

Legislation Act 2003
Subsection 15G(4) – Explanatory Statement

Broadcasting Services Clarification Notice 2016 made under the *Broadcasting Services Act 1992*

Issued by the Australian Communications and Media Authority

Purpose and legislative basis

On 18 March 2016 the Australian Communications and Media Authority (the **ACMA**) made the *Broadcasting Services Clarification Notice 2016* (the **Notice**). The Notice replaces and consolidates the *Broadcasting Services Clarification Notice 2001* (the **2001 Notice**) and the *Broadcasting Services Clarification Notice 2002* (the **2002 Notice**) (together, the **previous Notices**), without making any substantive changes to the regulatory arrangements created by the previous Notices.

The ACMA has made the Notice prior to the automatic repeal of the previous Notices on 1 April 2016. The automatic repeal is in accordance with Part 4 of Chapter 3 of the *Legislation Act 2003* (the **LA**).

The ACMA has made the Notice in accordance with paragraph 19(1)(b) of the *Broadcasting Services Act 1992* (the **Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (the **AIA**).

Paragraph 19(1)(b) of the Act provides that the ACMA may clarify the criteria specified in sections 14 to 18A of the Act. Subsection 19(2) of the Act provides that different clarifications may be made for radio services and television services. Sections 14 to 18A of the Act set out the criteria for the seven different categories of broadcasting services to which the Act relates. The criteria for open narrowcasting services are set out in section 18 of the Act.

The Notice clarifies the criteria in section 18 of the Act, for open narrowcasting services that are non-subscription radio services provided in the AM and FM bands.

Subsection 33(3) of the AIA relevantly provides that where an act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Part 4 of Chapter 3 of the LA requires that most legislative instruments must 'sunset' (that is, they are automatically repealed) on the first 1 April or 1 October that falls 10 years after they are registered on the Federal Register of Legislation.

Background

In 2001, the former Australian Broadcasting Authority (the **ABA**) made the 2001 Notice under paragraph 19(1)(b) of the Act. The purpose of the 2001 Notice was to provide certainty about the category of service into which certain broadcasting services fall under the Act.

The 2001 Notice clarified the criteria for those open narrowcasting services in section 18 of the Act that were:

- provided as a radio service;
- provided using an AM or FM signal within the broadcasting services bands; and
- not made available only on payment of subscription fees.

Services that conformed to the types of broadcasting services described in the 2001 Notice were deemed to be open narrowcasting radio services for the purposes of the Act. The 2001 Notice provided clarification about the following types of broadcasting services:

- a service provided using low power transmitters (transmitters with a maximum effective radiated power of 1 watt or less) within the FM radio band in an urban centre or locality;
- a service provided for a limited period (defined as a cumulative total of not more than 30 days in any 12 month period);

- a service provided for special events (being an event organised by one or more persons that has major cultural, sporting or other community significance) for a continuous period of not more than 30 days;
- a pre-recorded, regularly repeated audio content service;
- an information service;
- a service provided only for the propagation of religious beliefs, values and lifestyles (including the provision of information and services relevant to religious beliefs, values and lifestyles) or the broadcasting of religious rituals and events of religious significance;
- a non-English language service;
- a racing service; and
- an ancillary service provided using only a sub-carrier channel.

The 2001 Notice was registered on 28 February 2006, and varied in 2011. The 2011 variation clarified that broadcasting services that provided pre-recorded, regularly repeated audio content would be considered to be open narrowcasting services for the purposes of the Act. This was required to reflect changes in technology.

In 2002, the ABA made the 2002 Notice, also under section 19(1)(b) of the Act. The 2002 Notice provided further certainty about the category of service for open narrowcasting radio services in the AM and FM bands. The 2002 Notice specified that:

- a broadcasting service that was targeted to persons of a particular age or range of ages was only an open narrowcasting service if it was targeted to persons less than 10 years old; and
- a group was able to be a 'special interest group' for the purpose of subparagraph 18(1)(a)(i) of the Act irrespective of whether or not the group was organised on a formal basis.

The ACMA has formed the view that the previous Notices have been operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. Accordingly, the Notice has consolidated the previous Notices into one instrument without any significant changes, so that their ongoing effect is preserved beyond the 1 April 2016 sunset date.

Operation of the Notice

The Notice clarifies the criteria at section 18 of the Act as they apply to non-subscription AM and FM radio broadcasting services delivered within the broadcasting service bands.

The Notice is intended to provide additional clarity about radio formats that fall within the open narrowcasting category of broadcasting services. It is expected that the Notice will be of assistance to any party, including radio service providers and the ACMA, seeking to understand whether a specific radio service is an open narrowcasting service.

The Notice sets out that a broadcasting service that does not comply with a particular section of the Notice may still be an open narrowcasting service under section 18 of the Act, depending on its individual characteristics.

Changes to the Notice from the previous Notices

Although the ACMA did not make any substantive changes from the previous Notices, some minor changes were made to simplify and update terminology that was used. Changes include:

- the term 'subcarrier channel' that was used in section 13 of the 2001 Notice to mean a broadcasting service that is an ancillary service, has been replaced in section 14 of the Notice with the term 'ancillary communication service';
- as a consequence, section 4 of the Notice ('Definitions') specifies that the term 'ancillary communication service' has the meaning given in Appendix 2 to the *Broadcasting Services (Technical Planning) Guidelines 2007*; and
- changes to wording in section 13 ('Racing service') to clarify that the content assessed for the purposes of subsection 13(3) cannot be the content referred to in subsection 13(2).

Consultation

On 2 December 2015, the ACMA published a consultation paper on its website for public comment, together with a copy of the draft Notice. Comments closed on 1 February 2016.

The ACMA received two responses to the consultation paper which were supportive of the proposal to make the Notice.

Regulatory Impact

On 9 November 2015, the OBPR determined that the proposed regulatory change effected by the Notice is minor or machinery in nature and that no further regulatory impact analysis is required – OBPR reference number 19967.

As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, a human rights compatibility statement has been prepared by the ACMA and is attached.

NOTES ON BROADCASTING SERVICES CLARIFICATION NOTICE 2016

Part 1 – Preliminary

Section 1 – Name of Notice

Section 1 provides that the name of the Notice is the *Broadcasting Services Clarification Notice 2016*.

Section 2 – Commencement

Section 2 provides that the Notice commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Revocation

Section 3 has the effect of revoking the *Broadcasting Services Clarification Notice 2001* and the *Broadcasting Services Clarification Notice 2002*.

Section 4 – Definitions

Section 4 defines certain terms used in the Notice.

Part 2 – Clarification for AM and FM radio services

Section 5 – Purpose of Part 2

Section 5 specifies the type of broadcasting service to which Part 2 of the Notice applies.

Subsection 5(1) provides that, for paragraph 19(1)(b) of the Act, Part 2 of the Notice clarifies the criteria for open narrowcasting services in section 18 of the Act for radio services that are provided using an AM or FM signal in the broadcasting services bands and that are not provided on a subscription basis. The meaning of ‘broadcasting services bands’ is set out in section 6 of the Act.

Subsection 5(2) specifies that the sections in Part 2 are not an exclusive list of open narrowcasting services. In other words, a broadcasting service that does not fall within a particular section of Part 2 may still be an open narrowcasting service within the meaning of section 18 of the Act due to having the characteristics of a service which has reception that is limited in some way.

Section 6 – Low power transmitter: urban centres and localities

Section 6 applies to low-powered radio broadcasting services described in subsection 6(1) – that is, FM radio broadcasting services that are provided in an urban centre or locality using a transmitter with an effective radiated power of 1 watt or less.

‘Locality’ and ‘urban centre’ are defined in section 4 of the Notice as being types of population clusters classified by the Australian Bureau of Statistics in accordance with the Australian Standard Geographical Classification 2001.

Subsection 6(2) provides that, for the purposes of the Act, a radio broadcasting service of the kind described in subsection 6(1) is not an open narrowcasting service by reason only of its being transmitted at a low effective radiated power.

For example, a low-powered radio broadcasting service with programs of broad appeal provided within an urban area would not be considered a narrowcasting service even though it is broadcast to a ‘limited location’, because the number of people able to receive the service could be in the thousands.

A low-powered service may be an open narrowcasting service if other characteristics of the service mean that it has reception that is limited in some way. For example, a low-powered radio broadcasting service in an urban area that provides programs of narrow appeal or that is provided during a limited period would be an open narrowcasting service.

Section 7 – Limited period

Section 7 relates to radio broadcasting services that are provided for limited periods.

Subsection 7(1) specifies that the section applies to radio broadcasting services that, under the terms of the transmitter licence (issued by the ACMA in accordance with the *Radiocommunications Act 1992*), are provided for either a continuous period of not more than 30 days in any 12-month period, or for separate periods that total not more than 30 days in any 12-month period.

Subsection 7(2) provides that a broadcasting service referred to in subsection 7(1) is an open narrowcasting service for the purpose of the Act.

Section 8 – Special event

Section 8 relates to radio broadcasting services that are provided for the coverage of events that are considered 'special' because they have cultural, sporting or other community significance.

Examples of such events include:

- sporting events such as the Australian Grand Prix, the Olympic or Commonwealth Games, various championships etc; and
- cultural events such as horticultural or flower shows, or artistic exhibitions.

Subsection 8(1) provides that the section applies where a broadcasting service is provided for a continuous period of not more than 30 days. Paragraph 8(1)(b) notes that the event must be organised by one or more persons. The note at the end of section 8 provides an example of a type of event that is not an 'organised' event, and would not be covered by section 8.

Subsection 8(2) provides that a service of the kind referred to in subsection 8(1) is an open narrowcasting service for the purpose of the Act.

Section 9 – Pre-recorded, regularly repeated audio content

Section 9 applies to radio broadcasting services providing pre-recorded, regularly repeated audio content (referred to as a 'pre-recorded, regularly repeated audio content service').

Subsection 9(1) specifies that the section applies to a service that consists of no more than four hours of pre-recorded material, which is repeated in the same order. The material cannot be updated or otherwise varied more than once in any week.

Subsection 9(2) clarifies that a service of the kind specified in subsection 9(1) is an open narrowcasting service for the purpose of the Act.

Section 10 – Information service

Section 10 applies to information services, specified in subsection 10(1) as a service the content of which relates only to specific information about a subject and which does not include any general news.

Subsection 10(2) clarifies that a service of the kind specified in subsection 10(1) is an open narrowcasting service for the purpose of the Act.

Section 11 – Religious service

Section 11 applies to radio broadcasting services which are provided for at least one of the purposes set out in subsection 11(1). These purposes are:

- the propagation of religious beliefs, values and lifestyles;
- the broadcasting of religious rituals and events of religious significance; and
- the provision of information relevant to religious beliefs, values and lifestyles.

Subsection 11(2) specifies that a radio broadcasting service does not comply with subsection 11(1) if the content of that service includes material that is not relevant to one or more of those purposes. An

example of material that is not relevant to the purposes mentioned in subsection 11(1) is mainstream music that has no obvious religious significance and is not broadcast for the purpose of analysis or commentary.

Subsection 11(3) clarifies that a service that complies with subsection 11(1) is an open narrowcasting service for the purpose of the Act.

Section 12 – Non-English language service

Section 12 applies to radio broadcasting services that are provided in a language other than English. Subsection 12(1) specifies that for the section to apply to a service, the service must be provided either wholly in a language other than English, or otherwise where English is only included to the extent that it is incidental to the provision of the service in the other language.

The note to subsection 12(1) sets out some examples of where English is only incidental to the provision of the service.

Subsection 12(2) clarifies that a service which is provided in accordance with subsection 12(1) is an open narrowcasting service for the purpose of the Act.

Section 13 – Racing service

Section 13 sets out a series of characteristics that together constitute a racing radio service that is an open narrowcasting service. For section 13 to apply, a service must have all of the characteristics in subsections 13(2), (3) and (4).

Subsection 13(2) requires that on each day (other than on Christmas or Good Friday) at least 80% of the broadcast content is:

- descriptions of horse races, harness races and greyhound races;
- the provision of information directly related to horse racing, harness racing or greyhound racing (including selections, scratchings, betting information and track conditions); and
- other material (including music, news reports, weather reports and advertisements) that complies with the limitations set out in subparagraphs 13(2)(c)(i) to (iv).

Subsection 13(3) requires that a significant proportion of the content not covered by subsection 13(2) must be relevant to horse racing, harness racing or greyhound racing, or of interest mainly to persons involved in horse racing, harness racing or greyhound racing.

Subsection 13(4) specifies services that promote themselves during broadcasts as a service that is of interest mainly to persons involved in horse racing, harness racing or greyhound racing, or by using the words 'racing radio service'.

Subsection 13(5) indicates that a radio broadcasting service that complies with subsections 13(2), (3) and (4) is an open narrowcasting service for the purpose of the Act.

Section 14 – Ancillary service

Section 14 clarifies that a broadcasting service provided by way of an ancillary communication service (i.e. provided using a subcarrier channel) is an open narrowcasting service.

'Ancillary communication service' is defined in section 4 of the Notice as having the meaning given in Appendix 2 to the *Broadcasting Services (Technical Planning) Guidelines 2007*.

Section 15 – Services targeted on the basis of age of audience

Section 15 sets out circumstances where a radio broadcasting service that is targeted to persons of a particular age, or a particular range of ages, is and is not an open narrowcasting service.

Subsection 15(1) provides that the section applies if a broadcasting service is targeted to persons of a particular age, or a particular range of ages. The note to subsection 15(1) sets out some examples of services that are likely to be targeted to persons of a particular age or range of ages.

Subsection 15(2) clarifies that if a broadcasting service is targeted to persons less than 10 years of age, the service is a narrowcasting service.

Subsection 15(3) clarifies that if subsection 15(2) does not apply, then the service is not an open narrowcasting service only by reason of the service being targeted to a particular age group. Other characteristics of such a service may cause the service to be an open narrowcasting service.

Section 16 – Groups other than formal groups

Section 16 clarifies that a group is able to be a special interest group for the purposes of subparagraph 18(1)(a)(i) of the Act whether or not the group is organised on a formal basis.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Broadcasting Services Clarification Notice 2016

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Broadcasting Services Clarification Notice 2016* (the **Notice**) is made in accordance with paragraph 19(1)(b) of the *Broadcasting Services Act 1992* (the **Act**).

The purpose of the Notice is to provide certainty about the category of service into which certain broadcasting services fall under the Act. It does this by clarifying that certain services with particular features set out in the Notice are open narrowcasting radio services. The Notice clarifies the criteria for those open narrowcasting services in section 18 of the Act that are:

- provided as a radio service;
- provided using an AM or FM signal within the broadcasting services bands; and
- not made available only on payment of subscription fees.

The Notice consolidates and replaces two former instruments – the *Broadcasting Services Clarification Notice 2001* and the *Broadcasting Services Clarification Notice 2002* (together, the **previous Notices**). The previous Notices were due to be automatically repealed on 1 April 2016, in accordance with Part 4 of Chapter 3 of the *Legislation Act 2003*.

The Australian Communications and Media Authority (the **ACMA**) formed the view that the previous Notices were operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework. Accordingly, the ACMA consolidated the previous Notices without any substantive changes, so that their ongoing effect is preserved.

Human Rights Implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights as it does not raise any human rights issues.