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Reform of the broadcasting regulator's enforcement powers

A report prepared by Professor Ian Ramsay

Sydney
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Foreword

The commencement of the *Broadcasting Services Act 1992* ushered in many positive changes to the regulation of broadcasting in Australia, particularly in the area of industry responsibility for codes of practice and the expansion of various new categories of service. While the regulatory framework has generally operated well, experience over the years has highlighted a lack of flexibility in enforcement measures available to the regulator under the Broadcasting Services Act. In particular the absence of a set of graduated powers did not always allow the then Australian Broadcasting Authority to deal with non-compliance with broadcasting rules in an appropriate manner.

Accordingly, in 2004, the ABA asked Professor Ian Ramsay of Melbourne University to examine the effectiveness of the ABA's existing enforcement powers and to make proposals to enable the ABA to deal more effectively with breaches of the rules.

The Australian Communications and Media Authority is now pleased to release the results of Professor Ramsay's research—his report on the regulator's enforcement powers under the Broadcasting Services Act.

You will see that Professor Ramsay concluded that the ABA's enforcement powers are deficient in a number of respects. In particular, ACMA does not have access to the flexible 'middle range' administrative powers and civil penalties available to other regulators here and overseas, including a number of measures available to ACMA under the *Telecommunications Act 1997*. The report also makes a number of recommendations aimed at overcoming these deficiencies.

ACMA commends the report as a substantive body of work on an important issue.

Lyn Maddock
ACMA Acting Chair

REFORM OF THE AUSTRALIAN BROADCASTING AUTHORITY'S ENFORCEMENT POWERS

Report to the
Australian Broadcasting Authority

Professor Ian Ramsay

September 2004

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Disclaimer

This report has been prepared at the request of the Australian Broadcasting Authority (ABA). The report contains the author's research findings and conclusions on issues the ABA asked the author to consider. It also contains ideas and recommendations to assist the ABA in promoting consideration of ways to improve its enforcement powers. Nothing in this report (including the recommendations) constitutes legal advice.

The report may be used by the ABA to assist the ABA promote consideration of ways to improve its enforcement powers. The report does not purport to contain all information which may be material and no representation or warranty, express or implied, is given as to the accuracy or completeness of this report or that the ideas and recommendations contained in this report satisfy legal requirements.

This report, and any extract from the report, must not be distributed or made available to any person without this disclaimer.

Section 1

Executive Summary, Author Details and Acknowledgements

Executive summary

Introduction

This report has been prepared at the request of the Australian Broadcasting Authority (ABA) to identify ways in which the enforcement powers of the ABA can be strengthened to enable it to deal more effectively with breaches of rules established by the *Broadcasting Services Act 1992* (BSA). As requested by the ABA, the report reviews the existing enforcement powers of the ABA, reviews the enforcement powers of several overseas broadcasting regulators, identifies limits in the existing enforcement powers of the ABA, and proposes several recommendations for enhanced enforcement powers.

As part of the research for this project, meetings were held with senior ABA officers and with members of the ABA Board. Broadcasting regulators were consulted in the USA, the UK, New Zealand and Canada and information obtained from them in relation to their enforcement powers.

Background to the report

For some time, the ABA has been concerned that its enforcement powers could be strengthened to enable it to deal more effectively with breaches of the rules established by the BSA. According to the ABA, the major areas of concern in terms of breaches of particular rules have been:

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

In the final report of the ABA in relation to the *Commercial Radio Inquiry* (August 2000), the ABA identified a number of proposals that it said might assist in the prevention and/or enforcement of future breaches of codes of practice. The proposals identified in the report included additional administrative remedies (such as advertising free periods) and the introduction of sanctions against presenters.

In early 2001, the Department of Communications, Information Technology and the Arts issued a discussion paper titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues.* 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:

- 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.

The industry submissions that were received, particularly the submissions received from the Federation of Australian Commercial Television Stations (FACTS) and the Federation of Australian Radio Broadcasters (FARB), were generally critical of these proposals. None of the proposals has been implemented.

Since the publication of the discussion paper in early 2001, further events have raised for consideration whether the ABA has adequate enforcement powers. For example, the recent experience of the ABA in its attempt to prosecute the licensee of commercial radio service 2UE for multiple breaches of the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* indicates some of the difficulties confronted by the ABA because of its limited enforcement powers. The Radio 2UE matter is discussed in Section 4 of this report.

In 2004, the ABA asked Professor Ian Ramsay to examine the effectiveness of the ABA's existing enforcement powers and consider whether any reforms are needed in relation to these powers.

The ABA's current enforcement powers

Section 3 of the report provides an overview of the ABA's current enforcement powers.

The penalties for breaches of the BSA comprise a mix of criminal and administrative penalties. The most significant administrative penalties are the power to suspend or cancel a licence and the power to impose a licence condition. Section 3 also provides information in relation to ABA investigations into programming matters. Statistics are presented in relation to ABA investigations resulting in breach findings for the period 1995-96 to 2002-03. There is analysis of the enforcement powers of the ABA in relation to breaches of codes of practice, breaches of licence conditions and breaches of the BSA.

Problems with the ABA's current enforcement powers

Section 4 of the report discusses in detail problems with the ABA's current enforcement powers. There are several areas of concern.

Codes of practice

Code enforcement issues arise primarily with serious and/or repeated breaches by commercial radio and television licensees. The main concern is the lack of effective enforcement mechanisms for breaches by individual licensees given that the ABA has only limited enforcement powers available to it and, in addition, there is evidence of recurring breaches of particular code provisions. A particular problem is that in relation to commercial broadcasting services, community broadcasting services and subscription television broadcasting services, there are no specific provisions in the BSA relating to code non-compliance. General provisions of the BSA permit the ABA to impose conditions on licences, including conditions relating to code compliance. A breach of such a condition imposed by the ABA could lead to suspension or cancellation of the broadcasting licence. However, these sanctions are of limited use, particularly in the context of a commercial broadcasting service given that the imposition of this sanction results in punishment of not only the licensee but also indirectly those members of the public who would otherwise receive the broadcast.

Licence conditions

A breach of some statutory conditions of licences and class licences is a criminal offence. Breaches of other licence conditions, including an additional condition imposed by the ABA, are not offences. However, where there is a breach of a licence condition (regardless of whether a breach of that condition is a criminal offence or not) the ABA can suspend or cancel the licence. The ABA can also issue a notice requiring that the licence condition be complied with, and failure to comply with this notice is an offence. The enforcement powers

available to the ABA in this situation are not only of a limited nature but they are also very severe in that they involve either a referral to the Commonwealth Director of Public Prosecutions (DPP) to instigate a criminal prosecution or the cancellation or suspension of the licence. As noted above, suspension or cancellation of a licence is an extreme action, particularly in relation to broadcasting services which have significant audiences.

Enforcing the categories of broadcasting services

This is an issue that has created considerable problems for the ABA. A particular area of difficulty has been open narrowcasters providing commercial services. Open narrowcasters operate under a class licence, so the ABA is not empowered to 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 ABA to issue "stop 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 "stop 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 with a "stop notice".

Notification provisions

Rules requiring licensees to notify the ABA of certain matters are an important aspect of the regulatory scheme established by the BSA. In particular, there are provisions requiring licensees to notify the ABA of who controls the licence and who are the directors of the licensee company. In respect of the control notifications, the ABA estimates that each year there are approximately 20 late notifications and 30 that are incomplete. Criminal penalties can apply for breach of these notification provisions. However, criminal penalties can be inappropriate if the breach is inadvertent.

Annual financial returns

The BSA requires licensees to lodge annual financial returns with the ABA. According to the ABA, on average, 10 commercial radio licensees lodge their financial returns late each year. 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.

Payment of licence fees

Licence fees for both commercial television licensees and commercial radio licensees are due on 31 December of each year (s 6 of the *Television Licence Fees Act 1964* and s 6 of the

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 due and payable at the rate of 20% per annum calculated on the amount unpaid. In the case of very small commercial radio licensees which pay only small licence fees this does not serve as an incentive for compliance.

Case study of ABA enforcement problems – Radio 2UE

Section 4 of the report also contains a case study of the recent experience of the ABA in its attempt to prosecute Radio 2UE for breaches of the commercial radio disclosure standard. The case study indicates the difficulties confronted by the ABA in its attempt to enforce the BSA because of its limited enforcement powers.

Evaluation of the ABA's enforcement powers based upon strategic regulation theory

Section 4 of the report also contains an evaluation of the ABA's enforcement powers based upon strategic regulation theory. This theory advocates regulatory compliance as best secured by persuasion, rather than legal enforcement, based upon co-operation between the regulator and regulated entities. According to strategic regulation theory, the threat of punishment should take the form of a set of integrated sanctions which should escalate in severity in response to more serious contraventions of the law. This process is usually graphically represented by the pyramid model with the most significant sanctions at the apex of the enforcement pyramid. According to strategic regulation theory, sanctions should serve three functions. They should:

- protect against actual and/or potential contraventions of the law (the protective function);
- impose punishments against persons committing contraventions of the law (the enforcement function); and
- deter people from contravening the law (the preventative function).

When the existing ABA's enforcement powers are evaluated according to strategic regulation theory, it becomes evident there is a significant deficiency. The ABA does not have at its disposal the flexible range of sanctions upon which the theory is based. Two examples can be given. First, the ABA does not have the power to seek court imposed civil monetary penalties which typically form part of the enforcement pyramid. Second, the ABA does not have the power to enter into accountability agreements or undertakings which are agreements between the regulator and the regulated entity whereby the regulated entity agrees to undertake certain actions.

The result is that the ABA has less enforcement powers at its disposal than are available to other regulators and that should be available to it according to strategic regulation theory. The costs of this to the ABA and to industry can be high. First, it can result in less

compliance than is desirable. Proponents of strategic regulation theory suggest that the taller the enforcement pyramid, and the more levels of possible escalation (i.e. the more levels of enforcement powers available to the regulator), then the greater is the pressure that can be exerted to motivate "voluntary" compliance at the base of the pyramid. Second, ensuring that the regulator has flexible enforcement powers is important in motivating regulated entities to have internal compliance procedures that are effective.

Third, it is very important to ensure that a regulator has effective and flexible enforcement powers where some of its enforcement powers may, for very good reason, be little used. A good example of this is the ABA's powers to suspend a licence or cancel a licence. This "ultimate" sanction has only been used once by the ABA. The reason why the ABA has not used this power more extensively is understandable. To utilise this sanction deprives the community of a broadcasting service. This means that in all but the most extreme situations, the top levels of the ABA enforcement pyramid are not available to the ABA.

Fourth, having a regulator with flexible and effective enforcement powers can minimise the costs of litigation (which are a cost to both the regulator and to regulated entities) by encouraging alternatives such as the use of enforceable undertakings.

Enforcement powers of other broadcasting regulators

Section 5 of the report contains a review of the responsibilities and enforcement powers of broadcasting regulators in the USA, the UK, Canada and New Zealand. Despite a number of differences in functions between the ABA and these other broadcasting regulators, a number of trends are evident. First, in contrast with the ABA, the overseas broadcasting regulators reviewed in Section 5 have a number of middle-range administrative penalties to address non-compliance with broadcasting laws. Second, several of the overseas regulators reviewed have powers to impose significant administrative monetary penalties on broadcasters for non-compliance with broadcasting laws.

Recommendations for Reform

Section 6 proposes a series of reforms which have has their objective enhancing the enforcement powers of the ABA. The reforms proposed in Section 6 are:

- The ABA be given the power to accept enforceable undertakings in connection with a matter in relation to which the ABA has a function or power under the BSA.
- The ABA be given the power to seek injunctive relief from the court for a breach of s 137 of the BSA (s 137 provides that if the ABA 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, the ABA may issue a written notice to the person directing them to cease providing that service).

- That breaches of certain provisions of the BSA be subject to civil monetary penalties. Civil monetary penalties – which would be imposed by the court – would apply where:
  an open narrowcaster provides a service that is not in accordance with the relevant class licence;
  there is a breach of specified licence conditions. The licence conditions are those conditions which, if breached, are currently subject to criminal penalties under s 139:
    subclause 7(1) of Schedule 2 (relating to commercial television broadcasting licences);
    subclause 8(1) of Schedule 2 (relating to commercial radio broadcasting licences);
    subclause 9(1) of Schedule 2 (relating to community broadcasting licences);
    subclause 9(1) of Schedule 2 (other than paragraph 9(1)(h) of Schedule 2 (relating to temporary community broadcasting licences);
    subclause 10(1) of Schedule 2 (relating to subscription television broadcasting licences); and
    subclause 11(1) of Schedule 2 (relating to subscription radio broadcasting services, subscription narrowcasting services and open narrowcasting services provided under class licences).
  there is a breach of an additional licence condition imposed by the ABA pursuant to ss 43, 87, 87A, 92J, 99(2) or 120(2);
  there is a breach of s 137 (this section provides that if the ABA 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, the ABA may issue a written notice to the person directing them to cease providing that service).
  there is a breach of s 141(1) (this section provides that the ABA may, by notice in writing given to a person, direct the person to take action to ensure that a service is provided in a way that conforms to the requirements of the relevant licence or class licence);
  there is a breach of s 141(2) (this section provides that if a subscription or open narrowcasting service or subscription radio broadcasting service is provided "in deliberate disregard" of a relevant code of practice, the ABA may issue a notice directing that action is taken to ensure compliance).
  I further recommend that in the case of recommendations (1), (2), (4), (5) and (6), the ABA should retain the right to refer a breach of the relevant section of the BSA to the Commonwealth Director of Public Prosecutions for criminal prosecution should the breach be of sufficient severity. The sections to which these recommendations relate are currently subject to criminal penalties. In the case of recommendation (3) – a breach of additional licence conditions - the sections to which this recommendation relates are not currently subject to criminal penalties and I do not recommend that this should change.

The ABA 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 with the ABA (these provisions are ss 62, 63, 64, 65, 112, and 205B).

In the case of late payment of licence fees by commercial television licensees and commercial radio licensees, the ABA have the power to:

(1) impose a penalty as an additional fee due and payable at the rate of 20% per annum calculated on the amount unpaid (this is the existing power available to the ABA for late

payment of licence fees pursuant to the *Television Licence Fees Act 1964* and the *Radio Licence Fees Act 1964*); or

(2) issue an infringement notice specifying payment of $1,500.

It is appropriate that late payment of licence fees be dealt with by allowing the ABA to either use the existing penalty scheme or issue an infringement notice. The reason is that sometimes the existing penalty scheme (which is based on the amount of the unpaid licence fee) will be higher than the recommended infringement notice penalty of $1,500 and sometimes the amount of $1,500 will be higher. It will depend on the amount of the unpaid licence fee. The amount of $1,500 is recommended following discussions with the ABA.

- The ABA be given the power to order a licensee to broadcast a statement relating to the findings of an ABA investigation which has found a breach 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.

The discussion of these recommendations in Section 6 includes analysis of other Australian regulators which have these powers, the use of similar powers by overseas broadcasting regulators, and analysis of the way in which the recommendations would enhance achievement of the policy objectives set out in the BSA.

Section 6 also contains a recommendation that the BSA not be amended to give the ABA the power to order advertising-free periods.

Section 6 concludes by making brief reference to two issues which have enforcement implications but which are not the subject of any recommendations because the ABA is currently considering these issues. The two issues are:

- section 67 refusal (s 67 of the BSA provides that a person may, before a transaction takes place or an agreement is entered into that would place a person in breach of a provision of Division 2 (limitation on control of certain licences), Division 3 (limitation on directorships) or Division 5 (cross-media rules) of the BSA, make an application to the ABA for an approval of the breach; and
- broadcast of “adult services” on satellite.

Author details

Professor Ian Ramsay

Ian Ramsay is the Harold Ford Professor of Commercial Law in the Faculty of Law at The University of Melbourne where he is Director of the Centre for Corporate Law and Securities Regulation. He has practised law with the firms Sullivan & Cromwell in New York and Mallesons Stephen Jaques in Sydney. Other positions Professor Ramsay currently holds or has previously held include:

- Dean, Faculty of Law, The University of Melbourne
- Member and Acting President of the Takeovers Panel (which is the main forum for resolving takeover disputes)
- Deputy Director of the Federal Government's Companies and Securities Advisory Committee where he wrote a number of reports which resulted in changes to the law including a report on directors' and officers' insurance
- Head of the Federal Government inquiry on auditor independence
- Member of the Corporations and Markets Advisory Committee (which is the Federal Government's main corporate law reform advisory body)
- Member of the Federal Government's Implementation Consultative Committee for the Financial Services Reform Act
- Member of the Executive of the Business Law Section of the Law Council of Australia
- Member of the National Law Committee of the Australian Institute of Company Directors and the Corporations Law Committee of the Law Council of Australia
- President of the Corporate Law Teachers Association
- Member of the International Federation of Accountants taskforce on rebuilding confidence in financial reporting
- Consultant to the Australian Securities and Investments Commission and author of the report for ASIC on disclosure of fees and charges in superannuation and other managed investments
- Member of the Federal Government's Companies Auditors and Liquidators Disciplinary Board
- Member of the Australian Securities and Investments Commission's Corporate Governance Roundtable
- Consultant to the Australian Law Reform Commission for its managed investments project
- Member of the Australian Law Reform Commission's Advisory Committee for its civil and administrative penalties project
- Consultant to the Victorian Government on corporate law reform
- Consultant to the Parliament of Australia House of Representatives Standing Committee on Economics, Finance and Public Administration
- Distinguished Visiting Professor, Faculty of Law, The University of Toronto
- Distinguished Visiting Professor and Professorial Fellow, Faculty of Law, The University of Hong Kong

Professor Ramsay has published extensively on regulatory and corporate law issues both internationally and in Australia. His books include **Ford's Principles of Corporations Law** – which is Australia's leading corporate law book - (co-author, 11th edition, 2003); **Commercial Applications of Company Law in Singapore** (co-author, 2004); **Experts' Reports in Corporate Transactions** (co-author, 2003); **Commercial Applications of Company Law** (co-author, 5th edition, 2004); **Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford** (editor, 2002); **Commercial Applications of Company Law in New Zealand** (co-author, 2002); **Commercial Applications of Company Law in Malaysia** (co-author, 2002); **Company Directors' Liability for Insolvent Trading** (editor, 2000); **The Corporate Law Economic Reform Program Explained** (co-author, 2000); **Securities Regulation in Australia and New Zealand** (co-editor, 1998); **The New Corporations Law** (co-author, 1998); **Corporate Governance and the Duties of Company Directors** (editor, 1997); and **Education and the Law** (co-author, 1996).

In addition, he has published approximately 100 research reports, book chapters and journal articles. His publications have been cited by the High Court of Australia, the Federal Court of Australia, the Courts of Appeal of the Supreme Courts of New South Wales, Victoria and Western Australia, as well as by the Supreme Courts of Queensland and South Australia.

Professor Ramsay is one of Australia's most successful academic lawyers in terms of competitive research grants.

1. Professor Ramsay is a respected commentator in the media on regulation, corporate governance and corporate law. He is regularly interviewed in the financial press and has been interviewed for international newspapers including the New York Times. His research has been reported in international newspapers including the Financial Times and the Wall Street Journal. Professor Ramsay has been interviewed on major TV programs such as the 7.30 Report, Lateline and Business Sunday, as well as radio programs including the Law Report and various current affairs programs.

Examples of Professor Ramsay's work leading to regulatory change

Professor Ramsay has had responsibility for several major policy related research projects which have led to important regulatory changes. Two recent policy related projects may be mentioned as examples of Professor Ramsay's work. In December 2001, the Australian Securities and Investments Commission commissioned Professor Ramsay to prepare a report on disclosure of fees and changes in superannuation and other managed investments. ASIC released Professor Ramsay's report in September 2002. As noted in the ASIC media release, the report contains:

- an overview of approaches to disclosure of fees and charges in a number of international jurisdictions as well as Australia; and
- options for improving the quality and comparability of fees and charges disclosure, particularly in product disclosure statements (prospectuses) and periodic statements.

The report was compiled after consultation with a cross-section of industry participants and consumer representatives.

ASIC's Executive Director for Consumer Protection states in the media release that "the report is a significant contribution to the current debate about how to take forward the disclosure of investment fees and charges within the Financial Services Reform Act framework".

In 2003, ASIC released its good practice model for fee disclosure in product disclosure statements. ASIC stated, when releasing its fee disclosure model, that it was based on Professor Ramsay's report to ASIC.

More recently, in December 2003, Federal Parliament amended the Financial Services Reform Act to improve disclosure of fees to consumers (in particular, to require dollar disclosure of fees). This amendment was a recommendation in Professor Ramsay's report to ASIC and Professor Ramsay's research was drawn upon both in the Parliamentary debates and in the preceding Parliamentary Committee debates.

A second example of Professor Ramsay's policy research is his report on Independence of Australian Company Auditors which was commissioned in 2001 by the then Federal Minister for Financial Services and Regulation. The report was released by the Government in October 2001. The recommendations contained in the report, which focus upon improvements to the current regulatory framework, were well received by key stakeholders as well as by the major political parties. The major recommendations in this report of Professor Ramsay have been included in the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004. This Act was passed by the Commonwealth Parliament in June 2004 with the support of all political parties.

Acknowledgements

I am grateful to Laura Little, Research Officer, Centre for Corporate Law and Securities Regulation, University of Melbourne, who prepared section 5 of this report. I am also grateful to Marion Jacka, Senior Project Officer, Policy and Research, ABA, who provided information for this report and who was the liaison person at the ABA for this project.

Section 2

Introduction

The ABA and the Broadcasting Services Act

The Australian Broadcasting Authority (ABA) is an independent statutory authority established under the *Broadcasting Services Act 1992* (BSA). It is stated in s 5 of the BSA that Parliament "charges the ABA with responsibility for monitoring the broadcasting industry, the datacasting industry and the internet industry" and that Parliament confers on the ABA a range of functions and powers that will:

- produce regulatory arrangements that are stable and predictable; and
- deal effectively with breaches of the rules established by the BSA.

The objects of the BSA are contained in s 3 and these include:

- to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
- to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs;
- to encourage diversity and control of the more influential broadcasting services;
- to ensure that Australians have effective control of the more influential broadcasting services;
- to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity;
- to promote the provision of high quality and innovative programming by providers of broadcasting services;
- to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance;
- to encourage providers of broadcasting services to respect community standards in the provision of program material; and
- to encourage the provision of means for addressing complaints about broadcasting services.

Section 4 of the BSA identifies the regulatory policy underpinning the Act. It is stated in s 4 that:

(1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.

(2) The Parliament also intends that broadcasting and datacasting services in Australia be regulated in a manner that, in the opinion of the ABA:

(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services; and

(b) will readily accommodate technological change; and

(c) encourages:

(i) the development of broadcasting technologies and datacasting technologies and their applications; and

(ii) the provision of services made practicable by those technologies to the Australian community.

Background to the report

For some time, the ABA has been concerned that its enforcement powers could be strengthened to enable it to deal more effectively with breaches of the rules established by the BSA. According to the ABA, the major areas of concern in terms of breaches of particular rules have been:

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

In the final report of the ABA in relation to the *Commercial Radio Inquiry* (August 2000) the ABA identified a number of proposals that it said might assist in the prevention and/or enforcement of future breaches of codes of practice. The proposals identified in the report included additional administrative remedies (such as advertising free periods) and the introduction of sanctions against presenters.

In early 2001, the Department of Communications, Information Technology and the Arts issued a discussion paper titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues.* 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:

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- 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.

The submissions that were received, particularly the submissions received from the Federation of Australian Commercial Television Stations (FACTS) and the Federation of Australian Radio Broadcasters (FARB), were generally critical of these proposals. None of the proposals has been implemented.

Since the publication of the discussion paper in early 2001, further events have raised for consideration whether the ABA has adequate enforcement powers. For example, the recent experience of the ABA in its attempt to prosecute the licensee of commercial radio service 2UE for multiple breaches of the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* indicates some of the difficulties confronted by the ABA because of its limited enforcement powers. The Radio 2UE matter is discussed in Section 4 of this report.

In 2004, the ABA asked Professor Ian Ramsay to examine the effectiveness of the ABA's existing enforcement powers and consider whether any reforms are needed in relation to these powers.

Overview of the report

The report is structured as follows. Section 1 is the executive summary. Section 2 is the introduction. Section 3 of the report is in two parts. The first part provides an overview of the ABA's functions. The second part provides an overview of the ABA's current enforcement powers. Section 4 identifies problems with the ABA's current enforcement

powers. It is in three parts. The first part examines specific enforcement problems, in particular, enforcement of codes of practice, licence conditions and categories of broadcasting services. The second part is a case study of the recent experience of the ABA in its attempt to prosecute Radio 2UE for breaches of a broadcasting standard. The third part is an evaluation of the ABA's enforcement powers based upon strategic regulation theory.

Section 5 then examines the enforcement powers of broadcasting regulators in the USA, the UK, New Zealand and Canada. The intention is to compare the enforcement powers of these regulators with the powers of the ABA. Section 6 identifies several enforcement powers which, if granted to the ABA, would enable it to have more flexible and effective enforcement powers. These are:

- the introduction of enforceable undertakings;
- an expanded injunctive power;
- the introduction of civil penalties;
- the introduction of infringement notices; and
- allowing the ABA to order on-air statements of ABA investigation findings.

Consultations

As part of this project, meetings were held with senior ABA officers to discuss issues relating to the ABA's enforcement powers. Meetings were held with Mr Giles Tanner (General Manager), Ms Jonquil Ritter (General Counsel), Ms Margaret Harradine (Manager – Legal), Ms Phyllis Fong (Manager – Investigations), Ms Marion Jacka (Senior Project Officer – Policy and Research) and Ms Andrea Malone (Manager – Industry Review). A meeting was also held with members of the ABA Board.

In addition, broadcasting regulators were consulted in the USA, the UK, New Zealand and Canada and information obtained from them in relation to their enforcement powers.

Section 3

The ABA's Current Enforcement Powers

Overview of the ABA's functions

Establishment

The ABA was established by s 154(1) of the *Broadcasting Services Act 1992* (BSA), and began operations on 5 October 1992.

The ABA is an independent statutory authority responsible through the Minister for Communications, Information Technology and the Arts to the Parliament.

Functions[1]

The primary functions of the ABA are:

(a) to provide advice to the Australian Communications Authority in relation to:
  (i) the spectrum plan and frequency band plans under the *Radiocommunications Act 1992* and the designation of bands for broadcasting purposes
  (ii) the designation under s 131 of that Act of parts of the radiofrequency spectrum as being primarily for broadcasting purposes
(b) to plan the availability of segments of the broadcasting services bands on an area basis
(c) to allocate, renew, suspend and cancel licences and to take other enforcement action under the BSA
(d) to conduct investigations or hearings relating to the allocating of licences for community radio and community television services
(da) to conduct investigations as directed by the Minister under s 171 of the BSA
(e) to design and administer price-based systems for the allocation of commercial television broadcasting licences and commercial radio broadcasting licences
(f) to collect any fees payable in respect of licences

[11] ABA, *Annual Report 2002-03* (2003), 7-8

(g) to conduct or commission research into community attitudes on issues relating to programs
(h) to assist broadcasting service providers to develop codes of practice that, as far as possible, are in accordance with community standards
(i) to monitor compliance with those codes of practice
(j) to develop program standards relating to broadcasting in Australia
(k) to monitor compliance with those standards
(l) to monitor and investigate complaints concerning broadcasting services (including national broadcasting services) and datacasting services
(m) to inform itself and advise the Minister on technological advances and service trends in the broadcasting industry; and
(n) to monitor, and to report to the Minister on, the operation of the BSA.

The ABA has additional functions under the BSA and other legislation. These include giving opinions concerning the category to which broadcasting services belong, and determining additional, or clarifying existing, criteria for those categories; giving opinions on whether a person is in a position to exercise control of a licence, company or newspaper; and administering aspects of the ownership and control rules applying to certain categories of licences.

The ABA also has a number of functions in relation to the regulation of Internet content:

- to investigate complaints;
- to register industry codes of practice and monitor compliance with those codes;
- to advise and assist parents and responsible adults in relation to the supervision and control of children's access to Internet content;
- to conduct and/or coordinate community education programs about Internet content and Internet carriage services;
- to conduct and/or commission research into issues relating to Internet content and Internet carriage services; and
- to liaise with regulatory and other relevant bodies overseas about cooperative arrangements for the regulation of the Internet industry.

For the purpose of exercising its powers and functions under the BSA, the ABA is obliged to take account of:

- the objects of the BSA and the regulatory policy set out in the BSA;
- any general policies of the Government notified to the ABA by the Minister;
- any directions given to the ABA by the Minister; and
- Australia's obligations under the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement.

Overview of the ABA's current enforcement powers[2]

Introduction

The penalties for breaches of the BSA comprise a mix of criminal and administrative penalties. The most significant administrative penalties are the power to suspend or cancel a licence and the power to impose a licence condition. The criminal penalty provisions under the BSA are set out below.

The regulatory scheme

The BSA was seen as marking a move towards a more market-based, less interventionist approach to broadcasting regulation. In discussing s 5 (the role of the ABA) the Explanatory Memorandum said:

> It promotes the ABA's role as an oversight body … rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities, and legalism as has been the experience with the ABT. It is intended that the ABA monitor the broadcasting industry's performance against clear, established rules, intervene only when it has real cause for concern, and has effective redressive powers to act to correct breaches (EM 97,009).

At the same time and as reflected in the above statement, the intention was to provide a framework that would enable the regulator to deal effectively with breaches of the rules. Various aspects of the underlying philosophy of the BSA as found in: s 3, the objects of the Act; s 4, the regulatory policy; and s 5, the role of the ABA, are relevant to enforcement as discussed below.

The objects of the BSA

The BSA has a range of objects, some of which are potentially competing. The ABA is expected to balance these, drawing on its assessment of community needs and attitudes, and its monitoring of industry developments. The object most directly relevant to enforcement is that in s 3(1)(b) of the BSA: "to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive, and responsive to audience needs."

[2] This section is drawn from material provided by the ABA and the *ABA Annual Report 2002-03* (2003), 53

Regulatory policy

Section 4 of the BSA sets out the regulatory policy to be pursued in the administration of the BSA (EM 97.008). Key elements are:

- Degrees of influence - different levels of regulatory control are to be applied across services according to the degree of influence they 'are able to exert in shaping community views', s 4(1).
- Regulation should be flexible and not unduly onerous. It should accommodate technological change and address public interest considerations in a way that does not impose unnecessary financial and administrative burdens on the service providers, s 4(2).

Role of the ABA

Section 5 of the BSA refers to Parliament's intention that breaches of the rules will be dealt with effectively, and that penalties should be proportionate to the seriousness of the breach concerned. Sub-section 5(1)(b) states that the Parliament:

> (b) confers on the ABA a range of functions and powers that are to be used in a manner that, in the opinion of the ABA, will:
>
> (i) produce regulatory arrangements that are stable and predictable; and
>
> (ii) deal effectively with breaches of the rules established by this Act.

Sub-section 5(2) states:

> … the Parliament intends that the ABA use its powers, or a combination of its powers, in a manner that, in the opinion of the ABA, is commensurate with the seriousness of the breach concerned.

Investigations into programming matters – overview

If the ABA receives a complaint about a possible breach of the BSA or of a licence condition, it must investigate the complaint (unless the complaint is frivolous, vexatious or was not made in good faith). The ABA has information gathering powers under Part 13, Division 1 of the BSA and investigation powers under Part 13, Division 2 of the BSA.

If a complaint relates to a matter covered by a code of practice, it must first be made to the broadcaster concerned. It is the broadcaster's responsibility to deal with the complaint and attempt to resolve the matter to the complainant's satisfaction. If the complainant considers the broadcaster's response inadequate or does not receive a response within 60 days, they may then lodge a complaint with the ABA. Complaints made in this way must be investigated by the ABA unless it is satisfied that the complaint is frivolous, vexatious, or was not made in good faith.

The ABA may itself initiate investigations into breaches of the BSA or of licence conditions or codes under s 170 of the BSA. In the event of a breach by a commercial broadcaster, community broadcaster, subscription broadcaster or a provider of a service under a class licence, the ABA has several sanctions available to it. With regard to breaches of a licence condition, the ABA may issue a notice requiring the broadcaster to take action to ensure that the service is provided in a way that conforms to the requirements of the licence. Failure to comply with such a notice may result in referral of the matter to the Director of Public Prosecutions for possible prosecution. If a licensee fails to comply with a notice or breaches a condition of its licence, the ABA may suspend or cancel the licence.

With regard to a breach of a code of practice, the ABA may make compliance with a code a condition of a broadcaster's licence. In its investigations, the ABA has urged broadcasters to take remedial action to ensure that breaches of the code are not repeated.

With regard to a breach of a code of practice by a national broadcasting service (ABC or SBS), the ABA may, if it is satisfied the complaint is justified, recommend by notice in writing that the service take action to comply with the relevant code of practice. This may include the broadcasting (or other publication) of an apology or retraction. If the national broadcaster does not take appropriate action within 30 days of the recommendation, the ABA may give the Minister a written report on the matter. Within seven sitting days of receiving the report, the Minister must table it in both Houses of Parliament.

The following table provides information on the investigations conducted by the ABA that have resulted in breach findings for the period 1995-96 to 2002-03.

Investigations resulting in breach findings 1995-96 to 2002-03

Type of breach	**2002–03 (pp 53-55)[1]**	**2001–02 (pp 39-41)**	**2000–01 (pp 39-41)**	**1999–2000[2] (pp 48-50)**	**1998–99 (pp 63-66)**	**1997–98 (pp 67 – 69)**	**1996–97 (p 83)**	**1995–96 (pp 44-45)**
Code of practice	31	71	123	177	75	59	34	(35)
Licence condition	16	20	15	22	55	24	7	15[3]
Broadcasting Services Act	1	2	4	-	6	1		
Code of practice and licence condition	1	0						
Type of breach	**2002 – 2003 (pp 53-55)[1]**	**2001 – 2002 (pp 39-41)**	**2000 – 2001 (pp 39-41)**	**1999 – 2000[2] (pp 48-50)**	**1998 – 1999 (pp 63-66)**	**1997 – 1998 (pp 67 – 69)**	**1996 – 1997 (p 83)**	**1995 – 1996 (pp 44-45)**
Broadcasting Services Act and licence condition	1	0						
Total investigations finding breaches	**50**	**93**	**142**	**199**	**136**	**84**	**41**	**50**

1. References are to ABA Annual Reports

2. Higher figures for 1999-2000 relate to commercial radio 'cash for comment' breaches

3. Includes four Program Standard breaches – codes not yet developed

Codes of practice

Industry-developed codes of practice cover most areas of program content except those dealt with by program standards (i.e. Australian content and children's programs on commercial television, and the three Commercial Radio Standards[3]). The code framework is co-

[3] The standards were made following the 2000 Commercial Radio Inquiry, which considered the impact of commercial agreements between presenters and sponsors on news and current affairs reporting. The ABA

regulatory in the sense that the ABA has a role in approving the codes and investigating unresolved complaints.

Overview of codes of practice

Section 123(1) of the BSA provides that it is the intention of Parliament that radio and television industry groups representing:

- commercial broadcasting licensees;
- community broadcasting licensees (with some exceptions);
- providers of subscription broadcasting services;
- providers of subscription narrowcasting services; and
- providers of open narrowcasting services;

develop, in consultation with the ABA, codes of practice that are to be applicable to the broadcasting operations of each of those sections of the industry.

Section 123(2) provides that codes of practice may cover a broad range of matters such as:

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast;
- methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority;
- promoting accuracy and fairness in news and current affairs;
- methods of handling complaints from the public about program content or compliance with codes of practice and reporting to the ABA on complaints so made;
- in the case of codes of practice developed by commercial broadcasting licensees – broadcasting time devoted to advertising time; and
- in the case of codes of practice developed by commercial radio broadcasting licensees – the broadcasting of Australian music.

Some codes of practice must be included in the Register of codes of practice maintained by the ABA. The requirements for inclusion in the Register include that:

- the code provides appropriate community safeguards for the matters covered by the code;
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code: s 123(4).

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concluded there was a failure of the commercial radio code of practice and made three standards which are: the Disclosure Standard; the Advertising Standard; and the Compliance Standard.

The ABA may determine program standards if it is satisfied that a registered code of practice is not providing appropriate community safeguards for a matter referred to in s 123(2) or if no code of practice has been registered for a matter referred to in s 123(2): s 125. The ABA must determine a standard in relation to the matter if, in addition to the above, it is satisfied that it should determine a standard in relation to the matter: s 125.

The ABA is also required to determine program standards for commercial television broadcasting licensees that relate to programs for children and the Australian content of programs: s 122.

Enforcement of codes of practice

The BSA requires the ABA to investigate complaints regarding compliance with codes of practice on satisfaction of certain preconditions (including prior complaint to the broadcaster). The ABA must notify the complainant of the results of the investigation (relevant sections are ss 148, 149, 150, 151 and 152).

The position with regard to enforcement mechanisms differs somewhat according to broadcaster type. For commercial services the only possible formal sanction is imposition of a condition.

(i) National services (ABC and SBS)
Subject to some preconditions, if a complaint is upheld, the ABA may, by written notice, recommend to the ABC or SBS that it take action to comply with the relevant code of practice, or take other action as specified in the notice. Such action may include broadcasting or otherwise publishing an apology or retraction (s 152). If such recommendation is not followed, the ABA may report in writing to the Minister with such report to be tabled in Parliament (s 153).

(ii) Subscription or open narrowcasting services; subscription radio broadcasting services
If a service is provided 'in deliberate disregard of' a relevant code of practice, the ABA may issue a notice directing that action is taken to ensure compliance (s 141(2)). Failure to comply with such a notice is an offence (s 142).

(iii) Commercial services; community services; subscription TV broadcasting services
There are no specific provisions in the BSA relating to code non-compliance. General provisions permit the ABA to impose conditions on licences including conditions relating to code compliance (ss 43, 44, 87, 92J, 99 and 120).

The ABA, may under s 125, determine program standards where it is satisfied that codes of practice are not providing appropriate community safeguards or where no codes of practice have been developed.

Licence conditions

The breach of *some* statutory conditions of licences and class licences is an offence (s 139). This applies primarily to the subclause (1) conditions in Schedule 2 which set out the general licence conditions for the various types of licences.

Where a breach of a licence condition is an offence, the ABA may refer the matter to the DPP for prosecution. If prosecution is successful, monetary penalties apply.

Breaches of other licence conditions, including a s 43 additional condition applying to a commercial radio or television broadcaster, are not offences.

However in both cases (offences and non-offences) the ABA can move directly to the administrative penalty of suspending or cancelling the licence (s 143).

Alternatively in both cases, the ABA can issue a notice that the person take action within a stated period (of no more than one month), to comply with the licence condition (s 141(1)). Failure to comply with a s 141 notice is an offence.

If the person does not comply with the notice, the ABA then has the option of referring the failure to comply to the DPP for prosecution (s 142), or of suspending or cancelling the licence (s 143).

Breaches of the BSA

Some breaches of the BSA carry criminal penalties and must be referred to the DPP for prosecution. Breaches of the BSA include breaches of control provisions and of licensing provisions.

Examples of
Criminal Penalties under the BSA

Offences concerning control of commercial TV/ commercial radio and datacasting transmitter licences			
Offence **NB 1 penalty unit = $110**	**Max. Penalty Units** **commercial TV broadcasting/ datacasting licence**	**Max. Penalty** **Units commercial radio broadcasting licence**	**Provision of BSA**
Failure to notify ABA of control and directorships	500	50	62
Failure by licensee to notify changes in control	500	50	63
Failure by person who obtains control of licence to notify ABA of that position	500	50	64

Failure by person in control of a licence to notify newspaper interests	500 (commercial TV broadcasting licences only)	50	65
Breach of control/ audience reach/ foreign control/ cross-media rules	20,000	2,000	66
Offences concerning control of commercial TV/ commercial radio and datacasting transmitter licences			
Offence **NB 1 penalty unit = $110**	**Max. Penalty Units** **commercial TV broadcasting/ datacasting licence**	**Max. Penalty** **Units commercial radio broadcasting licence**	**Provision of BSA**
Breach of notice under s 67 specifying time to rectify breach of control etc rules	20,000	2,000	69
Breach of notice under s 70 specifying time to rectify breach of control etc rules	20,000	2,000	72

Offences concerning Pay TV broadcasting licences		
Offence	**Maximum Penalty Units** **(1 unit = $110.00)**	**Provision of BSA**
Failure by licensee to lodge annual return concerning eligible drama expenditure	1,000	103ZA
Failure by channel provider or part-channel provider to lodge annual return concerning eligible drama expenditure	1,000	103ZB
Breach of control etc rules relating to subscription TV broadcasting services	20,000	111
Breach of notification provisions relating to control of subscription TV broadcasting services	500	112

Offences concerning International broadcasting licences		
Offence	**Maximum Penalty Units (1 unit = $110.00)**	**Provision of BSA**
Providing an international broadcasting service without a licence	20,000	121FG
Failure to comply with a notice directing a person to cease providing service without a licence	20,000	121FH
Breach of condition of international broadcasting licence	2,000	121FJ
Breach of conditions of nominated broadcaster declaration	2,000	121FLF

Other offences		
Offence	**Max Penalty**	**Provision**
Intentional or reckless contravention of anti-hoarding rule	2,000 penalty units	146F BSA
Disruption of ABA hearing	1 year imprisonment	201 BSA
Non-compliance with requirement to give evidence	1 year imprisonment	202 BSA
Breach of online provider rules	50 penalty units	Sch 5, cl 82 BSA
Breach of direction to comply with online provider rules	50 penalty units	Sch 5, cl 83 BSA
Misleading or deceptive conduct		Criminal Code cl 136.1
		Criminal Code cl 137.1

Section 4

Problems with the ABA's Current Enforcement Powers

Specific enforcement problems[4]

Introduction

The ABA's main concerns about the enforcement regime under the BSA can be summarised as follows:

- Lack of flexible remedies inhibits the ABA's capacity to engage in negotiations that might produce better compliance by licensees, particularly in relation to the rules about categories of broadcasting services and industry codes of conduct.
- The subjective elements of many of the more important offences under the BSA make successful criminal prosecution problematic. The consequence is that it is not clear that the existence of criminal sanctions has a better deterrent effect than might be achieved with other non-criminal sanctions.
- The moral culpability of many of the offences under the BSA is relatively low, so that criminal sanctions are not clearly appropriate. The absence of clear moral culpability tends to reduce willingness to enforce criminal penalty provisions.
- There is a lack of useful small penalties for minor breaches, so that there are insufficient incentives for compliance with reporting requirements under the BSA.

Codes of practice

Code enforcement issues arise primarily with serious and/or repeated code breaches by commercial radio and television licensees. This relates to the number and nature of complaints generated by these media given their pervasive and influential nature. As outlined above, while the ABA can recommend on-air corrections or apologies in relation to national broadcasters, it does not have this power, formally, in relation to commercial broadcasters. The main concern is the lack of effective enforcement mechanisms for breaches by individual licensees given:

- the standard-making option affects the whole sector and accordingly tends to be considered appropriate only in the case of serious breaches by more than one licensee;
- the option of imposing an additional licence condition may always not be an effective deterrent. While a breach of an additional licence condition is not an offence, the ABA does have the option of suspending or cancelling a licence, or referring a breach of a

[4] This section is drawn from material provided by the ABA and interviews with ABA officers.

notice to comply with the additional licence condition, to the DPP. However these are both 'top tier' sanctions which have practical difficulties, and are not necessarily commensurate with the nature of many code breaches.

The ABA reports on code breaches on its website and in its Annual Report. Other than this, ABA practice, when faced with serious or repeated breaches by individual licensees, has mainly been to advise the licensee that it will closely monitor future compliance.

While implying the threat of an additional licence condition, this has limited deterrent value given the problems with enforcing additional licence conditions.

In summary, the ABA regards the lack of appropriate remedies for code breaches as one of the main weaknesses of the regulatory scheme given the relatively large number of code breaches, and the pattern of recurring breaches that occurs with some licensees. By way of illustration, in commercial television there have been recurring breaches of code provisions relating to fair and accurate representation (clause 4.3.1 of the Commercial Television Code of Practice) and to privacy (clauses 4.3.5 and 4.3.7 of the Commercial Television Code of Practice).

Recurring code breaches – commercial television

Five year period 1 April 1999 to 30 April 2004

Accuracy and fairness

By network

In total 15 recurring breaches by licensees of the code provision relating to accuracy and fairness

Network Seven licensees	4	all *Today Tonight* program
Network Nine licensees	11	5 *A Current Affair*- the remainder were News, *60 Minutes* and *Sunday*

By licensee

Code complaints are brought against individual licensees.

Of the 11 breaches by Network Nine licensees, 7 were by TCN9 (Sydney) with four separate affiliates accounting for the remaining 4.

Privacy

(1) Clause 4.3.5 of the Code*

By network

In total 9 recurring breaches by licensees of code provision 4.3.5 relating to privacy

Network Seven licensees	7	6 *Today Tonight* program and 1 *News*
Network Nine licensees	2	both *A Current Affair*

By licensee

Network 7 licensees	3 breaches were by ATN – remaining 4 by individual licensees
Network 9	both breaches were by TCN9 (Sydney)

(2) Clause 4.3.7 of the Code*

In total 4 recurring breaches of the code provision 4.3.7 relating to privacy. All 4 breaches were by Network Nine licensees (3 relating to *A Current Affair* and 1 relating to *Sixty Minutes*)

(3) Summary

In total 13 recurring privacy related breaches

Network 7 licensees 7

Network 9 licensees 4

Information in this table has been provided by the ABA

* Clause 4.3.5 provides that 'a licensee must not use materials relating to a person's personal or private affairs, or which invades an individual's privacy, other than when there is an identifiable public interest reason for the material to be broadcast'.

* Clause 4.3.7 provides that a licensee 'should avoid unfairly identifying a single person or business when commenting on the behaviour of a group of persons or business'.

In order to provide insight into the types of breaches of codes of practice that occur, six case studies, from commercial television and commercial radio, are provided.

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.

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.

Violence and adult themes in a PG (Parental Guidance) rated program

The investigation concerned two segments in the television program 'What Went Wrong' broadcast by Channel 10 Sydney - one showing footage from the Maccabiah Games tragedy and the other showing images of a man being hit by a car at a speedway. The ABA found that both segments breached the classification requirements for violence and adult themes in PG classified programs. The adult themes presented in the Maccabiah Games segment were not carefully handled or mild in impact (as required by the code). The footage included shots of the bridge collapse and attempts to resuscitate a fatally injured man. Parts of the footage were repeated and the tone throughout was sensationalised. The violence shown in the speedway segment was not inexplicit or restrained as required. The shot of a man being hit was repeated a total of six times, while the voice over graphically described the man's situation.

In a further example, the complaint concerning an episode of 'Jag' broadcast by NEN Northern NSW was that adult themes of child abuse, child sexual abuse and murder were inappropriate for a PG time slot. The episode concerned the investigation of a murder of a five year old child and contained detailed verbal descriptions of the child's injuries and suffering leading to her death. The ABA found that the adult themes of murder and child abuse could not be said to be mild in impact as required by the code.

Violence during G (General) viewing time

The complaint concerned a promotion for 'Home and Away' broadcast by ATN 7 in G viewing time. The promotion depicted a bus accident, with children trapped in the bus, then the bus exploding. The ABA found the licensee breached the requirements for promotions in G viewing times by:

(1) broadcasting material that depicted close up vision of dead or wounded bodies;

(2) broadcasting material that contained more than a very low sense of threat or menace; and

(3) not taking care to minimise distress to children when special effects and camera work were used to create an atmosphere of tension or fear.

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.

In a written submission to the Australian Law Reform Commission relating to the Commission's project on Federal Civil and Administrative Penalties in Australia, the ABA said:

> Having regard to the unlikelihood that the ABA would exercise its power to suspend or cancel a broadcasting licence, particularly a commercial broadcasting licence, the ABA has few tools for ensuring compliance with the codes. In practice, its most powerful tools are its power of persuasion and its power to publish unfavourable investigation reports about breaches of the codes…
>
> The advantage of [other] remedies (e.g. an order to broadcast a corrective statement) is that they would act 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.

Licence conditions

With prosecution of an offence (for breach of a licence condition or of a notice to comply with a licence condition), as with other referrals to the DPP, the issue is satisfying the criminal standard of proof and meeting the terms of the DPP's Prosecution Policy (discussed below).

Suspension or cancellation of a licence is a severe penalty which impacts on viewers/listeners as well as broadcasters. In practice it is unlikely the ABA would exercise this power in respect of breaches by commercial broadcasters. In 2003 the ABA exercised its power to suspend or cancel a commercial licence for the first time, the case being that of Cybervale Pty Ltd, a commercial radio licence holder.[5] Suspension or cancellation of the license is an

[5] In 2002 the ABA considered whether to suspend a community radio broadcasting licence (2000 FM) but ultimately decided not to proceed as the licensee gave an undertaking it would desist from broadcasting advertisements. In the case of Cybervale, suspension was followed by a decision not to renew the licence on the basis that Cybervale Pty Ltd was not a suitable commercial radio licensee (s 47 of the Act) – see ABA media release of 25 November 2003.

extreme action, particularly in relation to services which have significant audiences. Evidence is presented later in this section of the report (under the heading "Evaluation of the ABA's enforcement powers based upon strategic regulation theory) that broadcasting regulators in other countries rarely use these powers.

Enforcing the categories of broadcasting services

This area has created considerable problems for the ABA in its enforcement efforts. The BSA provides significant criminal penalties for provision of a commercial broadcasting service without a licence, as well as criminal penalties for provision of other types of broadcasting service without an appropriate licence (ss 131, 132, 133, 134 and 135). The BSA also provides for the ABA to issue 'stop notices', requiring a person found to be providing an unlicensed service to desist from providing that service (s 137). The criminal penalties for breaching a stop notice are the same as for a breach of the substantive offence (s 138). 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 with a 'stop notice'. A particular area of difficulty has been open narrowcasters providing commercial services.

Narrowcasters operating as commercial broadcasters

Investigations of narrowcasters operating commercial services/outside terms of s 18 narrowcasting licences

Period 1 January 1993 to 10 December 2003

Total investigations re narrowcasters	43
Number involving complaints re operating commercial services	36
Number of breaches found in these complaints	17

Summary

84% of complaints against narrowcasters relate to the issue of them operating as commercial broadcasters

Breaches were found in 47% of these cases

Information in this table has been provided by the ABA

Open narrowcasters operate under a class licence, so the ABA is not empowered to suspend or cancel their licences. To make out an offence, the prosecution must demonstrate that the

service provided by the narrowcaster is a commercial broadcasting service. This would require the court to construe the meaning of 'commercial broadcasting service' (s 14) and probably the meaning of 'open narrowcasting service' (s 18) where this is raised in defence. The only relevant law (*Tallglen)*[6] suggests that a court will not necessarily take a narrow view of what is required to fall within the meaning of 'open narrowcasting.'

Issues can also arise with referrals to the DPP, who exercises an independent discretion as to whether to prosecute. The DPP must be satisfied that there is a prima facie case of a breach of the BSA and that the elements of an offence will be able to be established to the criminal standard of proof, that is, beyond reasonable doubt. The DPP then considers in accordance with its Prosecution Policy, whether there are public policy reasons why the matter should be prosecuted. To date, the ABA has not referred a matter to the DPP concerning the operation by an open narrowcaster of a commercial broadcasting service.

This is because the ABA has never been satisfied that it could provide a brief of evidence to the DPP that would make out a case of an offence of providing a commercial broadcasting service without a licence.

A further problem can arise with 'stop notices'. If the ABA issues a stop order, it can only do so in relation to the service that was the subject of the complaint. The difficulty is that a change to programming may be sufficient to mean that a new service is being provided. As a result, the ABA's powers of enforcement can be rendered nugatory by a service provider who makes a small change to the service under investigation – with the result that any complaint that the new service offends the BSA must be the subject of a fresh investigation to determine whether it is still a commercial service.

In order to provide insight into the enforcement challenges for the ABA where a service provider breaches a licence condition but then makes programming changes so that a new but still non-compliant service is being provided, a case study of BEST FM is presented.

BEST FM

Issue

Low powered open narrowcasting service (Bundy BEST FM) operating as a commercial radio broadcasting service.

Investigation and enforcement history

First investigation

The ABA received a complaint on 12 August 1998 that the Bundaberg LPON service, Best FM at 87.6 MHz was providing a service of broad commercial appeal.

On 8 April 1999 the ABA completed an investigation into the programming of Best-FM (ABA Investigation Report, Best FM Bundaberg Category of Service File No 1998/0582, Complaint No 10407, Investigation No 604). The ABA found the licensee of Best FM, Ms Janette Toll, in breach of s 133 of the BSA for providing a commercial radio broadcasting service without a licence.

[6] *Sportsvision v Tallglen Pty Ltd* (1998) NSWLR 103.

On 9 April 1999 the ABA issued a 'stop' notice to Ms Janette Toll under s 137, directing her as the licensee to cease providing a commercial service (it subsequently emerged that this notice was problematic because it was addressed to the licensee, Ms Toll, whereas the section requires the notice be served on the person who is providing the service, who it emerged, was Mr Toll).

Second investigation

On 7 May 1999 the original complainant alleged that Best FM was still providing a commercial radio broadcasting service. On 10 May 1999 the provider of the service, Mr Andrew Toll, advised the ABA that Best FM no longer provided the service that was the subject of the first investigation, and that its current service was a narrowcasting service. A second investigation was therefore required to determine whether Best FM was still a commercial service, following the claimed changes to its program format (ABA Investigation Report No 692 Best FM Bundaberg Category Of Service File No 1999/0275, Complaint No 10826, Investigation No 692).

Like the first ABA investigation, the second found a breach of s 133 of the BSA for providing a commercial radio broadcasting service without a licence. As a result, on 18 June 1999 the ABA issued a s 137 notice directing Mr Andrew Toll to cease operating a commercial radio broadcasting service.

Subsequent developments

The ABA subsequently received a further complaint that Mr Toll was continuing to provide an unlicensed commercial service, using the 87.6 frequency, notwithstanding the issuing of the s 137 notice. The name of the service had changed to Beat FM.

Mr Toll claimed, when he changed the service to BeatFM, that the service had been changed again, and was no longer a commercial service. It became clear that the ABA would need to reinvestigate each time he claimed that the service had changed. These investigations are time-consuming, as they require an investigator to listen to, analyse, and write a report on many hours of programming. The ABA was also concerned that even it was satisfied that a service was 'a commercial service' being provided in breach of s 133 (and s 138 if a notice had been issued), the evidence from an investigation was unlikely to satisfy a court to the criminal standard that such a service was being provided.

In 1999 the ABA obtained advice from Christine Adamson, of the Sydney Bar, on three enforcement options available in the case of a narrowcaster providing an unlicensed commercial broadcasting service. These were prosecution under ss 133 and 138 of the BSA; cancellation or suspension of the apparatus licence; and proceedings in the Federal Court for a declaration and injunctive relief. Counsel concluded that there were difficulties with all three options.[7]

[7] In the case of possible proceedings under s 144 for injunctive relief, Ms Adamson advised that it is likely that s 144 would be found inapplicable on the principles of statutory construction.

Non compliance with notices

Issuing a notice for a licensee to comply with a particular rule is one of the main tools available to the ABA. However, as discussed, there are practical difficulties with enforcing compliance with a notice given the next step is either prosecution through the DPP, or cancellation or suspension of the licence. An example arose in relation to CanWest's compliance with s 57 of Part 5 of the BSA relating to foreign ownership. CanWest's contravention of s 57 continued for 18 months, even though a s 70 notice had been issued directing that the breaches be remedied within 6 months.

Control notifications

Commercial radio and television licensees are required to notify the ABA annually of control and directorships (s 62). Commercial radio and television licensees and persons assuming control of these licences are required to notify the ABA of changes in control within seven days of becoming aware of them occurring (ss 63 and 64).

There is also a requirement for persons who control commercial television and radio licences to notify the ABA annually of any interests they hold in a newspaper associated with the licence area of the licence (s 65). Further, 112(6) requires subscription television broadcasting licensees to notify the ABA of foreign persons with company interests exceeding 20% in the licensee.

In respect of the control and foreign interest annual notifications (ss 62 and 112 respectively), the ABA estimates that each year there are around 20 late notifications and 30 that are incomplete. While breaches of these provisions attract criminal penalties on prosecution, it is unlikely that the DPP would proceed with a prosecution unless it considered it was warranted on public interest grounds. The option of cancelling or suspending a licence for breaches of the notification requirements would only become available to the ABA where the ABA has imposed an additional condition on the relevant licence requiring compliance with the requirement and the licensee subsequently failed to comply with the additional condition.

Further, it is not uncommon for breaches of the s 63 and s 64 rules (requiring notification by both licensees and controllers of changes within seven days of them occurring) to only come to the light when the annual return is provided and ABA staff can see that changes have occurred. In this circumstance the ABA contacts those licensees and controllers to elicit notification under s 63 and s 64.

Particularly in cases of minor breaches of the notification provisions, there appears to be a need for effective and commensurate sanctions. In a written submission, the ABA stated that its main concern is to obtain the information that is intended to be collected under the rules. 'The question of intention is not relevant in this context. There should be some sanction (although not necessarily a criminal sanction) for any failure to comply with notification rules'.

Annual financial returns

Annual financial returns are required by 31 December each year (s 205B). If the financial documentation is not received by the ABA it is a breach of the licence condition at clause 7(1)(ia) and 8(1)(ha) of Schedule 2 of the BSA, in that it is non-compliance with the requirements set out in s 205B of the BSA.

According to information received from the ABA, usually all commercial television licensees comply with s 205B of the BSA. However, on average 10 commercial radio licensees lodge their financial returns late. The licensees are called and then sent a letter advising of the breach of the licence condition.

Payment of licence fees

Licence fees for both commercial television licensees and commercial radio licensees are due on 31 December of each year (s 6 of the *Television Licence Fees Act 1964* and s 6 of the *Radio Licence Fees Act 1964*). According to information received from the ABA, on average 14 commercial broadcast licensees pay their licence fee after the due date each year. The penalty for non-payment of licence fees is an additional fee due and payable at the rate of 20% per annum calculated on the amount unpaid. In the case of very small commercial radio licensees this does not serve as an incentive for compliance.

Case study of ABA enforcement problems – Radio 2UE

The recent experience of the ABA in its attempt to prosecute Radio 2UE indicates some of the difficulties confronted by the ABA because of its limited enforcement powers.

On 29 June 2004, the ABA announced that it had received advice from the Commonwealth Director of Public Prosecutions that on the evidence available there would be no reasonable prospect of a conviction of Radio 2UE Sydney Pty Ltd in relation to breaches of the commercial radio disclosure standard and the matter would not be approved for prosecution (ABA News Release 44/2004).

Background information

In December 2003 the ABA found that the licensee of commercial radio service 2UE Sydney had breached s 7(1) of the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* on 19 occasions. The ABA also found six breaches of the special licence conditions imposed on the 2UE licensee following the ABA's Commercial Radio Inquiry in 2000.

In March 2000 the ABA had imposed two new licence conditions on 2UE that took effect on 3 April 2000. These conditions were intended to encourage disclosure of sponsors and to foster a 'culture of compliance' with the regulatory regime.

The first licence condition imposed on the 2UE licence provides that 2UE must maintain a regime of on-air and off-air disclosure of certain commercial agreements between presenters and their sponsors. It also required 2UE to conduct a compliance program which required presenters and staff of 2UE to undertake training concerning the obligations imposed on 2UE by the Broadcasting Services Act, the Commercial Radio Codes of Practice and the licence condition. The second licence condition requires that advertisements be distinguished from other program matter.

When it announced the results of its investigation in December 2003, the ABA stated that it regarded the breaches as serious (ABA News Release 90/2003). The Disclosure Standard and the special licence conditions imposed on 2UE were aimed at ensuring that current affairs programs on the influential medium of commercial radio are accurate and that information is not presented in a misleading manner by withholding relevant facts.

Where a radio presenter is personally sponsored by third parties, and the presenter comments on matters directly related to those third parties, listeners are entitled to know that a commercial relationship exists between the presenter and those parties. The ABA found the licensee of 2UE had repeatedly failed to maintain the standards of disclosure relating to commercial radio presenters, and the ABA decided to refer the matters to the Commonwealth Director of Public Prosecutions for its consideration.

In addition to the referral of the matter to the Commonwealth Director of Public Prosecutions, the ABA announced on 6 May 2004 that it had imposed a further licence condition on 2UE (ABA News Release 44/2004). This additional licence condition requires 2UE, at its expense, to engage an approved independent third party to monitor the John Laws program, for limited periods nominated by the ABA, and provide a report, including a transcript, direct to the ABA. This will provide an ongoing incentive to ensure compliance with the disclosure requirements by enabling the ABA to undertake spot checks on the program. 2UE appointed an independent monitor in June 2004.

In October 2003 the ABA released research that indicated strong endorsement by the community of the requirement for on-air disclosure of commercial agreements by talkback presenters introduced by the ABA in 2001. More than three-quarters of commercial AM radio listeners said it is important to be informed by radio presenters about their personal sponsors.

The ABA's investigation began in November 2002, following a complaint from the Communications Law Centre.

Analysis

In the ABA media release of 29 June 2004 announcing that the prosecution of 2UE would not proceed, Acting ABA Chair, Ms Lyn Maddock, noted some of the difficulties confronting the ABA in this matter:

> 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.

The only civil law-based remedies available to the 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. However the ABA has not ruled out the option of seeking criminal prosecutions in the future.

These observations are supported by an analysis of what must be proved to establish a conviction.

Section 139(3) of the BSA provides:

A person is guilty of an offence if:
(a) the person is a commercial radio broadcasting licensee;
(b) the person engages in conduct; and
(c) the person's conduct breaches a condition of the licence set out in subclause 8(1) of Schedule 2.

Subclause 8(1) of Schedule 2 provides, among other things, that the licensee will comply with program standards applicable to the licence under Part 9 of the BSA.

Section 10A of the BSA provides that the *Criminal Code Act* applies to offences under the BSA. The *Criminal Code* specifies, among other things, how elements of particular offences are determined and sets out general principles of criminal responsibility.

The major difficulty confronting the ABA in relation to prosecution of 2UE is proving that 2UE intended to engage in the offending conduct. The *Criminal Code* provides that in relation to a body corporate such as 2UE, fault must be attributed to the body corporate by showing that it "expressly, tacitly or impliedly authorised or permitted the commission of the offence".

Section 12.3 of the *Criminal Code* provides that the means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Factors relevant to the application of (c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

"Corporate culture" is defined in s 12.3(6) to mean "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place".

"High managerial agent" is defined in s 12.3(6) to mean "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy".

There was no evidence that the board of directors of 2UE or a "high managerial agent" of 2UE authorised or permitted the commission of the alleged offence. In addition, evidence was not obtained that could establish that a corporate culture existed within 2UE that "directed, encouraged, tolerated or led to non-compliance with the relevant provision" or that 2UE "failed to create and maintain a corporate culture that required compliance with the relevant provision". In fact, 2UE had strengthened its compliance system.

Although the ABA investigation found that breaches had continued, despite a strengthened compliance system, the Commonwealth Director of Public Prosecutions advised the ABA that the fact that breaches continued would not of itself be sufficient to establish a breach of the BSA according to the required criminal standard; namely, proof beyond reasonable doubt at the time of the alleged breaches.

The outcome of this matter starkly reveals the limits of the ABA's enforcement powers. A lengthy ABA investigation established a series of breaches of the commercial radio disclosure standard. The ABA regarded these breaches as serious yet the Commonwealth Director of Public Prosecutions advised that there was no reasonable prospect of a conviction of 2UE.

This leaves the ABA with only limited civil sanctions – suspension or cancellation of 2UE's licence or the imposition of further licence conditions (which must not be punitive). Suspension or cancellation of the licence would punish listeners by depriving them of a radio service. In relation to imposing additional conditions, the history of this matter indicates that the ABA previously imposed a series of conditions, some of which, according to the ABA investigation, had been breached by 2UE.

Consequently, there is doubt whether the ABA is able to fulfil its mandate in s 5 of the BSA that requires the ABA to "deal effectively with breaches of the rules" established by the BSA.

Section 6 of this report identifies possible law reforms to assist the ABA fulfil its enforcement mandate.

Evaluation of the ABA's enforcement powers based upon strategic regulation theory

Strategic regulation theory provides an important perspective on the role of enforcement sanctions in securing regulatory compliance.[8] The theory advocates regulatory compliance as best secured by persuasion, rather than legal enforcement because legal proceedings are expensive, while co-operation between the regulator and the persons regulated is cheap. For persuasion to be effective, generally a threat of punishment must lie behind the regulator's conciliatory actions or gestures. The threat of punishment should take the form of a set of integrated sanctions which can be threatened by the regulator where contravention takes place. The sanctions should escalate in severity in response to more serious contraventions of the law. This process is usually graphically represented by the pyramid model, with incapacitation at the apex of the enforcement pyramid.[9]

At the base of the pyramid are methods of education and persuasion. This level is usually sufficient for most of those regulated, including those who commit minor acts of non-compliance. The remaining levels are necessary when dealing with others such as the incompetent, the irrational and those rational calculating citizens who believe that it is not in their self interest to comply and only respond when the costs outweigh the benefits.[10] The appropriate sanctions may be letters of warning; followed by civil penalties and other civil legal mechanisms. Continued failure to comply or more egregious contraventions will activate criminal sanctions. The severity of a sanction is graphically represented by its proximity to the apex of the pyramid.[11]

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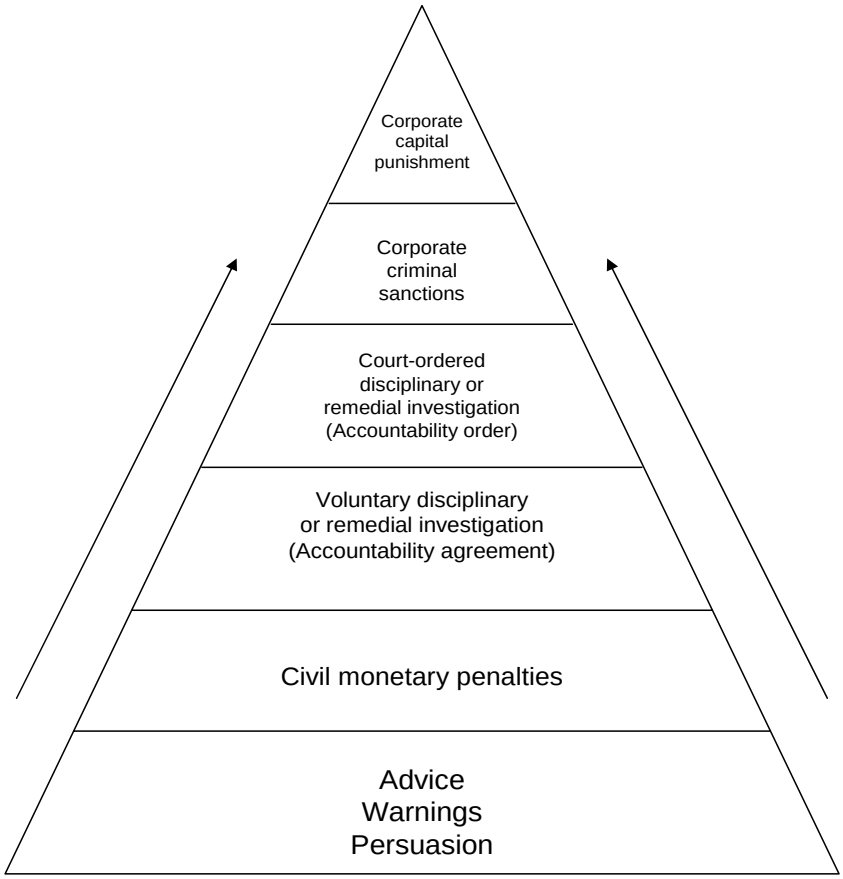
[8] Proponents of strategic regulation theory include: J Scholtz, 'Deterrence, Cooperation and the Ecology of Regulatory Enforcement' (1984) 18 *Law & Society Review* 179; I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993); C Dellit and B Fisse, 'Civil Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994).

[9] Professor Braithwaite formulated and developed the enforcement pyramid in a number of his publications: see, for example, J Braithwaite, *To Punish or Pursuade: Enforcement of Coal Mine Safety* (1985); Ayres and Braithwaite, supra n 5.

[10] Ayres and Braithwaite, supra n 5. These views reflect the "game" theory of regulation which argues that regulation is a game of negotiation and interaction between the regulator and the persons regulated. Those regulated are presumed to be rational, single actors who determine whether to comply with regulation by assessing the costs and benefits which compliance produces for them at a particular time. See Scholtz, supra n 5.

[11] P Grabosky, "Discussion Paper: Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems" (1997) 25 *International Journal of the Sociology of Law* 195, 196.

Figure 1: Pyramid of disciplinary and remedial interventions against corporate offenders[12]



Level 1

Persuasion, warnings, advice, and other informal methods of promoting compliance.

Level 2

Civil monetary penalties (corporate and individual).

Level 3

Disciplinary or remedial investigation undertaken upon agreement with an enforcement agency (accountability agreements) and court-approved assurance of an effective program of disciplinary or remedial action (accountability assurances), coupled with publication of an accountability report.

Level 4

Court-ordered disciplinary or remedial investigation (accountability orders) or court-approved assurance of an effective program of disciplinary or remedial action (accountability assurances), coupled with publication of an accountability report.

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12 This enforcement pyramid is drawn from Fisse and Braithwaite, supra n 5, 142.

Level 5

Criminal liability (individual and corporate), with community service, fines and probation authorised for individual offenders, and adverse publicity orders, community service, fines and probation for corporate offenders.

Level 6

Escalated criminal liability (individual and corporate), with jail authorised for individual offenders, and liquidation (corporate capital punishment), punitive injunctions, and adverse publicity orders for corporate offenders.[13]

Figure 1 is an enforcement pyramid for corporate offenders. The reason why this type of pyramid is appropriate in the context of this report is that the ABA typically allocates licences to companies (see, for example, s 37 of the BSA). A pyramid with different types of penalties would be used if the main focus of a regulator was upon individuals rather than companies.

The goal of the pyramid is to stimulate maximum levels of regulatory compliance. Regulators start by assuming that the regulated are willing to comply voluntarily (whether in a self-regulatory or public agency environment). In an ideal world the regulated would not need any inducement or threat from the regulator. However, the regulator must provide for the possibility that this assumption cannot be made by being prepared to move up the enforcement pyramid with increasing degrees of regulatory response. The rationale of strategic regulation theory and its pyramid model is that those regulated will comply sooner or later through a combination of normative desire and instrumental deterrence. Ayres and Braithwaite argue that if the regulator can plausibly threaten to meet the regulated's non-compliance by moving successively up the pyramid, then most of the regulator's work can get done effectively at the bottom layers of the pyramid . This is because the "bigger the sticks at the disposal of the regulator, the more it is able to achieve its results by speaking softly."[14]

Pursuant to strategic regulation theory, sanctions should serve three functions. They should:

- protect against actual and/or potential contraventions of the law ('the protective function');
- impose punishments against persons committing contraventions of the law ('the enforcement function'); and
- deter people from contravening the law ('the preventative function').

Strategic regulation theory developed partly as a response to changing expectations of regulators and also partly as a response to criticisms of a form of regulation which has become known as "command and control," in which regulation is largely seen as standards, developed by parliament or by regulators, which are enforced by criminal sanctions. Numerous criticisms have been made of command and control regulation and these include:[15]

[13] Fisse and Braithwaite, supra n 5, 141.
[14] J Braithwaite, "Responsive Business Regulatory Institutions" in C Cody and C Sampford (eds), *Business, Ethics and Law* (1993), 88.
[15] These criticisms are drawn from C Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002), 8.

- a tendency towards unnecessary complex rules that are too difficult or costly for business to access, understand and comply with;
- over-regulation, legalism, inflexibility and unreasonableness in design and implementation that tend to break down the natural willingness to comply with reasonable, substantive objectives;
- evasion and "creative" compliance by taking advantage of technical and detailed rules, rather than compliance with the substance and goals of regulation;
- "capture" of regulatory agencies by regulated entities; and
- dependence on strong monitoring and enforcement where sufficient resources, expertise and strategy are not necessarily available.

Figure 2: ABA enforcement pyramid – based on existing powers

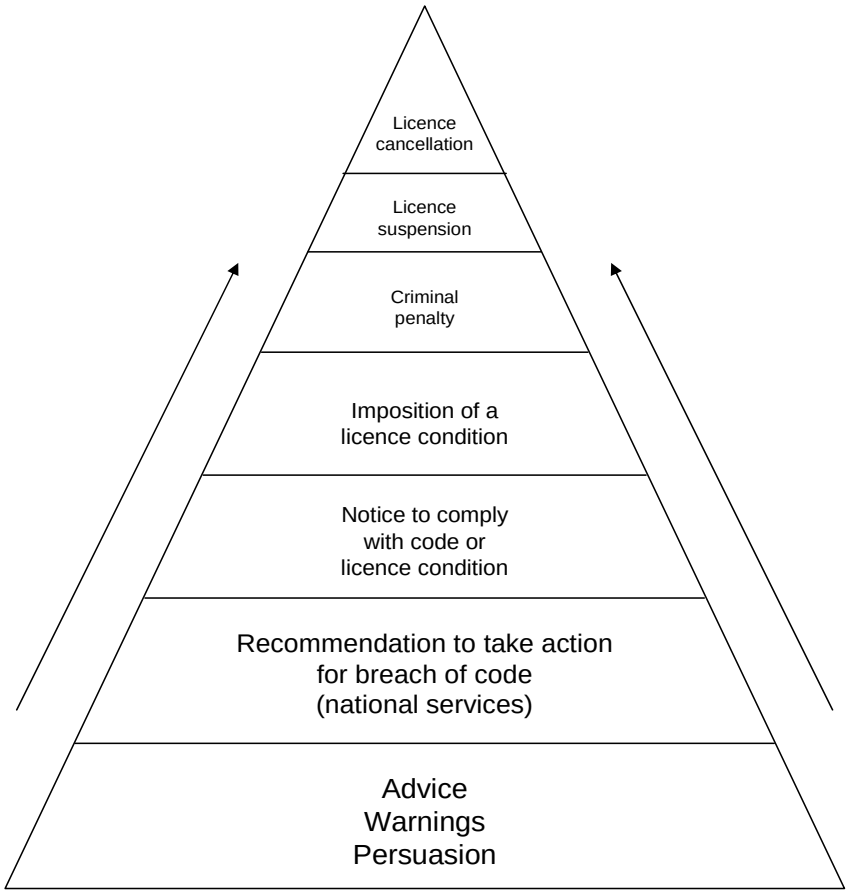

Figure 2 is an enforcement pyramid which reflects the current enforcement powers of the ABA. At the bottom (level 1) is advice, warnings and persuasion. Above this (level 2) is a recommendation to take action for breach of a code of practice in relation to national services (ABC and SBS). If a complaint is upheld against a national service broadcaster, the ABA may, by written notice, recommend to the national broadcaster that it take action to comply with the relevant code of practice, or take other action as specified in the notice (which may include broadcasting or otherwise publishing an apology or retraction). If the national broadcaster does not follow this recommendation, the ABA may report in writing to the Minister with the report to be tabled in Parliament.

The next level (level 3) is a notice issued by the ABA to comply with a code of practice or a licence condition. The next level (level 4) is the imposition of a licence condition. The ABA could, for example, impose conditions on licences (including conditions relating to code compliance) in relation to commercial services, community services, and subscription television broadcasting services. The next level (level 5) is the imposition of a criminal penalty by a court. Where the ABA has issued a notice directing that action must be taken to ensure compliance with a relevant code of practice, failure to comply with such a notice is an offence. In addition, the breach of some statutory conditions of licences and class licences is an offence. Where the ABA is of the view that criminal penalties should be imposed, the ABA refers the matter to the DPP for its consideration.

At the apex of the pyramid (levels 6 and 7) are licence suspension and licence cancellation. Breach of licence conditions can lead the ABA to impose one of these penalties.

An important point to note about figure 2 (the ABA enforcement pyramid) is that it suffers two significant deficiencies when compared to figure 1 (the pyramid of disciplinary and remedial interventions against corporate offenders). First, the ABA enforcement pyramid does not have civil monetary penalties (level 2 of figure 1). Second, the ABA enforcement pyramid does not have what is referred to in figure 1 as accountability agreements. Such agreements are another phrase for undertakings between the regulator and the regulated entity whereby the regulated entity agrees to undertake certain actions.

The result is that the ABA has less enforcement powers at its disposal than are available to other regulators and that should be available to it according to strategic regulation theory. The costs of this to the ABA and to industry can be high. First, it can result in less compliance by those regulated than is desirable. Proponents of strategic regulation theory suggest that the taller the enforcement pyramid and the more levels of possible escalation (ie the more levels of enforcement powers available to the regulator), then the greater is the pressure that can be exerted to motivate "voluntary" compliance at the base of the pyramid.[16]

Second, ensuring that the regulator has flexible enforcement powers is an important way of strongly motivating regulated entities to have internal compliance procedures that are effective. If such internal compliance procedures do not exist or are less effective than they otherwise might be, then the regulator has a range of sanctions that can be imposed according to the severity of the non-compliance.

Third, having a regulator with flexible and effective enforcement powers can minimise the costs of litigation (which can be a cost to both the regulator and to those regulated) by encouraging alternatives such as the use of enforceable undertakings.

Finally, it is very important to ensure that a regulator has effective and flexible enforcement powers where some of its enforcement powers or sanctions may, for very good reason, be

[16] Fisse and Braithwaite, supra n 5, 85.

little used. A good example of this is the ABA's powers to suspend a licence or cancel a licence. This "ultimate" sanction has only been used once by the ABA (in the case of Cybervale – discussed earlier in this section). The reason why the ABA has not used this power more extensively is understandable. To utilise this sanction deprives the community of a broadcasting service and, if used too extensively, could easily create a community backlash against the ABA. This means that in all but the most extreme situations, the top two levels of the ABA enforcement pyramid are not available to the ABA.

Limited use by broadcasting regulators of the power to revoke a broadcasting licence is not unique to the ABA. Correspondence from the UK broadcasting regulator (Ofcom) indicates that it has never revoked a broadcasting licence and that in the 10 year existence of the Independent Television Commission (one of the predecessor regulators of Ofcom), this power was used only once or twice. The US broadcasting regulator (the Federal Communications Commission) indicates that it has only once since 1999 revoked a broadcasting licence and the Canadian broadcasting regulator (the Canadian Radio – Television Communications Commission) indicates that since 1968 there has only been one or two broadcasting licence revocations and since 1977 only seven non-renewals of licences.[17]

Section 6 provides more details about specific ways in which the ABA's enforcement powers can be made more effective.

[17] Emails received from Ofcom, 30 June 2004; the Federal Communications Commission, 5 August 2004 and the Canadian Radio – Television Telecommunications Commission, 5 August 2004.

Section 5

Enforcement Powers of Other Broadcasting Regulators[18]

This section contains a review of the responsibilities and enforcement powers of broadcasting regulators in the USA, the UK, Canada and New Zealand.

The Federal Communications Commission (USA)

Introduction

Broadcasting in the United States is regulated by the Federal Communications Commission ('FCC'). The FCC is a national, independent US government agency, established under the *Communications Act* of 1934.

The FCC's responsibilities extend beyond regulation of broadcasting to encompass the communications sector generally. Its jurisdiction covers interstate and international communications by radio, television, wire, satellite and cable. The FCC is not responsible for regulation of Internet service providers, radio and television networks or intrastate communications.

The FCC regulates conduct in broadcasting and other sectors of the communications industry by:

- issuing licences, permits, certificates and other instruments of authorisation containing terms and conditions;
- issuing rules and regulations; and
- enforcing statutory provisions, FCC rules and regulations and licence conditions.

In addition to its regulatory functions, the FCC is also responsible for:

- development of policy, particularly relating to the development of wireline and domestic wireless communication;
- coordination of telecommunications policy efforts with industry and with other governmental agencies — federal, tribal, state and local — in serving the public interest;
- educating and informing consumers about telecommunications goods and services;
- engaging with consumers and obtaining input; and
- conducting studies and analyses relating to the communications sector.[19]

[18] Section 5 of the report has been written by Laura Little, Research Officer, Centre for Corporate Law and Securities Regulation, The University of Melbourne. Section 5 includes information received from the following regulators: the FCC, Ofcom, the BSA and the CRTC.

Enforcement powers of the FCC

The FCC can take action to enforce communications laws on its own motion or in response to complaints. The enforcement powers of the FCC include:

- powers to investigate breaches of communications laws;
- powers to conduct hearings; and
- powers to impose penalties for breaches of communications laws.

These powers are elaborated upon below.

Information gathering powers

The FCC has the power to require communications operators to submit to it certain information and documents (see, for example, ss 213(f), 218, 219).

The FCC also has wide powers to investigate a breach of rules or regulations, licence conditions or other conditions imposed by the FCC upon communications operators. Under s 403 of the *Communications Act* the Commission is given "full authority and power at any time to institute an inquiry, on its own motion" or in response to a complaint, in relation to matters within the Commission's jurisdiction.

Specific investigative powers of the FCC include:

- power to require the attendance and testimony of witnesses through subpoena; and
- power to subpoena books, papers, schedules of charges, contracts, agreements and other documents relating to the investigation (s 409(f)).

The FCC has power to impose monetary forfeiture penalties and revoke licences in certain circumstances for failure of communications operators to comply with rules concerning the provision of information to the FCC.[20]

Powers to conduct hearings

The FCC has the power to conduct hearings to determine whether there has been a breach of communications laws by a communications operator (however, it does not necessarily have to conduct a full evidentiary hearing into a matter in order to determine whether there has been a breach of communications laws). The FCC has significant internal structures in place to deal with hearings. Within the FCC, there is an Office of Administrative Law Judges which is responsible for conducting hearings. The FCC has extensive powers under 47 CFR 1.243 in conducting hearings. These powers include authority to:

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[19] See 47 CFR 0.11 – 0.151; See also the following FCC sites: <http://www.fcc.gov/aboutus.html>, <http://www.fcc.gov/cgb/consumers.html>

[20] 'Firm, Fast Flexible and Fair: The FCC Enforcement Bureau After Three and a Half Years', Remarks by David H Solomon, Chief, Enforcement Bureau, Federal Communications Commission, FCBA Enforcement CLE Seminar (April 28 2003) p2.

- administer oaths and affirmations;
- issue subpoenas;
- examine witnesses;
- rule upon questions of evidence; and
- take or cause depositions to be taken.

Powers of the FCC to impose sanctions

The FCC has powers to impose penalties in relation to breaches of communications laws generally as well as powers to impose specific sanctions in response to formal complaints made against a broadcaster. These sanctions are:

- monetary forfeiture penalties;
- suspension of licences;
- revocation of licences and construction permits and/or cease and desist orders; and
- consent orders.

(i) Monetary forfeiture
The Commission has power to impose a monetary forfeiture penalty against any person who holds, or is an applicant for, a licence, permit, certificate or other authorisation issued by the Commission, if that person is found to have:

(1) Wilfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorisation issued by the Commission;
(2) Wilfully or repeatedly failed to comply with any of the provisions of the *Communications Act* of 1934, as amended; or of any rule, regulation or order issued by the Commission under that Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding on the United States;
(3) Violated any provision of s 317(c) or s 508(a) of the *Communications Act* (these provisions relate to requirements of broadcasters to announce when payments have been received in relation to a program – i.e. cash for comment);
(4) Violated any provision of ss 1304, 1343, or 1464 of Title 18, United States Code (these provisions relate to obscenity and indecency).

There are guidelines in the Federal Regulations indicating the base amount that should be imposed in relation to particular violations. There are also maximum upper limits on the amount of a forfeiture penalty, set by Federal Regulations (47 CFR 1.80(b)). These limits are:

(1) For a broadcast station licensee or permittee, a cable television operator or applicant for a broadcast or cable television operator licence, permit, certificate or other authorisation:
Up to US$27,000 for each violation or each day of a continuing violation, with the total amount for a single act not to exceed US$300,000.

(2) For a common carrier subject to the *Communications Act*, or an applicant for any common carrier license, permit, certificate or other authorisation:

- Up to US$120,000 for each violation or each day of a continuing violation, with the total amount for a single act not to exceed US$1,200,000.

(3) For any other case:
Up to US$11,000 for each violation or each day of a continuing violation, with the total amount for a single act not to exceed US$87,500.

There are procedures for review of Commission orders. Any party to proceedings may appeal an order of the Commission and seek review under 47 CFR 1.276. The decision of the Commission on the appeal is final. Further appeals can only be made by seeking judicial review in accordance with 5 USC 504(c)(2). (47 CFR 1529).

There are mechanisms for enforcement of forfeiture orders in cases of non-compliance. If a forfeiture has not been paid after an order has become final, the Commission can refer the matter to the Attorney General who can recover the penalty in the appropriate district court (s 503(b)(3)(B), s 504(a)). In that instance, the assessment of the forfeiture penalty is not subject to review.

(ii) Suspension of licences
The Commission has the power to issue orders suspending the licence of amateur and commercial radio operators and broadcast television where the licensee has engaged in any of the conduct outlined in s 303(m) of the Act.[21] (47 CFR 1.85)

The following are the procedures for the imposition of a licence suspension:

- the Commission must give notice in writing stating the cause of the proposed suspension;
- the licensee is able to make a written application for a hearing in relation to the order; and
- the hearing is to be heard by the Chief of the Wireless Telecommunications Bureau who has power to affirm, modify or revoke the order of suspension.

(47 CFR 1.85)

Again, there are procedures for review of Commission orders. Any party to the proceedings may appeal an order of the Commission and seek review under 47 CFR 1.276. The decision of the Commission on the appeal is final. Further appeals can only be made by seeking judicial review in accordance with 5 USC 504(c)(2). (47 CFR 1529).

[21] The licensee: (A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorised to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or (B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or (C) has wilfully damaged or permitted radio apparatus or installations to be damaged; or (D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted - (1) false or deceptive signals or communications, or (2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or (E) has wilfully or maliciously interfered with any other radio communications or signals; or (F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

There are mechanisms for enforcement of suspensions orders in cases of non-compliance. If an order is not complied with once it has become final, the Commission can refer the matter to the Attorney General who may apply to the appropriate district court for enforcement of the order. A court is able to hear the matter and determine whether the order was duly made and served. (s 401(b)).

(iii) Revocation of licence and/or cease and desist orders

The Commission has the power to revoke a station licence or construction permit and/or issue cease and desist orders. (*Communications Act*, s 312, 47 CFR 1.91(a)).

Before revoking a licence or issuing a cease/desist order the Commission must issue an order directing the person to show cause why a revocation and/or cease and desist order should not be issued. The respondent then has an opportunity to appear before the Commission at a hearing and show cause.

(iv) Consent orders

A consent order is "a formal decree accepting an agreement between a party to an adjudicatory hearing proceeding held to determine whether that party has violated statutes or Commission rules or policies, and the appropriate operating bureau, with regard to such party's future compliance with such statutes, rules or policies, and disposing of all issues on which the proceeding was designated for hearing. The order is issued by the officer designated to preside at the hearing or (if no officer has been designated) by the Chief Administrative Law Judge."(47 CFR 1.93(a))

Negotiation of a consent order can be initiated by the operating bureau or by the party whose possible violation is the subject of proceedings (47 CFR 1.94(a)). Other parties to the proceedings are also entitled to participate (47 CFR 1.94(b)). Once an agreement is reached, it is submitted to the presiding officer or Chief Administrative Law Judge. The officer or judge will either sign the order, reject the agreement, or suggest to the parties further negotiation of sections of the agreement he/she considers unsatisfactory. If the officer or judge signs the consent order, the proceedings are then closed. If he/she rejects the agreement, the hearing proceeds.

All agreements must contain:

- an admission of all jurisdictional facts;
- a waiver of the usual procedures for preparation and review of an initial decision;
- a waiver of the right of judicial review or otherwise to challenge or contest the validity of the consent order;
- a statement that the designation order may be used in construing the consent order;

- a statement that the agreement shall become a part of the record of the proceeding only if the consent order is signed by the presiding officer and the time for review has passed without rejection of the order by the Commission;
- a statement that the agreement is for purposes of settlement only and that its signing does not constitute an admission by any party of any violation of law, rules or policy (see 18 USC 6002); and
- a draft order for signature of the presiding officer resolving by consent, and for the future, all issues specified in the designation order.

As the content of the agreement suggests, the party subject to the consent order does not have rights of review by the Commission or judicial review of the order. However, a party to the proceedings that is not party to the agreement may appeal the consent order under s 1.1302 and seek review by the Commission of the consent order.

In the case of non-compliance with the consent order by the party subject to the order, that party becomes subject to "any and all sanction which could have been imposed in the proceedings resulting in the consenting order… and to any further sanctions for violation noted as agreed upon in the consent order." The Commission has the burden of proof for showing that the consent order has been violated (47 CFR 1.95).

Powers of the FCC to award damages in relation to complaints

The FCC has power to award damages to a complainant where a formal complaint is upheld against a communications operator (*Communications Act* s 207). It can also make an ordering requiring the carrier to pay the costs of the complainant (*Communications Act* s 209).

Before making an order in relation to a complaint, the FCC must first conduct formal complaint proceedings. These are generally written proceedings consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments (47 CFR 1.720).

Again, there are procedures for review of Commission orders. Any party to the proceedings may appeal an order of the Commission and seek review under 47 CFR 1.276. The decision of the Commission on the appeal is final. Further appeals can only be made by seeking judicial review in accordance with 5 USC 504(c)(2). (47 CFR 1529).

In the case of non-payment by the carrier, the complainant may file a petition setting forth the cause for the damages claim in the Commission order. The suit proceeds like a civil damages suit but the finding and order of the Commission are prima facie evidence of the claim (s 407).

Powers of the FCC to seek civil remedies through the courts

The FCC can seek the following civil remedies through the courts:

(i) Seizure of communications devices
The FCC can seek a warrant for seizure of communications devices and equipment. The warrant is executed by US Marshalls and the equipment then forwarded to the Commission (s 510).

(ii) Injunctions
The FCC can obtain a district court injunction through the Department of Justice (s 203).

Criminal penalties

In addition to the penalties imposed by the FCC, criminal penalties can also be imposed for certain acts and omissions and for breaches of rules and regulations (s 501, s 502). Penalties include:

- monetary fines set by the Act; and
- imprisonment of up to 2 years (s 501).

Ofcom (UK)

Introduction

Broadcasting in the UK is regulated by the statutory authority, Ofcom. Ofcom is a new body established under the *Communications Act 2003* that has replaced five regulators – the Broadcasting Standards Commission, the Independent Television Commission, the Director General of Telecommunications (Oftel), the Radio Authority and the Secretary of State (insofar as it has taken over certain roles of the Secretary).

Ofcom is responsible for regulation of radio, television, cable, satellite and electronic communications in the UK. It is also responsible for competition regulation in relation to the communications sector. Ofcom derives its powers from the *Communications Act 2003*, the *Broadcasting Acts* of 1990 and 1996, the *Telecommunications Act 1984*, the *Competition Act 1998* and the *Enterprise Act 2002*.

Ofcom regulates the communications sector through the following means:

Electronic communications and radio spectrum

Electronic communications:

- enforcement of the electronic communications code, set out in Schedule 2 of the *Telecommunications Act*, and enforcement of other statutory provisions; and
- imposing regulatory conditions on entitlement to provide these services.

Radio spectrum:

- granting of spectrum access; and
- imposing conditions on access.

Television and radio

Ofcom regulates the broadcasting industry through:

- issuance of broadcasting licences containing terms and conditions;
- issuance of broadcasting codes developed by Ofcom and the former relevant statutory authorities; and
- enforcement of the licence conditions and broadcasting codes.

Competition matters

Ofcom exercises powers under Part I of the *Competition Act 1998* and Part 4 of the *Enterprise Act 2002*, concurrently with the Office of Fair Trading ('OFT'). Part I of the *Competition Act 1998* prohibits agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition') and conduct which amounts to an abuse of a dominant position in a market.[22] Part 4 of the *Enterprise Act 2002* is concerned with market investigations in response to situations where 'competition does not appear to be working well, but where there is no apparent breach of existing competition law.'[23] Ofcom's powers include the ability to investigate and impose penalties for certain breaches of competition law.

In addition to Ofcom's regulatory functions, the agency is also responsible for:

- research of the communications industry and market;
- providing information to consumers on all aspects of the communications sector;
- consultation with industry, consumers and community groups; and
- investigating and providing advice in relation to media mergers.[24]

[22] Explanatory Notes to the *Communications Act 2003*, [784]-[787].
[23] Explanatory Notes to the *Communications Act 2003*, [779].
[24] See *Communications Act 2003*, ss 378-389.

Enforcement powers

Information gathering powers

Ofcom has powers to obtain information relating to broadcasting and telecommunications.

(i) Broadcasting

Under s 4 of the *Broadcasting Acts 1990* and *1996*, Ofcom can impose requirements on broadcasters to submit information required to fulfil Ofcom's functions under the Acts, as a condition of the broadcasting licence. Breach of these requirements is subject to the same penalties as breaches of any other licence conditions.

Ofcom can also obtain information from broadcasters as part of the proceedings prior to a hearing.[25]

Provision of false information and/or withholding relevant information is deemed an offence under s 144 of the *Broadcasting Act 1996*. Stringent penalties apply to these offences. Upon conviction a person can be subject to imprisonment for up to 3 months or a fine up to level 5 of the standard scale (s 144(4)). Under s 145, a person – and a body corporate of which that person is a director or part of management –can also be disqualified from holding a licence for up to 5 years.

(ii) Telecommunications

Under s 135 of the *Communications Act 2003*, Ofcom can require communications providers to provide all information that is necessary for Ofcom to carry out its regulatory functions.

Ofcom can impose the following penalties for non-compliance with requirements to submit information:

- a monetary penalty of up to £50,000 (s 139 *Communications Act*);
- suspension of service provision entitlement for serious and repeated contraventions (s 140 *Communications Act*);
- suspension of entitlement to supply communications apparatus (s 141 *Communications Act*).

Additionally, knowingly or recklessly providing false information is deemed an offence under s 144 of the *Communications Act*. Upon conviction a person may be subject to a fine not exceeding the statutory maximum and/or imprisonment for up to 2 years.

[25] This is implied in Ofcom, *Outline procedure for statutory sanctions in content cases*, Revised March 2004.

Powers of Ofcom to impose penalties

(a) Network services (electronic communications) and radio spectrum

Ofcom is able to take the following actions where there has been a breach of licence conditions or other statutory requirements:

(i) Imposition of financial penalties on the provider (*Communications Act* ss 37, 41, 96, 112, 123, 130, 139, 175-6). The table below outlines the maximum financial penalties Ofcom can impose in relation to breaches of the Act, the electronic communications code and licence conditions.

Relevant conduct	Amount of Penalty	Relevant Provisions
Failure by providers to give advance notification to Ofcom that they are providing, or ceasing to provide electronic communications networks or services, or making available a designated associated facility	Up to £10,000	Communications Act s 33
Non-payment by providers of administrative charges	Discretion given to Ofcom to set penalties	Communications Act s 41
Contravention of SMP apparatus supply conditions	An amount not exceeding 10% of the turnover of the notified provider's relevant business for the relevant period	Communications Act s 96, 97
Contravention of the electronic communications code	Up to £10,000	Communications Act s 112
Contravention of conditions regulating premium rate services	Up to £10,000	Communications Act s 123
Persistent misuse of network services	Up to £5,000	Communications Act s 130
Contravention of requirement to provide Ofcom with certain information	Up to £50,000	Communications Act s 139
Contravention of conditions or use of wireless telegraphy	Up to £250,000 or 5% of gross revenue	Communications Act s 175

The Act addresses non-compliance by providing that where a penalty is unpaid, it is "to be recoverable by … [Ofcom] accordingly" (*Communications Act* ss 37, 41, 96, 112, 130, 139,175).

(ii) Suspension or restriction of a provider's entitlement to provide network services (*Communications Act* ss 42, 100, 124, 132, 140). Ofcom may also impose conditions on the provider in relation to the suspension or restriction of entitlement. Generally, Ofcom can only impose this penalty where there have been serious and repeated contraventions of the provider's obligations. It must also satisfy certain other substantive and procedural requirements.

Non-compliance with an order of suspension or restriction is deemed an offence under the Act. A person guilty of this offence is liable to payment of a fine (*Communications Act* ss 43(1),(2), ss 103, 124, 133, 143).

(iii) Suspension or restriction of the entitlement of a supplier of electronic communications apparatus, to supply apparatus (*Communications Act* s 101, s 141). Ofcom may also impose conditions on a supplier of electronic communications apparatus in relation to the suspension or restriction of entitlement. Conditions include payment of compensation to customers that have suffered loss or damage due to the supplier's contravention of their obligations (*Communications Act* s 101).

Non-compliance with an order of suspension or restriction by the supplier is deemed an offence under the Act. A person found guilty of this offence is liable to payment of a fine (*Communications Act* ss 103, 143).

(iv) Suspension of the application of the electronic communications code to a provider (s 113). This means that the provider cannot exercise any rights conferred by the code.[26]

(v) Power to make orders (upon approval of the Secretary of State) where a public communications provider has not put in place suitable procedures, standards and policies to deal with complaints and other customer interests. These orders include establishing an independent body corporate to administer and enforce the necessary arrangements to ensure customer protection, and obliging public communications providers to pay for the establishment and maintenance of such a body (*Communications Act* s 55).

[26] Explanatory Notes to the *Communications Act 2003*, [271].

(b) Television and Radio

Ofcom can impose a variety of sanctions for breach of broadcasting licence conditions or statutory regulations. Generally, Ofcom will only impose these statutory sanctions where it believes a broadcaster has repeatedly, deliberately or seriously breached the terms of its licence or Ofcom's statutory codes.[27] The sanctions available to Ofcom are:

(i) Imposition of financial penalties on the broadcaster (*Communications Act 2003* s 237; *Broadcasting Act 1996* ss 11,17, 23, 27,53,59, 62,66, 102; *Broadcasting Act 1990* ss 18, 41, 55, 101, 110). Breach of broadcasting licence conditions is generally subject to a fine of £250,000 or 5% of the qualifying revenue. See the table below for an outline of the amounts of relevant penalties.

Relevant Conduct	**Amount of penalty**	**Relevant provision**
Breach of conditions of licence to provide a television licensable content service	Up to £250,000 or 5% of qualifying revenue[28]	Communications Act s 237
Failure to begin providing Channel 3 licensed service	Up to £500,000 or 7% of qualifying revenue	Communications Act Schedule 13 s 2
Failure to comply with Channel 3, 4 or 5 licence conditions	Up to 5% of the qualifying revenue	Communications Act Schedule 13 s 3
Breach of conditions of licence to provide restricted services	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 4
Breach of additional service licence conditions	Up to 5% of the qualifying revenue	Communications Act Schedule 13 s 5
Failure to begin providing a national sound broadcasting service	Up to £250,000 or 7% of qualifying revenue	Communications Act Schedule 13 s 6
Breach of national sound broadcasting licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 7
Breach of additional sound broadcasting service licence conditions	Up to 5% of qualifying revenue	Communications Act Schedule 13 s 8

[27] Ofcom, *Outline procedure for statutory sanctions in content cases,* [3].

[28] The qualifying revenue consist of "all payments received or to be received by him or by any connected person— (a) in consideration of the inclusion in the licensed service in that period of advertisements or other programmes, or (b) in respect of charges made in that period for the reception of programmes included in that service": Section 19 of the *Broadcasting Act 1990.*

Failure to begin providing a television multiplex service	UP to £500,000 or 7% of the multiplex revenue for the last complete accounting period	Communications Act Schedule 13 s 11
Breach of television multiplex licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 13
Breach of digital program licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 14
Breach of digital additional services licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 15
Failure to begin providing radio multiplex service	Up to £250,000	Communications Act Schedule 13 s 17
Breach of national or local radio multiplex licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 19
Breach of digital sound program licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 20
Breach of digital additional services licence conditions	Up to £250,000 or 5% of qualifying revenue	Communications Act Schedule 13 s 21
Breach of restrictions on broadcasting listed events	An amount not exceeding the sum produced by multiplying the relevant consideration (an amount determined by the Commission as representing so much of any consideration paid by the person on whom the penalty is being imposed as is attributable to the acquisition of the rights to televise the event in question, and) by a multiplier prescribed by the Secretary of State.	Broadcasting Act 1990 s 102

(ii) Reduction of the term of the licence for breach of licence conditions (*Broadcasting Act 1996* ss 17, 59; *Broadcasting Act 1990* ss 41, 110) (not applicable to the BBC, S 4C and Channel 4).

(iii) Revoking or otherwise ending the licence for breach of licence conditions or directions (*Communications Act 2003* s 238; *Broadcasting Act 1996* ss 11, 23, 27,53,62,66, *Broadcasting Act 1990* ss 18, 42, s 45A, 81, 101, 111) (not applicable to the BBC, S 4C and Channel 4).

(iv) Suspension of a licence for breach of licence conditions (*Broadcasting Act 1996* ss 62, 66; *Broadcasting Act 1990* ss 110, 45A).

(v) Direction that a licence holder include a correction and/or statement of findings in the licensed service (*Communications Act 2003* s 236; *Broadcasting Act 1990* ss 40, s 109). Generally Ofcom and the broadcaster agree on the wording of the statement.[29] Ofcom can order that the material to be broadcast is broadcast with equivalent prominence to the original broadcast.[30]

(vi) Direction that the broadcaster not include a particular program in the licensed service again, if that program contravened a condition of the licence (*Communications Act* s 236; *Broadcasting Act 1990* s 40).[31]

(vii) Imposition of a requirement that a broadcaster provide scripts or recorded matter and particulars of the programs to be included in the licensed service, to Ofcom, where there has been repeated failures to comply with licence conditions (*Broadcasting Act 1990* s 109).

(c) Competition Matters

(i) *Competition Act 1998*

Ofcom has powers under the *Competition Act* to investigate and enforce Part I of the Act concerning anti-competitive arrangements and abuse of market position, in relation to activities concerned with communication matters. Ofcom exercises its functions under the Act concurrently with the Office of Fair Trading (OFT) (s 371).

Where Ofcom decides that certain conduct or an agreement infringes the prohibition on anti-competitive behaviour, it can:

- Order modification or termination of an agreement (s 32). In cases of non-compliance, Ofcom can apply to court for an order requiring the defaulter to comply with the directions. This order can include an award of costs (s 34).
- Require a person to modify or cease relevant conduct (s 33). In cases of non-compliance, Ofcom can apply to court for an order requiring the defaulter to comply with the directions. This order can include an award of costs (s 34).
- Take appropriate interim measures mid-investigation in matters of urgency to prevent serious, irreparable damage to a particular person or category of person, or to protect the public interest (s 35).

[29] Memorandum from Ofcom to the General Manager, ABA, regarding Ofcom's enforcement powers and precedents.
[30] Ibid.
[31] Ibid.

- Impose financial penalties upon finding a contravention of the prohibition on anti-competitive behaviour (s 36). The financial penalty may not exceed 10% of turnover of the undertaking – the entity in question.[32]

Where penalties are unpaid, Ofcom may recover from the undertaking, as a civil debt, any amount payable under the penalty notice which remains outstanding (s 37).

(ii) *Enterprise Act 2002*

Ofcom has functions under Part 4 of the *Enterprise Act 2002* in relation to commercial activities connected with communications matters (s 370 *Communications Act*). Ofcom exercise its functions under Part 4 concurrently with the Office of Fair Trading (OFT). Before the OFT or Ofcom can exercise any of their concurrent functions, they are required under the Act to consult the other body (s 370(4)). Under Part 4, Ofcom can:

- Make a market investigation reference to the Competition Commission where it has reasonable grounds to suspect that a feature or features of a market prevent, restrict or distort competition (s 131).
- Accept an undertaking in lieu of a market investigation (s 154).
- Facilitate negotiations of undertakings (s 163).
- Exercise powers of investigation in determining whether to make a market investigation reference or accept an undertaking. These investigative powers include: requiring a person to give evidence, to produce documents, to supply estimates, forecasts, returns or other information (s 174). A person who fails to comply with a request for information commits an offence and is liable to a fine and/or imprisonment upon conviction (s 175).
- Enforce any undertaking or enforcement order through civil proceedings seeking an injunction or for interdict or for any other appropriate relief or remedy (s 167).

Procedures for the imposition of sanctions

This section discusses procedures for the imposition of sanctions in relation to broadcasting only, although there are also procedures for imposition of sanctions in relation to competition matters and telecommunications matters.

Where Ofcom is considering the imposition of sanctions, the broadcaster is to be given a reasonable opportunity to make written representations and, in the case of fines or shortening or revocation of licences, an opportunity to give oral representations, about what type of

[32] Office of Fair Trading, Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty [1.4].

penalties should be imposed and at what level.[33] The procedures for dealing with contents cases are as follows:

Cases concerned with all standards (i.e., taste and decency, impartiality, sponsorship issues etc) are delegated to a Content Sanctions Committee within Ofcom – a committee made up of members of the Content Board and the Ofcom Board.
The Content Sanctions Committee invites the broadcaster to a meeting where the broadcaster has an opportunity to make an oral representation.
The Content Sanctions Committee makes a final decision on whether to impose a sanction and if so, the appropriate sanction.[34]
In determining the appropriate penalty, Ofcom considers general factors such as: (a) the seriousness of the contravention;
(b) any precedents set by previous cases; and
(c) the need for penalties to act as a sufficient incentive to comply.[35]
It also considers other factors detailed in the Penalty Guidelines released by Ofcom.[36]

Criminal penalties

The *Broadcasting Acts* of 1990 and 1996 and the *Communications Act* of 2003 impose criminal penalties for certain acts and omissions. These acts and omissions include, for example, dishonestly obtaining electronic communications services (s 125 *Communications Act*) and various offences relating to the provision of information. Criminal penalties include:

fines;
terms of imprisonment; and
disqualification of a person and/or body corporate from holding a broadcasting licence.

Broadcasting Standards Authority (New Zealand)

Introduction

In New Zealand, broadcasting regulation is divided amongst a number of bodies. The Broadcasting Standards Authority ('BSA') is responsible for regulation of standards in broadcast programs. The Advertising Standards Authority oversees regulation of advertising standards in television and radio. Licences, regulations associated with actual transmission and other broadcasting issues are regulated by government Ministries and agencies.

[33] Ofcom, *Outline procedure for statutory sanctions in content cases* [7].
[34] Ibid, [11]-[21].
[35] Ofcom, *Penalty guidelines.*
[36] Ibid.

The BSA is a crown authority established under the *Broadcasting Act 1989*. The BSA derives its powers from the *Broadcasting Act 1989*, the *Radiocommunications Act 1989* and the *Commerce Act 1986*.[37]

The BSA regulates broadcasting through:

- Its involvement in establishing broadcasting codes. The BSA is responsible for encouraging the development of codes by industry, for approving these industry-developed codes and for issuing its own codes where appropriate.
- Enforcement of broadcasting codes. The BSA can only take enforcement action in response to a complaint made to the BSA that there has been a breach of code standards.

Enforcement powers of the BSA

The BSA is empowered under the Act to deal with complaints regarding program standards. This power is discretionary; under s 10 of the *Broadcasting Act 1989*, the BSA can refuse to deal with a complaint.[38]

Powers to determine whether there has been a breach of broadcasting codes

In general, the BSA is only able to deal with code violations where a complaint has first been made to the broadcaster. The exception is privacy issues, where the BSA can respond directly to a complaint.

The BSA is empowered to consider and determine any complaint referred to it in accordance with s 8, but it must:

(a) give the complainant and the broadcaster a reasonable opportunity to make submissions to it in writing in relation to the complaint; and

(b) have regard to all relevant submissions made to it in writing in relation to the complaint (s 10(1)).

Generally the BSA will consider the complaint at a board meeting. Usually it will examine written statements submitted by the complainant and broadcaster in making its determination but the BSA can hold a hearing if necessary.[39]

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[37] Office of the Minister of Broadcasting, 'Broadcasting Issues: Introductory Paper: Platform and Technology Issues, 6 July 2000', available at http://www.executive.govt.nz/minister/hobbs/broadcasting/issues 1.htm.

[38] The BSA can do so "if it considers - (a) That the complaint is frivolous, vexatious, or trivial; or (b) That, in all the circumstances of the complaint, it should not be determined by the Authority."

[39] 'Television and Radio Complaints: A Guide for Viewers and Listeners' available from www.bsa.govt.nz

Once the BSA makes a determination in response to a complaint, it must give notice in writing of its determination to the broadcaster of the program and the complainant (s 13(2)(a),(b)).

Powers to enforce broadcasting standards

(a) Specific orders

Where a complaint is upheld, the BSA has power to make the following orders:

- an order requiring the broadcaster to "publish in such manner as shall be specified in the order, and within such period as shall be so specified, a statement which relates to the complaint and which is approved by the Authority for the purpose" (s 13(1)(a)). For the period January 2003 to July 2004, the BSA ordered the broadcasting of 16 statements amounting to corrections;[40]
- an order requiring the broadcaster to refrain from broadcasting (s 13(1)(b)(i));
- an order requiring the broadcaster to refrain "from broadcasting advertising programs (including any credit in respect of a sponsorship or underwriting arrangement entered into in relation to a program) for such period, not exceeding 24 hours, in respect of each program in respect of which the Authority has decided the complaint is justified, and at such time as shall be specified in the order" (s 13(1)(b)(ii));
- an order "referring the complaint back to the broadcaster for consideration and determination by the broadcaster in accordance with such directions or guidelines as the Authority thinks fit" (s 13(c));
- an order directing the broadcaster to pay an individual, as compensation, a sum not exceeding $5000, if "the Authority finds that the broadcaster has failed to maintain, in relation to any individual, standards that are consistent with the privacy of that individual" (s 13(d));
- an order requiring "any party to pay to any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit" (s 16(1)).

In relation to the broadcasting of specific material such as violence and sexual exploitation "in a manner that is likely to be injurious to the public good", the BSA has power to:

- make an order directing the broadcaster to make available to the Authority a copy of any visual recordings, transcript or any other material related to the further programs in the series (s 13A(1)(d)-(f));
- if, after reviewing relevant material, the Authority is satisfied that the program or all programs in the series are "injurious to the public good" the Authority is empowered to:

[40] Email received from the BSA, 9 August 2004.

- make an order directing that the broadcaster withdraw (a) the program; (b) the series subject of complaint; or (c) withdraw one or more specified programs within the series; (orders (b) an (c) apply where all programs are found to be "injurious to the public good" (s 13A(3)(a),(b) and s 13A(4)(a),(b));
- make an order specifying the conditions that must be complied with by the broadcaster to broadcast the series, where all programs in the series are determined by the BSA to be "injurious to the public good" (s 13A(4)(c));

Once an order has been made not to broadcast a program or series, or to broadcast only subject to certain conditions, other broadcasters must also comply with the order (s 13A(5)-(7)).

(b) Appeals against orders made by the BSA
Under s 18 of the Act, a complainant or broadcaster is able to appeal a decision of the BSA to the High Court of New Zealand (s 18(1)). The decision of the High Court is final (s 19).

(c) Mechanisms to enforce BSA orders

(i) General orders

The broadcaster is required to comply with orders made by the BSA, where the BSA finds a complaint is justified. It is also required to give "notice in writing to the Authority and the complainant of the manner in which the order has been complied with" (s 13(3)(a), (b)).

Where the broadcaster does not comply with an order of the BSA, the order can be enforced through s 14 of the Act. Under s 14, broadcasters that do not comply with an order made by the BSA under s 13 or s 13A regarding program standards, are liable to a summary conviction and a fine of up to $100,000.

(ii) Cost orders

Section 17 of the Act provides for enforcement of cost orders made by the BSA. Under s 17, the person to whom costs are payable can file a duplicate of the order made by the BSA with the office of the court named in the order. That order then becomes enforceable as a final judgment of the court in its civil jurisdiction.

Canadian Radio-Television Telecommunications Commission

Introduction

The statutory authority responsible for regulation of broadcasting in Canada is the Canadian Radio-Television Telecommunications Commission (CRTC). The CRTC is an independent public authority established under the *Canadian Radio-Television Telecommunications Commission Act.* The CRTC derives its powers from the *Broadcasting Act 1991*, the *Telecommunications Act 1993* and the *Bell Canada Act 1987*.

The CRTC is responsible for regulating and supervising all aspects of the Canadian broadcasting system, as well as regulating telecommunications common carriers and service providers that fall under federal jurisdiction.[41] The CRTC regulates Canadian broadcasting and telecommunications through:

issuance of licences containing terms and conditions;
issuance of regulations; and
enforcement of licence conditions, CRTC regulations and statutory provisions and regulations.

Enforcement powers of the CRTC

Information gathering powers

The CRTC has powers to require submission of information and, in relation to telecommunications, specific powers of inquiry.

Broadcasting

Under s 2 of the *Broadcasting Information Regulations 1993*, the CRTC can request a licensee to provide 'a response to any inquiry regarding the licensee's programming or ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking.'

Telecommunications

Under s 37 of the *Telecommunications Act 1993*, the Commission can require a carrier or any person to "submit to the Commission… any information that the Commission considers necessary for the administration of this Act".

[41] See <http://www.crtc.gc.ca/eng/about.htm>

With regard to powers of inquiry, s 70 of the *Telecommunications Act* allows the Commission to appoint any person to inquire and report to the Commission on any matter that is:

pending before the Commission or within the Commission's jurisdiction under the Act or any Special Act; or
on which the Commission is required to report under s 14.

The Commission can also designate "any qualified person as an inspector for the purposes of verifying compliance with the Act or any Special Act for which the Commission is responsible and with the decisions of the Commission under this Act". The designated inspector has wide ranging powers under s 71(4) to inspect the premises of carriers and to obtain data.

Criminal penalties are provided for knowingly making material misrepresentations of fact, or omitting a material fact to a person appointed under s 70 as an inspector (s 73(2) *Telecommunications Act*).

Powers to conduct hearings

The CRTC has power to inquire into, hear and determine matters in relation to broadcasting and telecommunications. In relation to broadcasting, the CRTC can exercise these powers under s 12 of the *Broadcasting Act*:

"Where it appears to the Commission that

(a) any person has failed to do any act or thing that the person is required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such regulation, licence, decision or order, or
(b) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part".

In relation to telecommunications, the CRTC has powers under s 48(1) of the *Telecommunications Act* to inquire into and make a determination in relation to:

"anything prohibited, required or permitted to be done under Part II, except in relation to international submarine cables, Part III or this Part or under any special Act."

Both the *Broadcasting Act* and *Telecommunications Act* provide that, in the hearing of a matter, the Commission is to have "all such powers rights and privileges as are vested in a superior court of record" in relation to:

- the attendance, swearing and examination of witnesses at the hearing;

- the production and inspection of documents;
- the enforcement of its orders;
- the entry and inspection of property; and
- other matters necessary or proper in relation to the hearing (s 16 *Broadcasting Act*; s 55 *Telecommunications Act*).

The Commission is also authorised to:

> " determine questions of fact or law in relation to any matter within its jurisdiction under this Act" (s 17 *Broadcasting Act*; s 52 *Telecommunications Act*).

Powers to impose penalties

The discussion in this section is limited to powers of the CRTC to impose penalties in relation to broadcasting. The CRTC has powers to take the following actions in relation to breaches of regulation, licence conditions or mandatory orders:

- revocation of a broadcasting licence (s 9(e) *Broadcasting Act*);
- suspension of a broadcasting licence (s 9(e) *Broadcasting Act*); and
- issuance of mandatory orders (s 13(2) *Broadcasting Act*).

Mandatory orders can require a person to do a particular act they are required to do or to cease particular conduct prohibited by the *Broadcasting Act*, broadcasting regulations, licence conditions, and decisions or orders of the CRTC. Mandatory orders previously issued by the Commission include: orders to desist from broadcasting without a licence[42] and orders requiring a company not to use "inside wire" for delivery of broadcasting services unless the company offers third party competitors use of the wire at a fee not above that specified by the Commission.[43]

Mandatory orders can only be imposed after a public hearing has been held (s18(1)(d) *Broadcasting Act*).

There are procedures provided in the Act for enforcement of mandatory orders in cases of non-compliance. Under s 13(1)(2) of the Act, a mandatory order of the Commission can be made an order of a Federal Court or of any superior court of a province by the Commission filing with the registrar of the court a certified copy of the order. Once the order has been filed it becomes an order of the court and is enforceable in the same manner as an order of the court (s 13(1)). The CRTC can also seek criminal penalties for breach of mandatory orders (see section below on criminal penalties).

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[42] CRTC, Mandatory Orders Issued Pursuant to Subsection 12(2) of the *Broadcasting Act* Concerning the Operations of Unlicensed Undertakings at Edmonton, Lethbridge, Grande Prairie, Alberta; and Lloydminster, Saskatchewan, Public Notice CRTC 1992-34, Ottowa, 8 May 1992.

[43] CRTC, Mandatory Order issued pursuant to subsection 12(2) of the *Broadcasting Act* against Vidéotron Ltée and its subsidiaries, Broadcasting Decision CRTC 2002-299, Ottowa, 9 October 2002.

The decisions and orders of the Commission are generally final and conclusive (s 31(1)). The decision or order can only be appealed to the Federal Court of Appeal on a question of law or jurisdiction. Leave must be obtained to appeal to the court through an application made within one month of the decision or order, or within such time as the court, under special circumstances, allows (s 31(2)).

Criminal penalties

Criminal penalties are available in relation to breaches of broadcasting and telecommunications laws.

In relation to broadcasting, under s 32 of the *Broadcasting Act* the CRTC can seek criminal penalties for: broadcasting without or contrary to a licence; contravention of a regulation or order; or contravention of licence conditions. The *Broadcasting Act* provides guidelines as to the amount of the fine that can be imposed in relation to broadcasting without a licence and broadcasting in contravention of regulations and orders. Under s 32(1), upon conviction for broadcasting without a licence:

- an individual is liable for up to CA$20,000 for each day the offence continues; and
- a corporation is liable for up to CA$200,000 for each day the offence continues.

Under s 32(2), upon conviction for contravention or failure to comply with regulations or orders:

- an individual is liable for up to CA$25,000 for the first offence and up to CA$50,000 for each subsequent offence; and
- a corporation is liable for up to CA$250,000 for the first offence and up to CA$500, 000 for each subsequent offence.

In relation to telecommunications, s 73 of the *Telecommunications Act* enables the CRTC to seek criminal penalties for certain contraventions of licence conditions and for certain breaches of statutory regulations. Penalties include fines and forfeiture of telecommunications apparatus.

Implications of the review of enforcement powers of overseas regulators

General comments

The discussion above indicates that there are different types of bodies responsible for the regulation of broadcasting in overseas jurisdictions. These bodies range from 'super-regulators' like Ofcom and the FCC, that have broad powers to regulate the entire communications sector, to regulators like the BSA, whose jurisdiction is limited to the enforcement of broadcasting codes. Also, the range of enforcement powers available differs significantly amongst the various regulators. Whilst the FCC and Ofcom have a wide range of powers – including powers to impose administrative monetary penalties and various other administrative penalties – the enforcement powers of the BSA are limited largely to middle

range administrative penalties. Nevertheless, despite the differences, a number of trends are evident. First, in contrast to the ABA, the overseas regulators reviewed have a number of middle range administrative penalties to address non-compliance with broadcasting laws. Second, several of the overseas regulators reviewed have powers to impose significant administrative monetary penalties on broadcasters for non-compliance with broadcasting laws.

Following is a discussion outlining more specifically the enforcement mechanisms available to overseas regulators that are not available to the ABA.

Penalties for violations of broadcasting codes, statutory or other regulations and licence conditions

The FCC

FCC regulation of broadcasting is different to the ABA in that the FCC regulates broadcasting standards through statutory rules and regulations rather than codes.

Examples of enforcement powers of the FCC that are different to those of the ABA are:

- The FCC can impose administrative penalties of up to US$300,000 for breach of statutory or FCC rules and regulations.
- The FCC can issue consent orders.

  Consent orders are effectively a settlement between the FCC and a party to an FCC adjudicatory hearing. Provisions of these agreements may include a voluntary payment to the US government of a specific amount and a requirement that the party implement a compliance plan, perform quality control or undertake specific staff training programs.

Overall, the powers of the FCC to impose penalties without resort to the courts, and the flexible remedies available through consent orders provide the FCC with strong enforcement capabilities.

Ofcom

The penalty provisions of legislation that Ofcom enforces are different to the provisions in the BSA that the ABA enforces in that the penalty provisions do not distinguish between a breach of broadcasting codes and breach of licence conditions. Compliance with broadcasting codes is a *condition* of broadcasting licences and therefore breaches of the code are subject to the same penalties as breaches of any other licence conditions. Ofcom has a number of enforcement powers that are unavailable to the ABA. It can :

Impose administrative penalties, generally up to £250,000.
Reduce the term of a broadcaster's licence.
Direct that the broadcaster include a correction or statement of findings in the licensed service.
Impose a requirement that a broadcaster provide scripts or recorded matter and particulars of the program to be included in the licensed service to Ofcom where there has been repeated failures to comply with license conditions.

The BSA

The BSA is different to the ABA in that it is concerned only with enforcement of broadcasting codes; it is not concerned with licence conditions. However, despite the BSA's more limited scope of jurisdiction, it has a range of powers that are not available to the ABA. These are:

- Ability to order a broadcaster to publish a statement relating to a complaint.
- Ability to order a broadcaster to refrain from broadcasting.
- Ability to order a broadcaster to refrain from broadcasting advertisements for up to 24 hours.
- Ability to order a broadcaster to pay compensation to an individual.

The CRTC

The CRTC has significant powers to conduct hearings and determine breaches. The CRTC has powers to impose mandatory orders, which are subject to criminal penalties in the event of non-compliance.

Section 6

Recommendations for Reform

Based upon information received from the ABA, the major areas of concern for the ABA in terms of breaches of particular rules have been:

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

Section 4 of this report identified the problems that exist with the current enforcement powers of the ABA. Section 5 of the report identified the way in which overseas broadcasting regulators have more flexible enforcement powers than those currently granted to the ABA. Appendix A of this report provides an overview of the enforcement powers of the Australian Communications Authority (ACA). The ACA also has more flexible enforcement powers than the ABA and there is specific reference to some of these powers of the ACA in this section, as well as reference to the enforcement powers of other Australian regulators.

This section identifies several enforcement powers which, if granted to the ABA, would enable it to have more flexible and effective enforcement powers. These powers are:

- the introduction of enforceable undertakings;
- an expanded injunctive power;
- the introduction of civil penalties;
- the introduction of infringement notices; and
- allowing the ABA to order on-air statements of ABA investigation findings.

This section also contains a recommendation that the ABA not be given the power to impose advertising-free periods on licensees.

Section 6 concludes by making brief reference to two issues which have enforcement implications but which are not the subject of any recommendations because the ABA is currently considering these issues. The two issues are:

- section 67 refusal (s 67 of the BSA provides that a person may, before a transaction takes place or an agreement is entered into that would place a person in breach of a provision of Division 2 (limitation on control of certain licences), Division 3 (limitation on

directorships) or Division 5 (cross-media rules) of the BSA, make an application to the ABA for an approval of the breach; and
- broadcast of "adult services" on satellite.

Enforceable undertakings

An enforceable undertaking is a promise enforceable in court. If such an undertaking is breached, this does not constitute contempt of court. However, once the court has ordered compliance with the undertaking, a breach of that court order is contempt of court.[44]

Enforceable undertakings are used by both the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC). Other Commonwealth regulators that have the power to accept enforceable undertakings include the Australian Prudential Regulation Authority and the Civil Aviation Safety Authority. State regulators that have this power include the New South Wales Department of Fair Trading, the Queensland Department of Industrial Relations and the Tasmanian Department of Infrastructure, Energy and Resources.[45]

The most recent examples of Commonwealth regulators or Commonwealth Ministers being given the power to accept enforceable undertakings are the Minister for Health under the *National Health Amendment Regulations* (No 1) 2004 No 185 and the Australian Communications Authority under the *Spam Act 2003*.

A concept similar to enforceable undertakings is used in other countries.[46]

It was noted in Section 4 of this report that strategic regulation theory advocates regulators having the power to enter into enforceable undertakings or agreements with regulated entities. The ABA does not currently possess the power to enter into enforceable undertakings. This part of the report:

- provides an overview of the use of enforceable undertakings by ASIC and the ACCC;
- evaluates the usefulness of enforceable undertakings; and
- recommends that the ABA be given the power to enter into enforceable undertakings.

[44] Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report 95, December 2002), 98.
[45] C Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67 *Modern Law Review* 209, 210
[46] ALRC, supra n 1, 98.

Use of enforceable undertakings by ASIC and the ACCC

ASIC is given the power to enter into enforceable undertakings pursuant to ss 93A and 93AA of the *Australian Securities and Investments Commission Act 2001*. Section 93AA(1) provides that: "ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act." Appendix B of this report is ASIC's Practice Note 69 in which ASIC provides its views on the policy, interpretation and operation of those provisions of the ASIC Act that enable it to enter into enforceable undertakings. In Practice Note 69, ASIC states that its power to accept enforceable undertakings enhances its enforcement capability. It also states that this power gives ASIC a legislative basis for negotiating administrative solutions and accepting undertakings which are enforceable by the court. ASIC notes that it may accept an enforceable undertaking instead of taking legal proceedings or administrative action. However, according to ASIC, an enforceable undertaking:

> is more versatile than any of those remedies, and may be used to achieve outcomes which might not be achievable by those means, and which are more focused (eg adoption of a compliance regime, restriction of a person's securities business or practice as an auditor).[47]

It is stated in Practice Note 69 that ASIC will only accept an enforceable undertaking when the entity entering into the undertaking (the promisor) makes a positive commitment to:

- stop the particular conduct or alleged breach that concerns ASIC; and
- not recommence that conduct.

An enforceable undertaking must also set out how the promisor will:

- address the conduct ASIC is concerned about;
- prevent the conduct occurring again; and/or
- rectify the consequences of the conduct.

An enforceable undertaking must set out what the promisor is going to do to ensure that the conduct does not occur again. This may include:

- details of the monitoring and reporting mechanisms it will adopt (for example, developing internal control/compliance programs);
- the name of the contact officer who is responsible for monitoring and complying with the undertaking; and
- the name of an ASIC officer to whom the contact officer must report.

[47] ASIC Practice Note 69, para 69.6.

It is stated in Practice Note 69 that ASIC will not accept enforceable undertakings in confidence. According to the Practice Note:

> ASIC is committed to adopting enforcement strategies which foster a culture of compliance. One such strategy is the publication of enforcement outcomes. Given that the usual alternative to offering an enforceable undertaking involves the prospect of publication of an adverse finding by a court … ASIC regards it as appropriate that the subject in terms of an enforceable undertaking be made public.[48]

If the terms of an enforceable undertaking are not complied with, ASIC may apply to the court for appropriate orders and these orders can include an order directing the promisor to comply with the undertaking and/or an order directing it to compensate any person who has suffered loss or damage as a result of the breach of the undertaking.

Enforceable undertakings became available to ASIC in July 1998. ASIC has since made significant use of these undertakings.

Use of enforceable undertakings by ASIC

2004 to 30 June	9
2003	23
2002	33
2001	31
2000	67
1999	38
1998	14
Total	215

The ACCC has the power to enter into enforceable undertakings pursuant to s 87B(1) of the *Trades Practices Act 1974.* This section provides that:

> The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).

[48] Ibid, para 69.26.

Like ASIC, the ACCC has also made extensive use of enforceable undertakings. Enforceable undertakings were first introduced into the *Trade Practices Act* in 1993.

Use of enforceable undertakings by the ACCC

2004 to 30 June	20
2003	30
2002	45
2001	63
2000	80
1999	53
1998	30
1997	54
1996	63
1995	39
1994	36
1993	2
Total	515

Appendix C of this report is an extract from the ACCC's guideline on use of enforceable undertakings. It is stated in the guideline that:

> The Commission has for many years employed administrative resolution, based on undertakings by the business concerned, as an alternative to the costly and lengthy court process. The importance of s 87B is that it greatly increases the effectiveness of the administrative resolution approach as undertakings are ultimately enforceable in court. In negotiating such resolutions, the Commission's broad objectives are:
>
> - cessation of the conduct leading to the alleged breach;
> - redress for parties adversely affected by the conduct;
> - implementation of compliance measures to help prevent future breaches by the business concerned; and
> - by means of publicity, an educative and deterrent effect into the community at large and in particular in the industry concerned.[49]

[49] ACCC, *Section 87B of the Trade Practices Act – A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertaking,* August 1999, 3.

It is stated in the guideline that the foundation of all undertakings accepted by the ACCC is a positive commitment to cease the particular conduct and not re-commence it. It is also stated in the guideline that in many settlements under s 87B the ACCC will require the company to undertake a program to improve its overall compliance with the *Trade Practices Act.* Such a program will typically involve a combination of elements including:

- demonstrable board of directors and senior management commitment to, and involvement with, the compliance program;
- the assignment of responsibility for the compliance program to a named senior manager;
- the development and dissemination throughout the company of a clear compliance policy;
- the identification of compliance issues and operating procedures for compliance;
- the development of a compliance training program utilising effective adult learning techniques;
- delivery of a program, a specified number of times over a specified period, to key personnel groups within the organisation – such groups to be identified after an audit to identify the areas of the business at risk of breach;
- the establishment of permanent procedural checking – monitoring mechanisms, such as nominating a compliance officer and procedures to check the accuracy of all advertisements and labelling to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management; and
- the commitment to an independent audit of the program at regular intervals (usually annually) for a specified period (usually three years).[50]

The ACCC's view, as expressed in the guideline, is that all s 87B undertakings are a matter of public record and open to public scrutiny. The ACCC's policy is to publicise undertakings in news media statements, reports in ACCC publications and in any other manner appropriate to the particular matter. In addition, a progressive register of s 87B undertakings is maintained at ACCC offices for public inspection and published on the ACCC's website. A similar approach is adopted by ASIC in relation to enforceable undertakings which it enters into.

Where an undertaking is breached and the matter is not resolved by consultation, the ACCC can seek enforcement of the undertaking in court. If the court is satisfied that a person has breached a term of the undertaking, the court may make all or any of the following orders:

- an order directing compliance with the undertaking;
- an order for the party to pay to the Commonwealth an amount up to the amount of any financial benefit that can be reasonably attributed to the breach;
- any order that the court considers appropriate to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order that the court considers appropriate.

[50] Ibid, 7.

Evaluation of enforceable undertakings

Undertakings given to ASIC and the ACCC have been used to secure a wide range of commitments by regulated entities. The undertakings include commitments to:

- develop and implement compliance programs;
- pay compensation to consumers or investors;
- refund money to consumers or investors;
- provide accurate information to consumers or investors;
- publish corrective advertising;
- publish notices in newsletters or on websites;
- refrain from specified activities; and
- fund consumer education programs.[51]

It can therefore be seen that one of the significant advantages of enforceable undertakings is their capacity to protect those who deal with regulated entities and to enforce compliance (including the introduction of compliance programs) by regulated entities. They are able to do this without the resort to expensive litigation and they are voluntary in the sense that neither the regulator nor the regulated entity must enter into such an undertaking.

The Australian Law Reform Commission (ALRC) in its recent report on regulation stated that "undertakings are also popular with the regulated community."[52] The Australian Corporate Lawyers Association, in a submission to the ALRC, stated that enforceable undertakings encourage greater candour and promote compliance and also give the regulated entity "another chance."[53]

It has also been said that the advantages of negotiated settlements, such as enforceable undertakings, include:

- saving time, financial costs and court resources;
- allowing compromise;
- allowing flexibility and the opportunity for change;
- encouraging learning;
- allowing defendants a say in the outcome;
- strengthening an organisation's internal compliance systems;
- encouraging regulatory cooperation; and
- allowing internal discipline systems to work.[54]

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[51] ALRC, supra n 1, 853.
[52] Ibid, 591.
[53] Ibid, 591.
[54] C Dellit and B Fisse, "Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement" in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994), 602-603.

Another advantage of enforceable undertakings is that they can ensure that the process of compliance is ongoing on the part of the regulated entity. This may not always occur with a one-off penalty such as a small fine. One commentator who has studied the use of enforceable undertakings by the ACCC has stated that: "enforceable undertakings can also deliver superior remedies than courts to compensate victims, prevent future misconduct and fix systemic problems that lead to misconduct."[55]

In its report on regulation, the ALRC notes the positive aspects of enforceable undertakings. The ALRC also notes there has been some criticisms of the use of undertakings by the ACCC in particular. The ALRC made two recommendations specifically relating to enforceable undertakings. They are as follows:

ALRC Recommendation 16-2

… in the absence of any clear, express statutory statement to the contrary, where legislation provides a regulator with authority to accept an enforceable undertaking, the terms of an enforceable undertaking must:

(a) bear a clear or direct relationship with the alleged breach;

(b) be proportionate to the breach;

(c) not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law);

(d) stipulate a time period within which compliance with undertakings is required and not be otherwise open ended.

This Recommendation is not intended to prevent an enforceable undertaking requiring a regulated party to perform work or undertake prescribed activities at its expense.

ALCR Recommendation 16-3

When legislation provides a regulator with the authority to accept enforceable undertakings, regulators should develop and publish guidelines in accordance with Recommendations 6-2 to 6-4, 9-1 and 10-1 outlining:

(a) the circumstances in which the regulator will accept enforceable undertakings, including

  (i) whether they will be used as an alternative to criminal proceedings;

  (ii) the stage of an investigation or civil enforcement proceedings or proceedings to enforce a quasi-penalty that the regulator will accept enforceable undertakings;

(b) examples of acceptable and unacceptable terms in enforceable undertakings;

(c) what will happen if an enforceable undertaking is not complied with;

[55] Parker, supra n 2, 210

(d) the circumstances in which a regulator will consider a request to vary or withdraw an enforceable undertaking;

(e) when and how a third party's interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.

Recommendation

It is recommended that the ABA be given the power to accept enforceable undertakings. It is increasingly common for Commonwealth regulators to be given this power and the many advantages associated with giving regulators this power have been identified in this section.

The form of such a power could be the same as that given to, for example, ASIC (which broadly reflects the usual drafting of these types of provisions in other Commonwealth legislation giving this power to Commonwealth regulators). The power would be contained in a new provision of the BSA and have the following terms:

(1) The ABA may accept a written undertaking given by a person in connection with a matter in relation to which the ABA has a function or power under this Act.

(2) The person may withdraw or vary the undertaking at any time, but only with the ABA's consent.

(3) If the ABA considers that the person who gave the undertaking has breached any of its terms, the ABA may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

  (a) an order directing the person to comply with that term of the undertaking;

  (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

  (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damages as a result of the breach;

  (d) any other order that the Court considers appropriate.

In addition, it would be appropriate for the ABA to comply with the recommendations of the ALRC in relation to enforceable undertakings. These recommendations are outlined above. In particular, the ABA should develop and publish guidelines relating to its use of enforceable undertakings. This is the practice adopted by both ASIC and the ACCC.

Injunctions

An injunction is a court order requiring a person to do, or refrain from doing, a particular action. Injunctions are typically part of a regulator's enforcement tools as they can provide a much quicker remedy to deal with breaches by regulated entities than other enforcement powers. An injunction can be particularly useful to deal with certain breaches of the BSA. However, the BSA only permits limited use of injunctions by the ABA.

This part of the report:

- summarises the existing power of the ABA to seek injunctions;
- outlines the power of ASIC and the ACCC to seek injunctions; and
- recommends that the ABA be given a broader power to seek injunctions.

The existing power of the ABA to seek injunctions

Under the BSA, the ABA can currently seek an injunction from the Court in the following circumstances:

- against the holder of a commercial television broadcasting licence who is engaging or is proposing to engage in any conduct in contravention of an approved implementation plan for digital television (Part 7 of Schedule 4 to the BSA);
- against a person who has engaged, is engaging, or is proposing to engage in any conduct in contravention of Part 5 of Schedule 4 to the BSA (Part 5 deals with the transmitter access regime) (Part 7 of Schedule 4 to the BSA);
- against an internet service provider who is supplying an internet carriage service otherwise than in accordance with an online provider rule and against an internet content host who is hosting internet content in Australia otherwise than in accordance with an online provider rule (Part 6 of Schedule 5 to the BSA);
- against a person who intentionally provides a datacasting service without a licence (or who proposes to provide such a service without a licence) and against a person who has a datacasting licence but who is engaging or proposing to engage in any conduct in contravention of a condition of the licence (Part 8 of Schedule 6 to the BSA); and
- against a person who is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence (s 144 of the BSA).

According to the opinion of a barrister provided to the ABA in 1999, the drafting of s 144 of the BSA presents difficulties. The background to the obtaining of the barrister's opinion was consideration of what enforcement action the ABA could take in respect of an unlicensed commercial broadcasting service. An apparatus licence was issued to a licensee under s 100 of the *Radio Communications Act*. The licence did not permit its holder to provide commercial radio broadcasting services although it did enable its holder to provide open narrowcasting radio services. The ABA received complaints that the licensee was offering a

commercial radio broadcasting service. The ABA conducted an investigation and found that the licensee did not fulfil any of the criteria for an open narrowcasting service under s 18 of the BSA. The ABA further determined that the licensee satisfied the criteria for commercial radio broadcasting services under s 14 of the BSA.

The barrister concluded that s 144 (pursuant to which the ABA can apply to the Court for an injunction) was arguably applicable although the barrister stated that "there are weighty arguments to the contrary." The principal difficulties according to the barrister are:

- Section 144 requires the ABA to be satisfied that the licensee is providing "…open narrowcasting services otherwise than in accordance with the relevant class licence." Yet the ABA, as a result of its investigation, had concluded that the licensee met none of the criteria for an open narrowcasting service.
- The licensee was breaching a condition of the licence pursuant to which the licensee was permitted to operate an open narrowcasting service as distinct from providing "open narrowcasting services otherwise than in accordance with the relevant class licence."

The barrister also considered whether the ABA could seek an injunction under s 23 of the *Federal Court Act*. This section provides that the Federal Court has power in relation to matters in which it has jurisdiction to make various orders including injunctions. The barrister referred to decisions of the High Court of Australia in which that Court has held that the power given to the Federal Court in s 23 cannot be used where the relevant statute to which a regulator is subject provides an exhaustive code of available remedies. For example, the High Court has held that s 23 of the Federal Court Act cannot be used to permit the Federal Court to grant injunctions at the request of the ACCC because that regulator has the power to seek injunctions from the Federal Court under the *Trade Practices Act.*

The barrister concluded that "it is more likely that the Federal Court will find that s 144 is a code and that therefore s 23 does not provide it with jurisdiction to grant an injunction" although the barrister considered that the contrary view was arguable.

The power of ASIC and the ACCC to seek injunctions

Both ASIC and the ACCC have wide ranging powers to approach the Court to obtain injunctions. Section 1324(1) of the *Corporations Act* provides that:

> Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act; or
>
> (b) attempting to contravene this Act; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

(f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

Part 2 Division 2 of the *ASIC Act* deals with unconscionable conduct and consumer protection in relation to financial services. Section 12GD provides for the granting of injunctions on the application of the Minister, ASIC or any other person, if the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute, among other things, a contravention of a provision of Part 2 Division 2.

The ACCC also has wide ranging powers to approach the Court to seek injunctions. Section 80 of the *Trade Practices Act* provides that where, on the application of the ACCC or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute, among other things, a contravention of Part IV (restrictive trade practices), Part IVA (unconscionable conduct), Part IVB (industry codes) or Part V(consumer protection), the Court may grant an injunction in such terms as the Court determines to be appropriate.

Recommendation

It is recommended that the ABA be given broader powers than it currently has to approach the Court for an injunction. There are a number of reasons why this should be done. First, the ABA has evidence that its duty to stop the operation of commercial broadcasting services where this is done without an appropriate licence is hindered by the lack of a remedy which can be used in a timely manner. The ABA has submitted that it has evidence of instances of operators who have a licence to provide open narrowcasting radio services providing commercial broadcasting services and that it has been unable to deal effectively with these illegal broadcasts.[56] The ABA may have sanctions that can be imposed. However, these sanctions typically will not have the advantages of an injunction such as quick application to remedy non-compliance.

[56] Letter of the Chairman of the ABA to the Secretary of the Department of Communications, Information Technology and the Arts, 22 May 2000.

Second, it is clear that one of the most important duties of the ABA is to deal with illegal broadcasting. In order to undertake this duty in an effective and timely manner, the ability to approach the Court for an injunction is an essential enforcement power.

Third, although the ABA currently does have the power to approach the Court for an injunction, the circumstances in which the ABA can do this are limited. These circumstances have been outlined above. In addition, where the ABA does have the power under the BSA to apply for an injunction, the drafting of the relevant section of the BSA may hinder the ABA's use of it. An example is s 144 which grants the ABA the power to approach the Court for an injunction where the ABA is satisfied that a person is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence. The limitations of this section have been outlined above. This section appears to be premised on the fact that a person holds a relevant class licence and, in addition to the limitations outlined above, it can be seen that this section is only of limited use in relation to dealing with illegal broadcasting.

Fourth, strategic regulation theory, as outlined in Section 4 of this report, supports regulators being given enforcement powers which are flexible, which can have speedy application and which can encourage compliance by regulated entities. Injunctions are therefore an important enforcement tool according to strategic regulation theory. Finally, injunctions are subject to the safeguard of requiring the regulator to prove, to the satisfaction of the Court, that the Court should grant an injunction. Injunctions are not an enforcement power that enables a regulator to act unilaterally.

An important issue is the scope of a recommendation to broaden the power of the ABA to approach the Court for an injunction. There are three possibilities:

- a broad based power, similar to that which has been granted to ASIC and the ACCC, to enable the ABA to approach the Court to obtain an injunction for breaches of much of the BSA;
- a more limited power to enable the ABA to approach the Court to seek an injunction for a breach of ss 137 or 141 of the BSA; or
- a narrow power to enable the ABA to approach the Court to seek an injunction for a breach of s 137 of the BSA.

Section 137 of the BSA provides that if the ABA 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, the ABA may issue a written notice to the person directing them to cease providing that service.

Section 141(1) of the BSA provides that if the ABA is satisfied that:

- a commercial television broadcasting licensee, a commercial radio broadcasting licensee, a community broadcasting licensee or a subscription television broadcasting licensee is breaching a condition of their licence; or
- a person is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence,

then the ABA may give a written notice to the person directing them to take action to ensure that the service is provided in a way that conforms to the requirements of the licence or class licence.

Section 141(2) of the BSA provides that if the ABA is satisfied that a person who is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services is doing so in deliberate disregard of the code of practice that applies to those services and that is included in the register of codes of practice, the ABA may issue a written notice to the person directing them to take action to ensure that the services are provided in accordance with that code of practice.

While there may be advantages in a more broad based power, the history of the several attempts by the ABA to broaden its power to seek injunctions may limit what can be achieved.

It is useful to note briefly this history based on documents I have been provided with by the ABA. On 22 May 2000 the Chairman of the ABA wrote to the Secretary of the Department of Communications, Information Technology and the Arts suggesting that the ABA be given "a broad power to seek an injunction whenever a person's conduct would constitute an offence under the BSA." In its August 2000 final report titled *Commercial Radio Inquiry*, the ABA had a section titled "The need for legislative change." While this section did not deal with enforceable undertakings, it did propose that the ABA be given a broader power to seek injunctions. It is stated in the report (at page 105) that:

> There is no general provision at present (although one is being considered separately), that allows the Authority to approach the Federal Court for injunctive relief in the event of a breach of the Act. While an application for an injunction is likely to put the Authority to some expense and could be protracted and time consuming if defended vigorously, it is likely to be speedier than a criminal prosecution and may be a suitable remedy in preventing future breaches of the Act. It is not proposed that this remedy should be available to prevent breaches of the codes of practice.

In early 2001 the Department of Communications, Information Technology and the Arts released 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 options discussed in the paper was injunctions. Two options were identified.

First, "to grant the ABA a broad power to seek and obtain either a restraining or a performance injunction from the Federal Court where a broadcasting licensee has engaged, is engaging or is proposing to engage in any conduct in contravention of the BSA. Such a broad power would not be limited to any particular class of licensee." The second option was called a "more targeted approach" which would allow the ABA to approach the Court for an injunction "where a person has failed to comply with a notice issued under s 137 (providing broadcasting services without the appropriate licence) or s 141 (concerning breaches of licence conditions or code of practice requirements) of the BSA."

Major submissions in relation to the discussion paper were received from the Federation of Australian Commercial Television Stations (FACTS) and the Federation of Australian Radio Broadcasters (FARB). FACTS stated in its submission that it supported injunctive relief for the ABA where a person has failed to comply with a notice issued under s 137. FACTS stated in its submission that: "broadcasting without a licence is such a fundamental and serious matter that injunctive relief may be the most appropriate immediate response." However, FACTS stated that it did not support an injunctive power being given to the ABA in relation to notices issued under s 141. By implication, FACTS did not support the first option identified in the discussion paper of giving the ABA a broad based injunctive power. FARB in its submission opposed the granting of any further injunctive powers to the ABA. It stated in its submission that it did not agree that the ABA lacks sufficient powers under the BSA and that if there are difficulties being confronted by the ABA, then: "the problem may lie not with the powers granted to the regulator under the Act, but rather with its resourcing."

Earlier, in a letter from the Chairman of the ABA to the Minister for Communications, Information Technology and the Arts dated 3 November 2000, the ABA submitted that it be granted a limited injunctive power and that the power to apply to the Court for an injunction should be provided to the ABA only where a person fails to comply with a notice issued under s 137 or s 141.

Following consideration of the submissions received from FARB and FACTS in relation to the Department's discussion paper, on 7 August 2001, the General Manager of the ABA wrote to the Department of Communications, Information Technology and the Arts. In this letter, it is stated that the ABA "accepts that there has been little indication to date of need for [an injunctive] power" under Part 10 Division 3 (the power to issue a notice under s 141 and, in the event of a breach, suspend or cancel a licence). However, the ABA does state in the letter that its powers in relation to Part 10 Division 2 (the power to issue a notice under s 137 to broadcasters found to be providing a service without an appropriate licence) "have proved demonstrably ineffective, particularly in relation to findings against open narrowcasters who are found to be providing a commercial broadcasting service without an appropriate licence."

Given the history of this matter, and the correspondence between the ABA and the Minister and the Department, it would seem appropriate that an extended power for the ABA to approach the Court to seek injunctive relief be limited to s 137. It is to be noted that providing an injunctive power to the ABA which applies in only specific areas is consistent with other parts of the BSA in which injunctive powers have been granted to the ABA.

Civil penalties

A civil penalty is one imposed by courts applying civil rather than criminal court processes.[57] One of the key differences between civil and criminal penalties is that the civil standard of proof applies in the case of civil penalties. That is, in order to establish a breach of a provision of legislation which is a civil penalty provision, the standard of proof required is the balance of probabilities. In order to establish a breach of a provision of legislation which is a criminal provision, the case must be proven beyond reasonable doubt.

In its report titled *Principled Regulation*, the Australian Law Reform Commission notes that civil penalty provisions in legislation have been described as a hybrid between the criminal and the civil law.[58]

> They are clearly founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence (for example, breaches of director's duties or publishing misleading material) and may involve the same or similar conduct, and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court processes.[59]

Civil penalties are not exclusively monetary and may include other penalties such as banning orders (banning individuals from undertaking certain activities) and orders to pay compensation.

Civil penalties have a long history in Australia. The Australian Law Reform Commission notes that civil penalties have been available in the *Customs Act* since its enactment in 1901.[60]

The Australian Law Reform Commission, in its review of penalties in federal legislation, identified three categories of civil penalty processes:[61]

- civil penalties which sit alongside criminal penalties in legislation as additional or alternative enforcement options, often when the necessary fault element to prove a criminal offence (usually intention or knowledge) is not present, such as under the *Environment Protection and Biodiversity Conservation Act* and Part 9.4B of the *Corporations Act*;
- separate civil penalty schemes which sit alone as the penalty for certain contraventions, such as Part IV of the *Trade Practices Act*; and

[57] ALRC, supra n 1, 72.
[58] Ibid, 73.
[59] Ibid, 73.
[60] Ibid, 74.
[61] Ibid, 77-78.

- those which have a quasi-criminal status but use civil procedures, such as customs prosecutions, and involve features of both criminal prosecutions and civil penalty proceedings.

This part of the report:

- identifies the rationale for civil penalties;
- examines the use of civil penalties by regulators in Australia; and
- recommends that the BSA be amended to introduce civil penalties which would apply to breaches of certain provisions of the BSA.

The rationale for civil penalties

There are a number of reasons why civil penalty provisions exist in Australian legislation. First, civil penalties avoid criminalising certain behaviour which is serious enough to warrant the imposition of a penalty but which is not serious enough to warrant the imposition of a criminal penalty (such as imprisonment or a fine). Second, civil penalties can play an important role where there is a continuing relationship between the regulator and regulated entities. It is said that the greater flexibility of civil penalties makes them the preferred method of regulation "where persuasion, negotiation and voluntary compliance are viewed as the techniques most likely to achieve the desired results." On the other hand, criminal sanctions are said to be suitable for dealing with isolated conduct.[62] Third, strategic regulation theory (as outlined in Section 4 of this report) identifies civil penalties as an important part of the enforcement pyramid. As noted in Section 4, the goal of strategic regulation theory is to obtain maximum levels of regulatory compliance and this goal can be achieved by ensuring that the regulator has flexible and effective enforcement powers.

Use of civil penalties by regulators in Australia

The use of civil penalties in federal legislation in Australia has been growing. As noted above, civil penalties have existed in federal legislation since 1901 (as part of the *Customs Act*). Civil penalties are now widespread in federal legislation. The *Trade Practices Act* has contained civil penalties since 1974 and the *Corporations Act* has contained civil penalties since 1993.

In addition to the above Commonwealth legislation, civil penalties or pecuniary penalties are contained in the following Commonwealth legislation:

Commonwealth Authorities and Companies Act 1997, Environment Protection and Biodiversity Conservation Act 1999, Spam Act 2003, Superannuation Industry (Supervision) Act 1993, Space Activities Act 1998, Sydney Airport Demand Management Act 1997,

[62] A Freiberg, quoted in ALRC, supra n 1, 77.

Telecommunications Act 1997, Workplace Relations Act 1996, Australian Postal Corporation Act 1989, Liquid Fuel Emergency Act 1984, National Health Act 1953, Petroleum Retail Marketing Sites Act 1980, Proceeds of Crimes Act 2002.

Civil penalties are also common in state legislation.

In order to provide further insight into the use of civil penalties by regulators in Australia, the following discussion focuses upon the use of civil penalties by the ACCC and ASIC.

Section 76 of the *Trade Practices Act* permits the Court to impose civil monetary penalties (called pecuniary penalties in s 76) in certain circumstances. The main circumstance is if the Court is satisfied that a person has contravened a provision of Part IV of the Act (which deals with restrictive trade practices). The monetary penalties which can be imposed by the Court are substantial. In the case of a body corporate which has breached one of the relevant provisions, the monetary penalty the Court can impose is either up to $750,000 or $10 million, depending upon the provision which has been breached. In the case of an individual, the penalty the Court can impose is up to $500,000.

Section 76 allows the Court to impose a monetary penalty not only against a person (including a body corporate) who has contravened one of the relevant provisions but also to impose a monetary penalty if the Court is satisfied that a person:

- has attempted to contravene such a provision;
- has aided, abetted, counselled or procured a person to contravene such a provision;
- has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
- has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- has conspired with others to contravene such a provision.

Between 1974 and 1997, 70 civil monetary penalties were imposed by Courts under the *Trade Practices Act.* [63]

In the case of the *Corporations Act*, the consequences of contravening civil penalty provisions are contained in Part 9.4B of the Act. Civil penalties were introduced into the Act in 1993. However, the circumstances in which civil penalties apply under the Act has expanded since 1993. Appendix D of this report is a detailed analysis of civil penalties under the *Corporations Act*. The history of civil penalty provisions in corporate legislation is outlined in the Appendix. Initially, the list of civil penalty provisions was confined to breaches of directors' duties, liability with respect to related party transactions, liability with respect to financial statements and liability for insolvent trading. Liability with respect to certain share

[63] M Welsh, *The Corporate Law Civil Penalty Provisions*, LLM Thesis, 2000, 85.

capital provisions and certain provisions about managed investment schemes was added in 1998. Financial services provisions were added in 2001.

The list of civil penalty provisions in the *Corporations Act* is now extensive and includes not only directors' and officers' duties but also share capital transactions, requirements for financial reports, continuous disclosure, market manipulation and insider trading.[64]

If any civil penalty provision in the Act is breached by a person, the Court can order that person to pay the Commonwealth a pecuniary penalty of up to $200,000. Some of the civil penalty provisions in the Act permit additional orders to be made by the Court. For example, s 206C permits the Court, on application by ASIC, to disqualify a person from managing corporations for a period that the Court considers appropriate. The Court also has the power, in the case of a breach of certain of the civil penalty provisions, to order a person to compensate a corporation or registered managed investment scheme for damage suffered by the corporation or scheme if the person has contravened one of the relevant civil penalty provisions and damage has resulted from the contravention.

A study of the use by ASIC of civil penalties has shown that ASIC made limited use of these penalties in the first six years of their operation. The authors of this study found that ASIC brought only fourteen civil penalty actions relating to ten case situations between 1993 and 1998. The authors of the study interviewed ASIC officers in order to explore what they referred to as the "marked disparity between the intrinsic enforcement capabilities of civil penalties and the enthusiasm of the regulators to apply them on the one side, and the low incidence of civil penalties on the other."[65]

According to the authors, the relatively low incidence of civil penalty actions in the first six years was due to a complex set of operational factors. The factors included:

- Unclear drafting of the civil penalty provisions, particularly regarding the elements that had to be proved to satisfy the Court that a breach of a civil penalty provision had occurred.
- The requirement to liaise with the Commonwealth Director of Public Prosecutions over significant enforcement matters adversely impacted on the use of civil penalties. These consequences included:
    (i) the requirement meant the DPP effectively had a veto over the use of civil penalties;
    (ii) the need for the DPP to satisfy itself that there was no criminal element in the matter resulted in delay that impacted on the opportunity for a civil penalty action; and

[64] In relation to the use by ASIC of civil penalties to enforce the directors' duties provisions of the legislation, see G Gilligan, H Bird, and I Ramsay, *Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?*, Research Report, Centre for Corporate Law and Securities Regulation, the University of Melbourne, 1999.
[65] Ibid.

(iii) ASIC and the DPP have different enforcement objectives – the role of the DPP is to prosecute criminal breaches of the law, while ASIC has broader objectives which include using civil penalties.

A number of important changes were made to the civil penalty provisions of the legislation subsequent to this research. The drafting of the provisions was made clearer. In addition, the distinction between civil and criminal proceedings was made clearer. Previously, the criminal and civil provisions were blurred and there were complex provisions that permitted the Court, where a prosecution for a criminal offence had failed, to make a civil penalty order. In other words, the one legal proceeding could lead to either a criminal conviction or a civil penalty. One of the consequences of this was that in such proceedings, any prosecution must be brought by the DPP and even if no prosecution was brought but a prosecution was contemplated, then the DPP needed to be involved. This could lead to significant delay. Now, there is a clear distinction in the Act between criminal and civil penalties which means that where ASIC brings civil penalty proceedings, the DPP is not involved.

Since these amendments to the Act, more recent research indicates that in the three year period up to December 2001, ASIC has made more use of the civil penalty provisions and has brought civil penalty actions against thirty people relating to twelve case situations.[66]

Recommendation

It is recommended that the BSA be amended to allow the Court to impose civil penalties for breaches of certain provisions of the BSA. It is to be noted that in its August 2001 final report titled *Commercial Radio Inquiry,* the ABA recommended that it (rather than the Court) be given the power to impose civil penalties. The recommendation presents two difficulties. First, the general understanding of civil penalties is that they are imposed by Courts and not by regulators.[67] Second, the report does not indicate what provisions of the BSA should be civil penalty provisions. It may be that these difficulties relating to the report's discussion of civil penalties is why the 2001 discussion paper of the Department of Communications, Information Technology and the Arts titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*, makes no reference to civil penalties.

There are a number of reasons which justify the introduction of civil penalty provisions into the BSA. Very importantly, as noted above, civil penalties avoid criminalising certain behaviour which is serious enough to warrant the imposition of a penalty but which is not serious enough to warrant the imposition of a criminal penalty. In addition, it was also noted above that civil penalties can play an important role where there is a continuing relationship between the regulator and regulated entities. This is particularly the case where a co-

[66] G Moodie and I Ramsay, "The Expansion of Civil Penalties Under the Corporations Act" (2002) 30 *Australian Business Law Review* 61.

[67] ALRC, supra n 1.The fact that the ABA report incorrectly describes civil penalties would seem to be reinforced by the fact that later in this section of the ABA report there is a part outlining recommendations relating to judicial remedies but civil penalties are not discussed in this part. Civil penalties are in fact a judicial remedy.

regulatory environment is one that typifies a particular industry. A co-regulatory environment describes the Australian broadcasting industry, and this is specifically recognised in the annual reports of the ABA.

The use of civil penalties is widespread in Commonwealth and State legislation and regulators that have the power to seek civil penalties include the Australian Communications Authority.

It was noted in Section 5 of this report (which reviewed the enforcement powers of other broadcasting regulators) that several of these regulators have the power to impose significant penalties without the need to go to Court. For example, the Federal Communications Commission in the US can impose administrative penalties of up to US$300,000 while Ofcom in the UK can impose administrative penalties of up to £250,000. Civil penalties differ from these types of administrative penalties in that civil penalties are imposed by the Court and therefore there is additional protection for regulated entities. Rather than allow regulators to impose substantial administrative penalties upon regulated entities, the regulatory approach adopted in Australia has been to increase the use of civil penalties, given the advantages of these as indicated above, and this explains the widespread use of such penalties in Australian legislation.

An important issue is the identification of the provisions of the BSA which should be made civil penalty provisions. According to information received from the ABA, a major enforcement challenges for it is in relation to breaches of licence conditions.

Breaches of licence conditions – existing powers of the ABA

As noted in Section 3 of the report, a breach of some statutory conditions of licences and class licences is an offence (s 139). Where a breach of a licence condition is an offence, the ABA may refer the matter to the DPP for prosecution.

In the case of a commercial television broadcasting licensee, that licensee will only have committed an offence under s 139 if the licensee's conduct breaches a condition of the licence set out in subclause 7(1) of Schedule 2 of the BSA.

The following is a list of the licence conditions in subclause 7(1). A breach of any one of these conditions is subject to criminal penalties.

Conditions of commercial television broadcasting licences – breach subject to criminal penalties

(1) Each commercial television broadcasting licence is subject to the following conditions:

(a) the licensee will not, in contravention of the Tobacco Advertising Prohibition Act 1992, broadcast a tobacco advertisement within the meaning of that Act;

(b) the licensee will comply with program standards applicable to the licence under Part 9 of this Act;
(c) the articles of association of the licensee will at all times contain provisions under which:
(i) a person is not eligible to continue to be the holder of shares in the licensee if, because of holding those shares and of any other relevant circumstances, that or some other person would contravene Part 5 of this Act; and
(ii) the licensee may secure the disposal of shares held by a person to the extent necessary to prevent a contravention of Part 5 of this Act continuing or of shares held by a person who refuses or fails to provide a statutory declaration under the provisions referred to in subparagraph (paragraph (iii) or (iv); and
(iii) a person who becomes the holder of shares in the licensee is required to provide to the company a statutory declaration stating whether the shares are held by the person beneficially and, if not, who has beneficial interests in the shares and stating whether the person, or any person who has a beneficial interest in the shares, is in a position to exercise control of another licence, and giving particulars of any such position; and
(iv) a person holding shares in the licensee may be required by the licensee, from time to time, to provide to the licensee statutory declarations concerning matters relevant to his or her eligibility to continue to be the holder of those shares having regard to the provisions of Part 5 of this Act; and
(v) any election of directors to the board of the licensee will be invalid if the election would result in more than 20% of the directors of the licensee being foreign persons;
(d) the licensee will, if the Minister, by notice in writing given to the licensee, so requires broadcast, without charge, such items of national interest as are specified in the notice;
(e) the licensee will, if the Minister notifies the licensee in writing that an emergency has arisen which makes it important in the public interest that persons authorised by the Minister have control over matter broadcast using the licensee's broadcasting facilities, allow those persons access to and control over those facilities;
(f) if the licence is a broadcasting services bands licence—the licensee will keep in force a licence under the Radiocommunications Act 1992 that authorises operation by the licensee of the radiocommunications devices used to provide the broadcasting service;
(g) the licensee will not broadcast a program that has been classified RC or X by the Classification Board;
(ga) the licensee will not broadcast films that are classified as R unless the films have been modified as mentioned in paragraph 123(3A)(b);
(h) the licensee will not use the broadcasting service in the commission of an offence against another Act or a law of a State or Territory;
(ha) the licensee will not contravene the anti-hoarding rule (within the meaning of section 146E);
(i) the licensee will commence to provide broadcasting services within one year of being allocated the licence or within such longer period as is notified in writing by the ABA;
(ia) the licensee will comply with the requirements set out in section 205B;
(j) the licensee will comply with the requirements of clauses 3, 3A, 4, 5 and 6.
(k) the licensee will comply with the requirements of the commercial television conversion scheme in force under clause 6 of Schedule 4 other than either of the following requirements:
(i) a requirement covered by paragraph 6(3)(a) or (b) of that Schedule;
(ii) a requirement of Part B of the scheme to commence digital transmission;
(l) the licensee will comply with so much of an implementation plan:
(i) given by the licensee to the ABA in accordance with the commercial television conversion scheme in force under clause 6 of Schedule 4; and
(ii) approved by the ABA;
as does not relate to either of the following requirements:

(iii) a requirement covered by paragraph 6(3)(a) or (b) of that Schedule;
(iv) a requirement of Part B of the commercial television conversion scheme to commence digital transmission;
(m) if there is a simulcast period for the licence area of the licence—the licensee will not broadcast a television program in SDTV digital mode during the simulcast period for the licence area unless the program is broadcast simultaneously by the licensee in analog mode in that area;
(n) the licensee will comply with standards applicable to the licence under Division 1 of Part 4 of Schedule 4 (which deals with digital broadcasting format);
(na) the licensee will comply with standards applicable to the licence under Division 2 of Part 4 of Schedule 4 (which deals with HDTV quotas);
(o) the licensee will comply with standards applicable to the licence under clause 38 of Schedule 4 (which deals with captioning of television programs for the deaf and hearing impaired);
(oa) the licensee will comply with any regulations made for the purposes of clause 36B of Schedule 4 (which deals with the accessibility of domestic reception equipment);
(p) if the licensee holds a transmitter licence under section 102 or 102A of the Radiocommunications Act 1992 that authorises the operation of a transmitter—the licensee will not operate, or permit the operation of, that transmitter to transmit in digital mode:
(i) a commercial broadcasting service that provides radio programs; or
(ii) a subscription radio broadcasting service; or
(iii) a subscription television broadcasting service; or
(iv) a subscription radio narrowcasting service; or
(v) a subscription television narrowcasting service; or
(vi) an open narrowcasting radio service; or
(vii) an open narrowcasting television service.

There are a number of licence conditions contained in Part 3 of Schedule 2 which will not result in a criminal offence if they are breached. For example, it will not be a criminal offence if subclause 7(2) of Schedule 2 is breached. This subclause provides that each commercial television broadcasting licence is subject to conditions that:

- the licensee will remain a suitable licensee;
- the licensee will provide a service that, when considered together with other broadcasting services available in the licence area of the licence (including another service operated by the licensee), contributes to the provision of an adequate and comprehensive range of broadcasting services in that licence area.

Other subclauses of Schedule 2 require each commercial television broadcasting licensee to not provide commercial television broadcasting services under the licence outside the licence area of the licence and a requirement that each commercial television broadcasting licence provide information to the national broadcasters and to other commercial television broadcasting licensees for the purpose of compiling information for an electronic program guide.

It is the same situation for commercial radio broadcasting licensees in that it is only a breach of some licence conditions that results in an offence under s 139.

Where there is a breach of any condition of a licence (regardless of whether a breach of that condition is subject to criminal penalties or not) the ABA can, pursuant to s 141(1), issue a notice in writing requiring that there be compliance with the licence condition. A failure to comply with a notice under s 141 is an offence (s 142).

The ABA also has the power to suspend or cancel a licence in certain circumstances. Section 143(1) provides that if a commercial television broadcasting licensee, a commercial radio broadcasting licensee, a subscription television broadcasting licensee or a community broadcasting licensee:

- failures to comply with a notice under s 141; or
- breaches a condition of the licence (regardless of whether a breach of that condition is a criminal offence or not);

the ABA may, by notice in writing given to the person:

- suspend the licence for such period, not exceeding 3 months, as is specified in the notice; or
- cancel the licence.

Breaches of licence conditions – enforcement issues for the ABA

A particular area of difficulty for the ABA has been open narrowcasting services providing commercial services. Open narrowcasters operate under a class licence which means that the ABA does not possess the power to suspend or cancel their licence. Where an open narrowcaster provides a commercial broadcasting service, then the options available to the ABA, following an investigation, are:

- to refer the matter to the DPP for prosecution under s 133 (prohibition on providing a commercial radio broadcasting service without a licence - penalty of $220,000); or
- to issue a notice under s 141(1) to the narrowcaster to take action to comply with the class licence and if the notice is not complied with, then to refer the matter to the DPP for prosecution under s 142 - which has variable penalties but in the case of an open narrowcaster, the penalty is $5,500; or
- to seek an injunction from the Federal Court under s 144 (noting however the limits of s 144 referred to earlier in this report).

There is a difficulty here for the ABA. Some breaches of class licences by open narrowcasters will be minor or inadvertent. The ABA, following an investigation, may form the view that a penalty should be imposed. However, the only penalty that can be imposed

will be a criminal penalty. This will necessitate a referral to the DPP. Not only will this require use of DPP resources, but the DPP, as part of its prosecution policy, considers whether the public interest requires a prosecution. In such a situation, the DPP may not believe a prosecution is warranted, even though both the DPP and the ABA believe that the circumstance warrants the imposition of a penalty. It is in this type of circumstance that civil monetary penalties can play an important and useful role by imposing a penalty but not criminalising behaviour which does not warrant being classified as a criminal offence.

I therefore recommend that where an open narrowcaster provides a service that is not in accordance with the relevant class licence, then this be subject to a civil monetary penalty. The amount of this penalty should be the subject of discussions between the ABA and the government but should be of such an amount as to provide a sufficient deterrent.

However, the enforcement challenges for the ABA in relation to breaches of licence conditions extend well beyond open narrowcasters providing commercial services. Since 1995, ABA investigations have resulted in 174 findings of licence condition breaches. It is clear that breaches of licence conditions represent a significant enforcement issue for the ABA. For example, the discussion in Section 4 of the report indicated the problems that confront the ABA in relation to enforcement of program standards.

The existing enforcement powers available to the ABA to deal with breaches of licence conditions are severely restricted – seeking the imposition of criminal penalties or suspending or cancelling the licence (which, as has already been noted, can typically not be used where the licensee broadcasts to a large audience). The solution is not to introduce additional criminal penalties. I do not recommend that breaches of licence conditions that are not currently subject to criminal penalties be subject to criminal penalties. Rather, the solution is to introduce civil penalties which do not criminalise behaviour which does not warrant being classified as criminal.

I therefore recommend that those licence conditions which if breached, are currently subject to a criminal penalty, be subject to a civil monetary penalty. The amount of this penalty should be the subject of discussions between the ABA and the government but should be of such an amount as to provide a sufficient deterrent. Specifically, the following provisions of the BSA should be subject to civil penalties. They are currently subject to criminal penalties under s 139:

- subclause 7(1) of Schedule 2 (relating to commercial television broadcasting licences);
- subclause 8(1) of Schedule 2 (relating to commercial radio broadcasting licences);
- subclause 9(1) of Schedule 2 (relating to community broadcasting licences);
- subclause 9(1) of Schedule 2 (other than paragraph 9(1)(h) of Schedule 2) (relating to temporary community broadcasting licences);
- subclause 10(1) of Schedule 2 (relating to subscription television broadcasting licences); and
- subclause 11(1) of Schedule 2 (relating to subscription radio broadcasting services, subscription narrowcasting services and open narrowcasting services provided under class licences).

A further issue is whether the ABA should retain the right to refer a matter to the DPP for criminal prosecution should the breach be of sufficient severity. There is other legislation (such as the *Corporations Act*) which does provide for alternatives for breaches of certain provisions (i.e. either the imposition of a civil penalty or a criminal penalty). There are advantages in having this flexibility. As the Australian Law Reform Commission stated in its report titled *Principled Regulation: Federal Civil and Administrative Penalties in Australia* "The ALRC finds value in maintaining provisions in legislation which allow for a choice of criminal or civil proceedings for the same conduct. Such flexibility is an important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches".[25] I therefore recommend that the ABA should retain the right to refer a breach of a licence condition to the DPP for criminal prosecution should the breach be of sufficient severity. This recommendation should apply where an open narrowcaster provides a service that is not in accordance with the relevant class licence and also to breaches of s 139 (the subclauses of Schedule 2 outlined above).

Breaches of additional licence conditions

Several sections of the BSA allow the ABA to impose additional licence conditions on licence holders. For example, s 43 of the BSA provides that the ABA may impose an additional licence condition on the licence of a commercial television broadcasting licensee or a commercial radio broadcasting licensee.

Specifically, s 43(1) provides that the ABA may, by notice in writing given to a commercial television broadcasting licensee or a commercial radio broadcasting licensee, vary or revoke a condition of the licence or impose an additional condition on the licence. If the additional licence condition is breached, this does not constitute a criminal offence. However, the ABA can:

- issue a notice requiring compliance with the additional condition pursuant to s 141 (and a failure to comply with the notice will be an offence pursuant to s 142); or
- suspend or cancel the licence pursuant to s 143.

Other sections of the BSA that permit the ABA to impose additional licence conditions are s 87 (community broadcasting licences), s 87A (CTV licences), s 92J (temporary community broadcasting licences), s 99(2) (subscription television broadcasting licences), and s 120(2) (subscription broadcasting and narrowcasting class licences).

Breaches of additional licence conditions is another area where the ABA's enforcement powers are severely restricted. The ABA can only seek the imposition of criminal penalties where a notice requiring compliance with the additional licence condition is ignored or can (except in the case of class licences) suspend or cancel the licence. I therefore recommend

[25] ALRC, supra n 1, 407.

that a breach of an additional licence condition imposed by the ABA pursuant to ss 43, 87, 87A, 92J, 99(2) or 120(2) be subject to a civil monetary penalty. The amount of this penalty should be the subject of discussions between the ABA and the government but should be of such an amount as to provide a sufficient deterrent.

Failure comply with ABA notices relating to licences

A further issue is the type of penalty that should apply where there is a failure to comply with a notice issued by the ABA that relates to providing a service without a licence or breaching a licence condition.

(i) Section 137

Section 137 of the BSA provides that if the ABA is satisfied that a person is providing:

- a commercial television broadcasting service; or
- a commercial radio broadcasting service; or
- a subscription television broadcasting service; or
- a community broadcasting service;

without a licence to provide that service, then the ABA may, by notice in writing to that person, direct the person to cease providing that service. A failure to comply with the notice is an offence (s 138) and penalties range from $5,500 (where a community broadcasting service is provided without a licence) to $220,000 (where a commercial radio broadcasting service is provided without a licence) and $2,200,000 (where a commercial or subscription television service is provided without a licence).

If failure on the part of an open narrowcaster to provide a service not in accordance with the relevant class licence is to become subject to a civil monetary penalty (as recommended above), then there is merit in ensuring that failure to comply with a s 137 notice is also subject to a civil monetary penalty. The reason is that the ABA may respond to an open narrowcaster providing a commercial service by issuing a notice under s 137 to cease providing that service. It may be regarded as anomalous for the ABA to only have the option of a criminal prosecution for failure to comply with the s 137 notice and yet failure on the part of the open narrowcaster to provide a service in accordance with the relevant class licence to be subject to civil monetary penalties. Consequently, failure on the part of an open narrowcaster to comply with a s 137 notice should be made subject to a civil monetary penalty although it would be appropriate for the ABA to retain the discretion to refer the matter to the DPP for a criminal prosecution should the failure to comply be of sufficient severity.

However, there is also merit in civil monetary penalties applying generally to a breach of s 137 by any person offering one of the prohibited services (while retaining the discretion on

the part of the ABA to refer the matter to the DPP for a criminal prosecution should the failure to comply be of sufficient severity). Failure to comply with a notice may warrant the imposition of a penalty but not a criminal penalty. A civil monetary penalty offers an additional enforcement sanction that may, depending on the circumstances, better suit the breach of s 137.

(ii) Section 141(1)

Section 141(1) provides that if the ABA is satisfied that:

- a commercial television broadcasting licensee, a commercial radio broadcasting licensee or a community broadcasting licensee is breaching a condition of the licence; or
- a person who is in a position to exercise control of a commercial television broadcasting licence or a commercial radio broadcasting licence is causing the licensee to breach a condition of the licence; or
- a subscription television broadcasting licensee is breaching a condition of a subscription television broadcasting licence; or
- a person is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence;

the ABA may, by notice in writing given to the person, direct the person to take action to ensure that the service is provided in a way that conforms to the requirements of the licence or class licence. The notice is to specify a period, not exceeding one month, during which the relevant action must be taken.

Failure to comply with such a notice is an offence (s 142) and the penalties are:

- $2,200,000 (where the notice was given to a commercial television broadcasting licensee, a person who is in a position to exercise control of a commercial television broadcasting licence or to a satellite subscription television broadcasting licensee);
- $220,000 (where the notice was given to a subscription television broadcasting licensee, other than a satellite subscription television broadcasting licensee);
- $55,000 (if the notice was given to a commercial radio broadcasting licensee or a person who was in a position to exercise control of a commercial radio broadcasting licence); and
- $5,500 (in any other case).

In the case of open narrowcasters, if failure on the part of an open narrowcaster to provide a service not in accordance with the relevant class licence is to become subject to a civil monetary penalty (as recommended above), then there is merit in ensuring that failure to comply with a s 141(1) notice is also subject to a civil monetary penalty. The reason is that the ABA may respond to an open narrowcaster providing a commercial service by issuing a notice to comply under s 141(1). It may be regarded as anomalous for the ABA to only have the option of a criminal prosecution (with a maximum fine of $5,500) for failure to comply

with the notice and yet failure on the part of the open narrowcaster to provide a service in accordance with the relevant class licence to be subject to civil monetary penalties. Consequently, failure on the part of an open narrowcaster to comply with a s 141(1) notice should be made subject to a civil monetary penalty although it would be appropriate for the ABA to retain the discretion to refer the matter to the DPP for a criminal prosecution should the failure to comply be of sufficient severity.

However, there is also merit in civil monetary penalties applying generally to a breach of s 141(1) while retaining the discretion on the part of the ABA to refer the matter to the DPP for a criminal prosecution should the failure to comply be of sufficient severity. Failure to comply with a notice may warrant the imposition of a penalty but not a criminal penalty. A civil monetary penalty offers an additional enforcement sanction that may, depending on the circumstances, better suit the breach of s 141(1).

Failure to comply with ABA notices relating to breaches of codes of practice – s 141(2)

A further issue relates to breaches of codes of practice by subscription or open narrowcasting services or subscription radio broadcasting services. If such a service is provided "in deliberate disregard" of a relevant code of practice, the ABA may issue a notice directing that action is taken to ensure compliance (s 141(2)). Failure to comply with such a notice is an offence (s 142).

If failure to comply with a notice issued pursuant to s 141(1) to remedy a breach of a licence condition is to become subject to a civil monetary penalty, then there is merit in ensuring that failure to comply with a s 141(2) notice is also subject to a civil monetary penalty. It may be regarded as anomalous for the ABA to only have the option of a criminal prosecution for failure to comply with the notice under s 141(2) yet failure to comply with a s 141(1) notice is subject to civil monetary penalties. Consequently, I recommend that failure on the part of a subscription or open narrowcasting service or subscription radio broadcasting service to comply with a s 141(2) notice be made subject to a civil monetary penalty although it would be appropriate for the ABA to retain the discretion to refer the matter to the DPP for a criminal prosecution should the failure to comply be of sufficient severity.

ALRC recommendations

It is appropriate that any amendment to the BSA introducing civil monetary penalties take into account the recommendations of the Australian Law Reform Commission contained in its recent report titled *Principled Regulation.* A key principle stated by the Commission is that imprisonment should not be part of any civil penalty, either directly as a possible sentence or indirectly for non payment unless failure to pay is held by a court to be contempt of court.

The Commission made the following recommendations in relation to civil penalties and, in particular, the interaction between civil and criminal penalties.

ALRC Recommendation 11-1. When the same physical elements can attract both a civil penalty and criminal liability, the physical and fault elements of both the contravention attracting a civil penalty and the criminal offence should be clearly distinguished in the legislation.

ALRC Recommendation 11-2. Legislation that provides for exposure to parallel criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that:

(a) civil penalty proceedings against a person must be stayed if criminal proceedings are commenced, or have already been commenced, against a person for a criminal offence constituted by conduct that is the same or substantially the same as the conduct alleged to constitute the civil penalty contravention;

(b) no, or no further, civil penalty proceedings may be taken against a person if that person is being convicted of a criminal offence constituted by conduct that is the same or substantially the same as the conduct alleged to constitute the civil penalty contravention; and

(c) if the person is not convicted of that criminal offence, the civil penalty proceedings may not be resumed.

This Recommendation is not intended to restrict the ability of a regulator to seek compensation orders, disqualification orders or preservation orders.

ALRC Recommendation 11-3. Legislation that provides for criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that evidence of information given or documents produced by a person is not admissible in criminal proceedings against a person if the person gave the evidence or produced the documents in civil penalty proceedings.

ALRC Recommendation 11-4. Where conduct constitutes a contravention of two or more provisions of legislation that would attract a civil penalty, a person should not be liable for more than one civil penalty in respect of the same or substantially the same conduct.

ALRC Recommendation 11-5. Regulators should develop and publish guidelines in accordance with Recommendations 6-2 to 6-4, 9-1 and 10-1 in relation to criminal and civil penalty proceedings for the same or substantially the same conduct that address issues of:

(a) choice of proceedings;

(b) double punishment; and

(c) limits on the use of evidence.

Infringement notices

Infringement notice schemes are administrative methods for dealing with certain breaches of the law. The Australian Law Reform Commission provides the following definition:

> An infringement notice (sometimes called a penalty notice) is a notice authorised by statute setting out particulars of an alleged offence. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or electing to have the matter dealt with by a court. The notice also specifies the time and method for payment and the consequences if the person to whom the notice is issued fails to respond to the notice either by making payment or electing to contest the alleged offence.[26]

Over 15 federal regulatory schemes have provision for infringement notices.[27]

[26] ALRC, supra n 1, 96.
[27] Ibid, 93.

This part of the report:

outlines the rationale for infringement notices;
examines the use of infringement notices by regulators in Australia; and
recommends that the ABA be given the power to issue infringement notices in certain circumstances.

The rationale for infringement notices

The use of infringement notices is often justified on the grounds that they are a low cost, efficient way for regulators to deal with minor offences and they provide a straightforward and simple way for wrongdoers to discharge their obligation of paying the penalty set out in the notice without appearing before a court.[28]

The advantages of infringement notices are said to include:[29]

- they provide a less harsh and less discriminatory way of dealing with minor offences;
- speed and reduced expense;
- elimination of delay in courts;
- proportionality between the seriousness of the offence, the enforcement procedure and the penalty; and
- avoidance of a conviction results in reduced stigma.

The Australian Law Reform Commission considers that the type of non-criminal contraventions that might appropriately be dealt with by way of an infringement notice scheme include requirements to provide information to a regulator within a specified period or in a specified form.[30]

Use of infringement notices by regulators in Australia

As noted above, more than 15 federal regulatory schemes have provision for infringement notices. Infringement notices are also used by state governments in Australia.

An example of an infringement notice scheme used at the federal level is that which is available to the Australian Communications Authority (ACA). The ACA has the power to issue infringement notices under the *Radiocommunications Act 1992,* the *Telecommunications*

[28] Ibid, 92.
[29] Ibid, 427.
[30] Ibid, 441.

Act 1997, and the *Spam Act 2003*. The key feature of the infringement notice scheme utilised by the ACA is that it allows a person who is alleged to have committed an offence of a particular kind to pay to the Commonwealth, as an alternative to prosecution, a penalty specified in the infringement notice. Section 315 of the *Radiocommunications Act* identifies the sections of the Act, a breach of which is a criminal offence, but in relation to which an infringement notice can be issued to the offender. These provisions of the Act deal with matters such as:

unlicensed operation of radiocommunications devices (s 46);
unlawful possession of radiocommunications devices (s 47);
contravention of conditions of apparatus licences (s 113);
requirement for licensees to keep records of authorisations (s 117);
requirement for licensees to notify authorised persons of certain matters (s 118); and
failure to retain certain records (s 187A).

The *Radiocommunications Regulations 1993* contain the procedure for the issuing of infringement notices by the ACA. Regulation 23 provides that if there are reasonable grounds for believing that a person has committed an offence of a minor nature against a provision mentioned in s 315 of the Act, the ACA may serve, or cause to be served, an infringement notice on that person. Regulation 24 specifies how an infringement notice is to be served and Regulation 25 states what must be included in an infringement notice. An infringement notice must contain:

a statement of the name of the authorised person who issues it, or causes it to be issued;
a statement setting out the nature of the alleged offence and when and where the offence is alleged to have been committed;
a statement to the effect that, if the person on whom the notice is served does not wish the matter to be dealt with by a court, he or she may pay a penalty of an amount worked out in accordance with s 315 of the Act in relation to the alleged offence, being the amount specified in the notice, within the period of 28 days after the date of the notice unless the notice is sooner withdrawn;
information describing where and how the penalty may be paid;
a statement setting out the procedures under the regulations relating to the withdrawal of notices and the consequences of the withdrawal of a notice;
a statement to the effect that if the person pays the penalty within the period referred to in the notice or any further period (not being more than 14 days) that the ACA allows, or if the notice is withdrawn after the person has paid the penalty:
  (i) any liability of the person for the alleged offence is regarded as being discharged;
  (ii) no further proceedings may be taken for the alleged offence; and
  (iii) the person is not to be regarded as having been convicted of the alleged offence;
any other matters that the ACA considers relevant.

Regulation 30 further provides that nothing in the regulations:

- requires an infringement notice to be served in relation to an alleged offence (reinforcing that the ACA retains the discretion whether or not to issue an infringement notice or to instigate a prosecution of the offender); or
- affects the liability of a person to be prosecuted for an alleged offence if the person does not comply with an infringement notice; or
- affects the liability of a person to be prosecuted for an alleged offence if an infringement notice is not served on the person in relation to the offence, or if an infringement notice is served on the person and is subsequently withdrawn; or
- limits the amount of the fine that may be imposed by a court on a person convicted of an alleged offence.

Breaches of the BSA that could be subject to infringement notices

The ABA has submitted that it has particular problems in relation to (1) compliance with the control notifications provisions of the BSA, (2) compliance with the annual financial returns provisions of the BSA, and (3) the late payment of licence fees.

Control notifications

As noted in Section 4 of the report, the BSA contains a number of provisions requiring the ABA to be notified of matters relating to control of broadcasters. The main ones are:

requirement for commercial television broadcasting licensees, commercial radio broadcasting licensees and datacasting transmitter licensees to notify the ABA annually of persons who, to the knowledge of the licensee, exercise control of the licence and the names of directors of the licensee (s 62). The penalties for a breach are $5,500 if the breach relates to a commercial radio broadcasting licence and $55,000 if the breach relates to a television broadcasting licence or a datacasting transmitter licence;

requirement for commercial television broadcasting licensees, commercial radio broadcasting licensees and datacasting transmitter licensees to notify the ABA within 7 days of becoming aware of changes in the control of the licence (s 63). The penalties for a breach are $5,500 if the breach relates to a commercial radio broadcasting licence and $55,000 if the breach relates to a commercial television broadcasting licence or datacasting transmitter licence;

requirement that a person who obtains control of a commercial television broadcasting licence, a commercial radio broadcasting licence or a datacasting transmitter licence notify the ABA within 7 days after becoming aware that they control a licence (s 64). The penalties for a breach are $5,500 if the breach relates to a commercial radio broadcasting licence and $55,000 if the breach relates to a commercial television broadcasting licence or datacasting transmitter licence;

requirement that a person who is in a position to exercise control of a commercial television broadcasting licence or a commercial radio broadcasting licence notify the ABA within 3 months after the end of each financial year of details of any company interests the person had at the end of that financial year in a newspaper that is associated with the licence area of the licence (s 65). The penalties for a breach are $5,500 if the breach relates to a commercial radio broadcasting licence and $55,000 if the breach relates to a commercial television broadcasting licence.

There is also a requirement for subscription television broadcasting licensees to notify the ABA, within 3 months of the end of each financial year, of the details of each foreign person who, to the knowledge of the licensee had company interests exceeding 20% in the licence at the end of that financial year (s 112). The penalty for a breach of this provision is $55,000.

The ABA estimates that each year there are around 20 late notifications and 30 notifications that are incomplete. While breaches of these provisions attract criminal penalties, it is unlikely that the ABA would refer a breach of these provisions to the DPP for prosecution unless it is sufficiently serious. In addition, the DPP, as part of the criteria it employs to assess whether a prosecution will proceed, must be satisfied that a prosecution is warranted on public interest grounds. The difficulty confronting the ABA is that there are continuing breaches of the notification provisions and yet there are understandable reasons why a breach may not be subject to criminal prosecution.

It is in this context that infringement notices can provide an appropriate deterrent and thereby encourage licensees to comply with the notification provisions.

Annual financial returns

As noted in Section 4 of the report, annual financial returns are required by 31 December each year (s 205B). If annual financial returns are not received by the ABA it is a breach of the licence condition contained in clause 7(1)(i)(a) and 8(1)(h)(a) of schedule 2 of the BSA, in that it is non-compliance with the requirement set out in s 205B of the BSA.

According to the ABA, it is usually the case that all commercial television licensees comply with s 205B of the BSA. However, on average, 10 commercial radio licensees lodge their financial returns late. Because a breach of s 205B is a breach of a licence condition, then the ABA can:

refer the matter to the DPP for prosecution (s 139);
issue a notice requiring compliance (s 141) and failure to comply with a s 141 notice is a criminal offence (s 142); or
suspend or cancel the licence (s 143).

These are all substantial penalties and do not provide the ABA with the flexibility to deal with the relatively minor breach of failing to lodge annual financial returns on time. It would only

be in the most extreme situations where the ABA refers the matter to the DPP for prosecution or the licence is suspended or cancelled. Yet the fact that there are continuing breaches of the requirement to lodge annual financial returns indicates that a lower level penalty scheme, such as an infringement notice scheme, may provide an appropriate incentive to comply with the provisions.

Late payment of licence fees

As noted in Section 4 of the report, licence fees for both commercial television licensees and commercial radio licensees are due on 31 December of each year (s 6 of the *Television Licence Fees Act 1964* and s 6 of the *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 due and payable at the rate of 20% per annum calculated on the amount unpaid. In the case of very small commercial radio licensees this does not serve as an incentive for compliance. In addition, the ABA advises that late payment of licence fees creates problems for it in that it is resource intensive to contact licensees to require payment of late licence fees and then additional resources must be devoted to ensuring the payment of the penalties as penalties can only be calculated once the licence fees have been paid (because of the formula in the legislation used to calculate penalties for the late payment of licence fees). An infringement notice scheme can assist in this situation.

Recommendations

Control notifications and annual financial returns

It is recommended that the ABA be given the power to issue infringement notices for breaches of ss 62, 63, 64, 65, 112 and 205B of the BSA. There are continuing breaches of the control notification provisions and s 205B which requires lodgement of annual financial reports and the ABA does not have sufficiently flexible enforcement powers to deal effectively with these breaches. Currently, the ABA can only seek significant penalties which, in the case of criminal prosecution, criminalise the behaviour of failure to lodge notices on time. An infringement notice scheme can, as we have seen, provide a more appropriate way of dealing with this type of breach. In addition, it was noted above that the Australian Law Reform Commission has stated that infringement notice schemes can be appropriate to deal with breaches of requirements to provide information to a regulator within a specified period or in a specified form. It was also noted above that, given the advantages of infringement notice schemes to both regulators and those who are regulated, there is growing use of such schemes in federal and state legislation.

Late payment of licence fees

In the case of late payment of licence fees by commercial television licensees and commercial radio licensees it is recommended that the ABA have the power to:

- impose a penalty as an additional fee due and payable at the rate of 20% per annum calculated on the amount unpaid (this is the existing power available to the ABA for late payment of licence fees pursuant to the *Television Licence Fees Act 1964* and the *Radio Licence Fees Act 1964*); or
- issue an infringement notice specifying payment of $1,500.

It is appropriate that late payment of licence fees be dealt with by allowing the ABA to either use the existing penalty scheme or issue an infringement notice. The reason is that sometimes the existing penalty scheme (which is based on the amount of the unpaid licence fee) will be higher than the recommended infringement notice penalty of $1,500 and sometimes the amount of $1,500 will be higher. It will depend on the amount of the unpaid licence fee. The amount of $1,500 is recommended following discussions with the ABA.

Form of infringement notice scheme

It is recommended that the form of the infringement notice scheme that should be made available to the ABA is that which has been made available to the Australian Communications Authority. In particular, it would be appropriate for regulations to be made which make provision, in relation to a person who is alleged to have breached one of the above sections of the BSA, to pay to the Commonwealth, as an alternative to prosecution, a penalty of an amount that is specified in the regulations. The proposed regulations should, like those which apply to existing infringement notice schemes, make clear that if the penalty specified in the infringement notice is paid, then:

> any liability of the person for the alleged offence is regarded as being discharged;
> no further proceedings may be taken for the alleged offence; and
> the person is not to be regarded as having been convicted of the alleged offence.

The ABA would have the discretion to decide, in relation to a breach of the above sections of the BSA, whether it issues an infringement notice or whether it decides to take some alternative enforcement action. If the person does not comply with an infringement notice issued by the ABA, then the ABA may take alternative enforcement action for the breach of the above sections of the BSA (along the lines of that which is currently allowed for a breach of these provisions).

It is appropriate that a recommendation to allow the ABA to issue infringement notices in certain circumstances take into account the recommendations of the Australian Law Reform Commission relating to infringement notices in its recent report titled *Principled Regulation:*

Federal Civil and Administrative Penalties in Australia. The Law Reform Commission made a series of recommendations relating to infringement notice schemes, including:

> **ALRC Recommendation 12–3.** The payment of the amount specified in an infringement notice should act as a bar to proceedings in respect of the alleged offence or contravention.
>
> **ALRC Recommendation 12–4.** In the absence of any clear, express statutory statement to the contrary, regulators should have the power to withdraw an infringement notice issued in error or to correct an infringement notice issued in error by withdrawing it and issuing a fresh notice.
>
> **ALRC Recommendation 12–5.** Subject to Recommendation 12–6, if a record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice forms part of the formal compliance history maintained by the regulator (or any other person or agency) about the person to whom the infringement notice was issued, this record should:
>
> (a) expressly note that the issue of an infringement notice constitutes no more than an allegation of a breach and that payment does not constitute an admission for any purpose;
>
> (b) be reviewed periodically and stale information expunged (for example, two years after the date of issue of the infringement notice); and
>
> (c) be subject to the *Freedom of Information Act 1982* (Cth) (i.e., able to be corrected by the person).
>
> **ALRC Recommendation 12–6.** A regulator may keep a record of the issue of an infringement notice and payment or non-payment of the amount specified in an infringement notice for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by the regulator in compliance with any relevant Commonwealth policies or procedures (for example, the Commonwealth Fraud Investigation Model Procedures or the Archives Act 1983 (Cth)). Any public reporting (for example, in the regulator's annual report or on its website) should be on an aggregate or anonymous basis.
>
> **ALRC Recommendation 12–7.** No public announcement should be made by a regulator about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an identified or identifiable person.
>
> **ALRC Recommendation 12–8.** The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the design

and use of infringement notice schemes in federal regulatory law should follow a model scheme that should incorporate the following features:

(a) The options for the regulator should include:

(i) the commencement of action to seek a criminal or civil penalty;

(ii) the issue of an infringement notice;

(iii) a formal caution;

(iv) an informal warning; and

(v) no action.

(b) The amount payable under an infringement notice should not exceed a small proportion (say, one-fifth) of the maximum penalty which might be imposed if the matter is dealt with by a court, or a set penalty specified in the legislation or for which a method of calculation is specified in the legislation.

(c) Before an infringement notice may be issued, the regulator must have reasonable grounds to believe that the alleged offence or contravention has been committed.

(d) The payment of an amount by a person under an infringement notice, including payment by instalments, should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

(e) The consequence of failing to pay an amount set out in an infringement notice should be action to seek a penalty for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation.

(f) Guidelines should be developed and published by regulators in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on how they will exercise their discretion to issue, withdraw and correct infringement notices.

(g) Only one notice should be issued for each alleged offence or contravention – if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention upon which it will base the infringement notice.

(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued.

(i) The nature of the alleged offence or contravention should be set out clearly in the infringement notice (including the section of the legislation creating the offence or contravention).

(j) The rights of the recipient of the infringement notice should be set out clearly in the infringement notice in plain English. These should include, in particular:

  (i) the right to elect to contest liability in court;

  (ii) the right to apply for withdrawal of the notice;

  (iii) the effect of payment; and

  (iv) information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the amount specified in the infringement notice.

(k) The recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material to the issuing authority demonstrating that the factual basis on which the infringement notice was issued was erroneous.

(l) Where the issue of the infringement notice is based on information provided to the regulator by any person, the person to whom the infringement notice is issued should have the right to request a written copy of any information considered relevant by the decision maker in making the decision to issue the infringement notice.

(m) If the amount payable under an infringement notice is more than two penalty units, the recipient of the infringement notice should have the right to request, on the ground of financial hardship, that the time to pay that amount be extended or that the penalty be paid by agreed instalments. Agreement to pay that amount by instalments should not be unreasonably withheld. Agreement to pay that amount by instalments should have the effect of making the unpaid portion of that amount a debt due to the Commonwealth.

(n) Infringement notice schemes may apply to continuing offences or contraventions.

(o) The issue of an infringement notice does not limit the penalty that may be imposed by a court on a person convicted of an offence or found liable for a contravention.

(p) The statements of principle contained in Recommendations 12–3 to 12–7.

ALRC Recommendation 12–9. The form of an infringement notice should be specified in delegated legislation and in the guidelines referred to in Recommendation 12–8(f).

This form might be based on the Customs Act 1901 (Cth) Infringement Notice set out in Appendix C to the Customs Act Guidelines for Serving Infringement Notices. At a minimum, an infringement notice should specify:

(a) To whom it is issued (including the name of the individual or corporation and address);

(b) By whom it is issued (including the name and work address of the delegate);

(c) A unique form of identification (such as a notice number);

(d) The date on which it is issued;

(e) The nature of the alleged offence or contravention (including the provision of the legislation that it is alleged has been contravened);

(f) When and where the offence or contravention is alleged to have been committed;

(g) The amount payable under the notice (including its relationship to the maximum fine or penalty a court could impose);

(h) The date by which payment is due;

(i) Where and how payment may be made;

(j) The effect of payment, including a statement that, if payment is made within the period specified in the notice (or any further period that is allowed):

  (i) the person's liability is taken to be discharged;

  (ii) further proceedings cannot be taken against the person for the offence or contravention;

  (iii) the person is not regarded as having been convicted of the offence or found liable for the contravention; and

  (iv) payment does not constitute an admission of liability for any purpose;

(k) The effect of non-payment;

(l) The right to request an extension of time to pay or to pay the amount payable under the notice by instalments (if applicable);

(m) The right to apply for withdrawal of the notice (including to whom an application for withdrawal should be made);

(n) The right to elect to contest liability in court;

(o) Information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the infringement notice;

(p) The details of any corrections (if any) to any previous infringement notice issued in respect of the same alleged contravention (if any);

(q) Contact details for further information; and

(r) Any other information appropriate in the circumstances.

ALRC Recommendation 12–10. The officer within the regulator who considers an application for withdrawal of an infringement notice should be different from the officer who made the decision to issue the infringement notice.

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.

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[31] Productivity Commission, *Broadcasting Inquiry Report*, (Report No 11, 2000), 475, 479.

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.

No change recommended – whether the ABA should have the power to order advertising free periods

In the August 2000 report of the ABA titled *Commercial Radio Inquiry*, in the section dealing with the need for legislative change, it is suggested that the ABA be given the power to impose advertising-free periods on licensees. It is stated in the report:

> One option may be for the Authority to direct a licensee not to broadcast advertisements for a specified period of time. As one of the main objectives of commercial radio is to maximise revenue from the sale of advertising time, this would, in effect, be a monetary penalty. Moreover, this form of monetary penalty is always sensitive to current advertising rates and is more effective than a fixed rate penalty (which can be overtaken by inflation).
>
> Arguably, this remedy could be imposed using the existing power to impose an additional licence condition under s 43. This process, which involves gazettal of both the proposed and final conditions, can be slow and thus may not be well designed for the purpose of requiring advertising-free periods. Further, before imposing such a penalty, the Authority would need to have a clear understanding of the commercial implications it would have for the licensee.

In the subsequent discussion paper of the Department of Communications, Information Technology, and the Arts titled *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*, the issue of allowing the ABA to order advertising-free periods is raised for consideration. It is stated in the discussion paper:

> An option is that the ABA be granted the power to require licensees not to broadcast advertisements for a specified period of time…any power to require licensees not to broadcast advertisements for a specified period of time, could be:
>
> - limited to a breach of the BSA, a licence condition or an industry standard;
> - limited to a period of a maximum of seven days; and
> - subject to appeal to the Administrative Appeals Tribunal.
>
> The advantage of this proposal is that it would provide an effective penalty for licensees without necessarily affecting the audience. There would be an incentive for the licensee to continue to provide the service (to maintain audience numbers for the service generally), but the licensee's revenue would be affected.
>
> The proposal may be open to criticism on the basis that it may have an arbitrary and uncertain effect – the effective level of penalty would vary upon the advertising revenue earned by the programs in the timeslot subject to the advertising ban. The Australian Association of National Advertisers made a submission to the ABA expressing a concern about the potential detrimental impact on advertisers who may be innocent third parties and not involved in the offending breach.

This proposal was subject to strong opposition in the industry submissions that were received in response to the Department's discussion paper. The Federation of Australian Radio Broadcasters (FARB) stated that it "is strongly opposed the proposal and suggests that where a broadcaster is in breach of the Act, a licence condition or an industry standard, substantial financial penalties already are available to the ABA, where it devotes the resources to pursuing the breach". FARB also stated that the proposal:

- can be viewed as an attempt to allow the ABA to impose a penalty without having to deal with the due process of law;
- would affect the rights of third parties, such as advertisers, and advertising campaigns are determined and scheduled in some cases months in advance;
- may particularly disadvantage small businesses in rural communities which depend on the local commercial radio station to advertise at competitive rates;
- suffers from the deficiency that the ABA could not without any precision calculate the financial impact of imposing an advertising-free period on a licensee given that advertising is sold at different rates at different periods and may depend on the date on which the advertising is sold; and
- may result in the same breach (even as between broadcasters in the same marketplace) attracting significantly different penalties, depending on the broadcaster's advertising rates.

The Federation of Australian Commercial Television Stations (FACTS) also expressed its strong opposition to the proposal and made arguments similar to those submitted by FARB. FACTS also stated in its submission that the proposal would affect audiences by impacting on scheduling arrangements because most programs broadcast on commercial television are shorter than 30 minutes and 60 minutes to allow for the insertion of commercials. Having

advertising-free periods may therefore inconvenience viewing audiences by making it difficult to commence programming on the hour or the half hour.

The ABC made no comment on the proposal in its submission and the SBS expressed its opposition to the proposal in its submission. It stated that mandated advertising-free periods are "an inequitable and inappropriate sanction for a non-profit public service broadcaster". The SBS further noted that a substantial portion of advertisements are paid government campaigns (such as road safety) which are broadcast in the public interest.

I do not recommend that the BSA be amended to give the ABA the power to order advertising-free periods. It has the potential to operate in an unfair way in certain circumstances and as seen from the submissions responding to the Department's discussion paper, there is strong opposition to the proposal. It is also the case that the power to order advertising-free periods may have a different impact according to whether the order relates to a television licensee or a radio licensee. This is because television licences are subject to limits on the amount of advertising that may be broadcast and it would be difficult for a television licensee to shift advertisements affected by the ABA order to another time.

Other issues not the subject of recommendations for reform

This section of the report makes brief reference to two issues which have enforcement implications but which are not the subject of any recommendations because the ABA is currently considering these issues.

Section 67 refusal

Section 67 of the BSA provides that a person may, before a transaction takes place or an agreement is entered into that would place a person in breach of a provision of Division 2 (limitation on control of certain licences), Division 3 (limitation on directorships) or Division 5 (cross-media rules) of the BSA, make an application to the ABA for an approval of the breach. An applicant for s 67 approval of temporary breaches of the control provisions of the BSA was a director of several companies. One of the companies (A) had a commercial radio broadcasting licence in each of two licence areas. Another (B) proposed to acquire several licences including two licences in each of the licence areas where company A's licences were located. The applicant sought approval under s 67 for the breaches of s 56(a) (director of companies in a position to control more than two commercial radio licences in a licence area) that would result from company B's purchase. The ABA declined to give the approval, in the exercise of its discretion, despite being satisfied in relation to each of the three matters set out in s 67(4). The applicant sought review in the AAT.

No offence against s 66 was committed by the applicant when the transaction proceeded, as the applicant was neither a party to the transaction, nor in a position to prevent it. The applicant was, however, in breach of the BSA, so the ABA could issue a s 70 notice to the applicant for one year or two years, but not less, due to the terms of s 70(7). If the applicant failed to comply with that notice, a referral to the DPP could follow. The ABA could have given s 67 approval for as little as six months. This appears to be an anomaly, both in respect of the time discrepancy (6 months to remedy breaches if given prior approval cf. minimum of

12 months if no prior approval), and with regard to the result (a person who is not given a prior formal approval on discretionary grounds nevertheless is allowed a (longer) period within which to rearrange his or her affairs).

The AAT does not have jurisdiction in relation to the issue of a notice under s 70, so it appears that the ABA could issue such a notice while the AAT review was proceeding.

Broadcast of "adult services" on satellite

The ABA is currently investigating "adult services" being broadcast into Australia on satellite from overseas. In all cases, the broadcasting services are subscription

television narrowcasting services being provided by offshore entities. Subscription television services are subject to the condition that the licensee will not broadcast a program that has been classified RC or X by the Classification Board (Schedule 2 Part 7(11)(4) of the BSA).

The origin of the programming in another country and its transmission via satellite from overseas does not take these broadcasting services outside the operation of the BSA. As long as the "broadcasting service" is received within Australian Territory, and the person in control of the service intends to provide it here, the licensing provision of the BSA can be enforced against foreign persons who broadcast from outside Australia. Notwithstanding the fact that extraterritoriality applies, it may be difficult for the ABA to enforce its powers under the BSA in the event that any of these offshore entities are found to be in breach of the relevant licence condition. This raises the broader issue of the ABA's enforcement powers when offshore entities are involved in the provision of broadcasting services in Australia.

Appendix A

Overview of Enforcement Powers of the Australian Communications Authority

Overview of enforcement powers of the Australian Communications Authority (ACA)

Introduction

The ACA is a statutory authority established under the *Australian Communications Act 1997*. It is responsible, along with the ACCC, for regulation of the radiocommunications and telecommunications industries. The functions of the ACA are established in the *Radiocommunications Act 1992* and the *Telecommunications Act 1997*.

The ACA regulates the radiocommunications and telecommunications industries by:

- Working with industry to develop industry codes and standards that allow for industry self-regulation.
- Setting mandatory industry standards where industry-developed codes and standards have not been developed or where they are inadequate.
- Issuing licences and permits in relation to radiocommunications transmitters and telecommunications.
- Enforcement of codes and standards, licences and permits, and statutory rules and regulations.

In addition to these functions, the ACA is also responsible for functions including:

- Representing Australia in international regulation of communications.
- Resolving competing demands for spectrum through price-based allocation methods.
- Investigating and helping in resolving radiocommunications interference.
- Reporting on telecommunications industry performance.
- Maintaining and administering the Telecommunications Numbering Plan.
- Informing industry and consumers about communications regulation.[68]

Enforcement powers

Investigative powers

The ACA has power under the *Telecommunications Act 1997* to investigate contraventions of telecommunications legislation and codes on its own motion or in response to complaints (ss 508, 510, 511). These investigative powers include specific information-gathering powers. Under the *Telecommunications Act*, the ACA has power to obtain information and documents

[68] 'About the ACA' available at http://www.aca.gov.au/aca_home/about_aca/aca_law/aboutaca.htm#Introduction.

from telecommunications carriers, service providers, and other persons, in certain situations (see ss 521 and 522), by issuing a written notice. Provision of false or misleading information is deemed an offence, subject to a penalty of up to 12 months imprisonment upon conviction (s 525 *Telecommunications Act*).

The ACA also has the power to appoint inspectors to investigate offences committed under the *Telecommunications, Radiocommunications* and *Spam Acts* (*Telecommunications Act* s 533; *Radiocommunications Act* s 267). These inspectors can conduct searches and seizure of property, pursuant to a search warrant,[69] where there are reasonable grounds to believe the property is connected with an offence under the *Radiocommunications Act 1992* (s 272), Part 21 of the *Telecommunications Act 1997* or the *Spam Act 2003* (s 542) or where it is reasonably necessary to monitor compliance with the *Spam Act 2003* (s 547).

Powers of the ACA to impose penalties or to seek court-imposed penalties

(a) Radiocommunications

The ACA can impose the following penalties in relation to contraventions of radiocommunication licences and permits:

Suspension of a licence (ss 74,76, 125, 127, 128C, *Radiocommunications Act).*
Cancellation of a licence (ss 74, 77, 125, 128,s128D, 171, *Radiocommunications Act*).
Issue infringement notices for breaches of certain provisions of the *Radiocommunications Act.*

(b) Telecommunications

The ACA has power to take the following enforcement action in relation to breaches of telecommunications laws:

Seek civil penalties in relation to contravention of carrier licence conditions or service provider rules (ss 68, 101 *Telecommunications Act*). Penalties are up to $10 million for each contravention (s 570).
Issue a written direction for breach of licence conditions or service provider rules (ss 69, 102). The ACA may give the carrier or service provider a written direction requiring the carrier to take specified action directed towards ensuring that the carrier does not contravene the licence condition, or is unlikely to contravene the condition, in the future. This can include directions that the carrier 'implement effective administrative systems for monitoring compliance with a condition of the licence' (s 69).
Issue a written notice (ss 121, 128) for contravention of industry codes or standards. The ACA may direct the person contravening an industry code or standard, to comply. Non-compliance with the written notice is subject to civil penalties. The

[69] There are exceptions to the requirement of a search warrant under the *Telecommunications Act 1997*, contained in s 545.

amount of the penalty is up to $250,000 for each contravention by a body corporate, and up to $50,000 for each contravention by an individual (s 570).

Issue a formal warning for breach of licence or permit conditions, service provider rules, industry codes or standards (ss 70, 103, 122, 129, 400, 435).

Cancel licences or permits for certain breaches of statutory regulations or where a person has been convicted of an offence (ss 72, 402, 438).

Issue infringement notices for breaches of certain provisions of the *Telecommunications Act.*

(c) Spam

The ACA can take the following enforcement action in relation to breaches of the *Spam Act*:

Seek civil penalties (ss 24, 26 *Spam Act*)

The Act provides guidelines as to the amount of the penalty that can be imposed. The penalties applicable to corporations that have no prior record in relation to particular civil penalties are:

100 penalty units for contraventions of s 16(1), (6) or (9) of the *Spam Act* or 50 penalty units in any other case (with a maximum total of 2000 penalty units for contraventions of s 16(1), (6) or (9) or 1000 penalty units for other cases, where there are multiple contraventions.

The penalties applicable to corporations that do have prior records in relation to particular civil penalties are:

500 penalty units for contraventions of s 16(1), (6) or (9) of the *Spam Act* or 250 penalty units in any other case (with a maximum total of 10,000 penalty units for contraventions of s 16(1), (6) or (9) or 5000 penalty units for other cases, where there are multiple contraventions.

The penalties applicable to individuals that have no prior record in relation to particular civil penalties are:

20 penalty units for contraventions of s 16(1), (6) or (9) of the *Spam Act* or 10 penalty units in any other case (with a maximum total of 400 penalty units for contraventions of s 16(1), (6) or (9) or 200 penalty units for other cases, where there are multiple contraventions.

The penalties applicable to individuals that do have prior records in relation to particular civil penalties are:

100 penalty units for contraventions of s 16(1), (6) or (9) of the *Spam Act* or 50 penalty units in any other case (with a maximum total of 2000 penalty units for contraventions of s 16(1), (6) or (9) or 1000 penalty units for other cases, where there are multiple contraventions.

Infringement notices

The ACA can issue infringement notices for contraventions of civil penalty provisions as an alternative to instituting legal proceedings.

Injunctions (ss 32, 33 *Spam Act*)

The ACA can seek an interim or permanent injunction where a person is engaging in conduct that contravenes a civil penalty provision, or has failed to do particular acts where that failure constitutes a contravention of a civil penalty provision.

Enforceable undertakings

The ACA can accept undertakings in relation to matters under the *Spam Act*

(s 38 *Spam Act*). Where a person does not comply with the undertaking the ACA can seek a court order pursuant to s 39:

directing the person to comply with the undertaking;
directing the person to pay to the Commonwealth a direct or indirect financial benefit reasonably attributable to the breach of the undertaking;
directing the person to pay compensation to another person suffering loss or damage as a result of the breach;
containing any other directions considered appropriate.

Formal warnings

The ACA can issue formal warnings where a person contravenes a civil penalty provision (s 41 *Spam Act*).

Criminal penalties

Breaches of statutory rules and regulations under the *Radiocommunications* and *Telecommunications Acts*, and certain breaches of licences and permits, are deemed offences and are subject to criminal penalties. Penalties include:

fines;
imprisonment; and
forfeiture of communication devices.

Appendix B

Australian Securities and Investments Commission Practice Note 69 – Enforceable Undertakings

ASIC Practice Note 69 – Enforceable Undertakings

Issued 7/4/1999

Headnotes

s93A; s93AA; enforceable undertakings; terms; acceptance;

compliance; variation; withdrawal; civil.

Purpose

[PN 69.1] In this practice note, the Australian Securities & Investments Commission (ASIC) states its view on the policy, interpretation and operation of s 93A and 93AA of the Australian Securities and Investments Commission Act 1989 (ASC Law).

(a) Part A explains when ASIC will accept enforceable undertakings under s 93A and 93AA of the ASC Law. *see [PN 69.2]–[PN 69.17]*

(b) Part B provides examples of acceptable and unacceptable terms in enforceable undertakings. *see [PN 69.18]–[PN 69.33]*

(c) Part C explains what happens if an enforceable undertaking is not complied with. *see [PN 69.34]–[PN 69.35]*

Sections 1B and 1D of the ASIC Act have the effect that the ASIC Act may generally also be referred to as "the ASC Law". This alternative short form of citation has been retained because it is used in the Corporations [Name of State or Territory] Act 1990 of each State and the Northern Territory, which statutes apply the Corporations Law and some provisions of the ASIC Act as laws of that jurisdiction as well as providing the machinery provisions for the operation of the national scheme laws in relation to companies and securities. It is expected that this alternative citation will be varied after the States and the Northern Territory have amended their legislation to take account of ASIC's new name and additional functions.

(d) Part D explains when ASIC will consent to a request to vary or withdraw an enforceable undertaking. *see [PN 69.36]–[PN 69.39]*

Part A: When ASIC will accept enforceable undertakings

[PN 69.2] Sections 93A and 93AA of the ASC Law commenced operation on 1 July 1998. ASIC may accept a written enforceable undertaking either:

(a) in connection with a matter in relation to which it has a function or power under the ASC Law (s 93AA); or

(b) given by a responsible entity of a registered scheme in connection with a matter concerning the registered scheme, and in relation to which ASIC has a function or power under a national scheme law (s 93A).

In general terms, ASIC has functions and powers conferred on it by

(a) Corporations Law (Law);

(b) ASC Law;

(c) Insurance Act 1973;

(d) Insurance (Agents and Brokers) Act 1984;

(e) Insurance Contracts Act 1984;

(f) Superannuation (Resolution of Complaints) Act 1993;

(g) Life Insurance Act 1995;

(h) Retirement Savings Accounts Act 1997; and

(i) Superannuation Industry (Supervision) Act 1993.

[PN 69.3] ASIC's power to accept enforceable undertakings enhances its enforcement capability. This power also gives ASIC a legislative basis for negotiating administrative solutions and accepting undertakings which are enforceable by the Court.

[PN 69.4] An enforceable undertaking can be initiated by a company, an individual or a responsible entity ("Promisor") or as a result of a discussion between that party and ASIC. However, ASIC does not have the power under s 93A and 93AA to require a person to enter into an enforceable undertaking. Similarly, a person cannot compel ASIC to accept an enforceable undertaking.

Nature of an enforceable undertaking

[PN 69.5] ASIC may accept an enforceable undertaking instead of taking proceedings for a civil order from a Court (eg an award of damages or compensation, or an injunction) or taking administrative action (eg imposing conditions on a licence) or referring a matter to other bodies (eg to the Companies Auditors and Liquidators Disciplinary Board or Corporations & Securities Panel). However, it is more versatile than any of those remedies, and may be used to achieve outcomes which might not be available by those means, and which are more focused (eg adoption of a compliance regime, restriction of a person's

securities business or practice as an auditor). [PN 69.6] An enforceable undertaking is different from an undertaking to the Court. An undertaking to the Court is normally

given instead of the Court giving an injunction or other relief. The main differences between an undertaking to ASIC and an undertaking to the Court are that:

(a) an undertaking to the Court may only be given when a Court action has been commenced. ASIC does not have to commence Court action before it can accept an undertaking under the ASC Law (s 93A or 93AA); and

(b) an undertaking to the Court may be enforced in the same way as an injunction, that is, a breach of an undertaking to the Court may itself be the subject of contempt proceedings (see [PN 69.35]).

Offer of enforceable undertakings

[PN 69.7] A person wishing to offer ASIC a s 93A or s93AA enforceable undertaking should raise it with an ASIC officer. However, that officer may not be authorised to accept the enforceable undertaking. Only certain senior ASIC officers are authorised to accept

enforceable undertakings: see [PN 69.9]. Every offer of an enforceable undertaking will be assessed on its merits.

Accepting enforceable undertakings

[PN 69.8] ASIC's acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a precedent.

[PN 69.9] An enforceable undertaking will not take effect until it is formally accepted by one of ASIC's senior delegates such as a Regional Commissioner.

[PN 69.10] ASIC will generally only consider accepting an enforceable undertaking when:

(a) it has considered starting civil or administrative enforcement action in respect of a contravention or an alleged contravention of the relevant legislation (see [PN 69.2]) by a party; and

(b) it considers the undertaking to be an appropriate regulatory outcome having regard to the significance of the issues concerned to the market and community.

[PN 69.11] Other factors which ASIC will consider when deciding whether accepting an enforceable undertaking is an appropriate regulatory outcome, include:

(a) whether a person is likely to comply with it (any history of complaints involving the Promisor may be relevant);

(b) whether a person is prepared to acknowledge that ASIC has reason to be concerned about the alleged breach;

(c) the nature of the alleged breach and the regulatory impact of the undertaking compared to that of the other forms of enforcement remedy; and

(d) the prospects for an expeditious resolution of the matter.

Civil or administrative proceedings

[PN 69.12] ASIC will not always accept an enforceable undertaking instead of commencing or settling existing civil or administrative proceedings. In appropriate cases, ASIC may accept a Promisor's enforceable undertaking if that would be a complete settlement of existing or potential civil or administrative enforcement action.

Pecuniary civil penalty

[PN 69.13] ASIC will not accept enforceable undertakings to solely secure payment of a pecuniary civil penalty. In ASIC's view, in these cases, the public interest is served by a court determining whether a pecuniary penalty is available, and if so, its quantum.

Companies Auditors and Liquidators Disciplinary Board

[PN 69.14] The Companies Auditors and Liquidators Disciplinary Board (CALDB) is the specialist body empowered to determine, upon application by ASIC, whether a person should continue to be registered as an auditor or a liquidator. In light of the functions and

powers of the CALDB, ASIC does not consider the use of enforceable undertakings to be appropriate once a matter has been referred to the CALDB.

The Corporations and Securities Panel (the Panel)

[PN 69.15] Like the CALDB, the Panel is a specialist body. Upon application by ASIC, it is empowered to conduct a hearing to determine whether to make a declaration of unacceptable acquisition or unacceptable conduct. In view of the functions and powers of the Panel, ASIC does not consider the use of enforceable undertakings to be appropriate once a matter has been referred to the Panel.

Applications for modification of or exemption from the Law

[PN 69.16] ASIC does not consider the use of enforceable undertakings to be appropriate in relation to compliance with a condition of a relief instrument granted by ASIC. This is because under the Law, ASIC has a power to repeal, rescind, revoke, amend or vary an instrument in the case of a breach of an instrument's condition.

Examples

[PN 69.17] The following examples are described in general terms to illustrate the circumstances in which ASIC may accept an enforceable undertaking. Every enforceable undertaking is tailored to the particular circumstances of the matter and will contain specific undertakings clearly setting out the Promisor's obligations. ASIC may accept an

undertaking from the Promisor that it will:

(a) pay damages to identified third parties, along with a description of the process for bringing this about;

(b) refrain from taking part in the management of a certain corporation for a set period of time;

(c) remove a website at which securities advice is given by an entity contrary to the Law and to refrain from replacing it with a website falling within defined parameters;

(d) cease promoting an illegal fundraising scheme and/or to bring the scheme into compliance with relevant provisions of the Law within a defined period of time;

(e) amongst other things, inform the market to correct some previous false or misleading disclosure or any continuing misapprehension for which it is responsible;

(f) set up and implement an internal compliance plan and to report periodically to the market;

(g) refrain from acting as a broker without a licence in contravention of the Insurance (Agents and Brokers) Act 1984;

(h) remedy the deficiencies in the company's structure and administration system by taking certain specified action;

(i) compensate the beneficiaries of a superannuation entity for any loss suffered as a result of its misleading conduct whilst acting as trustee;

(j) remedy the unacceptable circumstances which have, or may have occurred in relation to a takeover by carrying out certain necessary action (provided that the matter has not been referred to the Panel — see [PN 69.15]); and

(k) perform a community service obligation, for example, to increase consumers' knowledge of particular financial services.

Part B: Terms of enforceable undertakings

Acceptable and standard terms

[PN 69.18] ASIC will only accept an enforceable undertaking when the Promisor makes a positive commitment to:

(a) stop the particular conduct or alleged breach that concerns ASIC; and

(b) not recommence that conduct.

[PN 69.19] An enforceable undertaking must also set out how the Promisor will:

(a) address the conduct ASIC is concerned about;

(b) prevent that conduct occurring again; and/or

(c) rectify the consequences of the conduct.

[PN 69.20] An enforceable undertaking must set out what the Promisor is going to do to ensure that the conduct does not occur again. This may include:

(a) details of the monitoring and reporting mechanisms it will adopt (for example, developing internal control/compliance programs);

(b) the name of the contact officer who is responsible for monitoring and complying with the undertaking; and

(c) the name of an ASIC officer to whom the contact officer must report.

[PN 69.21] Generally, the Promisor, its lawyer or its auditor will be responsible for:

(a) monitoring how the undertaking is implemented; and

(b) reporting this to ASIC in the specified manner.

The way the Promisor proposes to do this must be set out in the undertaking and ASIC must be satisfied that this is adequate.

[PN 69.22] In resolving any matter ASIC wants to find ways to undo the harm caused by the alleged breach. This may involve the Promisor compensating, reimbursing or giving other appropriate forms of redress to parties adversely affected by its conduct.

[PN 69.23] In cases of misleading conduct, ASIC will require the Promisor to unequivocally correct the misapprehension for which it is responsible.

[PN 69.24] ASIC may also require an enforceable undertaking to state that the Promisor will pay ASIC's costs such as those incurred in conducting an investigation of the alleged breach in question.

[PN 69.25] The Promisor must acknowledge that the undertaking does not affect the rights of other parties or constitute any restraint on ASIC except in relation to specific civil or administrative action compromised. ASIC may accept an enforceable undertaking while continuing with its investigation.

Publicity and public access to undertakings

[PN 69.26] ASIC will not accept enforceable undertakings in confidence (but see [PN 69.27]). ASIC is committed to adopting enforcement strategies which foster a culture of compliance. One such strategy is the publication of enforcement outcomes. Given that the usual alternative to offering an enforceable undertaking involves the prospect of publication of an adverse finding by a Court, the Panel or the CALDB, ASIC regards it as appropriate that the subject and terms of an enforceable undertaking be made public (see standard terms set out in [PN 69.33]).

[PN 69.27] ASIC will not make certain information in an undertaking available for public inspection if the Promisor asks that such information not be released and ASIC is satisfied that it:

(a) is commercial in confidence; or

(b) would be against the public interest to do so; or

(c) contains personal details of an individual.

[PN 69.28] When ASIC makes a copy of an undertaking available under s 93A(6) with such confidential information deleted, the copy will include a note stating that certain information has been deleted. While there is no equivalent provision in s 93AA, ASIC considers that it is appropriate regulatory practice to adopt the same approach as for s 93A undertakings by also making copies of these undertakings available to the public, with the confidential information deleted where appropriate. All enforceable undertakings will contain a waiver of confidentiality clause (excluding certain information set out in [PN 69.27]).

[PN 69.29] The Promisor must acknowledge that it accepts ASIC's publicity and public access policy in the written undertaking.

[PN 69.30] Anyone can access copies of enforceable undertakings from ASIC's ASCOT database (via its online agents and Business Centres). When an enforceable undertaking is given by a listed company, Listing Rule 3.1 of the Australian Stock Exchange Limited (ASX) and s 1001A of the Law may require the company to release a copy of the undertaking to the ASX.

Unacceptable terms

[PN 69.31] Generally, ASIC will not accept an undertaking if it contains a clause denying liability or it omits any of the standard clauses listed in [PN 69.33] (unless otherwise specifically excluded by ASIC).

[PN 69.32] ASIC will not accept an undertaking if it contains any clause that sets up defences for possible non-compliance with an enforceable undertaking.

Examples

[PN 69.33] The following are examples of the standard terms that will be included in every enforceable undertaking unless otherwise specifically excluded by ASIC.

1. X acknowledges ASIC's concerns set out in this undertaking

   [or X acknowledges that it has breached section Y of the (name the relevant legislation)].
2. X acknowledges that ASIC:
   (a) may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
   (b) may from time to time publicly refer to this undertaking; and
   (c) will make this undertaking available for public inspection.
3. X acknowledges that this undertaking in no way derogates from the rights and remedies available to ASIC or any other person or entity arising from any conduct described in this undertaking.
4. X acknowledges that ASIC's acceptance of an enforceable undertaking does not affect ASIC's power to investigate a contravention arising from future conduct, or pursue a criminal prosecution, or its power to lay charges or seek a pecuniary civil order.

Part C: What happens if an enforceable undertaking is not complied with

[PN 69.34] If ASIC believes or has been advised that a Promisor has not complied with a term of an enforceable undertaking, ASIC may apply to the Court for appropriate orders. ASIC will make public its application to the Court and seek legal costs from the Promisor when appropriate. The orders which the Court can make are as follows:

(a) directing the Promisor to comply with that term of the undertaking;

(b) directing the Promisor to transfer money (up to the amount of any financial benefit it obtained directly or indirectly and that is reasonably attributable to the breach) to:

  (i) the scheme property, if it is a responsible entity; or

  (ii) the Commonwealth, if it is an individual or company;

(c) directing it to compensate any person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

[PN 69.35] A breach of an undertaking given to ASIC under s 93A or 93AA of the ASC Law cannot itself be the subject of contempt proceedings. However, a breach of a Court order granted because of a breach of the enforceable undertaking may constitute a contempt of Court.

Part D: Varying or withdrawing enforceable undertakings

[PN 69.36] A Promisor may withdraw or vary an enforceable undertaking only with ASIC's consent: s 93A(2) and 93AA(2).

[PN 69.37] ASIC will only consider a request to vary an undertaking if it does not alter the spirit of the original undertaking, or where compliance with the undertaking is subsequently found to be impractical or where there has been a material change in the circumstances.

[PN 69.38] A factor relevant to ASIC's consideration of a Promisor's request to withdraw an undertaking is whether the Promisor's obligations under the undertaking have been fully performed.

[PN 69.39] ASIC will make withdrawals and variations publicly available on its ASCOT database.

Appendix C

Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings

Guideline on the ACCC's use of enforceable undertakings

Introduction

Section 87B of the *Trade Practices Act 1974* provides for the Australian Competition and Consumer Commission to accept written undertakings in the exercise of its powers under the Act (other than Part X) — and for the enforcement of such undertakings in the Federal Court.

Parties which give such undertakings may subsequently withdraw or vary them only with the consent of the Commission.

The Commission regards s 87B as an important compliance tool for use in situations where there is evidence of a breach or potential breach of the Act that might otherwise justify litigation.

This publication is a guide to the Commission's current approach to administration of s 87B in connection with its enforcement activities.

Enforcement of the Trade Practices Act — overview

The object of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The Commission's Corporate Plan describes its mission as fostering competitive, efficient, fair and informed Australian markets with the following four goals:

- compliance with the Trade Practices Act;
- improvement in market conduct;
- a community educated and informed about the Trade Practices Act and its implications for business and consumers; and
- efficient and effective use of the Commission's resources.

In particular matters the Commission seeks such specific outcomes as:

- ensuring that conduct in apparent breach of the Act is stopped;
- establishing mechanisms to prevent that conduct recurring;
- achieving compensation for any victims of the conduct;

- deterring other from similar conduct; and
- educating those at fault.

Response to complaints

The Commission receives over 10 000 complaints and inquiries a year. Of these:

- the overwhelming majority are resolved virtually immediately, usually through advice about rights and obligations under the Act or referral to other more appropriate agencies; and
- over 2000 receive some form of investigation — of these some are concluded after initial inquiries and others are investigated in depth.

The Commission's enforcement work gives priority to matters in which:

- there appears to be blatant disregard of the law;
- the conduct involves significant public detriment;
- successful enforcement will have a significant deterrent or educational effect;
- new and important issues are involved; or
- there is a detriment to disadvantaged individuals or groups.

When choosing between litigation or an administrative solution the Commission opts for the approach which seems likely to produce the best results — in terms of lasting compliance with the law and redress for injured parties.

Legal proceedings will, however, continue to be a major focus of the Commission's work because of the significant effects of court decisions, including:

- deterrence by way of penalty and resultant publicity;
- punishment of unlawful conduct;
- authoritative statement of the gravity of breaches of the law; and
- clarification of the requirements of the law.

The Commission has for many years employed administrative resolution, based on undertakings by the business concerned, as an alternative to the costly and lengthy court process.

The importance of s 87B is that it greatly increases the effectiveness of the administrative resolution approach as undertakings are ultimately enforceable in court.

In negotiating such resolutions the Commission's broad objectives are:

- cessation of the conduct leading to the alleged breach;
- redress for parties adversely affected by the conduct;
- implementation of compliance measures to help prevent future breaches by the business concerned; and
- by means of publicity, an educative and deterrent effect in the community at large and in particular in the industry concerned.

The Commission does not consider s 87B settlements to be a 'soft option', and does not accept them lightly.

The following sections discuss the circumstances in which they are appropriate and the detailed criteria adopted by the Commission in their negotiation and acceptance.

This guideline does not cover the potential use of s 87B undertakings in relation to the Commission's non-enforcement functions.

When are s 87B undertakings appropriate?

The Commission stresses that it seeks to resolve matters under s 87B only when it believes that a breach has occurred or is likely to occur and that an administrative resolution based on enforceable undertakings offers the best solution.

Clearly a s 87B undertaking will not be the appropriate way to resolve every matter involving a perceived breach.

In deciding between litigation and administrative resolution the Commission will be influenced by such factors as:

- the nature of the alleged breach in terms of:
  its impact on third parties and the community at large;
  the type of practice;
  the product or service involved; and
  the size of the business or businesses involved;

- the history of complaints against the business or businesses and of complaints involving the practice, the product or the industry generally and any relevant previous court or similar proceedings;
- the cost-effectiveness for all parties of pursuing an administrative resolution instead of court action;
- prospects for rapid resolution of the matter; and
- the apparent good faith of the corporation.

This list is not exhaustive. Often there will arise other considerations which reflect the particular circumstances of the alleged breach.

Acceptance of undertakings

The Commission does not have the power to demand or require a s 87B undertaking, but may raise it as an option, leaving it to the other party to decide whether to pursue it or not.

Staff of the Commission will often canvass the possibility of a s 87B undertaking in the course of their investigation of a matter — though never at the outset. In doing so they may give advice which reflects the Commission's general attitude to the matter, without pre-empting its ultimate decision.

It is important to understand that staff are not empowered to finally accept undertakings. That is the responsibility of the Commission.

Undertakings must be of substance and address the conduct which has given rise to the perceived breach and its consequences. They must also include firm future actions to prevent a recurrence or any other breaches of the Act. They must, by law, be given in writing.

Unacceptable terms

Undertakings will not be accepted if they include:

- a denial of liability (but companies providing undertakings will not be required to admit having breached the Act);
- a statement that the undertaking is not an admission in relation to action by third parties such as employees (but the undertaking need not make such an admission);
- terms purporting to set up defences for possible non-compliance; or
- obligations placed upon the Commission.

While in most circumstances acceptance of a s 87B undertaking will be the resolution of the matter, there may be circumstances in which the Commission negotiates and accepts an undertaking while continuing to investigate with a view to possible legal proceedings in relation to past or associated conduct.

Typical elements of s 87B undertakings

Section 87B undertakings are the subject of negotiation between the Commission and the parties concerned as to which elements are appropriate and what undertakings the Commission is prepared to accept.

The Commission is careful to ensure that obligations under the undertaking are reasonable, clearly expressed and have not been obtained unfairly.

The Commission is not committed to a fixed formula for s 87B undertakings, but rather tailors each to the particular circumstances of the matter and especially to the outcomes desired. However, experience to date has shown that most can fit within the following framework:

background	a brief description of the company and relevant conduct;
the undertaking	what the company undertakes to do; and
acknowledgment	acknowledgment by the company that the undertaking will appear on the public register and may receive other forms of publicity.

Most will contain all of the ingredients discussed below.

Commitment

The foundation of all undertakings accepted by the Commission must be a positive commitment to cease the particular conduct and not recommence it.

Corrective action and compensation

In the resolution of any matter the Commission will be concerned to find ways to undo the harm caused by the alleged breach.

Of paramount concern will be mechanisms for compensation, reimbursement or other appropriate forms of redress for parties adversely affected by the conduct.

Other forms of corrective action will be dictated by the circumstances of the breach. For example, in cases of misleading advertising the Commission may require unequivocal corrective advertising which will reach the same target audience as the original campaign.

Overall compliance

In many settlements under s 87B the Commission will require the company to undertake a program to improve its overall compliance with the Act. Typically such a program would involve a combination of such elements as:

- demonstrable Board and senior management commitment to, and involvement with, the entire program;
- the assignment of responsibility for the compliance program to a named senior manager;
- the development and dissemination throughout the company of a clear compliance policy;
- the identification of compliance issues and operating procedures for compliance;
- the development of a compliance training program utilising effective adult learning techniques;
- delivery of the program, a specified number of times over a specified period, to key personnel groups within the organisation — such groups to be identified after an audit to identify the areas of the business at risk of breach;
- the establishment of permanent procedural checking/monitoring mechanisms, such as nominating a compliance officer and procedures to check the accuracy of all advertisements and labelling, to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management; and
- the commitment to an independent audit of the program at regular intervals (usually annually) for a specified period (usually three years).

At a specified time after a settlement, the business may also be required to report to the Commission on the steps taken to implement the compliance program.

The Commission will normally expect the company concerned to use the Australian Standard on Compliance Programs AS 3806 in the design and implementation of its compliance program.

The Commission will not involve itself in the implementation of tailored compliance programs resulting from s 87B undertakings but may undertake industry-wide compliance activities in some cases.

Publicity

The Commission's view is that all s 87B undertakings should be a matter of public record and open to public scrutiny.

Its policy is to publicise undertakings in news media statements, reports in Commission publications and in any other manner appropriate to the particular matter.

Moreover, a progressive register of s 87B undertakings is maintained at Commission offices for public inspection.

A summary of the register is published in the Commission's bi-monthly *ACCC Journal.*

It may be possible to grant confidentiality to some aspects of a s 87B undertaking involving commercially sensitive information. Businesses giving undertakings under s 87B are required, as part of the process, to acknowledge that they are aware of the Commission's policy on publicity.

Community service orders

Often the undertakings negotiated by the Commission under s 87B include novel requirements, in the nature of community service orders, which the courts have not usually ordered as the result of litigation, for example:

- implementation of an industry-wide compliance education program; and
- publication of material dealing with the undertaking in relevant trade journals.

Merger undertakings

To date the Commission has accepted undertakings pursuant to s 87B from parties to an acquisition for either of two purposes:

- to ensure that an acquisition is not completed until the Commission has had the opportunity to conduct the appropriate market inquiries; or
- to resolve matters where the proposed acquisition is, in the Commission's view, likely to contravene the Act.

Where, following its inquiries into a proposed acquisition, the Commission forms the view that the proposed acquisition is likely to substantially lessen competition in breach of s 50, the Commission will provide the parties with reasons for that view. If the parties consider that undertakings could be offered to reduce or eliminate the stated concerns, they may choose to offer to the Commission undertakings aimed at restructuring the proposal in such a way as to address the competition concerns.

In these circumstances, the offer of such an undertaking designed to address the competition concerns is a matter for strategic decision by the parties to the acquisition, and presumably will be considered along with other options — for example challenging the Commission in court, seeking authorisation, revising the proposal without undertakings, or even abandoning the proposal. It is not the policy or practice of the Commission to demand such undertakings.

The Commission is likely to look most favourably on proposed undertakings which address structural issues in the relevant market(s). Structural solutions provide a basis for the continuing operation of competitive markets. The regulatory costs are one-off, rather than a permanent burden. For example, divestiture of particular divisions of the merged company may remove competitive concerns from the merger, while leaving it an attractive proposition for the parties.

In certain cases it may be appropriate for the Commission to accept an undertaking which provides for third party or competitive access to a particular facility.

The Commission is not likely to favour behavioural undertakings, such as price, output, quality and/or service guarantees and obligations. Such undertakings may well interfere with the competitive process through their inflexibility and unresponsiveness to market changes. The duration of such undertakings is also highly problematic.

In addition, behavioural undertakings involve substantial regulatory difficulties. They are extremely difficult to make certain and workable in detail, particularly in the short time frames in which mergers are considered, they require continuing monitoring, and where

breaches are detected they are often dependent on enforcement after the event. There are also likely to be substantial associated costs to the Commission of compliance and enforcement.

When considering applications for authorisation of a proposed merger, the Commission may consider proposed undertakings which address the balance between public benefit and detriment, particularly the anti-competitive detriment. Again the Commission prefers structural remedies but, where these are not feasible, it may consider proposals for behavioural undertakings, taking account of the regulatory costs in balancing the likely public benefit and detriment.

Specific procedural issues relating to merger undertakings

Scope

The scope of a s 87B undertaking is potentially wider and the terms more flexible than a court imposed remedy. For example, the court may be reluctant to make orders requiring ongoing monitoring and supervision by the court, whereas the Commission does have the resources and functions of an administrative agency and may be prepared to accept undertakings with an ongoing obligation.

The scope of s 87B undertakings that the Commission is likely to accept in the mergers context will be determined by its assessment of the anti-competitive effects of the merger. The test will be whether the arrangements envisaged by the proposed undertakings will address the reduction in competition. The focus is not necessarily on the assets to be acquired and this may mean that the Commission may accept an undertaking which is not directly related to the assets to be acquired where that is considered necessary to address the reduction to competition.

Consultation and third party interests

In most, if not all, cases the Commission will want to consult with relevant market participants before accepting a substantive s 87B undertaking. While the Commission will usually already have undertaken extensive consultation through its market inquiries process, this consultation may not be sufficient to address all issues relevant to a decision to accept a proposed undertaking or not. Once having formed the view that an acquisition would be or is likely to be anti-competitive, and having received the offer of undertakings, the Commission will need to undertake a separate assessment of the impact of the proposed undertakings. This will almost always require further consultation with marketplace participants.

The Commission will need to assess the competitive significance of the undertakings, and at the same time inform itself as to the requirements necessary to make the undertakings

workable. The Commission will also want to assess the impact of the proposal on third parties. This aspect is discussed further below.

To permit this process of consultation, the substance of the undertaking proposal, if not all the mechanics of its timing and implementation, may need to be disclosed.

The Commission may also need to assess the impact on third party rights and interests. Any merger will achieve some measure of structural change in a market and, therefore, will be likely to impact on firms and consumers not parties to the transaction. In its simplest terms, if a merger is anti-competitive it will have a direct impact on parties dealing with the merged firm, whether in terms of increased prices or reduced service or quality. If a merger reduces competition in a market, it may benefit rivals through lower competitive pressure and higher prices.

Just as any anti-competitive merger will have an impact on third parties, so too will any undertaking designed to address the anti-competitive consequences of such a merger. Where the merger is likely to be anti-competitive, the provision of undertakings to address that is likely to favour customers, but may remove the benefits that rival firms may have anticipated through the reduction in competition.

Publication and confidentiality

As with s 87B undertakings generally the Commission will insist that the general terms of any merger s 87B undertaking accepted are made public. In almost all cases this would mean the publication of the actual provisions of the undertaking, by placing a copy of it on a public register.

However, the Commission is prepared to consider requests for confidentiality of certain information, for example the timing of any divestiture arrangement, or the arrangements in the event of the failure to divest, particularly where the disclosure of that information would undermine the effectiveness of the undertakings.

Compliance with undertakings

Following acceptance of an undertaking, the Commission requires that its implementation and effectiveness be monitored.

Monitoring will generally be the responsibility of the business concerned. However, as mentioned previously the Commission will require a commitment to an independent audit of compliance with the undertaking at regular intervals (usually annually) for a specified period (usually three years).

Where it has reason to believe that a business has not complied with an undertaking the Commission will usually first try to resolve the matter by consultation.

If this approach fails, it will not hesitate to apply to the court for appropriate orders. The Commission will make public its application to the court and will seek legal costs from the offending party where appropriate.

Section 87B provides that the court, if it is satisfied that a person has breached a term of the undertaking, may make all or any of the following orders:

- an order directing compliance with the undertaking;
- an order for the party to pay to the Commonwealth an amount up to the amount of any financial benefit that can be reasonably attributed to the breach;
- any order that the court considers appropriate to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order that the court considers appropriate.

At the time of publication of this guide the Commission has not had cause to apply to the court because of a failure to honour an undertaking.

Variations

Under s 87B(2) parties may withdraw or vary undertakings with the consent of the Commission.

This allows negotiations for changes if undertakings are subsequently found to be too hard to comply with, not practical or where changes in circumstances occur.

The Commission will sympathetically consider such requests as long as they do not alter the spirit of the original undertaking. Variations will be made public and put on the Commission's public register.

Monitoring and Commission information requirements

In order to ensure that s 87B undertakings are complied with and to assist in monitoring that compliance, the Commission has as a standard practice sought the inclusion of provisions requiring relevant information to be made available to the Commission:

- periodically — for example, a periodic audit of compliance with the undertaking;
- in specified circumstances — for example, where there is an event of default, information relating to that default, such as the reasons for it; or
- upon the Commission's request.

Costs

The Commission will seek to ensure that s 87B undertakings and their development, implementation and monitoring are cost neutral to the Commission and may require cost recovery for the Commission as part of the undertaking.

Attachment A: Sample (hypothetical) undertaking

TRADE PRACTICES ACT 1974

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

by

XYZ Pty Ltd

ACN. ###.###.###

Background

(1) **Full name of company (including ACN) (abbreviation of company name e.g. XYZ) and description of its business and selling areas in general terms, for example:**

XYZ PTY LTD ACN. ###.###.### (XYZ) sells Widgets in New South Wales and Southern Queensland. The Widgets are manufactured by Widgets International Pty Ltd (ACN .....).

(2) **Description of the conduct that the Commission investigated**, for example:

In advertisements that went to air on television stations REQ8 and JKN6 on the following dates (.....) XYZ advertised Widgets as being able to work under water and having a manufacturer's recommended retail price (RRP) of $X.

(3) **Explanation of why the Commission considers the conduct to contravene the Trade Practices Act**, for example:

Following an investigation, the Australian Competition and Consumer Commission has reached the view that XYZ contravened the *Trade Practices Act 1974* (the Act) in that XYZ made false or misleading representations in those advertisements in contravention of sections 52, 53(a) and 53(e) of the Act. The Commission considers XYZ contravened sections 52, 53(a) and 53(e) of the Act by:

(a) advertising Widgets as having RRPs when a RRP is not specified by the manufacturer; and

(b) falsely representing that Widgets could work under water.

(4) **Brief details of Commission inquiries**, for example:

In (month/year) the Commission brought to XYZ's attention its view that the representations referred to in paragraph (3) above contravened sections 52, 53(a) and 53(e) of the Act. The Commission and XYZ subsequently met several times to discuss the Commission's view.

(5) **A statement that the conduct has stopped (and possibly an admission)**, for example:

XYZ admits that its conduct contravened the Act and states that it has now ceased the conduct referred to in paragraph (3).

Undertakings

(6) XYZ hereby undertakes for the purposes of section 87B of the Act:

(i) that it will not, and will ensure that its subsidiaries will not, in trade or commerce:

(i) advertise products as having RRPs when there are no RRPs specified by the manufacturer or wholesaler for those particular products; or

(ii) make false representations concerning the qualities of Widgets;

(ii) that it will:

(i) cause to be telecast on television stations REQ8 and JKN6 on the

following dates .....; .....; and ..... corrective advertisements in the form annexed hereto, subject only to such variations as may be agreed to by the Commission in writing.

(7) Within three months of the signing of this undertaking, Company X shall create and maintain at its own expense, a trade practices compliance program. In summary the company will:

- demonstrate commitment to a policy of compliance and embed a culture of compliance throughout the organisation;
- analyse and respond to the trade practices matters resulting in this undertaking *[by taking specified corrective measures as directed by ACCC]*;
- identify risk areas for trade practices breaches and develop systems to eliminate or minimise these risks *[by undertaking a detailed risk analysis]*;
- state that the company will take action internally against those responsible for breaches and will not indemnify them; and
- provide practical and verifiable training for all relevant staff and management so that breaches and potential breaches may be prevented or otherwise detected, referred and acted upon.

In particular the company shall implement the following steps.

1. Commitment

A. Form a compliance committee of the Board or ensure that compliance matters are standing items on the Audit Committee and/or Board meetings.

B. Appoint a Compliance Manager or Senior Manager with overall responsibility for compliance systems.

C. Implement adequate procedures to check for trade practices compliance.

D. Ensure that compliance procedures are understood by staff and other relevant third parties e.g. agents, distributors and advertising representatives.

2. Policy and procedures

A. Produce a written policy of commitment to compliance and articulate how this will be carried out; set in place procedures so that the policy is well understood throughout the company; ensure procedures are laid down to assess compliance against predetermined objectives and assessment criteria.

3. Management responsibility

A. Detail the processes involved in establishing, implementing and maintaining the compliance program and the roles and responsibilities of management, staff and other stakeholders.

B. Ensure that line managers are responsible for compliance in their immediate area.

4. Resources and authority

A. Ensure that the senior executive responsible for compliance systems has:

- authority, recognition and support within the organisation;
- access to all levels in the organisation to ensure compliance;
- overall responsibility for design, integrity and updating of the program; and
- access to the Board when required.

B. Ensure that staff have access to the necessary materials including compliance manuals and training, reference material and databases.

C. Ensure that any external compliance service providers have the resources and expertise to carry out the required tasks.

5. Continuous improvement

A. Put in place procedures to ensure that the program has regular ongoing reviews.

6. Operating procedures for compliance

A. Integrate compliance considerations into:

- computer systems
- forms
- contracts
- administrative procedures
- financial evaluations
- management performance evaluations (line and senior).

7. Training

A. Develop and execute a practical and easily understood compliance training system throughout the company. Training will be:

- integrated into induction courses
- reviewed every six months
- participatory
- verifiable by third parties
- framed to reflect areas of risk
- integrated into line and senior management development.

8. Complaints handling system

A. Implement a visible and accessible complaints handling system which complies with Australian Standard AS 4269.

9. Record keeping

A. Keep an accurate record of compliance failures and complaints and of the rectification of such failures and complaints.

10. Employee compliance

A. Develop a disciplinary policy for breaches of the Act by employees

and ensure that the policy is widely disseminated.

B. Ensure that compliance is integrated into performance reviews for

employees.

11. Identification and rectification

A. Develop a system to identify and classify compliance failure so that

systemic and recurring problems are rectified.

12. Reporting

A. Ensure that compliance problems are rapidly reported to the Compliance Manager.

13. Monitoring and review

A. Introduce a system to monitor and review the effectiveness of the compliance program.

14. Accountability

A. Ensure that the Compliance Manager is accountable to the Board for compliance issues.

Review of the trade practices compliance program

XYZ shall cause, at its own expense, an independent audit of its compliance program to be conducted annually from the date of acceptance of the undertaking for a period of [X] years or at such other time as specified in the undertaking. The audit shall be carried out by a suitably qualified compliance professional who is entirely independent of XYZ. Such a professional will qualify as independent on the basis that he or she:

- is not a present or past staff member or director of XYZ;
- has not acted or does not act for XYZ;
- is not retained by XYZ in any other capacity;
- has not and does not provide consultancy or other services for XYZ;
- has no substantial shareholding or other interest in XYZ.

The auditor shall review and report on:

A. the company's adherence to the undertaking;

B. the implementation of the compliance program and the achievement of its objectives over the preceding twelve months;

C. any recommended changes to the compliance program that may be necessary to ensure achievement of its objectives.

The date for the completion of the first such audit, and the provision of the auditor's report to the ACCC shall be [one year and one month after the signing of the undertaking]. Consequently, audit reports shall be prepared and presented by or on the same date in each following year, with the last report due on [x date, usually three years after the signing of the undertaking].

The ACCC shall review the recommendations contained in each audit report. Subject to ACCC approval XYZ shall implement those recommendations.

Acknowledgments

(8) XYZ acknowledges that the Commission will make this undertaking available for public inspection.

(9) XYZ further acknowledges that the Commission will from time to time publicly refer to this undertaking.

(10) XYZ further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

(11) XYZ further acknowledges that the reports referred to in paragraph (7) and the trade practices compliance program as in force from time to time will be held with this Undertaking on the public register.

IN WITNESS of these undertakings and its agreement the common seal of XYZ PTY LTD (ACN. ###.###.###) was hereunto affixed by authority of the Board of Directors in the presence of:

Secretary/Director Director

This day of 200#

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE

TRADE PRACTICES ACT 1974.

.....

Chairman

This day of 200#

Appendix D

Civil Penalties under the Corporations Act

Civil penalties under the Corporations Act[70]

Under the Corporations Act, a civil penalty is a punishment for contravention, involving payment of an amount (a "pecuniary penalty") of up to $200,000, which the court orders the defendant to pay. The amount is owing to the Commonwealth and payable to ASIC on the Commonwealth's behalf, and is treated as a civil judgment debt: s 1317G. It becomes payable as a result of proceedings "prosecuted" by the regulator (ASIC, in the case of the Corporations Act), although the proceedings are brought in a civil court, subject to civil rules of procedure and evidence and the civil standard of proof. Like a fine for an offence, a civil penalty is assessed by reference to the seriousness of the contravention rather than by reference to the quantum of loss or profits flowing from the contravention. Thus, a civil penalty provision lies somewhere between a provision contravention of which is an offence, and a provision contravention of which can lead only to civil proceedings.

Civil penalty provisions were recommended by reformers who thought that directors and others who contravene the Corporations Act should not be branded as criminals unless they act dishonestly. Particularly influential was a report by the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (AGPS, Nov 1989, Ch 13). Parliament had an expectation that civil penalties, ordered upon the application of ASIC, would improve the range of sanctions for the enforcement of the standards set by the Corporations Act for the conduct of companies even in cases where criminal prosecution is an alternative.

The reforms introducing the civil penalty regime were informed by a strategic theory of regulation. According to the theory, regulatory compliance is best secured where enforcement actions are backed up by a pyramid-shaped framework of sanctions. The pyramid shape represents the hierarchical order of sanctions from the least to the most severe.

While the initial focus of the civil penalty provisions was on the enforcement of directors' statutory duties, the scope of the civil penalty regime has been widened substantially in recent years. By statutory amendments in 1998 the regime was expanded to cover contraventions of provisions regarding share capital transactions and the statutory duties imposed on those involved in the management of managed investment schemes. With the introduction of the Corporations Act, there were further expansions to the civil penalty provisions regarding managed investment schemes. Then the Financial Services Reform Act, effective in March 2002, extended the civil penalty regime to cover market misconduct provisions.

The use of civil penalty regimes in Commonwealth laws is explored in a report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and*

[70] This section is extracted from HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law,* 2 volume looseleaf edition, 2000 [3.390] – [3.420].

Administrative Penalties in Australia (Report 95, December 2002) and in an earlier discussion paper published by the Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (Discussion Paper 65, April 2002).

According to the report, civil penalty provisions are a hybrid between the criminal and the civil law. They are founded on the notion of preventing or punishing conduct that causes public harm. They differ from traditional private civil remedies in that they do not necessarily bear any relationship to the actual damage caused (that is, they are non-compensatory — although the Corporations Act makes provision for compensation orders).

The civil penalty provisions in the Corporations Act work, for the most part (the penalty for breach of the duty of care of corporate officers being an obvious exception), alongside criminal penalties. They provide an additional or alternative enforcement option, especially where there may be difficulty in proving the necessary fault element to establish a criminal offence. The structure of the civil penalty provisions of the Corporations Act is in contrast to the civil penalties in Pt IV of the Trade Practices Act 1974 (Cth), which stand alone as the penalties for certain contraventions.

The civil penalty provisions

The civil penalty provisions were introduced into the former Corporations Law Pt 9.4B by amendments which took effect in 1993. Initially, the list of civil penalty provisions was confined to breach of directors' duties, liability with respect to related party transactions, liability with respect to financial statements and liability for insolvent trading. Liability with respect to certain share capital provisions and certain provisions about managed investment schemes was added by the 1998 amendments. Financial services provisions were added to the list by the Financial Services Reform Act 2001.

Now the list of civil penalty provisions (in s 1317E) is as follows:

(a) ss 180(1), 181(1) and (2), 182(1) and (2), 183(1) and (2) (directors' and officers' duties);

(b) s 209(2) (related parties rules);

(c) ss 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions, including financial assistance by a company for the acquisition of its shares);

(d) s 344(1) (requirements for financial reports);

(e) s 588G(2) (insolvent trading);

(f) s 601FC(1) (duties of a responsible entity);

(g) s 601FD(1) (duties of officers of a responsible entity);

(h) s 601FE(1) (duties of employees of a responsible entity);

(i) s 601FG(2) (responsible entity acquiring interest in scheme);

(j) s601JD(3) (duty of members of a scheme's compliance committee);

(ja) s 674(2) or s 675(2) (continuous disclosure);

(jb) s 1041A (market manipulation);

(jc) s 1041B(1) (false trading and market rigging — creating a false or misleading appearance of active trading etc);

(jd) s 1041C(1) (false trading and market rigging — artificially maintaining etc market price);

(je) s 1041D (dissemination of information about illegal transactions);

(jf) s 1043A(1) (insider trading — dealing or procuring another to deal);

(jg) s 1043A(2) (insider trading — communicating information);

(k) s 29(6) of Sch 4 (disclosure requirements for demutualisation of financial institution or friendly society).

Paragraphs (ja) to (k), added by the Financial Services Reform Act 2001, are called the "financial services civil penalty provisions". The others are called the "corporation/scheme civil penalty provisions": s 1317DA.

The 1999 amendments radically changed the civil penalty provisions, by simplifying the drafting and changing the provisions dealing with the relationship of civil penalty proceedings to criminal proceedings. There were four key changes, as noted in the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill (paras 6.127 to 6.131).

First, the provisions of Pt 9.4B that created a criminal offence where a civil penalty provision was contravened dishonestly were repealed. Instead, the criminal consequences of contraventions are dealt with in the substantive provisions themselves. Second, while the former provisions allowed the court to make a civil penalty order where a prosecution for a criminal offence had failed, under the new provisions a civil penalty order cannot be made after an unsuccessful criminal prosecution, unless ASIC commences fresh proceedings for that purpose. Third, under the former provisions the commencement of proceedings for a civil penalty order was a bar to a subsequent prosecution for the corresponding criminal offence. Under the new provisions, there is no such bar, but evidence given in the course of proceedings for a pecuniary penalty order is not admissible in the criminal prosecution. Fourth, the former power of a criminal court to make a compensation order against a defendant who had not been found guilty has been removed, and so a compensation order may be made only if fresh civil proceedings are taken. The changes are more fully discussed below.

Part 9.4B permits the court to make a "declaration of contravention". If it does so, it may then make a "pecuniary penalty order", or a "disqualification order". Additionally, the court may

make a compensation order, whether or not it makes a declaration of contravention. These four forms of relief are together called "civil penalty orders": see definition in s 9.

Declaration of contravention

The court is required to make a declaration of contravention if it is satisfied that a person has contravened any of the civil penalty provisions: s 1317E(1). The declaration of contravention must specify the court that made the declaration, the civil penalty provision that was contravened, the person who contravened it, the conduct that constituted the contravention, and the corporation or registered scheme to which the conduct related: s 1317E(2). A declaration of contravention is conclusive evidence of these matters: s 1317F; *Re One.Tel Ltd (in liq)*; *ASIC v Rich* (2003) 44 ACSR 682; 21 ACLC 672; [2003] NSWSC 186. A difficulty for the courts will be to specify the conduct that constituted the contravention with sufficient but not too much particularity. Presumably the legislature had in mind a statement of fact rather than a statement applying the law to facts.

Pecuniary penalty orders

Section 1317G empowers the court to order a person to pay the Commonwealth a pecuniary penalty of up to $200,000, if two conditions are met. The first condition is that a declaration of contravention by that person has been made, either by the court in question or by some other court. The second condition is that the contravention:

(i) materially prejudices the interests of the corporation or scheme, or its members;

(ii) materially prejudices the corporation's ability to pay its creditors; or

(iii) is serious.

This assumes that a contravention may be serious even though it has not materially prejudiced the corporation or its members. An example might be where a director wrongfully diverts a corporate opportunity from the company and makes a large profit, even though the company could not have exploited the opportunity.

While the court is obliged to make a declaration of contravention once it is satisfied that a civil penalty provision has been contravened, it has no obligation to make a pecuniary penalty order. Presumably there will be circumstances where the court considers that it is inappropriate to impose a pecuniary penalty, in light of other orders which it makes. For example, an honest but improper use of information which enables a director to make a large profit which the company could not have made, may amount to a contravention of

s 183 which is "serious" because of the amount of profit involved, but the court may nevertheless decide that is enough to strip the director of the unlawful profit (less an allowance for skill and effort) without any further penalty.

Disqualification orders

Section 206C permits the court, on application by ASIC, to disqualify a person from managing corporations for a period that the court considers appropriate. The two conditions which must be met for the making of such an order are that a declaration of contravention is made (presumably, as with pecuniary penalty orders, the declaration made by the court in question or another court), and that the court is satisfied that the disqualification is justified.

In determining whether the disqualification is justified, the court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the court considers appropriate: s 206C(2).

This suggests that the court may endeavour to assess the person's propensity to contravene civil penalty provisions, by taking into account the person's history in relation to other corporations, whether or not that history establishes other contraventions.

In general terms, the purpose of a disqualification order is to protect the public rather than to act as a deterrent against repetition of like conduct: *ASIC v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 and on appeal, *Adler v ASIC* (2003) 46 ACSR 504 at 643–4; [2003] NSWCA 131 per Giles JA, (with whom Mason P and Beazley JA agreed); *Rich v ASIC* (2003) 203 ALR 671; 48 ACSR 6; [2003] NSWCA 342 (Spigelman CJ and Ipp JA, McColl JA dissenting). However, considerations relating to deterrence may be taken into account when the court considers whether to make a disqualification order. In that case, the defendant was found to have contravened the financial assistance provisions of the Corporations Act (s 260A) and the court ordered disqualification for 20 years.

Relevant considerations included the seriousness of the offence and the defendant's apparent lack of contrition. The Court of Appeal allowed an appeal in part, but found that the trial judge, Santow J, did not err in imposing pecuniary penalties and making disqualification orders.

The distinction between punitive and protective provisions, and the case law asserting that the purpose of a disqualification order is protective rather than punitive, were upheld by the Court of Appeal of New South Wales in *Rich v ASIC*, above. The majority (Spigelman CJ and Ipp

JA, McColl JA dissenting) applied that line of cases to conclude that the defendant in a proceeding by ASIC seeking a disqualification order could not invoke the privilege against exposure to a penalty, so as to refuse to give discovery in the normal manner in civil proceedings. In April 2004 the High Court heard, by leave, an appeal against that decision and made orders reversing the trial judge's orders for discovery, but the High Court's reasons are not (at the time of writing) available, and it is not clear whether the principles stated above will be affected.

Compensation orders

Section 1317H empowers the court, in the case of a corporation/scheme civil penalty provision, to order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if the person has contravened a civil penalty provision in relation to the corporation or scheme, and damage has resulted from the contravention. The order must specify the amount of the compensation. The order may be enforced as if it were a judgment of the court. Although the statutory power to make a compensation order is not available unless a person has contravened a civil penalty provision, the power may be exercised without a declaration of contravention being made.

The language of the section suggests that the common law test of causation must be applied, rather than the broader "but for" test developed for equitable compensation (as to which, see *Maguire v Makaronis* (1997) 188 CLR 449; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; 29 ACSR 148; 12 ACLC 1705; note the even looser causal linking permitted by *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, which applies where a breach of an equitable duty involves failure to disclose information).

The right to recover compensation is vested in the corporation or registered scheme, rather than in members. In this respect, s 1317H is to be contrasted with s 1324, which allows any person whose interests are, have been or would be affected by a contravention to sue for an injunction, and for damages in addition to, or in substitution for, injunctive relief. In the case of a registered scheme, the amount of compensation is recovered on its behalf by the responsible entity, unless the responsible entity is the person who has contravened the law. In the latter case, the responsible entity must transfer the amount of the compensation to scheme property: s 1317H(4).

The former provision (old s 1317HD) dealt separately with recovery of profits made because of a contravention. It allowed the corporation or registered scheme to recover from the contravening party an amount equal to the profit made by that person or anyone else. Now s 1317H(2) says "In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence".

This curiously drafted provision seems to be intended to achieve the same result as the former provision, by "simplified" drafting. If so, the corporation or scheme still has the statutory right to recover from the contravening party an amount equivalent to profits made either by that party or by a third party from the contravention, regardless of whether the corporation or scheme has also suffered a loss. Doubt is created because the drafting treats profits as a component in the calculation of damages, and does not confer a specific right of recovery of profits. Nevertheless, it seems that the new drafting has not altered the law.

Section 1317H(3) says that in determining the damage suffered by a scheme for the purposes of making a compensation order, the court must include any diminution in the value of the property of the scheme. The words "resulting from the contravention", which appear in subs (2) dealing with profits, do not appear in subs (3). The question arises whether the contravening party can be ordered to pay for a diminution in the value of the scheme property that occurred after the contravention but was not a result of it. It is suggested that only a diminution in the value of the property that resulted from the contravention may be recovered, since subs (1) limits a compensation order to compensation for damage that resulted from the contravention.

Section 1317HA states that in the case of a financial services civil penalty provision, the court may order a person to compensate another person (including a corporation) or a registered scheme, for damage suffered by the person or scheme if the "liable person" has contravened a financial services provision and damage has resulted. In the case of insider trading, this general compensation provision is supplemented by s 1043L.

Proceedings for a civil penalty

Part 9.4B envisages civil proceedings seeking a declaration of contravention, or a pecuniary penalty order, or a disqualification order, or a compensation order. No doubt more than one of these forms of order may be sought in a single proceeding. Presumably other civil relief may be sought in the same proceeding, such as a money order for breach of the general law of fiduciary duties or the statutory law concerning misleading or deceptive conduct.

Standing to sue

ASIC may apply for a declaration of contravention, a compensation order, a pecuniary penalty order, or a disqualification order: ss 1317J(1) and 206C(1). According to

s 1317J(4), no one other than ASIC may apply for a declaration of contravention or a pecuniary penalty order. As a practical matter the same is true of a disqualification order, although s 1317J(4) does not expressly say so. Although the relevant corporation or responsible entity cannot apply for a declaration of contravention or a pecuniary penalty order, it may intervene in an application for that relief, and is entitled to be heard on all matters other than whether the declaration or order should be made: s 1317J(3).

The corporation, or the responsible entity in the case of a registered scheme, may apply for a compensation order: s 1317J(2). Section 1317J(4) says that no one else may apply for a compensation order. Nevertheless, an officer or member who seeks to assert the company's right to compensation for contravention of a civil penalty provision may bring a statutory derivative action under Pt 2F.1A, since the proceedings (although brought "on behalf of" the company) must be brought in the company's name (s 236(2)) and therefore the company is the plaintiff for the purposes of s 1317J. On the same reasoning, ASIC may cause the corporation or responsible entity to bring proceedings for a compensation order by using the power conferred on it by s 50 of the ASIC Act, since s 50 requires that the proceedings be conducted in the name of the corporation or responsible entity rather than in ASIC's name.

Further, a person whose interests are, have been or will be affected by a contravention may take proceedings for damages under s 1324(10) in addition to or in substitution of an injunction. A member of a company may be able to take proceedings under s 1324 where a contravention also damages the company, since those proceedings assert the member's personal statutory right rather than the right of the company to compensation: see Ch 11.

Section 1317J does not purport to restrict the member's right to sue under s 1324. Similarly, a member may take oppression proceedings under Pt 2F.1 without any inhibition arising out of s 1317J.

Procedure and evidence

The court must apply the rules of procedure and evidence for civil matters when hearing proceedings for a declaration of contravention or a pecuniary penalty order: s 1317L. The same must apply to proceedings for a compensation order, which are inherently civil proceedings.

One consequence of s 1317L is that, to the extent that the standard of proof in civil proceedings looks to the balance of probabilities as opposed to the higher standard of proof beyond reasonable doubt used in criminal proceedings, the civil standard is to be applied in proceedings for a declaration of contravention or a pecuniary penalty order, as well as in proceedings for a compensation order. But in the application of the civil standard, the nature and consequence of the facts to be proved are appropriate considerations according to Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334. His Honour said (CLR at 362–3):

> When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues … But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is required.

Even though a proceeding for a declaration of contravention or a pecuniary penalty is a civil proceeding, a consequence of the fact being proved can be the imposition of a penalty. It is submitted that the issue is sufficiently like a criminal one that the presumption of innocence and the need for exactness of proof are attracted.

The privilege against exposure to a penalty, which is an extension of the privilege against self-incrimination, is based on the principle that those who allege that a penalty has been incurred should prove it themselves and should not be able to compel the defendant to provide proof against himself: *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 at 129; 123 ALR 503; 14 ACSR 309; see also *Daniels Corp Int Pty Ltd v ACCC* (2002) 192 ALR 561; 43 ACSR 189; [2002] HCA 49. The privilege is clearly available to a defendant in a civil penalty proceeding, if a pecuniary penalty is sought by the plaintiff. Where the plaintiff does not seek a pecuniary penalty but applies for a disqualification order, the question is whether the proceeding should be classified as a proceeding for a penalty in order to attract the privilege. In *Rich v ASIC* (2003) 203 ALR 671; 48 ACSR 6; [2003] NSWCA 342 the Court of Appeal of New South Wales held, by majority, that the privilege did not apply in such a case. However, notwithstanding a line of cases which say that disqualification orders are to be made for the protection of the public rather than to penalise the defendant, the High Court overruled the Court of Appeal in April 2004, for reasons not yet published at the time of writing. It is unclear whether a civil penalty proceeding in which only a compensation order is sought will attract the privilege. In *Rich v ASIC*, above, at ACSR 65ff, McColl JA (dissenting) appears to have taken the view that the privilege is available whenever relief is sought under Pt 9.4B, even if the only relief sought is compensation.

The High Court's decision creates practical problems for the conduct of civil penalty hearings. The effect is that the defendant is not required to give discovery, submit to interrogatories, provide affidavits or other evidence before the hearing, or give any other indication of his or her case, until after the plaintiff's case has been closed. If the defendant then decides to go into evidence, the plaintiff may need some time to prepare cross-examination, before the hearing continues. The procedures that have been developed by courts for the case management of complex commercial proceedings, including such matters as directions for expert witnesses to consult and prepare joint reports, and any arrangements to narrow and focus the issues for determination, are unlikely to be feasible.

Proceedings for a declaration of contravention, a pecuniary penalty order or a compensation order may be commenced no later than six years after the contravention:

s 1317K. The lapse of substantial time from the contravention to the proceedings will probably have the effect of dissuading the court from exercising its discretion to make a pecuniary penalty order or a disqualification order, even if the contravention is established and the declaration of contravention is made. The lapse of time is likely to be less significant in proceedings for a compensation order, unless the plaintiff is guilty of delay or the defence of laches is established.

The limitation period for civil penalty proceedings is to be compared with the five year limitation period (longer, with the Minister's consent) for proceedings for an offence against the Corporations Act: s 1316; *Oates v A-G (Cth)* (1998) 26 ACSR 601; 16 ACLC 511. In November 1995 the Parliamentary Committee on Corporations and Securities recommended that s 1316 be changed so that for the more serious criminal offences there should be no limitation period. The five year limit should remain for lesser offences, but the need for the Minister's consent should be abolished because it is inconsistent with the need for the prosecution process to be independent.

Assistance to ASIC

ASIC has the statutory right to require a person to give it all reasonable assistance in connection with an application for a declaration of contravention or a pecuniary penalty order: s 1317R(1). The same right is conferred on ASIC with respect to criminal proceedings for an offence against the Corporations Act, without derogating from the similar right contained in s 49(3) of the ASIC Act: s 1317R(1) and (8). ASIC can require assistance regardless of whether the proceedings have already begun: s 1317R(4).

On the application of ASIC, the court may order the person to comply with ASIC's requirement in a specified way: s 1317R(7). But the duty to give assistance to ASIC arises as soon as ASIC properly requires assistance (s 104) and failure to comply is an offence under s 1311. The requirement to assist must be given by ASIC in writing: s 1317R(6).

ASIC has the right to require assistance if it appears to ASIC that someone other than the person required to assist may have contravened a civil penalty provision, and ASIC suspects or believes that the person required to assist can give relevant information: s 1317R(2). The right to require assistance in respect of criminal proceedings arises only if it appears to ASIC that the person required to assist is unlikely to be a defendant, and the person is an employee, agent or partner of the likely defendant (or if the likely defendant is a corporation, the person is an officer): s 1317R(3). But ASIC cannot require assistance from a lawyer, or a person who has been a lawyer, for the person suspected of contravention: s 1317R(5).

It is important to note that ASIC cannot require assistance from the person suspected of a contravention. This reflects the fundamental principle that those who allege the commission of a crime or the incurring of a penalty should prove it themselves, and should not be able to compel the defendant to provide proof against himself or herself. That principle has been held to be applicable to civil penalty provisions under the Trade Practices Act 1974 (Cth) s 76: *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96; 14 ACSR 359. It would seem equally applicable to the civil penalty provisions in the Corporations Act.

Relief from liability

As noted in Ch 9, the Corporations Act gives the court the power to relieve a person from liability in certain circumstances. Section 1318 is available in civil proceedings for negligence, default, breach of trust or breach of duty. It gives the court the power to relieve a person from liability, if it appears to the court that the person has acted honestly and that, having regard to all the circumstances of the case, the person ought fairly to be excused.

Section 1317S is a similar provision which does not limit, and is not limited by, s 1318. Prior to the introduction of s 1317S, it was thought that the statutory jurisdiction to grant relief from liability (then only in s 1318) was not available to relieve a director from liability for insolvent trading, because the statutory provision of the time simply imposed liability for debt on the director in stated circumstances, and did not involve default or breach of duty: *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; 9 ACLC 946; *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290; 131 ALR 1; 18 ACSR 1; 13 ACLC 1381. By virtue of amendments to the former Corporations Law which took effect in 1993, liability for insolvent trading arises where a director fails to prevent the company from incurring a debt (s 588G(2)), and consequently the liability arises out of default. Moreover, s 1317S confers jurisdiction on the court, in unambiguous terms, to relieve the director from liability in the stated circumstances: *Kenna & Brown Pty Ltd (in liq) v Kenna* (1999) 32 ACSR 430; 17 ACLC 1183.

Section 1317S applies to "proceedings for contravention of a civil penalty provision", words which are not otherwise defined in Pt 9.4B. Presumably s 1317S is available in proceedings for a declaration of contravention, or a pecuniary penalty order, or a disqualification order under s 206C, as well as in proceedings for a compensation order under s 1317H. By its express terms, the section is also available in proceedings for compensation for insolvent trading by directors (s 588M) or by a holding company

(s 588W). Presumably the section is also available in any other proceedings which seek relief for contravention of a civil penalty provision — for example, proceedings under s 1324 which complain of contravention of a civil penalty provision.

The court is empowered by s 1317S to relieve a person wholly or partly from liability if it appears to the court the person has, or may have, contravened a civil penalty provision but that the person has acted honestly, and having regard to all the circumstances of the case the person ought fairly to be excused for the contravention. The circumstances to which the court may have regard include those connected with the person's appointment as an officer of the relevant corporation. Where the contravention is of s 588G (insolvent trading by directors), the court may have regard to any action the person took with the view to appointing an administrator of the company, when that action was taken, and the results of it: s 1317S(3).

Civil penalties and criminal proceedings

One of the important changes made by the 1999 amendments was the removal of the former s 1317FA, which stated that a person was guilty of a criminal offence for contravening a civil penalty provision, where the person did so knowingly, intentionally or recklessly, or dishonestly intending to gain, or intending to deceive or defraud. Now the criminal consequences of contravention are dealt with, if at all, in the various civil penalty provisions themselves. Thus:

(i) a director or officer of a corporation commits an offence under s 184 where an element of recklessness or intentional dishonesty is added to the ingredients of the civil penalty provisions relating to the duty of good faith, and to improper use of position or information (ss 181, 182 and 183). There is no criminal offence associated with contravention of s 180 (the duty of care and diligence of a director or officer);

(ii) a person who is involved in a contravention of s 208 (which prohibits a public company from giving a financial benefit to a related party) commits an offence if the involvement is dishonest (s 209(3));

(iii) similarly, a person who is involved in contravention of any of the share capital provisions which are stipulated as civil penalty provisions commits an offence if the involvement is dishonest (ss 254L(3), 256D(4), 259F(3) and 260D(3));

(iv) a director of a company who contravenes s 344(1) by failing to take all reasonable steps to secure compliance with the requirements of Pts 2M.2 (keeping financial records) and 2M.3 (financial reporting) commits a criminal offence if the contravention is dishonest (s 344(3));

(v) a director of a company that incurs a debt whilst insolvent commits an offence if he or she suspected at the time that the company was insolvent and dishonestly failed to prevent the company incurring the debt: s 588G(3).

Several provisions in Ch 5C (managed investment schemes) are civil penalty provisions. They are s 601FC(1) (duties of a responsible entity), s 601FD(1) (duties of officers of a responsible entity), s 601FE(1) (duties of employees of a responsible entity), s 601FG(1) (limitations on the circumstances in which a responsible entity may hold an interest in the scheme) and s 601JD(3) (duties of members of a scheme's compliance committee). In each case, intentional or reckless involvement is an offence: ss 601FC(6), 601FD(4), 601FE(4), 601FG(3), 601JD(4).

Civil proceedings after criminal proceedings

Before the 1999 amendments, Pt 9.4B contained some complex provisions designed to address the situation where a prosecution for a criminal offence had failed, but the court was

satisfied that there had been a contravention of the relevant civil penalty provision: see former ss 1317GC, 1317GK and 1317HB. Amongst other things, the former provisions permitted the court to make a civil penalty order. Those provisions were repealed by the 1999 amendments. According to the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill (para 6.128) the intention was that if a criminal prosecution fails, ASIC should commence fresh proceedings to obtain a civil penalty order.

A court must not make a declaration of contravention or a pecuniary penalty order against a person for contravention, if the person has been convicted of an offence constituted by substantially the same conduct: s 1317M. Presumably there is no impediment to the making of a disqualification order, on the application of ASIC, if a declaration of contravention was made before the criminal conviction. Nor is there anything to stop a civil court making a compensation order in proceedings taken before or after the criminal proceedings. The criminal court no longer has the general power to order compensation when it finds a person guilty of an offence related to a civil penalty provision (cf old s 1317HB), except in the case of insolvent trading by a director: s 588K.

Criminal proceedings during civil proceedings

Proceedings for a declaration of contravention or a pecuniary penalty order are stayed if criminal proceedings are commenced against the same person for an offence constituted by substantially the same conduct: s 1317N. There is no stay of proceedings for a compensation order or a disqualification order. Proceedings which have been stayed by

s 1317N may be resumed if a person is not convicted of the offence, but otherwise the proceedings are dismissed: s 1317N(2). The criminal court no longer has the power to make a pecuniary penalty order under Pt 9.4B (cf old ss 1317GF–1317GK). In the result, a person who is convicted of an offence is subject to the penalties attached to that offence, but is not liable to a pecuniary penalty order under Pt 9.4B; while a person who is not convicted of an offence is at risk of a pecuniary penalty in the resumed proceedings.

Criminal proceedings after civil proceedings

Before the 1999 amendments, an application for a civil penalty order prevented the commencement of criminal proceedings: old s 1317FB. According to the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill (para 6.129), this provision was intended to prevent evidence obtained in the course of the civil proceedings being used in subsequent criminal proceedings. However, old s 1317FB did not prevent the commencement of criminal prosecutions under other Acts, such as the Commonwealth and state Crimes Acts.

Now s 1317P states that criminal proceedings may be commenced against a person for conduct substantially the same as conduct constituting contravention of a civil penalty

provision, regardless of whether a declaration of contravention, a pecuniary penalty order, a disqualification order or a compensation order has been made. Section 1317Q provides that evidence of information given, or evidence of documents produced, by an individual in proceedings for a pecuniary penalty is not admissible in criminal proceedings against the individual. There is no equivalent provision to protect evidence given in proceedings for a disqualification order, a compensation order or a mere declaration of contravention.

Section 1317Q is an unsatisfactory provision. Once evidence has been given by a person in proceedings for a pecuniary penalty order against that person, the evidence is forever inadmissible in criminal proceedings against the same person. Problems will arise in determining whether evidence sought to be adduced in the subsequent criminal proceedings is the very evidence given in the earlier proceedings for a pecuniary penalty order. This will disadvantage the prosecution. Conversely, there is no prohibition on "derivative use", and so the prosecution will not be prevented from adducing evidence flowing from a chain of inquiry started by the evidence in the proceedings for a pecuniary penalty order, and in this respect the accused will be disadvantaged.