EXPLANATORY STATEMENT
Issued by the Australian Communications and Media Authority

Radiocommunications Licence Conditions (Broadcasting Licence) Amendment Determination 2009 (No. 1)
Radiocommunications Act 1992

Purpose
The purpose of the Radiocommunications Licence Conditions (Broadcasting Licence) Amendment Determination 2009 (No 1) (the Amendment Determination) is to amend the Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998 (the Broadcasting LCD) in accordance with the Australian Communications and Media Authority (MF NAS Transmitter Licences) Direction No. 1 of 2009 (the Direction).

The Direction was made by the Hon Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy on 18 February 2009. The Direction requires the Australian Communications and Media Authority (the ACMA) to amend Part 5 of the Broadcasting LCD to permit holders of certain MF NAS transmitter licences to resume providing a commercial broadcasting service under their licence.

Legislative provisions
The predecessor to the ACMA, the Australian Communications Authority (ACA), made the Broadcasting LCD in 1998 under paragraph 107(1)(f) of the Radiocommunications Act 1992 (the Act). In accordance with the Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005, the ACMA is taken to have made the Broadcasting LCD under the Act as previously made by the ACA.

The Broadcasting LCD contains licence conditions applicable to all broadcasting licences¹ issued under Part 3.3 of the Act. Part 5 of the Broadcasting LCD contains specific conditions for broadcasting licences that authorise the operation of narrowband area service stations.

Subsection 33(3) of the Acts Interpretation Act 1901 provides that where an Act confers a power to make an instrument, that power shall, unless the contrary intention appears, be construed as including a power exercisable in a like manner and subject to like conditions, to amend that instrument.

Background
A medium frequency narrowband area service (MF NAS) transmitter licence is an apparatus licence which operates at a frequency above the broadcasting services bands (BSBs). An MF NAS transmitter licence authorises the operation of a narrowband area service station in the frequency band 1606.5 kHz to 1705 kHz.

With an MF NAS transmitter licence and an over-the-counter section 40 non-BSB commercial broadcasting licence,² a person was, prior to 2003, entitled to provide a commercial radio broadcasting service using those frequencies.

¹ The term ‘broadcasting licence’ is defined in the Radiocommunications (Interpretation) Determination 2000.
² 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 was gazetted on 3 September 2003. It required the ACA to ensure that conditions were imposed on all MF NAS transmitter licences to prohibit the licensees from providing a commercial radio broadcasting service under the licence, subject to certain exceptions.

The exceptions were given effect by the insertion of a ‘grandfathering’ provision at section 5.3 of the Broadcasting LCD, which enables a licensee that, before 6 November 2002, had:

- provided a commercial broadcasting service using an MF NAS transmitter licence; and
- held a licence issued under section 40 of the Broadcasting Services Act 1992
to continue to provide the commercial broadcasting service, as long as the licensee had commenced the service before 29 August 2004. In addition, the station had to be in a location no more than 10 km from its location as at 6 November 2002 unless the ACA had approved a different location.

An unintended consequence of the grandfathering provisions is that if a licensee of a commercial broadcasting service allowed the related MF NAS transmitter licence to expire, any subsequent MF NAS transmitter licence allocated by the ACMA for that service would not fall within the scope of the grandfathering provisions (as it would have been issued after 6 November 2002). Consequently the right to provide a commercial broadcasting service from the station that was authorised under the expired MF NAS transmitter licence would be lost.

Operation

The Direction, given by the Minister to the ACMA under section 14 of the Australian Communications and Media Authority Act 2005, was registered on the Federal Register of Legislative Instruments on 23 February 2009. The Direction requires the ACMA to amend Part 5 of the Broadcasting LCD so as to provide that where a person:

1. is the licensee of a licence under the Act which authorises the operation of a narrowband area service station on a frequency in the frequency band 1606.5 kHz to 1705 kHz; and
2. was the licensee of a previous licence under which the person was able to provide a commercial broadcasting service by virtue of the provisions of subparagraphs 5.3(1)(a) to (d) of the Broadcasting LCD; and
3. did not apply for renewal of the previous licence in accordance with section 129 of the Act and consequently did not receive a new licence under section 130 of that Act,

the person may resume providing a commercial broadcasting service on terms set by the ACMA.

The Amendment Determination makes a number of changes to the Broadcasting LCD, primarily to give effect to the Direction. The individual changes introduced by the Amendment Determination are:

1. **Updating Notes in Part 1**

References to the Radiocommunications (Definition) Determination No. 2 of 1993 in Notes 1, 2 and 3 to subsection 1.4(1) of the Broadcasting LCD are updated to the Radiocommunications (Interpretation) Determination 2000.

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3 Legislative Instrument - F2009L00687
2. Change to section 5.3

Drafting change to section 5.3 to accommodate the introduction of new section 5.4 into the Broadcasting LCD.

3. New provisions after section 5.3

New provisions are inserted into the Broadcasting LCD immediately after section 5.3, at section 5.4, to give effect to the Direction.

The provisions are designed to accommodate licensees that did not apply to renew their MF NAS transmitter licence by allowing them to resume commercial broadcasting, under a subsequent MF NAS transmitter licence allocated by the ACMA, on terms specified by the ACMA.

New subsection 5.4(1) sets out the circumstances under which the new provisions are to apply. It limits the application of the proposed provisions, so that they only apply in circumstances where:

1. the licensee currently holds a broadcasting licence (narrowband area service) issued by the ACMA;
2. the licensee was previously providing a commercial radio broadcasting service under an MF NAS transmitter licence in accordance with section 5.3 of the Broadcasting LCD; and
3. that licence has expired because the licensee failed to apply for the renewal of the licence.

New subsection 5.4(2) sets out the conditions that must be satisfied in order for the licensee to resume providing a commercial radio broadcasting service. These provisions ensure that a licensee can only resume providing a commercial radio broadcasting service under a subsequent licence allocated by the ACMA where the subsequent licence is intended to serve the same audience as the expired licence.

The licensee is also required to provide evidence to the ACMA of how subsection 5.4(1) applies to their circumstances (if this is requested) and to notify the ACMA before providing a commercial broadcasting service using the subsequent licence.

New subsection 5.4(3) ensures that the meaning given to commercial licence and location in the grandfathering provisions at section 5.3 is applicable to the new provisions at section 5.4.

4. Updating references to the ACA and ABA

References to ‘the ACA’ and the Australian Broadcasting Authority (the ABA), in the Broadcasting LCD are updated and changed to ‘the ACMA’ unless the reference refers to a specific action undertaken by either the ACA or ABA prior to the establishment of the ACMA on 1 July 2005.

Consultation

Section 17 of Legislative Instruments Act 2003 (the LIA) requires the ACMA to be satisfied that any consultation it considers to be appropriate and that is reasonably practicable to undertake has been undertaken. The LIA provides that consultation could involve notification to bodies or to organisations representative of persons who are likely to be affected by the proposed instrument. Such notification might include inviting the public to make submissions by a specified date.

On 3 July 2009 parties likely to be affected by the proposed instrument (including industry bodies such as Commercial Radio Australia and the Australian Narrowcast Radio Association) were provided detailed information on the proposed amendments and of the upcoming release of the draft Amendment Determination.

The draft Amendment Determination and a background paper were published on the ACMA’s website for a period of two weeks from Monday 27 July 2009. These documents were accompanied by a public invitation to provide written comments to the ACMA by 10 August 2009.
There were no submissions to the ACMA from the public or industry members on the proposed amendments.

**Regulation impact**

The ACMA obtained advice from its SES contact officer for the Government’s regulation impact analysis arrangements that the Amendment Determination has no or low impact.

For those reasons under the self-assessment regime administered by the Office of Best Practice Regulation, the ACMA has determined that there is no need to produce a Business Cost Calculator Report or to prepare a Regulation Impact Statement. The ACMA RIS exemption number is ACMA 104.

**Attachment**

Details of the Amendment Determination are in the Attachment.
NOTES ON SECTIONS

Section 1 Name of Determination

Section 1 provides for the citation of the instrument.

Section 2 Commencement

This section provides for the Amendment Determination to commence on the day after it is registered.

Section 3 Amendment of Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998

This section provides that Schedule 1 varies the Radiocommunications Licence Conditions (Broadcasting Licence) Determination No. 1 of 1998.

Schedule 1 Amendments

[1] Subsection 1.4(1), notes 1 to 3


[2] Section 5.3

Item [2] amends existing section 5.3 to allow for the operation of new section 5.4.

[3] After section 5.3

Item [3] inserts a new section 5.4 immediately after section 5.3 to give effect to the Australian Communications and Media Authority (MF NAS Transmitter Licences) Direction No. 1 of 2009. In particular, new subsection 5.4(2) sets out the terms on which a person might resume providing a commercial broadcasting service using a subsequent MF NAS transmitter licence.


Item [4] updates reference to the ABA and ACA to the ACMA, where appropriate.