

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services Local Programming Determination 2018

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services Local Programming Determination 2018* (**the instrument**) under subsection 61CZ(1) of the *Broadcasting Services Act 1992* (**the Act**).

Subsection 61CZ(1) of the Act provides that the ACMA may, by legislative instrument, make a determination (**the local programming determination**) prescribing matters required or permitted by the Act to be prescribed by the local programming determination.

Background

Since 2001, the ACMA (and its predecessor, the Australian Broadcasting Authority) has maintained a series of licence conditions that required minimum levels of ‘material of local significance’ (also referred to as ‘local content’) to be provided by licensees holding regional aggregated commercial television broadcasting licences (**regional aggregated licences**). These licence conditions were made in accordance with the power to impose additional licence conditions on commercial television licensees under section 43 of the Act, and since 2007 the requirements contained in section 43A of the Act for the ACMA to make a local content licence condition for regional aggregated licences.

The most recent licence condition made pursuant to the obligation under section 43A was the *Broadcasting Services (Additional Television Licence Condition) Notice 2014* (**the 2014 licence condition**). The 2014 licence condition required regional aggregated commercial television broadcasting licences to provide 720 points of local content in a given six week timing period (**timing period**). The 2014 licence condition also defined local areas for each regional aggregated licence.

On 16 October 2017, Parliament enacted the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* (**the Broadcasting Reform Act**). The Broadcasting Reform Act introduced a new regulatory framework for local content in Division 5D of Part 5 of the Act (**Division 5D**).

In summary the new regulatory framework for local content in Division 5D:

- repeals section 43A of the Act and the 2014 licence condition, effective 17 April 2018;
- for regional aggregated licences, sets out substantively equivalent local content requirements to those in place prior to the reforms, unless a trigger event occurs (see below); and
- introduces additional local content obligations for regional aggregated licences and for regional non-aggregated commercial television licences (**regional non-aggregated licences**) in circumstances where a licence becomes part of a network with a common controller with a reach in excess of 75 per cent of the Australian population (a **trigger event**); and
- introduces a new points system for calculating local content in a timing period, which includes a new category that enables licensees to accumulate three points per minute (the maximum under the 2014 licence condition was two points per minute).

As mentioned above, subsection 61CZ(1) of the Act provides that the ACMA may, by legislative instrument, make a local programming determination prescribing matters required or permitted by the Act to be prescribed in that instrument. The local programming determination facilitates the local content obligations set out in Division 5D by establishing the meaning of material of local significance,

setting out local areas and setting out additional requirements to obtain three points per minute of local content (the maximum available). Subsection 61CZ(2) of the Act requires the ACMA to ensure that at all times from 17 April 2018, a local programming determination is in place.

Purpose and operation of the instrument

Consistent with the provisions introduced by the Broadcasting Reform Act, the purpose of the instrument is to prescribe various matters relevant to the operation of the local content obligations in Division 5D. These matters are the meaning of:

- ‘material of local significance’ in relation to a local area;
- the ‘local area’ for each regional commercial television broadcasting licence that will be subject to local content obligations under the Act; and
- additional criteria required for material of local significance broadcast by a licensee under a trigger event affected regional commercial television broadcasting licence to accumulate three points per minute.

The instrument is a necessary element of the legislative framework for the regional commercial television local content obligations established by Division 5D.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

A number of expressions used in the instrument are defined in the Act. The instrument also refers to 2001 Census data published by the Australian Bureau of Statistics. The instrument does not apply, adopt, or incorporate any other matter by reference.

The Act may be obtained from the Federal Register of Legislation (www.legislation.gov.au). The Act is incorporated as in force from time to time, in accordance with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the LA. Census data is available, free of charge, from the Australian Bureau of Statistics’ website (www.abs.gov.au).

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

On 8 December 2017, the ACMA released a consultation paper titled ‘Proposal to make Broadcasting Services Local Programming Determination 2018’ and a draft instrument for public consultation on the ACMA website. The ACMA alerted key stakeholders to the consultation, including relevant industry associations.

The consultation period ran for eight weeks and closed on 5 February 2018. The ACMA received one submission from Free TV Australia (FTA). FTA was supportive of the draft instrument with the exception of the local area definition for regional commercial television licences within Western Australia. FTA requested that, for each of the licence areas of Geraldton TV1, Kalgoorlie TV1, South West and Great Southern TV1, the ACMA specify a single local area that equates to the combined area of those three licence areas.

The ACMA considered the FTA submission, and does not consider that the Act permits it to define a local area for a licence as being significantly larger than the licence area for that licence.

In making the instrument, the ACMA has had regard to all matters raised during consultation.

Regulatory impact assessment

A preliminary assessment of the proposal to make the instrument was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required because the instrument was not expected to have a regulatory impact on businesses, community organisations or individuals (OBPR reference number 23536).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

This legislative instrument has been made in accordance with subsection 61CZ(1) of the *Broadcasting Services Act 1992* (the **Act**), noting that subsection 61CZ(2) of the Act requires that the ACMA take all reasonable steps to ensure that such an instrument be in force at all times from and after 17 April 2018.

The new regulatory framework imposes local content obligations for regional aggregated licences and for both regional aggregated licences and regional non-aggregated licences in circumstances where a licence becomes trigger event affected.

The instrument defines the meaning of material of local significance, specifies local areas for regional commercial television licences and establishes additional criteria for material of local significance to accumulate three points per minute (i.e. the maximum) towards the total required points for a licence in any timing period.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia. The ACMA has considered, in particular, the right to freedom of expression, including the freedom to receive information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other chosen media in Article 19.2 of the *International Covenant on Civil and Political Rights (ICCPR)*.

The effect of the instrument does engage with this right to freedom of expression. By defining matters to support the operation of Division 5D, this instrument promotes the freedom to receive information and ideas of local significance, disseminated through television programs to people living in regional areas of Australia.

Conclusion

The instrument is compatible with human rights as it promotes the right to freedom of expression.

Notes to the *Broadcasting Service Local Programming Determination 2018*

Part 1–Preliminary

Section 1 Name

This section provides for the instrument to be cited as the *Broadcasting Service Local Programming Determination 2018*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after it is registered on the Federal Register of Legislation or 17 April 2018, whichever date is later.

Section 3 Authority

This section identifies subsection 61CZ(1) of the Act as the statutory provision that authorises the making of the instrument.

Section 4 Definitions

This section defines a number of key terms used in the instrument.

A number of other expressions used in the instrument are defined in the Act.

Section 5 References to other instruments

This section provides that in the instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force at the commencement of the instrument.

Part 2–Material of local significance

Section 6 Material of local significance

Section 6 defines material of local significance. This definition is substantially unchanged from the definition provided in the 2014 licence condition. In order to be material of local significance, the material must directly relate to the local area for the licence, or the licence area for that licence.

Advertising and sponsorship matter is expressly excluded from the scope of the definition; however, community service announcements may fall within the definition of material of local significance.

Material that constitutes an announcement that material of local significance will appear later is not material of local significance. For example, a promotion of an upcoming local news show does not count as material of local significance, and cannot accumulate points towards the total required for that particular licence in the relevant timing period.

Part 3—Local area

Section 7 Local area for regional aggregated commercial television broadcasting licences

Section 7 specifies the local areas for each of the regional aggregated licences to which the instrument relates. Local areas for each of the regional aggregated commercial television broadcasting licences are the same as the local areas defined for those licences in the 2014 licence condition. The areas are defined by reference to geographical areas defined for the purposes of the 7 August 2001 Census conducted by the Australian Bureau of Statistics.

Section 8 Local area for regional non-aggregated commercial television broadcasting licences

Section 8 specifies the local area for each of the regional non-aggregated commercial television broadcasting licences to which the instrument relates. With the exception of the licence for the Regional and Remote Western Australia TV1 licence area (**RRWA TV1**), the local area for a regional non-aggregated commercial television broadcasting licence is defined to be an area equivalent to the licence area for that licence.

In the case of the licence for RRWA TV1, the local area is defined to be the combined area equivalent to the licence areas of Geraldton TV1, Kalgoorlie TV1, South West and Great Southern TV1, which are currently set out in the *Television Licence Area Plan (Remote and Regional Western Australia) 2013*.

Part 4—Additional requirements for certain material of local significance

Section 9 Additional requirements to accumulate 3 points per minute

Section 61CY of the Act sets out the system for calculating points for licences required to accumulate points of local content in timing periods. Relevantly, item 1 of the table following subsection 61CY(3) of the Act includes specifications for material that will accumulate 3 points per minute (the maximum available), and provides that the ACMA may specify additional requirements in the local programming determination. Section 9 of the instrument specifies the additional requirements to accumulate 3 points per minute. The ACMA has specified the following additional requirements:

- the news item in question must relate directly to the local area; and
- the depiction of people, places or things must predominantly consist of moving images; and
- certain restrictions on the extent and nature of file footage which may be used.

In relation to the latter point, section 9 sets out that file footage must:

- not be the only kind of footage used;
- be visually relevant to the news item;
- be recently obtained or provide a different perspective to the news item; and
- not be used extensively (unless it is directly relevant to the news item).

File footage is defined in section 4 as any footage other than live footage or footage that has been specifically obtained for the purpose of accompanying the broadcast of the news material in question.

Schedule 1—Areas of commercial television broadcasting licences

Schedule 1 sets out the areas of the regional aggregated television broadcasting licences, for the purposes of the defined local areas in section 7 of the instrument.