

AUSTRALIAN MEDIA LAW UPDATE
OPEN NARROWCASTING RADIO SERVICES
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[327] A series of initiatives have resulted from the investigation by the Australian Broadcasting Authority (ABA) into open narrowcasting radio services.² The central outcome of the investigation, prompted by a number of service categorisation breaches,³ was the issuing of two clarifications applicable to open narrowcasting radio services using the broadcasting services bands.⁴

The first of these clarifications, the *Broadcasting Services Clarification Notice 2001* (2001 notice),⁵ commenced on 9 January 2002,⁶ while the second, the *Broadcasting Services Clarification Notice 2002* (2002 notice),⁷ commenced on 28 August 2002.⁸ Additionally, the ABA announced on 7 September 2002 that the conditions of the [328] class licence for these services would be varied through the imposition of the *Broadcasting Services (Additional Conditions — Open Narrowcasting Radio Services) Notice 2002*.⁹

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² NR 87/2002, 4 September 2002, 'ABA provides guidance on open narrowcasting radio services'. General information about these types of services can be sourced through <<http://www.aba.gov.au/radio/narrowcasting/index.htm>>.

³ The background behind the clarifications can be found in: Marett Leiboff, 'Australian Media Law Update' (2001) 6(2) *Media & Arts Law Review* 131. The investigation commenced in April 2000. This is the first time the ABA has used s 19.

⁴ *Broadcasting Service Act 1992* (Cth) (BSA) s 6(1) defines the broadcasting services bands to mean the radiofrequency spectrum used for broadcasting purposes, as provided for in s 31 of the *Radiocommunications Act 1992*, and is referred by the Minister to the ABA for planning.

⁵ *Broadcasting Services Clarification Notice 2001* <www.aba.gov.au/radio/narrowcasting/clarification/pdfrtf/s19_clarification.pdf>.

⁶ Gazetted 9 January 2002. The notice commenced on gazettal: *2001 Notice* s 2.

⁷ *Broadcasting Services Clarification Notice 2002* <www.aba.gov.au/radio/narrowcasting/clarification/pdfrtf/s19_clarifn_02.pdf>.

⁸ Gazetted 28 August 2002. The notice commenced on gazettal: *2002 Notice* s 2.

⁹ Subscription broadcasting and narrowcasting class licences are provided for in Pt 8 of the BSA. Section 118 provides for conditions on class licences. Section 118(2) enables conditions for different categories of service, and can differ for services providing radio or television programs. The conditions are set out in Pt 7 of Sch 2: s 118(3). Section 119(1) provides that the conditions have to be relevant to the service, and s 119(2) sets out the types of conditions that can be imposed. Section 120(1) authorises the variation or revocation of conditions or specify additional conditions. Such conditions cannot be inconsistent with determinations or clarifications under s 10, or the conditions in Pt 7 of Sch 2: s 120(2).

The ABA also announced a package of initiatives designed to assist these services conform to their obligations under the legislation, the clarification notices, and the varied licence condition. To assist with this, the ABA has produced a booklet, *Narrowcasting for Radio*,¹⁰ which, among other things, expands upon the text of the clarifications by providing further guidance, background and information about the different clarifications.¹¹

What do the clarifications do?

Maintenance of s 18 of the Broadcasting Services Act 1992

The notices provide that the criteria specified in s 18 have been clarified for non-subscription AM or FM radio services using the broadcasting services bands.¹² The clarifications are not intended, nor designed, to replace the provisions of s 18(1)(a)(i)–(v), which set out the characteristics of open narrowcasting services. The service may still be an open narrowcasting service because of its 'individual characteristics',¹³ that is, a broadcasting service 'whose reception is limited' in some way:

- by being targeted to special interest groups;
- by being intended only for limited locations, for example, arenas or business premises;
- by being provided during a limited period or to cover a special event;
- because they provide programs of limited appeal;
- for some other reason.¹⁴

Specific types of services — what will and won't constitute an open narrowcasting service

The 2001 notice sets out the majority of the criteria designed to clarify open narrowcasting radio services, and the 2002 notice contains a further age-based

¹⁰ Australian Broadcasting Authority, *Narrowcasting for Radio: Guidelines & information about open & subscription narrowcasting radio services*, 2002; <www.aba.gov.au/radio/narrowcasting/guidelines/pdf/rf/narrowcastingForRadio.pdf>. The information provided is also directed to subscription narrowcasting radio services.

¹¹ Part 2 of the booklet sets out guidelines for narrowcasting services, 8.

¹² *2001 Notice* and *2002 Notice* s 4(1) — the extent of the clarification relates to s 19(1)(b).

¹³ *2001 Notice* and *2002 Notice* s 4(2).

¹⁴ If a broadcaster did not fall into the ambit of the clarifications, they may be best advised to obtain a category of service opinion by the ABA, as provided for in s 21. The ABA would need to consider the matters in s 22, about the type of service, its programs and audience, in giving its opinion.

clarification. The criteria have been drafted to specifically fix misunderstandings and uncertainties about particular types of open narrowcasting services.

Means of delivery

Narrowcasting is a type of service that has ‘narrowly’ focused content and programming, from the point of view of a listener, and is generally not determined by the technology that delivers the service. It is possible to interpret the phrase in s 18(1)(a), in relation to services ‘whose reception is limited’, as [329] meaning ‘transmission reception’, that is, that ‘low power’ meant the service was ‘narrowcast’.

Section 5 of the 2001 notice removes the issue of transmission in respect of FM radio narrowcasting for low power transmitters. It establishes that an FM radio broadcasting service,¹⁵ provided in an urban centre or locality,¹⁶ using a transmitter of 1 watt or less,¹⁷ is not an open narrowcasting service *only* on the basis of the power of the transmitter.¹⁸ For these purposes, an urban centre is a population cluster of 1000 or more people, while a locality is a cluster of 200-999.¹⁹ No such clarification has been made in respect of AM services.

The means of delivery is relevant in one situation: if an ancillary service is provided using a subcarrier channel, it will be an open narrowcasting service.²⁰

Limited period and special event narrowcasting

Section 18(1)(a)(iii) allows for narrowcasting provided during a ‘limited period’. The amount of time constituting a limited period is clarified in s 6 to amount to no more than 30 days in a 12 month period, which can be either a continuous 30 days or separate periods that would amount to 30 days.²¹ These periods also have conform to

¹⁵ 2001 notice s 5(1)(b).

¹⁶ *Ibid* s 5(1)(a).

¹⁷ *Ibid* s 5(1)(c).

¹⁸ *Ibid* s 5(2).

¹⁹ *Ibid* s 5(1). Additionally, s 3 defines locality and urban centre to mean the Australian Standard Geographic Classification 2001 as classified by the Australian Bureau of Statistics.

²⁰ *Ibid* s 13.

²¹ *Ibid* s 6(1).

the transmitter licence conditions issued by the ABA.²² If the service conforms to these periods, it will be an open narrowcasting service.²³

Section 18(1)(a)(iii) allows for narrowcasting provided during a 'special event'. Such an event will be of major cultural, sporting, or other community significance,²⁴ and will have been organised by one or more persons.²⁵ The service can only operate for 30 continuous days, effectively to cover the event. If it meets all these requirements, it will be an open narrowcasting service.²⁶ A comment attached to s 7 indicates that there is a difference between events that are organised and events that simply occur — the Moomba Festival and the Sydney to Hobart Yacht Race fall into the former, while skiing, which is dependent on weather conditions, is not 'organised', for the purposes of s 7.

Pre-recorded looped services and information services

Section 18(1)(a)(iv) allows for narrowcasting that provides 'programs of limited appeal'. Pre-recorded looped services, such as tourist information radio, are clarified in s 8, and will be open narrowcasting services if they conform to a series of characteristics.²⁷ To be a looped service, their content consists only of pre-recorded [330] material,²⁸ the whole of material is repeated after *each* completed broadcast,²⁹ but each broadcast is limited to four hours of material.³⁰ In addition, the material broadcast cannot not be updated or varied more than once a week.³¹

Information services will be also tend to be programs of limited appeal, though they can also be characterised as being targeted to special interest groups,³² and s 9 allows for these to be open narrowcasting services,³³ if the content of the service relates only

²² Ibid s 6(1).

²³ Ibid s 6(2).

²⁴ Ibid s 7(1)(a).

²⁵ Ibid s 7(1)(b).

²⁶ Ibid s 7(2).

²⁷ Ibid s 8(2).

²⁸ Ibid s 8(1)(a).

²⁹ Ibid s 8(1)(b).

³⁰ Ibid s 8(1)(c).

³¹ Ibid s 8(1)(d).

³² Ibid s 18(1)(a)(i).

³³ Ibid s 9(2).

to specific information about a subject,³⁴ and it does not include general news.³⁵ The comment attached to s 9(1) provides that these services may include stock market reports, weather services, real estate information and entertainment information.

Religious, non-English language and racing services

Section 18(1)(a)(i) and (iv) are applicable to these types of services, which have the characteristics of being targeted to special interest groups and because they provide programs of limited appeal. Despite this, services of this type are also the province of commercial and community radio broadcasting, and for this reason, the 2001 clarification has considerably narrowed the scope of the content they may broadcast.

The clarification that relates to religious services in s 10 is clearly designed to ensure that religious narrowcasting does not enter into the territory of either commercial or community religious radio broadcasting. Section 10(1) limits the service to that ‘provided for 1 or more of following purposes, *and for no other purpose*’ (emphasis added).³⁶ The three types of permitted purpose are:

- the propagation of religious beliefs, values and lifestyles;³⁷
- the broadcasting of religious rituals and events of religious significance;³⁸
- the provision of information and services relevant to religious beliefs, values and lifestyles.³⁹

Section 10(2) then reinforces the effect of the permitted purposes by excluding services that includes material *not relevant* to one or more of those permitted purposes. A comment explains that ‘mainstream’ music with no obvious religious significance, and not broadcast for analysis or commentary, is material not relevant for s 10(1). In other words, if the content of the service sounds like a commercial or community religious broadcasting service, it will not conform to the provisions of s 10(1) and will not be an open narrowcasting service.

³⁴ Ibid s 9(1)(a).

³⁵ Ibid s 9(1)(b).

³⁶ Ibid s 10(3) provides that such a service is an open narrowcasting service.

³⁷ Ibid s 10(1)(a).

³⁸ Ibid s 10(1)(b).

³⁹ Ibid s 10(1)(c).

The clarification also relates to non-English language services. To be an open narrowcasting service under s 11,⁴⁰ the content of the service has to either be provided wholly in language other than English,⁴¹ or be provided in a language other than English, except for incidental English content.⁴² The [331] latter provision is illustrated by a comment, that gives two examples of incidental content — interviews that are broadcast in English with a translation into the other language, and English broadcasts of the station identification.

Racing services are primarily permitted to broadcast descriptions of races and can only provide minimal incidental content,⁴³ as set out in the provisions of s 12(2)–(4) inclusive. The main characteristics of a racing service are set out in s 12(2), which provides that at least 80 per cent of the content of the service on a day, with the exception of Christmas or Good Friday, will comprise all of the following:

- descriptions of any combination of horse, harness and greyhound racing;⁴⁴
- the provision of information directly related to horse, harness, or greyhound racing, including selections, scratchings, betting information and track conditions;⁴⁵
- certain limited forms of incidental material, such as music, news weather, announcements, and advertisements, that is only provided during periods between races, and to the minimum extent practicable, for no more than 15 minutes in each hour of the day.⁴⁶

Of the remaining time,⁴⁷ a significant proportion of the content has to be relevant to horse, harness or greyhound racing, or be of interest mainly to persons involved in racing.⁴⁸ The service also has to be promoted as a service of interest mainly to persons involved in racing, or using the words 'racing radio service'.⁴⁹

⁴⁰ Ibid s 11(3).

⁴¹ Ibid s 11(1)(a).

⁴² Ibid s 11(1)(b).

⁴³ Ibid s 12(1) provides that the section applies if the broadcasting service has the characteristics set out in subsections (2), (3) and (4).

⁴⁴ Ibid s 12(2)(a).

⁴⁵ Ibid s 12(2)(b).

⁴⁶ Ibid s 12(2)(c).

⁴⁷ That is, approximately 20 per cent.

⁴⁸ 2001 notice s 12(3).

⁴⁹ Ibid s 12(4).

Groups

The 2002 notice provided two additional clarifications that relate to special interest groups and to programs of limited appeal.⁵⁰ The first of these clarifications is drafted curiously to construct a ‘negative’ definition of age. It concerns services ‘targeted to persons of a particular age, or a particular range of ages’,⁵¹ and adds a comment that if the target audience is described in terms such as ‘Generation X’ or ‘baby boomers’, the service is likely to be targeted to persons of a particular age or range of ages.

However, s 5(2) provides that the only age range that will be permitted as a open narrowcasting service are those ‘targeted to persons less than 10 years old’. If the only reason for the service is that based on age, then for all other age groups, the service cannot be an open narrowcasting service.⁵² The provision thus leaves open the possibility that additional features can be considered for these groups. However, the drafting of a provision that characterises ‘age’ in terms of a sociological observation, is not about ‘age’ at all, but is instead directed at the [332] ‘presumed interests’ of a demographic, and perhaps should be redrafted to say what it really means. Additionally, the provision has mixed demographics with ‘age’ by defining age in terms of demographic groups like baby boomers, and then constructing the permissive features of the provision with a calendar-based age span, that is, those under 10.

Informal groups, on the other hand, can be considered to be a special interest group for the purposes of s 18(1)(a)(i), whether it is organised on a formal basis or not.⁵³ However, this provision is not intended to affect the operation of s 5,⁵⁴ so would presumably exclude informal groups that are based on ‘age’ or demographics.

Broadcasting Services (Additional Conditions — Open Narrowcasting Radio Services) Notice 2002

The requirements of this notice (the condition notice) take effect on 1 January 2003,⁵⁵ and impose additional conditions for open narrowcasting radio services that use a

⁵⁰ Ibid s 18(1)(a)(i) and (iv) are applicable to these types of services, which have the characteristics of being targeted to special interest groups and because they provide programs of limited appeal.

⁵¹ Ibid s 5(1).

⁵² Ibid s 5(3).

⁵³ Ibid s 6(1).

⁵⁴ Ibid s 6(2).

⁵⁵ Conditions notice s 2.

transmitter authorised under an 'HPON radio licence', or provide the service as a 'networked service'.⁵⁶ The notice does not impact on *solus* open narrowcasting radio services that transmit using LPON radio licences, though will affect them if they are networked. The conditions are set out in Sch 1 of the conditions notice, as provided for in s 120(1)(b) of the BSA.⁵⁷

Definitions: HPON radio licence, LPON radio licence, and networked service

HPON radio licences are transmitter licences issued under s 100 of the *Radiocommunications Act 1992*, have been planned under s 34 of the BSA, and transmit at a maximum power which *exceeds* 1 watt in a residential area or 10 watts in a non-residential area.⁵⁸

LPON radio licences are also transmitter licences, but their maximum power *does not exceed* 1 watt in a residential area or 10 watts in a non-residential area.⁵⁹

Networked services are open narrowcasting radio service provided under any combination of 2 or more HPON and LPON licences, which provide substantially the same content in substantially the same form in each area to which the transmitters relate.⁶⁰

What do the conditions require?

Service providers affected by the conditions notice have to give the ABA a description of their service, in an approved form, of how reception of the service is limited as described under s 18(1)(a) of the BSA.⁶¹ Existing service providers have to

⁵⁶ Schedule 1, cl 1.

⁵⁷ Section 4 and see above n 9 above.

⁵⁸ Section 3. A note attached to this definition says that it is based on the definition of HPON radio licence in s 3 of the Australian Communications Authority (HPON Transmitter Licences) Direction No 1 of 2001.

⁵⁹ Section 3. A note attached to this definition says that it is based on the definition of low power open narrowcasting service in s 3 of the Australian Communications Authority (LPON Transmitter Licences) Direction No 2 of 2000.

⁶⁰ Section 3.

⁶¹ Clause 2. A note is provided for networked services, which says that an approved form may allow for a single statement that includes full information about the reception of the networked service for the program originator, and states that the information is the same for each of the other transmitters on which the service is broadcast.

give this information to the ABA by 31 January 2003.⁶² New service providers have to give this information to the ABA no later than 30 days after the service is first [333] provided.⁶³

Significant changes 'to a fact or circumstance by which reception of the service is limited in a way described in s 18(1)(a)', have to be notified to the ABA no later than 30 days after the significant change.⁶⁴ The statement has to be in an approved form describing the change and explaining how the reception of the service is limited in a way described in s 18(1)(a).

⁶² Clause 2(a), that is, not later than 30 days after the commencement of the notice.

⁶³ Clause 2(b).

⁶⁴ Clause 3. The note about networked services also applies to this provision.