Explanatory Statement

# Australian Communications and Media Authority Act 2005

# Broadcasting Services Act 1992

**Australian Communications and Media Authority (Television Licence Area Planning and Monitoring) Direction 2013**

Issued by the Authority of the Minister for Broadband, Communications and the Digital Economy

Authority

Section 14 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act) provides that the Minister for Broadband, Communications and the Digital Economy (the Minister) may give written directions to the Australian Communications and Media Authority (the ACMA) in relation to the performance of its functions and the exercise of its powers.

Subsection 26(8) of the *Broadcasting Services Act 1992* (the BSA) provides that the Minister may direct the ACMA about the exercise of its powers to make or vary a television licence area plan for a particular area.

Purpose

The purpose of the *Australian Communications and Media Authority (Television Licence Area Planning and Monitoring) Direction 2013* (the Direction) is to direct the ACMA that it must consider, on an area basis, whether providers of digital television broadcasting services in an area will be able to meet the *restack objective*.

The restack objective is that broadcasters in an area cease transmitting digital television broadcasting services in accordance with the applicable end dates for channel allotments specified in a Television Licence Area Plan (TLAP) for that area and continue to provide those services using another channel allotment in accordance with that TLAP.

If the ACMA is satisfied that the capacity of providers of digital television broadcasting services to meet the restack objective has been significantly affected by an event or circumstance outside their control, and mitigation actions could not reasonably have been taken, or could not reasonably be taken, by those providers or transmission service providers contracted to them, and that as a result, the restack objective is unlikely to be met in an area, the Direction requires the ACMA to exercise its power to vary a TLAP. The Direction requires that any variation to a TLAP that the ACMA makes in compliance with the Direction is to be to the minimum extent necessary to address the adverse impact of the event or circumstance. The Direction also provides that before varying a TLAP in compliance with the Direction, or commencing consultation for such a variation, the ACMA is to advise the Minister, with reasonable notice, of its intention to vary a TLAP.

This Direction is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (the LIA) but it is not subject to disallowance: item 41 of the table in subsection 44(2) of the LIA specifies that ministerial directions to any person or body are not subject to disallowance.

Background

On 24 June 2010, the Minister announced the Australian Government’s decision to release 126 MHz of broadcasting spectrum in the range 694-820MHz as a digital dividend. Two 45 MHz blocks of spectrum in the digital dividend is to be auctioned for other uses in April 2013 (along with spectrum from the 2.5GHz band). In order to release this spectrum, broadcasting services need to be relocated out of the digital dividend spectrum and reorganised in their remaining spectrum allocation. This process is commonly known as ‘restack’ and will involve around 1500 digital television broadcasting services moving to a new channel allocation.

The ACMA is responsible for undertaking the channel planning necessary for restack in licence areas throughout Australia.

Subsection 26(1B) of the BSA provides that the ACMA may prepare Television Licence Area Plans (TLAPs). TLAPs are being used by the ACMA to facilitate restack by identifying new channels on which broadcasters are to transmit their digital television broadcasting services, and setting associated technical requirements. Subsection 26(1D) enables the ACMA to specify specific dates in the TLAPs by when the allotment of new (restacked) channels come into effect, and existing (pre-restack) channel allotments cease to be in effect.

Section 26AA of the BSA imposes a compliance obligation on broadcasters in relation to the channel allotments and technical specifications contained in TLAPs. A licence condition requiring compliance with TLAPs is also imposed on commercial and community broadcasters (see paragraphs 7(1)(s) and 9(1)(k) of Schedule 2 to the BSA respectively) and a breach may attract civil or criminal penalties (Division 3 of Part 10 of the BSA refers).

Broadcasters have expressed concern about the consequences to them if the restack of their digital television broadcasting services is delayed (either generally throughout Australia or in a particular area) for a reason beyond their control, with the result that they are unable to comply with the channel allotment timeframes specified in the applicable TLAP. In particular, broadcasters have expressed concern that they are vulnerable to, among other things, the vagaries of nature, the availability of a skilled workforce for restack, the equipment supply line and project planning processes.

This Direction addresses broadcasters’ concerns by requiring the ACMA to consider, on an area basis, the ability of broadcasters to meet the restack objective. In making this assessment, the ACMA is required to take into account any relevant information provided by the Secretary or an SES employee of the Department.

The Direction also requires that if the ACMA is satisfied that the capacity of a provider of digital television broadcasting services to meet the restack objective has been significantly affected by an event or circumstance outside their control, and mitigation actions could not reasonably have been taken, or could not reasonably be taken, by the provider or a transmission service provider contracted to them, and that as a result, the restack objective is unlikely to be met in an area, it must vary a TLAP. The variation must be only to the minimum extent necessary to address the adverse impact of the event or circumstance.

The Direction also provides that before varying the TLAP in compliance with the Direction, or commencing consultation for the variation, the ACMA is to advise the Minister, with reasonable notice, of its intention to vary the TLAP. In providing its advice, the ACMA is required to include an initial assessment of options for how the TLAP may be varied, and the likely impact of each option on users (including future users) of the relevant spectrum (ie the radiofrequency spectrum in the frequency range 694 to 820 MHz).

The Direction does not prevent the ACMA from varying a TLAP at any other time in respect of any matter.

Regulation Impact Statement

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary as the Direction’s impact is of a machinery nature, particularly in light of the Australian Communications and Media Authority 2011 Regulation Impact Statement (RIS) *Clearing the Digital Dividend - Planning Principles for Restacking Digital Television Channels*.

Consultation

The ACMA, commercial television broadcasters and participants in the auction of the digital dividend spectrum were consulted before the making of this Direction. Issues raised by these stakeholders were considered and incorporated into the Direction where appropriate.

Details of the Direction are set out in the Attachment.

**Attachment**

Notes on Clauses

Clause 1 provides that the name of the Direction is the *Australian Communications and Media Authority (Television Licence Area Planning and Monitoring) Direction 2013*.

Clause 2 provides that the Direction will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3 defines the terms used throughout the Direction.

Clause 4 directs the ACMA in relation to its consideration of channel allotments in TLAPs.

Subclause 4(1) directs that the ACMA consider, until restack occurs in an area, whether the providers of digital television broadcasting services in that area will be able to meet the *restack objective*. The restack objective is that broadcasters in an area cease transmitting their digital television broadcasting services in accordance with the applicable end dates for channel allotments specified in a TLAP for the area, and continue to provide those services using another channel allotment in accordance with that TLAP. The end date for channel allotments most commonly specified in TLAPs is 31 December 2014.

Subclause 4(1) requires that the ACMA give consideration to whether the restack objective is able to be met in an area at those times that the ACMA considers appropriate, or at other times specified in a notice in writing provided by the Secretary or Deputy Secretary of the Department. This consideration by the ACMA is to continue until restack has occurred in the area.

Subclause 4(2) directs that when the ACMA is considering whether the restack objective is able to be met in an area, it is to take into account any relevant information provided by the Secretary or an SES employee of the Department. In providing this information, the Secretary or SES employee would (among other sources) be able to draw upon information provided to the Department by Broadcast Australia, the entity the Department has contracted to manage restack, or from other parties affected by restack.

Clause 5 directs the ACMA to vary a TLAP in specified circumstances.

Subclause 5(1) specifies that if the ACMA is satisfied of particular specified matters, the ACMA must vary a TLAP (pursuant to subsection 26(2) of the BSA).

Subclause 5(1) requires that the ACMA take account of any relevant information provided by the Secretary or an SES employee of the Department in satisfying itself of these matters. Again, the Secretary or SES employee would be able to draw upon information provided to the Department by Broadcast Australia (among other sources).

The ACMA is required under paragraph 5(1)(a) to be satisfied that the capacity of a provider of digital television broadcasting services in an area to meet the restack objective has been significantly affected by an event or circumstance outside their control.

Examples of events or circumstances outside a broadcaster’s control that may significantly affect the broadcaster’s capacity to meet the restack objective may include a natural disaster such as a flood or bushfire that causes damage to a widespread area, an extended delay on the part of a government authority (such as a local council) in providing a regulatory approval necessary for restack work to proceed, a large shortfall in the availability of equipment supplies necessary for restack (for example, due to a failure to provide equipment by an international supplier), or a significant breakdown in the performance of restack activities in an area that is not in any way attributable to a broadcaster’s action or inaction. The impact of such events or circumstances may vary depending on their scale and when they occur relative to the applicable end dates for channel allotments specified in TLAPs. By contrast, a broadcaster’s failure to comply with a reasonable request for information about a service or site in an area that results in equipment not being ordered in sufficient time for restack work to be completed within the TLAP timeframe, or incorrect equipment being ordered, would not be an event or circumstance outside a broadcaster’s control for the purposes of paragraph 5(1)(a).

The ACMA is also required under paragraph 5(1)(b) of the Direction to be satisfied that mitigation action could not reasonably have been, or could not reasonably be, taken by a broadcaster or a transmission service provider contracted to the broadcaster, in order to meet the restack objective.

Paragraph 5(1)(b) contemplates mitigation actions that could be taken in anticipation of an event or circumstance delaying restack (ie prior to the event or circumstance occurring), and also mitigation actions that could be taken after a disruptive event or circumstance occurs.

In satisfying itself as to the matter specified in paragraph 5(1)(b), it is expected that the ACMA would take into consideration any mitigation action already undertaken, as well as any other mitigation action that could reasonably have been taken, or could reasonably be taken, by the broadcaster or their contracted transmission service provider. A key consideration will be whether the broadcaster and their contracted transmission service provider have undertaken all reasonable mitigation actions available to date in order to meet the restack objective, and whether there is any reasonable prospect of other mitigation actions being available before the restack of the affected services is scheduled to occur in accordance with the relevant TLAP.

An example of mitigation action that could have been taken in anticipation of an equipment shortfall may be the broadcaster and/or their contracted transmission service provider making reasonable efforts to assist the restack manager, Broadcast Australia, to order equipment with sufficient lead-time to minimise the impact of any future equipment shortfall. A mitigation action that could reasonably be taken in the event that a shortfall occurs may be for the broadcaster and/or their contracted transmission service provider to make reasonable efforts to assist the restack manager in sourcing equipment from an alternative supplier.

The extent to which an event or circumstance has impacted on broadcasters and transmission sites would be relevant to considering the availability of mitigation actions to be reasonably taken. For example, it may be more reasonable to expect mitigation actions where an event or circumstance affects one service at a single transmission site than an event or circumstance that affects many broadcasters at multiple transmission sites. Also, it may be easier to mitigate an event occurring early in the restack process (through, for example, rescheduling works to a later date), than one occurring very close to the applicable end date for the relevant channel allotment(s).

Paragraph 5(1)(c) requires that the ACMA be satisfied that there is no reasonable prospect that the restack objective can be met in an area, and that this is as a result of the matters specified in paragraphs 5(1)(a) and (b).

That is, the ACMA is required to vary a TLAP only if it is satisfied that:

* the capacity of a provider of digital television broadcasting services to meet the restack objective in an area has been significantly affected by an event or circumstance outside their control; and
* there are no mitigation actions that could reasonably have been taken (in the past), or could reasonably be taken (in the future), by the provider or their transmission service provider in order to minimise the impact of the event or circumstance on their capacity to meet the restack objective (in addition to any mitigation action that have already been undertaken by the provider or their contracted transmission service provider); and

that as a result, there is no reasonable prospect of the restack objective being met in the area.

Subclause 5(2) directs that where the ACMA varies a TLAP in circumstances where it is required to do so by subclause 5(1), the variation is to be to the minimum extent necessary to address the adverse impact of the event or circumstance that has led to the restack objective not being able to be met. For example, if the adverse impact of an event or circumstance can be addressed and the affected provider of digital television broadcasting services may be able to cease transmitting their services on their existing channels and commence transmitting on their new channels within three months, a variation to a TLAP that extends the restack dates should not go beyond that timeframe. If, for example, only one service is adversely impacted by the occurrence of an event or circumstance, a variation to a TLAP should only change restack dates for that service (as well as for any service necessarily and consequentially affected by the other service’s restack date).

Paragraph 5(3)(b) makes clear that the ACMA must be satisfied of the existence of each of the factors in subclause 5(1) before it is required by this Direction to vary a TLAP.

The Direction makes clear in paragraph 5(3)(a) that the ACMA is not prevented from varying a TLAP at any other time, in respect of any other matter.

Clause 6 directs that where the ACMA is required to make a variation to a TLAP in compliance with clause 5 of this Direction, before exercising the power to vary or commencing consultation for the variation, the ACMA is to advise the Minister, with reasonable notice, of its intention to vary the TLAP (subclause 6(1) and (2) refer).

In providing its advice to the Minister, the ACMA is required by subclause 6(3) to include an initial assessment of the options for how the TLAP may be varied, and the likely impact of each option on users of the radiofrequency spectrum in the frequency range 694 to 820 MHz. The likely impact on users of the spectrum would include existing users (ie broadcasters) and future users (ie spectrum licence-holders whose licences for the frequency bands 703-748 MHz and 758-803 MHz commence on 1 January 2015).

It is intended that the ACMA provide the Minister with reasonable notice of its intention to vary a TLAP or commence consultation for such a variation so that the Minister has an opportunity to understand and assess the wider impacts of an intended variation before it is made.

The reasonableness of the timeframe in which notice is to be provided by the ACMA to the Minister pursuant to subclause 6(2) will depend on the circumstances. For example, the timeframe between when the ACMA is satisfied of the existence of the factors required in subclause 5(1) and the relevant restack dates specified in the TLAP will impact upon how much notice the ACMA may give to the Minister of its intention to vary a TLAP or commence consultation for a variation.