

# EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

*Broadcasting Services Act 1992*

## ***Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2)***

### **Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2)* (**the instrument**) under subsection 106(1) and paragraph 107(1)(f) of the *Radiocommunications Act 1992* (**the Act**).

Subsection 106(1) of the Act provides that the ACMA may determine in writing a price-based allocation system for allocating and/or issuing specified transmitter licences (other than licences issued under section 101A or NBS transmitter licences).

Subsection 107(1) of the Act provides that an apparatus licence is subject to certain conditions. Paragraph 107(1)(f) refers to such conditions (if any) as the ACMA may, by legislative instrument, determine in relation to a particular type of apparatus licence.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make a legislative instrument, the power shall be construed to include 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 purpose of the instrument is to amend:

- (a) the *Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014* (**the Allocation Determination**) made under subsection 106(1) of the Act; and
- (b) the *Radiocommunications Licence Conditions (Broadcasting Licence) Determination 2015* (**the Broadcasting LCD**) made under paragraph 107(1)(f) of the Act.

The amendments to these legislative instruments are a consequence of the making of the *Broadcasting Services (Technical Planning) Guidelines 2017* (**the 2017 TPGs**). The 2017 TPGs impose technical requirements on broadcasting licensees, datacasting licensees and authorised persons in respect of the planning and operating of transmission facilities. They revoke and replace the *Broadcasting Services (Technical Planning) Guidelines 2007* (**the 2007 TPGs**).

The 2017 TPGs form part of a wider group of legislative instruments that deal with the planning and operating of services using the broadcasting services bands. The 2007 TPGs were referred to in a number of other legislative instruments that apply to persons operating, or seeking to operate, transmitters used for the provision of broadcasting and datacasting services. These legislative instruments include the Allocation Determination and the Broadcasting LCD.

The Allocation Determination sets out a price-based allocation system for allocating and issuing specified high power open narrowcasting licences. The instrument amends the Allocation Determination by inserting or amending definitions in section 6 of the Allocation Determination and updates a reference in section 9 to a legislative instrument which has since been repealed and replaced.

The amendments that the instrument makes to the Allocation Determination are intended to maintain the regulatory arrangements established by the Allocation Determination.

The Broadcasting LCD sets out conditions to which specified broadcasting licences are subject. The instrument amends the Broadcasting LCD by amending definitions in section 1.4 of the Broadcasting LCD. The instrument also amends provisions in the Broadcasting LCD that referenced specific guidelines in the 2007 TPGs such that they now reference corresponding guidelines in the 2017 TPGs.

The amendments that the instrument makes to the Broadcasting LCD are intended to maintain the regulatory arrangements established by the Broadcasting LCD.

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**).

### **Documents incorporated by reference**

The instrument varies the Allocation Determination to incorporate, by reference, the *Radiocommunications (Charges) Determination 2017*. The instrument also varies the Broadcasting LCD to incorporate, by reference, the 2017 TPGs. Each of these legislative instruments is publicly available, free of charge, on the Federal Register of Legislation (which may be accessed at: [www.legislation.gov.au](http://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.

The ACMA released a draft of the 2017 TPGs together with an accompanying consultation paper on the ACMA website on 27 July 2017, inviting public comment. As well as discussing the proposal to make the 2017 TPGs, the consultation paper explained that as a consequence of the proposal, some 76 other listed legislative instruments made under either the Act, or the *Broadcasting Services Act 1992* would also need amending.

Comments on the proposal to make both the 2017 TPGs and the consequential amendments closed on 14 August 2017. The ACMA received three submissions in response to the consultation process.

Only one submission addressed the proposal to make consequential amendments to the 76 legislative instruments. That submission, which did not object to the proposal, but rather sought clarification on the operation of the instrument, was taken into account by the ACMA before it made the instrument.

In accordance with subsection 106(12) of the Act, the ACMA consulted with the ACCC about the proposed consequential amendments to the Allocation Determination. On 13 September 2017, the ACCC advised the ACMA that it had no comments on the proposed consequential amendment.

### **Regulatory impact assessment**

A preliminary assessment of the proposal to make the 2017 TPGs was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR determined that the remaking of the 2007 TPGs would have more than a minor regulatory impact. However, OBPR also determined that if the 2007 TPGs were assessed as operating effectively and efficiently as informed by a public consultation process, the ACMA may, in lieu of a RIS, self-certify that the

remaking of the 2007 TPGs as the 2017 TPGs would have no more than a minor regulatory impact (OBPR reference ID 22477). Informed by the public consultation process, the ACMA assessed the 2007 TPGs as operating effectively and efficiently. As the instrument does no more than update cross-references from the 2007 TPGs to the 2017 TPGs so as to maintain pre-existing regulatory arrangements, the instrument is also considered to have no more than a minor regulatory impact.

### **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 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 purpose of the instrument is to amend:

- (a) the *Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014* made under subsection 106(1) of the Act; and
- (b) the *Radiocommunications Licence Conditions (Broadcasting Licence) Determination 2015* made under paragraph made under paragraph 107(1)(f) of the Act.

The amendments to the abovementioned legislative instruments are a consequence of the making of the 2017 TPGs. The 2017 TPGs impose technical requirements on broadcasting and datacasting licensees for planning and operating new or existing transmission facilities. They revoke and replace the 2007 TPGs.

The instrument amends definitions contained in both the Allocation Determination and the Broadcasting LCD. The instrument also amends both instruments such that they no longer reference guidelines contained in the now repealed 2007 TPGs, but rather the corresponding guidelines in the 2017 TPGs, but only insofar as those changes are necessary to align relevant provisions with the 2017 TPGs. These amendments have been made for the purpose of maintaining the regulatory arrangements established by the Allocation Determination and the Broadcasting LCD.

### **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) Guidelines (Consequential Amendments) Instrument 2017 (No. 2)***

**Section 1      Name**

This section provides for the instrument to be cited as the *Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2)*.

**Section 2      Commencement**

This section provides for the instrument to commence on the later of: (a) the commencement of the *Broadcasting Services (Technical Planning) Guidelines 2017*; or (b) the start of the day after it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed at [www.legislation.gov.au](http://www.legislation.gov.au).

**Section 3      Authority**

This section identifies the provisions of the Act that authorise the making of the instrument, namely subsection 106(1) and paragraph 107(1)(f) of the Act.

**Section 4      Amendments to the *Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014***

This section provides that the Allocation Determination is amended in accordance with the items set out in Schedule 1 to the instrument.

**Section 5      Amendments to the *Radiocommunications Licence Conditions (Broadcasting Licence) Determination 2015***

This section provides that the Broadcasting LCD is amended in accordance with the items set out in Schedule 2 to the instrument.

**Schedule 1—Amendments to the *Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014 (F2014L00426)***

This Schedule lists the items that amend the Allocation Determination.

**Item 1**

The item inserts a definition of “locality” into subsection 6(1) of the Allocation Determination. This definition is necessary to support the newly-amended definition of “residential area” effected by item 2.

**Item 2**

This item amends the definition of “residential area” in subsection 6(1) of the Allocation Determination by omitting the reference to the 2007 TPGs, and replacing it with a definition based on the definition from the 2007 TPGs. The 2017 TPGs no longer include a definition of “residential area”.

### **Item 3**

This item inserts a definition of “urban centre” into subsection 6(1) of the Allocation Determination. This definition is necessary to support the newly-amended definition of “residential area” effected by item 2.

### **Item 4**

Item 4 replaces the words “*Legislative Instruments Act*” with the words “*Legislation Act*”, to reflect the renaming of that Act.

### **Item 5**

Item 5 repeals section 9 of the Allocation Determination to update the reference to the *Radiocommunications (Charges) Determination 2007* which has been repealed and replaced by the *Radiocommunications (Charges) Determination 2017*.

## **Schedule 2—Amendments to the *Radiocommunications Licence Conditions (Broadcasting Licence) Determination 2015 (FL2015L01489)***

The Schedule lists the items that amend the Broadcasting LCD.

### **Item 1**

The item replaces the Note in section 1.2 in order to replace a reference to the *Legislative Instruments Act 2003* with a reference to the *Legislation Act 2003*, to reflect the renaming of that Act.

### **Item 2**

The item amends the definition of the term “AM band” in section 1.4 of the Broadcasting LCD by replacing the term with the term “AM radio band” and inserting “range” into the definition. This is to maintain consistency with the wording used in the 2017 TPGs.

### **Item 3**

This item amends the definition of the term “FM band” in section 1.4 of the Broadcasting LCD by replacing the term with the term “FM radio band” and inserting “range” into the definition. This is to maintain consistency with the wording used in the 2017 TPGs.

### **Item 4**

Item 4 replaces the reference in section 1.4 to the now repealed “*Broadcasting Services (Technical Planning) Guidelines 2007*” with “*Broadcasting Services (Technical Planning) Guidelines 2017*”.

### **Item 5**

This item updates a reference to the *Legislative Instruments Act 2003* to reflect the renaming of this Act as the *Legislation Act 2003*.

### **Item 6**

Item 6 makes a change to section 2.4 of the Broadcasting LCD by replacing the words “Appendix 1 to the Technical Planning Guidelines” with a reference to the relevant corresponding guideline in the 2017 TPGs.

### **Item 7**

Item 7 makes a similar change to section 2.5 of the Broadcasting LCD as that specified in item 6 above. It replaces the reference in section 2.5 to “Appendix 2 to the Technical Planning Guidelines” with a reference to the relevant guideline in the 2017 TPGs.

### **Item 8**

The item makes a corresponding change to section 2.5A along the same lines as items 6 and 7 above. It removes the words “Appendix 4 to the Technical Planning Guidelines” and replaces it with a reference to the relevant guideline in the 2017 TPGs.

### **Item 9**

The item repeals and replaces paragraph 4.3(c). The new paragraph does not include the previous subparagraph 4.3(c)(ii). That subparagraph is not needed because Part 2 of the 2017 TPGs does not include a reference to “licence area”.

### **Item 10**

This item complements item 2 above. It replaces the term “AM band” with the term “AM radio band” in section 4.4, wherever occurring. This ensures the terminology used in the Broadcasting LCD is consistent with the 2017 TPGs.

### **Item 11**

Item 11 repeals paragraph 4.4(b) of the Broadcasting LCD to replace the reference to specific guidelines in the 2007 TPGs with the relevant guidelines in the 2017 TPGs. The item replaces the reference to guidelines 21 to 26 in Part 3 of the 2007 TPGs with a reference to guidelines 11 to 13 (inclusive) in Part 3 and guideline 21 in Part 5 of the 2017 TPGs.

The replacement paragraph 4.4(b) also adds additional words to subparagraph 4.4(b)(ii) which are “coverage area” and “licence area”. This is to align the subparagraph with the definition of “narrowcasting service area” in guideline 6 of the 2017 TPGs. The replacement subparagraph 4.4(b)(iii) provides that an open narrowcasting service provider operating a radio service in the AM radio band must comply with the relevant 2017 TPGs, as if references in those guidelines to matters specified in a relevant licence area plan or a digital radio channel plan were references to those same matters as specified in a licence condition imposed on their transmitter licence or an advisory note included in their transmitter licence.

### **Item 12**

This item complements item 3 above. It replaces the term “FM band” with the term “FM radio band” in section 4.5, wherever occurring. This ensures the terminology used in the Broadcasting LCD is consistent with the 2017 TPGs.

### **Item 13**

This item repeals and replaces subsection 4.5(2) of the Broadcasting LCD. The reference to guidelines 34, 36 to 42 (inclusive) and to guidelines 44 to 47 (inclusive) in the 2007 TPGs is replaced with a reference to guidelines 11 to 13 (inclusive) in Part 3 and guideline 21 in Part 5 of the 2017 TPGs.

The replacement paragraph 4.5(b) adds additional words to 4.5(b)(ii), in the same manner and for the same reasons as the words added to paragraph 4.4.(b)(ii), explained in item 11 above. The

replacement subparagraph 4.5(b)(iii) provides that an open narrowcasting service provider operating a radio service in the FM radio band must comply with the relevant 2017 TPGs, as if references in those guidelines to a licence area plan or a digital radio channel plan were references to those same matters as specified in a licence condition imposed on their transmitter licence or an advisory note included in their transmitter licence.

#### **Item 14**

The item repeals and replaces subsection 4.6(3) of the Broadcasting LCD. The reference to guidelines 81 to 89B (inclusive) of the 2007 TPGs is replaced with a reference to guidelines 11 to 14 (inclusive) in Part 3 of the 2017 TPGs.

The replacement subsection 4.6(3) also removes the term “broadcasting licensee” from paragraph 4.6(3)(b) to align with the wording of the 2017 TPGs which does not use this term. The replacement subsection also includes the addition of the words “coverage area” and “licence area”. This is to align the subparagraph with the definition of “narrowcasting service area” in guideline 6 of the 2017 TPGs.

The replacement subsection 4.6(3) rewords paragraph 4.6(3)(c) which provides that open narrowcasting service providers operating in the TV bands are required to comply with the relevant 2017 TPGs as if references in those guidelines to a licence area plan or a digital radio channel plan were a reference to those same matters as specified in the licence conditions imposed on their transmitter licence or the advisory notes included in their transmitter licence.

#### **Item 15**

Consistent with item 2, this item replaces the term “AM band” with “AM radio band” in section 5.2.