

GUIDE FOR SERVICE PROVIDERS UNDER CLASS LICENCES

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This guide has been designed to act as a reference for persons who intend providing a service under a class licence or those who currently provide broadcasting services under the *Radiocommunications Act 1983* ('the Radiocommunications Act') or the limited licences regime.

The guide provides only general information about class licences and is not intended to be a substitute for legal advice. The guide may be updated from time to time.

INTRODUCTION

The class licence system has been established to facilitate the emergence of a range of educational, business, ethnic, professional and other services that have so far been inhibited or banned by the previous regulatory structure under the *Broadcasting Act 1942* ('the Broadcasting Act'). The *Broadcasting Services Act 1992* ('the Act'), by being 'technology neutral', facilitates and accommodates emerging new services and technologies.

The Act provides a simple regulatory regime for broadcasting services that applies irrespective of the technical means of delivery. For example, a service provider may decide to deliver a service using either the broadcasting services bands, other parts of the radiofrequency spectrum, cable or satellite.

Class licences are not individually issued, but are a standing authority for any operator to enter the market and provide a service, as long as the operator has access to delivery capacity and abides by the conditions relevant to the particular category of class licence.

DETERMINATION OF CLASS LICENCES

The ABA has determined, by notice in the *Government Gazette* of 5 October 1992, a class licence for the provision of each of the five following services:

- a) subscription radio broadcasting services;
- b) subscription radio narrowcasting services;
- c) subscription television narrowcasting services;

- d) open narrowcasting radio services; and
- e) open narrowcasting television services.

The legislative effect of these determinations is to make the provision of a service under a class licence subject to the applicable licence conditions and program standards (see below).

Subscription television broadcasting services, or Pay TV as it is commonly referred to, is not regulated under the class licences system.

Limited licences granted under the Broadcasting Act are, for the purposes of the new Act, taken to be open narrowcasting services for the remainder of the former term of the licence. A licence warrant issued under the Broadcasting Act is deemed to be a transmitter licence under the Radiocommunications Act.

Class licences will also accommodate the VAEIS (Video and Audio Entertainment and Information Services) regime which operated under the authority of MDS and NAS licences granted by the Minister under the Radiocommunications Act or equivalent authority under the *Telecommunications Act 1991*, depending on the delivery technology used.

CATEGORIES OF BROADCASTING SERVICES

The Act identifies six generic categories of broadcasting services - national, commercial and community broadcasting services and subscription broadcasting, subscription narrowcasting and open narrowcasting services. Subscription services and open narrowcasting services, which are regulated under the class licence system, are both new concepts in Australian broadcasting.

The licence categorisation system is the cornerstone of the new Act. It presents a new approach to how services are regulated and facilitates the introduction of a range of exciting new services. Services will be regulated in accordance with their ability to influence the public. This approach is designed to ensure the public interest is

protected, but that small and less influential services are not subject to inappropriate regulatory provisions.

DEFINITIONS OF CLASS LICENCE CATEGORIES

Subscription services will only be received by people who make a conscious decision to pay for a service. Narrowcasting is a form of point-to-multi-point transmission that is limited in either its audience appeal or its ability to be received, so it is unable to be considered in the same terms as conventional broadcasting.

As both these service categories would be expected to raise only limited public interest concerns because of their narrow audience and appeal they are only subject to minimum levels of regulation and require no individual licensing as they are authorised under the standing authority of 'class licences'.

Section 16 of the Act defines subscription broadcasting services as broadcasting services that:

- a) provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and
- b) are made available to the general public but only on payment of subscription fees (whether periodical or otherwise); and
- c) comply with any determinations or clarifications under section 19 in relation to subscription broadcasting services.

In summary, subscription broadcasting services are services which broadcast programs of wide appeal that are provided to the general public for subscription or program-based fees.

Section 17 of the Act defines subscription narrowcasting services as broadcasting services:

- (a) whose reception is limited:
 - i) by being targeted to special interest groups; or
 - ii) by being intended only for limited locations, for example, arenas or business premises; or
 - iii) by being provided during a limited period to cover a special event; or

- iv) because they provide programs of limited appeal; or
- v) for some other reason; and
- (b) that are made available only on payment of subscription fees (whether periodical or otherwise); and
- (c) that comply with any determinations or clarifications under section 19 in relation to subscription narrowcasting services.

In summary, subscription narrowcasting services are directed at special interest groups to provide programs of limited appeal, or in limited locations, or during a limited period to cover a special event. Reception is only available on the basis of subscription or program based fees.

The distinguishing feature of a subscription service is that the service provider exercises control over either access to the receiving equipment necessary for the reception of the service, or the capacity of the customer's receiving equipment to intelligibly receive the service.

Section 18 of the Act defines open narrowcasting services as broadcasting services:

- (a) whose reception is limited:
 - i) by being targeted to special interest groups; or
 - ii) by being intended only for limited locations, for example, arenas or business premises; or
 - iii) by being provided during a limited period to cover a special event; or
- iv) because they provide programs of limited appeal; or
- v) for some other reason; and
- (b) that comply with any determinations or clarifications under section 19 in relation to open narrowcasting services.

Open narrowcasting services are similar to subscription narrowcasting services, except they are provided free to those with appropriate reception equipment.

Some VAEIS services, which were required to be encrypted in some form so as to restrict their reception in domestic premises (and therefore not constitute broadcasting under the Broadcasting Act), may dispense with encryption and may come within the ambit of this licence category. VAEIS providers who want clarification about their licence

category may apply to the ABA for an opinion.

ADVERTISING ON CLASS LICENCES

Services provided under class licences are able to broadcast advertisements subject to applicable program standards and licence conditions. However a person providing a subscription broadcasting service or a subscription narrowcasting service must ensure that subscription fees continue to be the predominant source of revenue for that service.

ABA may determine additional criteria or clarify existing criteria

As it may not be possible to categorise each service type according to the above criteria, section 19 of the Act empowers the ABA to define additional criteria or clarify existing criteria for the purposes of distinguishing between categories of broadcasting services. Different criteria or clarifications to the existing criteria may be determined or made for radio services and television services.

This flexibility is designed to accommodate new services provided by new technologies as they emerge without the need for amendment of the Act.

The Minister may also give specific directions to the ABA as to the making of determinations and clarifications.

MATTERS TO BE CONSIDERED BY THE ABA

In making determinations or clarifications under section 19 (and in giving opinions under section 21, referred to below) the ABA must have regard to the following matters in accordance with section 22:

- (a) the geographic coverage of those services; and
- (b) the number of persons who receive or are able to receive those services; and
- (c) the accessibility of those services, including:
 - (i) whether those services are encrypted; and
 - (ii) whether their availability is otherwise restricted, whether because of the high cost of the equipment required to receive those services, the controlled supply of that equipment or otherwise; and
 - (iii) whether their comprehensibility is otherwise restricted; and
- (d) the duration and frequency of the provision of those services including

whether those services are provided for a set period only; and

- (e) the nature of the audience to which those services are targeted; and
- (f) the nature of the programs being provided by those services, including:
 - (i) the level of interest in the subject matter of those programs; and
 - (ii) whether those programs are directed at a specialised audience; and
 - (iii) the social and cultural impact of those programs; and
- (g) such other matters as the ABA thinks fit.

CONDITIONS ON CLASS LICENCES

Consistent with the lighter regulatory approach for class licences, licence conditions support Government objectives to protect the public interest while ensuring regulation is kept to the minimum necessary so as not to unnecessarily inhibit the emergence of new services.

Parts 2 and 7 of Schedule 2 of the Act outline the conditions which are applicable to broadcasting services provided under class licences. (The relevant clauses are available as a separate attachment, Attachment A.)

In accordance with section 118, the ABA may also include conditions on a class licence consistent with the objects of the Act and the regulatory policy outlined in section 4 of the Act. This section stipulates that broadcasting services are to be regulated in a manner which:

- enables public interest considerations to be addressed without imposing unnecessary financial and administrative burdens on providers of broadcasting services; will readily accommodate technological change; and
- encourages the development of broadcasting technologies and their application and the provision of services made practicable by those technologies to the Australian community.

In imposing conditions on a class licence the ABA may also have regard to the matters referred to above under section 22 of the Act.

The ABA is able to specify different conditions for different categories of broadcasting services and for services providing radio programs and services providing television programs.

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MATTERS TO WHICH CONDITIONS MAY RELATE

In accordance with section 119, the ABA may impose a condition on a class licence:

- (a) requiring the licensee to comply with a code of practice that is applicable to the licensee (see below); or
- (b) designed to ensure that a breach of a condition by the licensee does not recur; or
- (c) designed to ensure compliance with the film classification system administered by the Office of Film and Literature Classification (television open narrowcasting only).

Conditions of class licences must be relevant to the broadcasting services to which those licences relate.

VARIATIONS OF LICENCE CONDITIONS

In accordance with section 120 the ABA may, by publishing a notice in the *Gazette*, vary or revoke conditions specified in a class licence or specify additional conditions of the licence.

Before publishing a notice the ABA must publicise its intention to vary the class licence by stating:

- the subject matter of the proposed variation; and
- a place at which copies of the licence and of the proposed variation may be bought; and
- an address to which representations concerning the proposed variation can be sent; and
- the last date for making those representations.

The ABA must give due consideration to any representations so made.

Section 121 states that class licences, and instruments which vary class licences, are disallowable instruments for the purposes of section 46A of the *Acts Interpretations Act 1901* and therefore have to be laid before both Houses of Parliament within 15 sitting days of the making of the instrument.

PROGRAM STANDARDS

The ABA has carried over a minimum number of standards that are applicable to particular categories of class licences in keeping with 'light touch' regulation.

The ABA has, by notice in the *Gazette* of 5 October 1992, determined that cer-

tain program standards (available as a separate attachment, Attachment B), which were in force prior to the commencement of this Act, are program standards applicable to class licence services provided under Part 9 of the Act.

Under subsection 21(6) these standards will cease to be in force by 4 October 1994. If a code of practice (see below) relating to a program standard, is registered under subsection 123(4) of the Act, the program standard is no longer applicable to that class licence.

CODES OF PRACTICE

Apart from the conditions detailed in Attachment A and any other conditions determined by the ABA, the regulation of program content will be determined by codes of practice. Under section 123 of the Act, it is intended by Parliament that industry groups representing class licence service providers will develop codes of practice, in consultation with the ABA and taking account of any relevant research conducted by the ABA, which are applicable to each category of broadcasting. Section 123 is available as a separate attachment, Attachment C.

Codes of practice may relate to matters such as: ensuring that programs meet community standards and protect children from exposure to harmful material; classifying of programs; promoting accuracy and fairness in news and current affairs; and preventing programs which simulate news so that it misleads or alarms people.

In developing codes of practice, community attitudes must be taken into account on issues such as the portrayal of physical and psychological violence, sexual conduct and nudity, the use of drugs including alcohol and tobacco, offensive language and other matters which are of concern to the community.

If the ABA is satisfied that a code of practice developed by service providers allows appropriate community safeguards, is endorsed by a majority of the providers of class licence services of a particular category and has allowed adequate public comment, the code will be included in a Register of codes of practice. The Register will include all codes of practice and will be open for public inspection.

The ABA is able to determine, under

section 125, a standard where a code of practice fails to provide appropriate community safeguards in relation to a particular matter.

Similarly, if no code of practice is registered within the first two years of operation of the Act and the ABA is satisfied that it should determine a standard in relation to a matter, it must, by notice in writing, determine a standard under section 125 of the Act.

Advertisements are also subject to codes of practice by reason of the wide definition of 'program' under section 6 of the Act which includes advertising or sponsorship matter.

REQUESTS TO ABA TO DECIDE WHICH CATEGORY A BROADCASTING SERVICE FALLS INTO

An important feature of the licence categorisation system is the ability of the service provider to obtain from the ABA an opinion on which category a service or proposed service fits into. This mechanism is designed to enable service providers to be certain they are complying with the relevant regulatory conditions.

To request such an opinion an application must be in accordance with the form approved by the ABA (Form ABA4) and must state the applicant's opinion as to which category of broadcasting services the service falls into.

If the ABA requires additional information before it is able to provide an opinion it will advise the applicant in writing within 30 days after receiving the application.

After receiving the application or further information to that application, the ABA will provide an opinion in writing as to which category of broadcasting services the service falls into.

If the applicant has not received an opinion within 45 days from the date the ABA received the application or further information, the ABA is taken to have given an opinion at the end of that period that accords with the applicant's opinion.

Any opinion given will be binding for five years on both the ABA and the person requesting the opinion so long as the circumstances under which the service is provided remain substantially the same as those advised by the service provider in the application for the opinion.

The ABA has determined a fee of \$475 for providing an opinion under section 21

of the Act. The fee is payable to the ABA upon receipt of the application.

Under section 210 of the Act the ABA is required to publish a copy of its opinion in the *Gazette* following the commencement of the service. In order for the ABA to meet this requirement it is essential that the service provider of a proposed class licence advise the ABA of the date the service commenced.

OFFENCES

A person can be prevented from providing a broadcasting service which breaches the relevant class licence conditions, or for not providing the service in accordance with the relevant class licence.

Section 139 states that a person who provides a subscription radio broadcasting service, a subscription narrowcasting service or an open narrowcasting service in breach of a condition as set out above is guilty of an offence which incurs a penalty of \$5000 for every day which the breach continues.

Under section 141, the ABA may also issue notices directing a person to ensure that the service is provided in conformity with the requirements of the class licence or in accordance with a relevant code of practice.

If the ABA is satisfied that a person is providing broadcasting services other than in accordance with the relevant class licence, the ABA may apply to the Federal Court, under section 144 of the Act, for an order that the person cease providing those services.

ALLOCATION OF RADIOFREQUENCY SPECTRUM BY THE ABA

One of the new responsibilities given to the ABA is the preparation of a frequency allotment plan that determines the number of channels that are available in particular areas of Australia to provide broadcasting services using the broadcasting services bands of the radiofrequency spectrum.

The Minister for Transport and Communications has assigned the broadcasting services bands to the ABA for planning broadcasting services. Service providers who wish to use the broadcasting services bands should apply to the ABA for a transmitter licence. Under section 34 of the Act the ABA may decide that parts

of the radiofrequency spectrum are available for allocation to providers of subscription broadcasting services, subscription narrowcasting services or open narrowcasting services for a specified period.

In making its decision, the ABA will have regard to:

- (a) the possible future demand for the use of that part of the radiofrequency spectrum; and
- (b) such other matters as the ABA considers relevant.

Price-based allocation systems for transmitter licences may exist for particular areas or frequencies or generally if determined by the Minister under section 92A of the Radiocommunications Act. Where transmitter licences are being allocated for the use of spectrum in the broadcasting services bands, these price-based allocation systems will only apply where the ABA has decided to make spectrum available for allocation for a specified period for class licences pursuant to section 34(1) of the Act.

HOW TO OBTAIN A BROADCASTING SERVICE UNDER A CLASS LICENCE

If you intend providing a service under a class licence you do not need to lodge an application with the ABA.

If you know which one of the five categories of class licence you intend to provide and intend using the broadcasting services bands, you should contact the Planning Division of the ABA in Canberra at the address below.

If you know which one of the five categories of class licence you intend to provide and intend to use other means of delivery you should contact the relevant organisation as outlined below.

If you do not know which category of class licence your proposed service falls into you should make an application to the ABA for an opinion on which category a proposed service fits into (see above).

APPLICATION FOR ACCESS TO MEANS OF DELIVERY

Service providers wishing to use the broadcasting services bands (AM, FM radio and VHF, UHF TV) should complete

an 'Application for a Transmitter Licence form', which is available from:

Assistant Director
Station Administration
Australian Broadcasting Authority
PO Box 34
BELCONNEN ACT 2616
Telephone (06) 256 2831

Service providers wishing to use other parts of the radiofrequency spectrum should apply to:

Director Licensing
Operations Section
Radiocommunications Operations Branch
Department of Transport and Communications
GPO Box 594
CANBERRA ACT 2601
Telephone (06) 274 8525

Service providers wishing to use cable should apply, in the first instance, to:

Senior Policy Analyst
Licences Section
AUSTEL
5 Queens Rd
SOUTH MELBOURNE VIC 3004
Telephone (03) 828 7362

Service providers who wish to use the satellite should contact Optus in their State capital city.

LICENCE FEES

Licence fees applicable to class licences are available in a separate attachment, Attachment D. These fees are payable on grant of a transmitter licence.

Attachments A, B, C and D are available from Sharonne Moore at the ABA on (02) 959 7863.

Attachment A:

Excerpts from Schedule 2 to the Broadcasting Services Act 1992 - Standard Conditions Applicable to Class Licences

Attachment B:

Program Standards Applicable to Class Licences

Attachment C:

Section 123 of the Broadcasting Services Act 1992 - Codes of Practice

Attachment D

Transmitter Fees Applicable to Class Licences Services

