

# EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

## *Broadcasting Services Act 1992*

### *Broadcasting Services (Remote Indigenous Communities) Determination 2022*

#### **Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Remote Indigenous Communities) Determination 2022* (**the Determination**) under section 8B of the *Broadcasting Services Act 1992* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Section 8B of the Act provides that the ACMA may determine an Indigenous community to be a remote Indigenous community for the purposes of the Act.

The determination of a remote Indigenous community must be made by legislative instrument.

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.

The Determination replaces the *Broadcasting Services (Remote Indigenous Communities) Determination 2011*.

#### **Purpose and operation of the Determination**

The purpose of the Determination is to determine that an Indigenous community is a remote Indigenous community for the purposes of the Act.

The *Broadcasting Legislation Amendment Act (No. 2) 2002* amended the Act to establish a new community television (CTV) broadcasting framework. The new framework introduced requirements aimed at improving the corporate governance and accountability of CTV licensees. However, provision was made for CTV broadcasting services provided to remote Indigenous communities to be exempt from the definition of a 'CTV licence' and thus exempt from the more stringent regulatory requirements applying to CTV licensees. For the exemption to apply, the ACMA must determine an Indigenous community to be a remote Indigenous community for the purposes of the Act.

The amendments also inserted paragraph 123(1)(ba) into the Act which allows an industry group representing community broadcasting licensees, whose services are targeted to a significant extent to one or more remote Indigenous communities, to develop their own code of practice. Provided that the ACMA is satisfied with relevant statutory matters, such a code of practice could be included in the Register of Codes of Practice under section 123 of the Act.

Although no such code of practice has been developed to date, industry groups representing these licensees have the option to develop one. Currently, licensees are subject to existing Community Broadcasting Association of Australia codes.

In addition, licensees for community television and radio services that are targeted to remote Indigenous communities can broadcast advertisements for which the licensee does not receive consideration in cash or kind. This reduces the administrative burden for licensees as well as providing potential benefits to the remote Indigenous community.

The Determination provides that the Indigenous communities listed in Schedule 1 to the Determination are remote Indigenous communities for the purposes of the Act.

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

The Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

### **Documents incorporated by reference**

The Determination does not incorporate any documents by reference.

### **Consultation**

The ACMA is satisfied that all consultation that it considers appropriate and reasonably practicable has been undertaken in accordance with the requirements of section 17 of the LA. A public consultation took place from 1 February to 22 February 2022 which included publication of the consultation paper on the ACMA website.

Section 17 of the LA requires all consultation that the rule-maker considers to be appropriate and reasonably practicable to undertake to take place before a legislative instrument is made. In determining whether consultation is appropriate and reasonably practicable, the rule-maker may have regard to any matter, including the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument and that persons likely to be affected by the proposed instrument have had an adequate opportunity to comment on its content.

The ACMA sought comments from the National Indigenous Australian's Agency (NIAA), the First Nations Media Association (FNMA), the Community Broadcasting Association of Australia (CBAA) and Commercial Radio Australia (CRA). NIAA, FNMA and CBAA supported the proposal to remake the Determination. The ACMA considered all of the submissions received. The ACMA drew on the knowledge of the NIAA and FNMA being parties having expertise in remote Indigenous communities for the purposes of the Act. In addition, persons likely to be affected by the proposed instrument, including persons involved in providing remote Indigenous broadcasting services, have had an adequate opportunity to comment as the consultation process was open to the public.

### **Regulatory impact**

The Office of Best Practice Regulation (OBPR) has determined that the Determination gives rise to minor and machinery regulatory changes with only minor impact on the business of remote Indigenous broadcasting services, and has verified that no further regulatory impact analysis is required – OBPR reference number 2021/01323.

### **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.

### Human rights implications

The Determination engages the following right:

- the right to equality and non-discrimination under Articles 2, 16, and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The right to equality and non-discrimination encompasses both positive and negative obligations - the obligation to refrain from discriminating or eroding equality and the obligation to protect and advance the fulfilment and enjoyment of the rights to equality and non-discrimination for all people.

The exclusion of services targeted to remote Indigenous communities from the definition for CTV licences has the effect that these services will be exempt from some of the higher governance and

accountability requirements placed on CTV licences. This is intended to assist licensees that provide a service targeted to remote Indigenous communities, where they may have limited resources to meet the higher governance and accountability requirements.

Generally, community broadcasting services are not able to broadcast advertisements. Allowing community broadcasting licensees that provide services to remote Indigenous communities to broadcast advertisements reduces the administrative burden for these licensees and allows them a degree of flexibility in that they are able to broadcast advertisements for which the licensee does not receive consideration in cash or kind. It also provides potential benefits for the community, including being able to broadcast advertisements that may be of relevance to the local audience.

Furthermore, industry groups representing licensees in remote Indigenous communities have the option to develop a code of practice. Currently, licensees are subject to existing Community Broadcasting Association of Australia codes.

If the Determination were not remade, the higher regulatory requirements would apply to community broadcasting licensees that provide services targeted to remote Indigenous communities. This could have the effect of limiting the availability of community broadcasting services targeted to remote Indigenous communities that do not have the resources to comply with the higher governance and accountability requirements.

### Conclusion

The Determination is compatible with human rights. The Determination advances human rights, particularly the right to equality and non-discrimination under Articles 2, 16, and 26 of the ICCPR and Article 5 of the ICERD.

**NOTES ON INSTRUMENT**

**Section 1 – Name**

Section 1 provides that the name of the Determination is the *Broadcasting Services (Remote Indigenous Communities) Determination 2022*.

**Section 2 – Commencement**

This section provides that the Determination commences the day after it is registered on the Federal Register of Legislative Instruments.

**Section 3 – Authority**

This section identifies the provision that authorises the making of the Determination, namely section 8B of the Act.

**Section 4 – Repeal of the *Broadcasting Services (Remote Indigenous Communities) Determination 2011***

Section 4 provides that the *Broadcasting Services (Remote Indigenous Communities) Determination 2011* is repealed.

**Section 5 - Definition**

This section sets out the definition of a term used in the Determination.

**Section 6 – Determination of remote Indigenous communities**

Section 6 provides that, for the purposes of the Act, the ACMA determines the Indigenous communities listed in Schedule 1 to be remote Indigenous communities.

**Schedule 1 – Remote Indigenous Communities**

Schedule 1 of the Determination sets out the remote Indigenous communities determined by the ACMA for the purposes of the Act.