## **EXPLANATORY STATEMENT**

## **Issued by the Australian Communications and Media Authority**

***Broadcasting Services (International Broadcasting) Guidelines Amendment 2016 (No. 1)***

***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 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.

The purpose of the *Broadcasting Services (International Broadcasting) Guidelines Amendment 2016 (No. 1)* (the instrument)is to insert an explanatory note to one of the definitions in the Guidelines, to make the effect of that definition plainer on the face of the Guidelines.

**Background**

The *Broadcasting Services (International Broadcasting) Guidelines 2016* (the Guidelines) commenced on 31 March 2016.

The Guidelines include a definition of ‘intellectual property rights’, which incorporates a definition of ‘intellectual property’ from Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967 concluded at Stockholm, to which Australia is a party (the Convention).

Section 14 of the *Legislation Act 2003* (the Legislation Act) deals with the manner in which material may be incorporated by reference into legislative instruments. Subsection 14(1) of the Legislation Act provides, relevantly, that:

If enabling legislation authorises or requires provision to be made in relation to any matter by a legislative instrument or notifiable instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter: …

(b)  subject to subsection (2), by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing at the time when the first‑mentioned instrument commences.

Subsection 14(2) of the Legislation Act provides that:

Unless the contrary intention appears, the legislative instrument or notifiable instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

That is, a legislative instrument can incorporate non-legislative material (such as the Convention) by reference, but such material may only be incorporated as it existed on the date the legislative instrument commenced (unless a contrary intention appears in the enabling legislation).

With respect to the Guidelines, the necessary effect of s 14 of theLegislation Actis that the Guidelines adopt the definition of ‘intellectual property’ from the Convention as it existed on 31 March 2016 (the date the Guidelines commenced).

The Senate Standing Committee on Regulations and Ordinances has recommended, as a matter of best practice, that where an instrument incorporates material by reference, the manner in which that material is incorporated should be clearly specified.

Accordingly, the instrument inserts a new explanatory note immediately after the definition of ‘intellectual property rights’ in the Guidelines, which explains that the definition is incorporated into the Guidelines as it was in force as at the commencement of the Guidelines. The note also provides information about how to access a copy of the Convention.

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 s 33(3) in making this instrument under s 121FP of the BSA.

**Operation**

This instrument adds an explanatory note to the definition of ‘intellectual property rights’. The new note does not alter the effect of the definition at all; it simply makes that effect plainer on the face of the instrument.

Documents incorporated in the Guidelines by reference

The new note refers to the Convention. As stated in the new note, the Convention is in Australian Treaty Series 1972 No. 15 ([1972] ATS 15) and could in 2016 be viewed in the Australian Treaties Library on the AustLII website ([http://www.austlii.edu.au](http://www.austlii.edu.au/)).

Consultation

The ACMA did not undertake any public consultation in connection with this instrument, given that the amendment does not affect the legal operation of the instrument in any way, and merely explains the effect of a provision which is already in effect.

Regulation Impact

The instrument does not give rise to a regulatory change as defined by the Office of Best Practice Regulation (OBPR). Therefore, a regulatory impact analysis process has not been applied.

Human Rights Compatibility Statement

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*.

Given that the instrument merely inserts a note which explains the effect of part of the existing Guidelines, this amending instrument has no human rights implications.