EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2010 (No.1)

Broadcasting Services Act 1992

Purpose

The purpose of the Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2010 (No.1) (the Amendment Declaration) is to amend the Broadcasting Services (Primary Commercial Television Broadcasting Service) Declaration 2010 (the Declaration) in order to declare, under subclause 41G(1) of Schedule 4 to the Broadcasting Services Act 1992 (the Act), a particular ‘SDTV multi-channelled commercial television broadcasting service’ (SDTV multi-channel) to be the ‘primary commercial television broadcasting service’ for commercial television broadcasting licensees in their licence areas.

Legislative Provisions

Clause 41G of Schedule 4 to the Act provides that the Australian Communications and Media Authority (the ACMA) may declare one of the SDTV multi-channels provided by a commercial television broadcasting licensee to be the ‘primary commercial television broadcasting service’ (Primary Service) during the simulcast period or simulcast-equivalent period for the licence area of the licence (subclause 41G(1)).

Subclause 41G(1A) requires that the ACMA must make such a declaration as soon as practicable after the later of when a licensee commences to provide a SDTV multi channel service and the commencement of that subclause.

The declaration of a Primary Service must be made by legislative instrument.

Background

The regulatory regime for commercial television broadcasting services is established by the Act. The Act sets out rules for the conversion, over time, of commercial television broadcasting services from analog to digital mode. These rules include the requirement for a ‘simulcast period’ for each licence area, during which time commercial television broadcasting licensees must simulcast their original analog service in both standard definition digital mode (SDTV) and analog mode. This simulcast service in SDTV is taken to be the core commercial television broadcasting service (the core service).

However, the concept of a core service does not apply for licences allocated under section 38B of the Act on or after 1 January 2009. These licences authorise the provision of the following services in digital mode only during the simulcast period:

- two SDTV multi-channels; and
- one high-definition multi-channelled commercial television broadcasting service (the HDTV multi-channel).

1 Licences allocated under section 38B of the Act before 1 January 2009 authorise the provision of commercial television broadcasting services in digital mode only. In these cases, the core service is the sole SDTV multi-channel that could be provided before 1 January 2009. See sections 41A to 41C of, and paragraph 7(1)(m) of Schedule 2 to, the Act.
These licences do not authorise an analog service and consequently do not have an SDTV simulcast service or a core service (all services provided under such licences are regarded as multi-channels).

In these instances, the ACMA may declare one of the SDTV multi-channels provided by the commercial television broadcasting licensee to be the Primary Service for the licence in the relevant licence area.

Declaring a Primary Service will provide certainty in respect of the regulatory obligations applying to each service provided by a commercial television broadcasting licensee during the simulcast period or simulcast-equivalent period in the case of services provided by any digital-only commercial television broadcasting licences.

A decision by the ACMA to declare a Primary Service will affect the operation of certain content regulations that apply to commercial television broadcasting services in the Act. These include, for example, the anti-siphoning scheme, program standards (e.g. Broadcasting Services (Australian Content) Standard 2005, Television Program Standard 23 – Australian Content in Advertising and the Children’s Television Standards 2009) and captioning rules.

Operation

The Amendment Declaration provides that during the simulcast period for the four licence areas, being Southwest and Great Southern TV1, Geraldton TV1, Kalgoorlie TV1 and Western Zone TV1, the SDTV multi-channels specified in new Schedule 2 to the Declaration are the Primary Services for the relevant licensees of those services.

There is one commercial television broadcasting licence allocated under section 38B of the Act on or after 1 January 2009 in each of the four licence areas, being SL1130049 held by West Digital Television Pty Ltd in Southwest and Great Southern TV1, SL1130046 held by West Digital Television No.2 Pty Ltd in Geraldton TV1, SL1130047 held by West Digital Television No.4 Pty Ltd in Kalgoorlie TV1 and SL1130048 held by West Digital Television No.3 Pty Ltd in Western Zone TV1. Each licensee currently provides only one SDTV multi-channel, known as TEN West.

Accordingly, the Amendment Declaration amends the Declaration to declare TEN West to be the Primary Service of each of the licensees of SL1130049, SL1130046, SL1130047 and SL1130048.

Consultation

Section 17 of the 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 ACMA released a Consultation Paper for public and industry comment on 3 May 2010 on its proposed approach to declare the service that is currently the commercial television broadcaster’s ‘core’ service to be the Primary Service by reference to its on-air identification tag. The Consultation Paper also referred to digital-only licences and noted that, where appropriate, any declaration made in relation to these licences will be consistent with the process applying to commercial television broadcasting licences after the end of the simulcast period.

A period of approximately 4 weeks was provided for comment on the Consultation Paper. Three submissions were received from the commercial television broadcasting industry association Free TV, WIN Television Mildura Pty Ltd and the Australian Subscription Television and Radio Association (ASTRA). All submissions were published on the ACMA website. Free TV and WIN Television Mildura Pty Ltd indicated that the Primary Services to be specified and the method of designating the Primary Services were appropriate. ASTRA was also supportive of declaring Primary Services for commercial television broadcasting licensees prior to the end of a simulcast period.
As there is only one service in each licence area referred to in the Amendment Declaration that can be declared as the Primary Service, a further public consultation process was not undertaken. Instead the affected licensees, being West Digital Television Pty Ltd, West Digital Television No.2 Pty Ltd, West Digital Television No.3 Pty Ltd, West Digital Television No.4 Pty Ltd and other commercial television broadcasting licensees in each licence area, being WIN Television WA Pty Ltd and entities in the PRIME Media Group, as well as Free TV, were consulted.

All comments received supported declaring TEN West as the Primary Service in each licence area.

Accordingly, the ACMA is satisfied that consultation has been conducted in accordance with the requirements under section 17 of the LIA.

**Regulatory Impact**

The ACMA obtained advice prior to 1 July 2010 from its SES contact officer for the Government’s regulation impact analysis arrangements that the Amendment Declaration has no or low impact. Accordingly, 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 134.

**Attachment**

Further details of the Amendment Declaration are in the Attachment.
NOTES ON SECTIONS

Section 1 – Name of Declaration

Section 1 provides that the name of the Amendment Declaration is the Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2010 (No.1).

Section 2 – Commencement

This section provides that the Amendment Declaration commences the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Amendment of Broadcasting Services (Primary Commercial Television Broadcasting Service) Declaration 2010

This section provides that Schedule 1 of the Amendment Declaration amends the Broadcasting Services (Primary Commercial Television Broadcasting Service) Declaration 2010.

Schedule 1 Amendments

[Item 1] New section 5 – Declaration of primary commercial television broadcasting service during the simulcast period or simulcast equivalent period

New subsection 5(1) provides that, under subclause 41G(1) of Schedule 4 to the Act, the ACMA declares that the SDTV multi-channel service specified in column 4 of the table in Schedule 2 to be the Primary Service of the relevant licensee in that licence area, in this case the Southwest and Great Southern TV1, Geraldton TV1, Kalgoorlie TV1 and Western Zone TV1 licence areas.

Subsection 5(2) provides that the Declaration made in subsection (1) ceases to have effect from the end of the simulcast period or the simulcast equivalent period (as the case may be) for the licence area of the licence. As the Declaration takes effect from the day after it is registered on the Federal Register of Legislative Instruments and consistent with subclause 41G(1A) of the Act, this subsection ensures that this Declaration ceases at the end of the simulcast period for the relevant licence areas, when that is determined.

In order that the ACMA or some other person is able to identify and differentiate the Primary Service from any other SDTV multi-channel services that may be provided by the licensee in the licence area, subsection 5(3) sets out particular criteria to which regard may be had in determining which SDTV multi-channel service provided by a licensee is the Primary Service specified in Schedule 2. Notably, watermarks or images displayed during provision of a service, as a means of identifying the service, could be used to distinguish between SDTV multi-channels.

Subsection 5(4) makes it clear that the matters to which regard may be had in identifying a Primary Service are not limited by the contents of subsection 5(3).

[Item 2] New Schedule 2 – Primary commercial television broadcasting services during the simulcast period or simulcast equivalent period

For the purposes of new section 5, new Schedule 2 of the Declaration sets out, in a table, the SDTV multi-channel declared by the ACMA to be the Primary Service of a licensee for a particular licence area, in this case the Southwest and Great Southern TV1, Geraldton TV1, Kalgoorlie TV1 and Western Zone TV1 licence areas. The TEN West service is declared to be the Primary Service of the licensees of the commercial television broadcasting licences SL1130049, SL1130046, SL1130047 and SL1130048.