children aged 0-17 years are viewing Free TV; and
- children aged 0-17 years make up 14.0 per cent of the total viewing audience at this time.

Free TV Australia notes that while it is true that some children and teenagers may be watching television after 8.30pm, ratings data shows that the majority of the audience is made up of adult viewers who wish to see more mature programming. It also indicates that those children who are watching are largely watching with an adult (60% of 5-12 year olds between 6pm to 9pm).

ACMA's research has shown that it is generally well-understood in the community that programming after 8.30pm is likely to be for mature audiences and that parental supervision is required at this time.

Recommendation 6

The Committee does not wish to tell television stations what they should or should not include in news and current affairs programming. However it recommends that ACMA, in consultation with broadcasters, review the sections of the Classification Code applying to news and current affairs programming, with regard to the use of graphic and disturbing imagery and excerpts from M or higher rated programs in news and current affairs broadcasting in early evening time zones.

Australian Government Response

The Government shares the Committee's concern not to interfere with the editorial independence of broadcasters' news and current affairs programming.

The Government notes that there are provisions in place to ensure viewers are appropriately warned about graphic and disturbing imagery. These include the following measures:

- the Commercial Television Industry Code of Practice requires prior warning to viewers when a news, current affairs, or other program which does not carry consumer advice includes material which is likely to seriously distress or seriously offend a substantial number of viewers;
- the warning must precede the relevant item in a news and current affairs program and precede the program in other cases; and
- such warnings must be spoken, and may also be written. They must provide an adequate indication of the nature of the material, while avoiding detail which may itself seriously distress or seriously offend viewers.

Recommendation 7

Free-to-air television stations should show the classification watermark throughout program promotion to increase viewer awareness of the classification of the program being promoted.

Australian Government Response

The Government recognises that, for some viewers, permanently visible displays on screen can obstruct, or distract from, programming.

The Government is not convinced that existing classification provisions in this area are not effective.

Recommendation 8

The Committee recommends that television broadcasters should give consideration to permanently displaying the classification symbol of a program on screen along with the letters indicating which classifiable elements are present in the program. The Committee believes that there is scope for broadcasters to place this information next to watermarks, which are now displayed by all free-to-air stations.

Australian Government Response

As noted in the response to Recommendation 7, the Government recognises that, for some viewers, permanently visible displays on screen can obstruct, or distract from, programming.

Furthermore, there is an extensive range of consumer advice provided to viewers, regarding the classification of television programming, specifically:

- the classification symbol must be displayed for at least 3 seconds as close as practicable to a program's start, as soon as practicable after each break and in any program promotion; and
- clearly visible classification symbols must accompany all press advertising of programs and all program listings in program guides produced by broadcasters.

For these reasons, the Government does not support the recommendation that television broadcasters should give consideration to permanently displaying the classification symbol of a program on screen next to existing watermarks.

Recommendation 9

The electronic programming guide on digital free-to-air television stations should contain the classification of the program being viewed and the consumer advice relevant to the program.

Australian Government Response

The Government notes this recommendation, and will request that ACMA bring it to the attention of free-to-air television broadcasters. Electronic program guides (EPG) are not mandatory or subject to particular regulation about their format which is a matter for the free to air television industry to consider.

ACMA has developed a number of principles and key performance characteristics that it will look for in relation to EPGs provided by free-to-air broadcasters as part of their digital television services. One of these principles is that EPGs must include parental guidance ratings to inform families.

ACMA will monitor the performance of industry EPGs against these principles, taking them into account when considering whether to use its powers to mandate industry codes or determine industry standards for digital commercial and national television services.

Recommendation 10

The Committee recommends that ACMA, in consultation with industry bodies for radio, considers implementing the use of verbal warnings in their next codes of practice.

Australian Government Response

The Government notes this recommendation.

ACMA will raise this issue with Commercial Radio Australia within the context of the current review of the Commercial Radio Code of Practice. ACMA will give particular consideration to how verbal warnings might be employed by broadcasters as one of a number of mechanisms to ensure that listeners are not surprised by the nature of content they may be exposed to.

Recommendation 11

The Committee recommends that all free-to-air commercial television stations should maintain a log of all telephone complaints received, including a short summary of the complaint, and provide that log to Free TV Australia and ACMA.

Australian Government Response

The Government notes this recommendation and that existing arrangements provide for summary information to be provided to Free TV Australia and ACMA.

Licensees are currently required to maintain a log of telephone complaints and record their substance and bring them to the attention of key staff. Licensees are then required to report quarterly to Free TV Australia on valid written complaints. Free TV Australia is required to provide a summary of this information to ACMA within 10 working days of receiving it.

ACMA has the discretion to seek more detailed information on complaints where it considers that this is appropriate.

Recommendation 12

All broadcasters should amend their codes of practice and website capabilities to allow viewers to make complaints about the code by email or electronically. Email and electronic complaints about code-related issues should receive the same response as a written complaint.

Australian Government Response

The Government supports this recommendation.

ACMA will raise this issue with Free TV Australia and Commercial Radio Australia within the context of the current reviews of the Commercial Television and Radio Codes of Practice, and with industry representative bodies relating to other broadcasters when appropriate.

Recommendation 13

Similarly worded complaints received by email, electronically or in writing may receive a standard written response from the broadcaster following notification to, and approval by, ACMA.

Australian Government Response

The Government supports this recommendation in part.

ACMA will raise this issue with Free TV Australia and Commercial Radio Australia within the context of the current review of the Commercial Television and Radio Codes of Practice, and with industry representative bodies relating to other broadcasters when appropriate.

ACMA notes that it is open to permitting licensees to deal with similarly worded complaints about the same broadcast with a standard written response. However, ACMA considers that prior notification to the regulator would be sufficient. Prior approval would be a departure from the approach taken under the co-regulatory framework as it could compromise the ability of broadcasters to resolve complaints promptly in the first instance without intervention by the regulator. One of the agreed objectives of the Commercial Television and Radio Codes of Practice in relation to handling complaints to licensees 'is to ensure that licensees respond promptly to written complaints ... and make every reasonable effort to resolve them.' If the complainant is not satisfied with the response, the matter may then be referred to the ACMA.

Recommendation 14

Codes of practice should contain a formal undertaking by broadcasters that they will direct complainants as appropriate. Industry bodies and ACMA should ensure that their staff are aware of how to re-direct complaints received in error and inform complainants where this occurs.

Australian Government Response

The Government notes this recommendation, and that the industry codes of practice contain requirements for complaint handling, including directing complainants to ACMA as appropriate.

ACMA advises that it will reiterate existing staff processes for the redirection of complaints received in error and will monitor compliance by industry with the current requirements to redirect complaints as appropriate.

Recommendation 15

The Committee recommends that, by the time of the next triennial review of free-to-air television codes of practice, broadcasters should seek to respond to all complaints received within 15 working days.

Australian Government Response

The Government notes this recommendation. The Commercial Television Code of Practice requires that complaints be responded to within 30 days. However, a broadcaster is able to respond in a shorter period if it wishes.

The Government will request that ACMA consult with the broadcasting industry on the incorporation of a shorter response period.

Recommendation 16

Each broadcaster should have a nominated complaints officer within the organisation whose sole role it is to respond to complaints. The officer should be separate from the program production and scheduling sections and from the area responsible for classifying or rating programs. Officers should receive relevant training in the appropriate code of conduct and complaint management. The contact details of the complaints officer should be published on the website of the broadcaster, industry body and ACMA.

Australian Government Response

The Government does not support this recommendation, and notes that broadcasters employ dedicated regulatory affairs staff who are responsible for coordinating responses to complaints.

Recommendation 17

Broadcasters should ensure that responses to complaints are comprehensive, deal with the substantive issue and are courteous in tone.

Australian Government Response

The Government notes this recommendation and will ask that ACMA bring it to the attention of the broadcasting industry.

Recommendation 18

ACMA should develop a practice of testing compliance with standards and codes of practice by conducting investigations into a sample of programs that may, in its opinion, raise issues with regard to the appropriateness of the classification received.

Australian Government Response

The Government does not support this recommendation as it is inconsistent with the co-regulatory framework. The co-regulatory approach to broadcasting requires broadcasters to respond, in the first instance, to complaints relating to their adherence to the industry codes of practice. Complaints may be referred to ACMA if the complainant is not satisfied with the response provided. Section 170 of the *Broadcasting Services Act 1992* allows ACMA to conduct investigations where community concern is evident.

Recommendation 19

In the event that SBS or the ABC fails to comply with an ACMA recommendation within a 14 days period of receiving such a recommendation, ACMA should automatically provide a report to the Minister on the matter.

Australian Government Response

The Government notes that ACMA currently has discretion to give the Minister a written report about a failure by a national broadcaster to comply with a recommendation. The Government does not support replacing this discretion with a requirement to report to the Minister within a specified timeframe. The discretion allows ACMA to consider the circumstances of the failure to take action before giving the Minister a written report on the matter.

Recommendation 20

ACMA should limit its use of unenforceable undertakings from broadcasters in relation to a breach of the code. The second time that a broadcaster is found to be in breach of the same part of the code within the duration of its code of practice, ACMA should use its existing powers to impose additional conditions on a license of the broadcaster. In the event of subsequent breaches, ACMA should use its powers to:

- Pursue a civil penalty;
- Refer the matter for prosecution as an offence;
- Suspend or cancel the licence; or
- Impose an enforceable undertaking.

Australian Government Response

The Government does not support this recommendation.

The automatic imposition of a licence condition following a second breach of the same part of a code would be an unnecessarily inflexible approach that runs counter to the objectives of the co-regulatory framework set out in the *Broadcasting Services Act 1992* (BSA). As set out below, the legislative intention is that the ACMA should use its discretion to form an opinion on the exercise of its power in relation to individual breaches, rather than be constrained by the application of inflexible rules.

Section 5 of the BSA confers on the ACMA a range of functions and powers that are to be used in a manner that, 'in the opinion of the ACMA', will:

- produce regulatory arrangements that are stable and predictable; and
- deal effectively with breaches of the legislation.

Section 5 also provides that: 'Where it is necessary for the ACMA to use [its] powers... the Parliament intends that the ACMA [should do so] in a manner that, in the opinion of the ACMA, is commensurate with the seriousness of the breach concerned'.

The Government notes that this requires ACMA to use its enforcement powers appropriately and to identify the most effective and proportionate way of dealing with breaches. This is further reinforced in the Explanatory Memorandum to the BSA.

It [section 5] promotes the ABA's [now ACMA's] role as an oversighting body ... rather than as an interventionist agency hampered by rigid, detailed statutory procedures and formalities and legalism ... It is intended that the ABA [now ACMA] monitor the broadcasting industry's performance against clear, established rules, intervene only where it has real cause for concern, and has effective redressive powers to act to correct breaches.

The automatic imposition of a licence condition runs counter to the intention of the legislation and would fetter the ACMA's ability to exercise its discretion in assessing the most appropriate way of dealing with breaches.

The imposition of a licence condition may not necessarily be the best way to promote compliance. In practical terms, for a licence condition to be imposed under section 43 of the BSA, ACMA first needs to give the licensee written notice of its intention to impose the licence condition. The licensee must then be given a reasonable opportunity to make representations to ACMA in relation to the proposed licence condition, which ACMA must consider under natural justice principles. The proposed licence condition must be published in the Commonwealth Gazette before becoming effective. The licensee can then apply for ACMA's decision to be reviewed by the Administrative Appeals Tribunal.

In contrast, negotiated agreements offer the prospect of a practical resolution of the matter within a much shorter timeframe. For example, ACMA has on many occasions agreed measures with licensees involving action by them intended to ensure

compliance problems are addressed and are effective. Such informal measures have often succeeded in improving behaviour within licensees.

Where ACMA finds that a breach of the Commercial Television Industry Code of Practice has occurred, it generally requires that the investigation report be circulated to the broadcaster's staff, that the action leading to the breach not be repeated, and that a similar breach in the future will result in significantly heightened compliance measures.

ACMA is currently working to further improve the quality and transparency of its investigations. It is implementing the recommendations of a recently released Australian National Audit Office audit report titled *Regulation of Commercial Broadcasting*, including the recommendation that ACMA regularly analyse investigations information to identify any patterns or trend in non-compliance and to reduce the time taken to complete investigations.

The Government will consult with ACMA about its compliance and enforcement capabilities and consider whether there are any new or alternative measures that could be introduced in this regard.

