

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority
Broadcasting Services (International Broadcasting) Guidelines 2016
Broadcasting Services Act 1992

Purpose and legislative basis

Section 121FP of the *Broadcasting Services Act 1992* (the BSA) requires the ACMA to formulate guidelines relating to international broadcasting services.

The *Broadcasting Services (International Broadcasting) Guidelines 2016* (Guidelines) have the objective of setting out arrangements for both proposed and operational international broadcasting services, matter in programs, and the conduct of international broadcasting licensees.

Background

The Guidelines replace the *Broadcasting Services (International Broadcasting) Guidelines 2005* (the 2005 Guidelines), which were due to 'sunset' on 1 April 2016. Under Part 4 of Chapter 3 of the *Legislation Act 2003*, most legislative instruments 'sunset' (that is, they are automatically repealed) on the 1 April or 1 October that first occurs 10 years after they are registered.

The new Guidelines are substantially the same as the 2005 Guidelines, with the only substantive amendments being the removal of a redundant provision (which dealt with revocation of the version of the guidelines in existence before the 2005 Guidelines) and the insertion of a new provision to revoke the 2005 Guidelines. Some minor drafting and formatting changes have also been made in order to be consistent with modern legislative drafting practice.

Under s 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative character, 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, unless a contrary intention appears. The ACMA has relied on the inclusion of that power in revoking the 2005 Guidelines and making the Guidelines under s 121FP of the BSA.

Operation

An international broadcasting service is a category of service defined at s 18A of the BSA. In summary, it is any service targeted, to a significant extent, to audiences outside Australia, where the means of delivery involves use of a radiocommunications transmitter inside Australia.

The Guidelines are based on the transborder satellite television broadcasting principles developed by the Asia-Pacific Regulatory Roundtable in 1998, of which Australia was a member. The principles require that material broadcast should meet the minimum standards of the country from which the broadcast has been made.

The Guidelines regulate the content of international broadcasting services to ensure that they comply with Australian community standards and demonstrate sensitivity in relation to communities to which those broadcasting services are directed.

The Guidelines contain safeguards relating to:

- privacy;
- matters causing offence or hatred;
- alarming/misleading audiences;
- broadcasting to children;
- news and current affairs (including impartiality, balance, and presentation of death, injury and suicide);

- advertising (including tobacco advertising);
- hypnosis/subliminal perception; and
- classification and scheduling.

The Guidelines also require licensees to have in place a complaints procedure and to respect intellectual property rights.

The ACMA does not monitor or investigate complaints regarding international broadcasting services (BSA, s 121FR(1)). Rather, compliance with the Guidelines is a factor in a decision on whether a person should hold an international broadcasting licence, in the following way.

A person may apply to the ACMA for a licence to provide an international broadcasting service (see s 121FA). If the ACMA is satisfied that an applicant for an international broadcasting licence is an Australian company and is not unsuitable, the ACMA must refer the application to the Minister for Foreign Affairs (the Minister), and include a report about whether the proposed service complies with the Guidelines (s 121FB(1)(d)). The Minister can direct the ACMA not to allocate an international broadcasting licence to the applicant, if the Minister is of the opinion that the proposed international broadcasting service concerned is likely to be contrary to Australia's national interest. Further, the Minister for Foreign Affairs may direct the ACMA to prepare a written report about an international broadcasting licensee's compliance with the Guidelines (s 121FM).

Documents incorporated in the Guidelines by reference

The Guidelines incorporate definitions used in the *Classification (Publications, Films and Computer Games) Act 1995*, *Therapeutic Goods Act 1989*, and *Customs Act 1901*. These Acts are available from <https://www.legislation.gov.au>.

The Guidelines also refer to Article 2 of the Convention Establishing the World Intellectual Property Organisation [WIPO] [1972] ATS 15 (the Convention). The Convention can be found in the *Australian Treaties Library* collection at <http://www.austlii.edu.au>.

Consultation

Before determining the Guidelines, the ACMA published a consultation paper and the draft Guidelines on 23 December 2015 for public comment. The ACMA also wrote to all relevant licensees about the proposals. Two submissions were received, from CV Global and Reach Beyond Australia (both international broadcasting licensees), by the closing date of 15 February 2016. Both submissions were supportive of the proposal to make the Guidelines.

Regulatory impact

On 18 November 2015, the Office of Best Practice Regulation determined that the proposed regulatory change in making the Standard is minor or machinery in nature and that no further regulatory impact analysis is required – OBPR reference number 20040.

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

Description of the provisions in the Guidelines

Part 1 – Preliminary

This Part covers the name, commencement date and object of the instrument and contains definitions of terms used in the instrument.

Part 2 – Guidelines on privacy, causing offence, and vilification

This Part provides guidelines for the content of programs in relation to privacy of persons and material that is likely to cause offence or incite hatred.

Part 3 – Simulation of events

This Part provides that material that simulates an event in a manner likely to alarm or mislead the audience should not be broadcast unless it is material of a specified type and is presented reasonably and in good faith.

Part 4 – Broadcasting to children

This Part requires matter in children's programs to deal with topics in a manner that has sufficient regard to the healthy educational, emotional and physical development of children. It provides guidelines about the broadcast of advertisements produced for children, promotions broadcast in children's programs and competitions in which children may participate.

Part 5 – News and current affairs

This Part applies to all forms of news and to current affairs programs. It provides guidelines covering accuracy in factual material, distinguishing between fact and commentary, and sensitivity when dealing with bereavement, survivors or witnesses of traumatic events. It provides that programs should be impartial and balanced, and that matter should not be presented in a manner that may cause panic, or that identifies individual members of a group unfairly or depicts an individual or group in a negative way based on gratuitous emphasis on certain specified attributes. It also provides guidelines on presenting images of death or injury in a program and on references to suicide.

Part 6 – Advertising

This Part requires advertisements to comply with Australian advertising codes of practice, to have appropriate regard to Australian community attitudes, to limit children's exposure to matter that is only appropriate for an adult audience, and also prohibits the advertising of tobacco products.

Part 7 – Persuasive techniques

This Part provides guidelines about program matter that describes or depicts techniques of hypnosis, induces a hypnotic state or depicts techniques designed to convey information at or near the threshold of normal awareness.

Part 8 – Assessing and scheduling matter for radio and television

This Part provides guidelines for the scheduling of program material taking into account the welfare of children, the cultural sensitivities of the relevant international audience and the composition of the audience in different time zones.

It includes specific guidelines for

- the classification of films and drama programs;
- advice, markings and warnings about the content of programs; and
- the assessment of the suitability of programs for broadcast to the international audience.

Part 9 – Additional guidelines for radio

This Part contains additional provisions for radio broadcasts about:

- gratuitous language or language that is likely to offend the audience;
- sounds that relate to a sexual act; and
- content or promotion of a feature program with sexual themes.

Part 10 – Complaints

This Part provides guidelines for complaint handling, including:

- procedures for dealing with complaints;

- publicising the complaints process;
- retaining records of complaints received; and
- providing the ACMA with access to records of complaints.

Part 11 – Conduct of an international broadcasting licensee

This Part provides that licensees should make every reasonable effort to comply with the Guidelines, and should not use an international broadcasting service in the commission of an offence against a law of the Commonwealth or of a State or Territory.

Part 12 – Intellectual property rights

This Part provides guidelines for licensees to respect intellectual property rights of other persons.

Part 13 – Applicants for an international broadcasting licence

This Part provides that applicants for an international broadcasting licence who commit to abide by the Guidelines will be taken by the ACMA to comply with the Guidelines for the purpose of the ACMA preparing a report to the Minister for Foreign Affairs regarding the allocation of a licence. Applicants who do not make such a commitment will be taken, for the same purpose, not to comply with the Guidelines.

Statement of Compatibility with Human Rights

Broadcasting Services (International Broadcasting) Guidelines 2016

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

Overview of the Legislative Instrument

The *Broadcasting Services (International Broadcasting) Guidelines 2016* (the Guidelines) are made under s 121FP of the *Broadcasting Services Act 1992* (the BSA).

The Guidelines regulate the content of international broadcasting services to ensure that they comply with Australian community standards and demonstrate sensitivity in relation to the international communities to which the broadcasting services are directed.

An international broadcasting service is a category of service defined at section 18A of the BSA. In summary, it is any service targeted, to a significant extent, to audiences outside Australia, where the means of delivery involves use of a radiocommunications transmitter inside Australia.

Human rights implications

Australia is a party to a number of international human rights treaties. In developing this legislative instrument, the human rights implications have been considered in the context of **the International Covenant on Civil and Political Rights (the ICCPR)**.

The Guidelines engage the right to freedom of expression, including the freedom to receive information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other chosen media (Article 19(2) of the ICCPR).

Article 19(3) of the ICCPR provides that the exercise of these rights carries with it special duties and responsibilities:

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

The Guidelines form part of a licensing scheme, set out in Part 8B of the BSA, for corporations that wish to provide an international broadcasting service from Australia. An applicant for a licence must warrant, as part of the application process, that it will abide by the standards set in the Guidelines.

Licensees may broadcast a wide range of programming which will be consistent with the Guidelines. Even so, the audience may be subject to a minimal degree of restriction on the information they receive through international broadcasting services because of the limitations in the Guidelines. The Guidelines provide that licensees should:

- respect privacy;
- avoid broadcasting matter causing offence or inciting hatred, or that could alarm or mislead audiences;
- broadcast children's programming in a manner that has sufficient regard to the healthy educational, emotional and physical development of children;
- provide news and current affairs which is impartial and balanced, and which presents material regarding death, injury and suicide in a sensitive manner;
- abide by basic standards for advertising which reflect Australian community standards (including prohibiting tobacco advertising);
- refrain from using hypnotic or subliminal perception techniques in broadcasts;

- ensure classification and scheduling decisions take into account the welfare of children, the cultural sensitivities of the relevant international audience and the composition of the audience in different time zones; and
- respect the intellectual property rights of other persons.

The ACMA's view is that those limited restrictions on the right to freedom of expression are consistent with the 'duties and responsibilities' mentioned in Art 19(3) of the ICCPR. That is, the ACMA considers that those restrictions are necessary:

- for respect of the rights and reputations of others, in that the Guidelines deal with privacy issues, and provide that news and current affairs material should be presented in a fair, accurate and balanced manner;
- for the protection of public order, in that the Guidelines restrict the broadcast of matters which could incite hatred, or which could alarm the public; and
- for the protection of public health, by restricting tobacco advertising, and ensuring children's programs and advertisements do not promote inappropriate products (alcohol, medicines, narcotic substances) or mislead as to the nutritional content of food products; and
- for protection of public morals, in that the Guidelines set minimum standards for offensive material, broadcasting appropriate material for children, and for scheduling and classification of programming.

By requiring international broadcasting licensees to provide programs that meet the minimum standards of the country from which the broadcast has been made, the Guidelines promote the freedom to receive information and ideas of all kinds that would be disseminated through television programs, consistent with Article 19(2) of the ICCPR.

Conclusion

This legislative instrument is compatible with human rights because, to the limited extent which it restricts the freedom to receive information and ideas of all kinds that would be disseminated through television and radio programs, it does so in a manner that respects the rights and reputations of others, and the protection of public order, public health and morals, by requiring international broadcasting licensees to provide programs that meet certain minimum standards of Australia.