EXPLANATORY STATEMENT

Issued by the authority of the Minister for Broadband, Communications,
And the Digital Economy

Australian Communications and Media Authority Act 2005

Australian Communications and Media Authority (MF NAS Transmitter Licences) Direction No. 1 of 2009

Authority for this Direction

Section 14 of the Australian Communications and Media Authority Act 2005 (‘ACMA Act’) provides, “the Minister may give written directions to ACMA in relation to the performance of its functions and the exercise of its powers”.

Purpose of this Direction

The purpose of this direction is to require ACMA to amend a statutory instrument, the Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998. The amendments will permit certain licence holders to provide a commercial radio broadcasting service under their apparatus licence, where they were previously providing such a service but are no longer able to do so because they now fall outside the grandfathering provision at Part 5.3.

Specifically the Direction preserves the application of the grandfathering provision, which gives the right to holders of MF NAS licences at 6 November 2002, to continue to provide a commercial broadcasting service. It also has the effect of allowing the licensees to maintain the benefit of section 40 broadcasting licences that they may hold.

Background

Section 9 of the ACMA Act confers on ACMA the function of managing the radiofrequency spectrum in accordance with the Radiocommunications Act 1992 (‘the Act’). This function, together with ACMA’s functions under certain related Acts, is referred to as “ACMA’s spectrum management functions”. Before the commencement of the ACMA Act in 2005, the spectrum management functions were vested in the Australian Communications Authority (‘ACA’).

Section 49 of the Act prohibits the operation of a radiocommunications device, otherwise than in accordance with a spectrum licence, an apparatus licence or a
class licence. Section 100 of the Act empowers ACMA to issue apparatus licences, and section 130 empowers ACMA to renew an apparatus licence by issuing a new apparatus licence.

Apparatus licences are subject to the licence conditions contained in the Act (Division 3 of Part 3.3, consisting of sections 107 to 113A). They are also subject to the applicable licence conditions found in the Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998 (“Broadcasting LCD”), made under subsection 107(1)(f) of the Act, and any further licence conditions imposed by ACMA under subsection 107(1)(g).

An MF NAS transmitter licence is an apparatus licence which operates at a frequency above the broadcasting services bands. Section 40 licences are issued under the Broadcasting Services Act 1992 without public tender, upon payment of a fee, to permit broadcasting of commercial services outside the broadcasting services bands.

The Australian Communications Authority (MF NAS Transmitter Licence) Direction No. 1 of 2003 (‘the Previous Direction’) was gazetted on 3 September 2003. It required the ACA to ensure that conditions were imposed on all MF NAS transmitter licences so as to prohibit the licensees from operating a station under the licence to provide a commercial broadcasting service, subject to certain exceptions.

The exceptions are based on a ‘grandfathering’ provision, enabling persons who had provided a commercial broadcasting service under an apparatus licence (narrowband area service) before 6 November 2002, and pursuant to a licence issued under section 40 of the Broadcasting Services Act 1992, to continue doing so.

The Previous Direction also required conditions to be imposed that prevent the licensee from moving the station more than 10 km from its location as at 6 November 2002, without the approval of the ACA.

The Broadcasting LCD was amended accordingly, and the relevant portion is set out at the foot of this explanatory statement.

**Consultation**

ACMA has been consulted prior to the making of the direction.

A direction made under section 14 of the ACMA Act is a legislative instrument for the purposes of the Legislative Instruments Act 2003 (LIA) (see LIA s.6(1)(d)).
A determination by ACMA under section 107 of the *Radiocommunications Act 1992* is also a legislative instrument, and must be tabled in the Parliament and is subject to disallowance.

Details of the clauses of the accompanying direction are provided in Attachment 1.
Clause 1 - Name of Determination

Clause 1 provides that the title of the accompanying direction is the *Australian Communications and Media Authority (MF NAS Transmitter Licences) Amendment Direction No. 1 of 2009*.

Clause 2 - Commencement

Clause 2 provides that the accompanying direction commences on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3 – Definitions

Clause 3 sets out definitions of terms used in the direction:

“Act” means the *Radiocommunications Act 1992*;

“Broadcasting LCD” means a statutory instrument under the *Radiocommunications Act 1992*, called *Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998*. This statutory instrument was made by the former Australian Communications Authority, and can be amended by ACMA.

Clause 4 – Amendment of the Broadcasting LCD

This is the operative clause of the direction, and requires ACMA to amend part 5.3 of the Broadcasting LCD (attachment 2).

The amendments to the Broadcasting LCD made pursuant to the Previous Direction applied to persons who operate a radio station under a narrowband area service (‘NAS’) licence in the frequency band 1606.5 kHz to 1705 kHz (‘MF’). It prohibited such licensees to provide a commercial broadcasting service, unless they came within the terms of an exception.

The terms of the exception are set out in subparagraphs 5.3(1) (a) to (d) of the Broadcasting LCD, attached.

The amendment required by this direction will allow a commercial service which had the benefit of the exception, but has suffered a lapse in continuity due to non-renewal of its licence, to resume and continue operation as under the original provision. The amendment will not increase the number of licensees operating under the exception, but may prevent it from diminishing.
The direction permits ACMA to determine further terms on which the licensee may resume transmission of a commercial broadcasting service. Examples of the types of terms which ACMA may impose are:

(1) ACMA may consider it necessary for the licensee give ACMA notice of its intention to use the licence for a commercial broadcasting service, and/or for ACMA to issue a formal acknowledgment of the applicability of the exemption prior to the commencement or recommencement of the service;

(2) the applicability of the provisions of subparagraphs 5.3 (1)(a) to (d), 5.3(2) and 5.3(3) of the Broadcasting LCD may be modified by ACMA where necessary, in relation to the licence;

(3) ACMA may determine administrative time limits applicable.
Extract from
RADIOCOMMUNICATIONS LICENCE CONDITIONS (BROADCASTING LICENCE) DETERMINATION NO 1 OF 1998

[Note: references to the ABA and the ACA should be read as references to ACMA; see *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005*, Schedule 4 Item 8.]

PART 5 – CONDITIONS FOR BROADCASTING LICENCE (NARROWBAND AREA SERVICE)

5.3 (1) A licensee that operates a narrowband area service station on a frequency in the frequency band 1606.5 kHz to 1705 kHz must not operate the station to provide a commercial broadcasting service unless:

(a) the broadcasting licence (narrowband area service) to which the station relates was issued by the ACA before 6 November 2002; and

(b) the commercial broadcasting service is permitted by a commercial licence allocated before 6 November 2002; and

(c) the commercial broadcasting service commenced before 29 August 2004; and

(d) the location of the station is:

(i) within 10 kilometres of its location on 6 November 2002 (the *old location*); or

(ii) a location that is:

(A) more than 10 kilometres from the old locations; and

(B) specified in a licence issued by the ACA in accordance with subsection (2A).

(2) The licensee must provide evidence required by the ACA for the purposes of paragraph (1)(c).

(2A) For sub-paragraph (1)(d)(ii)(B), the ACA may specify a location (the *new location*) if the ACA is satisfied that:

(a) transmissions from the new location would provide a service to substantially the same intended audience as the audience that was
intended to be covered from the old location; and

(b) transmissions from the new location would not significantly interfere with any existing Radiocommunications services.

(3) In this section:

commercial licence means a commercial radio broadcasting licence allocated by the ABA under section 40 of the *Broadcasting Services Act 1992*.

location, of a station, means the site latitude and longitude for the relevant broadcasting licence (narrowband area service) as recorded on the Register of Radiocommunications Licences.