

Enforceable undertakings for PBL Media Holdings and Seven Media Group transactions

ACMA has accepted enforceable undertakings from parties involved in the recapitalisation of media assets held by Publishing and Broadcasting Limited and Seven Network Limited. Both sets of enforceable undertakings warrant that the foreign entities involved in the transactions will not breach the current prohibition on foreign control of commercial television licences.

PBL Media Holdings Pty Limited, Publishing and Broadcasting Limited and Red Earth Holdings BV agreed deeds of undertakings about foreign control of the Nine network commercial television licences with ACMA on 15 December 2006. Seven Media Group Pty Limited, Seven

Network Limited and Pleiades Media International ULC agreed similar deeds of undertakings for the Seven network licences with ACMA on 22 December 2006.

Enforceable undertakings such as these will enable imaginative and flexible solutions to be applied in close liaison with licensees and their representatives. In general, the new 'mid-range' broadcasting powers enable ACMA to provide a more proportionate response to breaches. In the past, the regulator has had to choose between 'all or nothing' options.

Both sets of parties agreed deeds of undertakings with ACMA in December and committed to

replacing their deeds with enforceable undertakings under ACMA's new enforcement powers when they came into force on 4 February 2007. As required by the 2006 undertakings, ACMA received confidential reports from both PBL Media Holdings, for the Nine network commercial television licences, and Seven Media Group, for the Seven network licences, about their compliance with the terms of their undertakings.

ACMA regulates commercial television and radio licences under the *Broadcasting Services Act 1992*. Schedule 2 of the *Broadcasting Services Amendment (Media Ownership) Act 2006*, when

proclaimed, will alter the regulatory framework governing control of such licences, by repealing provisions restricting foreign persons' involvement in free-to-air commercial television, and by permitting certain 'cross-media' holdings which are currently not allowed. The amendments will permit foreign persons to be in a position to exercise control of commercial television licences, which is presently prohibited by section 57 of the Act. The existing laws remain in force until the amendments are proclaimed.

The enforceable undertakings are on the ACMA website at www.acma.gov.au.

Guidelines for new broadcasting powers released

ACMA recently released guidelines relating to its use of enforcement powers under the *Broadcasting Services Act 1992*, which are intended to enable a responsive, proportionate and flexible approach to breaches of the rules.

The guidelines set out the matters that ACMA will take into account in making enforcement decisions, and the principles ACMA will apply in using some of its broadcasting enforcement powers. These principles are:

- ACMA recognises the importance of encouraging and facilitating compliance by all industry participants with statutory obligations.
- ACMA's compliance activities may be both proactive and reactive.
- Enforcement decisions must not be influenced by bias, conflicts of interest or irrelevant considerations (such as gender,

race, religion, political views or affiliation).

- Enforcement action should be proportionate to the impact of the breach or risk of future breach.
- Any enforcement action should, so far as possible, seek to address any systemic or ongoing element that may give rise to future breaches.
- The circumstances of each breach will be separately considered.

Under the guidelines, ACMA will use any enforcement powers available to it in a manner that is, in the opinion of ACMA, commensurate with the seriousness of the breach concerned. Generally, this will involve using the minimum power or intervention necessary to achieve the desired result, consistent with the scale, risk and urgency of the breach. This graduated approach will enable ACMA to choose whatever enforcement action it considers most

appropriate to achieve compliance, given all the circumstances.

In 2004, the former Australian Broadcasting Authority asked Professor Ian Ramsay to examine the effectiveness of the existing enforcement powers under the *Broadcasting Services Act* and consider whether any reforms were needed. His 2005 report led to further consultations by the government with industry and ACMA, and legislative changes that were passed in November 2006 and came into effect on 4 February 2007.

The *Broadcasting Services Amendment (Media Ownership) Act 2006* also conferred additional enforcement powers on ACMA, including a power to seek injunctions for transactions prohibited under the media diversity provisions of the *Broadcasting Services Act* and to give remedial directions and accept enforceable undertakings.

From 4 February 2007, ACMA has enforcement powers to:

- pursue civil penalty orders (via the Federal Court)
- issue remedial directions in certain circumstances
- accept enforceable undertakings in relation to certain matters
- seek injunctions to ensure that an unacceptable media diversity situation or an unacceptable three-way control situation does not arise
- seek injunctions in circumstances where a person has failed to comply with requirements relating to the provision of broadcasting services without a licence and
- issue infringement notices for certain contraventions occurring after 4 February 2007.

The guidelines are on the ACMA website. For more information, contact ACMA by email to Patrick.Emery@acma.gov.au.