

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Technical Planning) Amendment Guidelines 2021 (No. 1)

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Technical Planning) Amendment Guidelines 2021 (No. 1)* (**the instrument**) under section 33 of the *Broadcasting Services Act 1992* (**the BSA**), and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Section 33 of the BSA provides that the ACMA may develop in writing guidelines for the technical planning of individual services that use the broadcasting services bands as a means of delivery.

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.

Purpose and operation of the instrument

The instrument amends the *Broadcasting Services (Technical Planning) Guidelines 2017* (**the TPGs**). The TPGs are made under section 33 of the BSA. The amendments are necessary to ensure that the TPGs continue to align with existing datacasting provisions, due to the changes introduced by the *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020* (**the Modernisation Act**), which repealed the definition of *datacasting transmitter licence* from the *Radiocommunications Act 1992* (**the RA**) and the BSA.

It is a condition of some apparatus licences under the RA to comply with the TPGs (see paragraphs 108A(1)(d), 109(1)(e) and 109(1)(n) of the RA). Operation of a radiocommunications device is not authorised by an apparatus licence if it is not in accordance with the conditions of the licence (subsection 97(4) of the RA). It is an offence, and subject to a civil penalty, to operate a radiocommunications device otherwise than as authorised by a spectrum licence, apparatus licence or class licence (section 46 of the RA). The RA prescribes the following maximum penalties for the offence:

- if the radiocommunications device is a radiocommunications transmitter, and the offender is an individual – imprisonment for 2 years;
- if the radiocommunications device is a radiocommunications transmitter, and the offender is not an individual – 1,500 penalty units (which is \$333,000 based on the current penalty unit amount of \$222);
- if the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$4,440).

The RA prescribes the following maximum civil penalties:

- if the radiocommunications device is a radiocommunications transmitter – 300 penalty units (\$66,600);
- if the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$4,440).

It is an offence, and subject to a civil penalty, to possess a radiocommunications device for the purpose of operating the device otherwise than as authorised by a spectrum licence, apparatus licence

or class licence (section 47 of the RA). The RA prescribes the same penalties for this offence and civil penalty contravention as for the offence and civil penalty contravention in section 46.

In addition, an apparatus licensee, or a person authorised under section 114 of the RA in relation to an apparatus licence, must not contravene a condition of the licence. Contravention is subject to a civil penalty (section 113 of the RA). The RA prescribes a maximum civil penalty of 100 penalty units (\$22,200).

The amendments insert the definition of *datacasting transmitter licence* into the TPGs. With the repeal of the statutory concept of a ‘datacasting transmitter licence’ from the RA and the BSA by the Modernisation Act, apparatus licences could be issued under and in accordance with the RA that perform the same function, and those apparatus licences will remain relevant to the TPGs. The definition in the TPGs is very similar to the wording of the definition of ‘datacasting transmitter licence’ that was repealed from the RA, and accordingly uses the term ‘datacasting service’ within the meaning of the BSA.

The amendments also insert a definition of *NBS transmitter licence* into the TPGs, which is a term used in the definition of *datacasting transmitter licence*.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*. The TPGs are subject to the sunset provisions of the LA.

Documents incorporated by reference

The instrument varies the TPGs to incorporate the BSA and the RA, as in force from time to time, as permitted by section 14 of the LA.

The BSA and the RA may be accessed, free of charge, from the Federal Register of Legislation: www.legislation.gov.au.

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

On 7 October 2021, the ACMA undertook targeted consultation through the release of an e-bulletin to an extensive list of approximately 300 stakeholders regarding the proposed minor amendment of the TPGs as reflected in **Attachment A**. The ACMA did not receive any submissions and decided to proceed with the proposal.

Regulatory impact assessment

In accordance with the agreed process in place between the ACMA and the Office of Best Practice Regulation (**OBPR**) for legislative changes arising from the Modernisation Act, OBPR has determined that regulatory changes of a minor or machinery nature do not require a further regulatory impact analysis and may be progressed under OBPR reference number 44662.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

The instrument is required as an amendment in the Modernisation Act repealed the definition of ***datacasting transmitter licence*** from the RA and the cross-referencing of this definition in the BSA. However, a definition of ***datacasting transmitter licence*** is still required in the TPGs, and the instrument inserts the required definition and make minor related amendments.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

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

Notes to the *Broadcasting Services (Technical Planning) Amendment Guidelines 2021 (No. 1)*

Section 1 Name

This section provides for the instrument to be cited as the *Broadcasting Services (Technical Planning) Amendment Guidelines 2021 (No. 1)*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision of the BSA that authorises the making of the instrument, namely section 33 of the BSA.

Section 4 Amendments

This section provides that the *Broadcasting Services (Technical Planning) Guidelines 2017* are amended as set out in Schedule 1.

Schedule 1 Amendments

Broadcasting Services (Technical Planning) Guidelines 2017 (F2017L01290)

Item 1 Subsection 6(1)

This item inserts a definition of *datacasting transmitter licence* that is based on the definition repealed from the RA. This will ensure that apparatus licences that perform an equivalent function to datacasting transmitter licences continue to be governed and dealt with by the TPGs. This item also inserts a definition of *NBS transmitter licence*, by reference to the RA.

Item 2 Subsection 6(1) (note at the end, paragraph (h))

This item repeals paragraph (h) from the note at the end of subsection 6(1). This note is no longer required.