

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2021 (No. 1)

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2021 (No. 1)* (**the instrument**) under clause 41G of Schedule 4 to the *Broadcasting Services Act 1992* (**the Act**), and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Subclause 41G(2) of Schedule 4 to the Act provides that the ACMA may, by legislative instrument, declare that a specified multi-channelled commercial television broadcasting service provided by a commercial television broadcasting licensee for the licence area of the licence is the licensee's primary commercial television broadcasting service (**primary service**) in that licence area. Subclause 41G(3) of Schedule 4 to the Act requires that the ACMA must ensure that such a declaration is in force at all times after the licensee commences provision of a multi-channelled commercial television broadcasting service. Subclause 41G(4) of Schedule 4 to the Act provides that the ACMA may, by legislative instrument, declare that one or more specified multi-channelled commercial television broadcasting services provided by a commercial television broadcasting licensee whose licence was allocated under section 38C of the Act (services provided with the use of a satellite) are the licensee's primary services in the licence area. Subclause 41G(6) of Schedule 4 to the Act requires that the ACMA must ensure that such a declaration is in force at all times for the licence area concerned.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose and operation of the instrument

The instrument amends the *Broadcasting Services (Primary Commercial Television Broadcasting Service) Declaration 2020* (**the 2020 Declaration**). For each commercial television broadcasting licensee in a licence area, the 2020 Declaration declares a specified multi-channelled commercial television service to be the primary service of the licensee in that licence area.

The declaration of the primary service is important as the concept of a primary service underpins various regulatory obligations on commercial television broadcasting licensees. Under the Act, commercial television broadcasting licensees are authorised to deliver multiple commercial television broadcasting services in digital mode under a single commercial television broadcasting service licence. This is referred to as 'multi-channelling'.

Multi-channelling creates a two-track regulatory system for commercial television broadcasting services, in which some obligations apply to the primary service but not to other multi-channelled services transmitted by the same licensee.

The amendments made by the instrument to the 2020 Declaration are necessary given the recent affiliation agreements entered into between media groups Nine Entertainment Co. (**Nine**) and the WIN Network (**WIN**), as well as those between Southern Cross Austereo (**SCA**) and Network 10, which affect the declaration of primary services specified in the 2020 Declaration. The instrument amends the Schedules to the 2020 Declaration, which specify (for the purposes of subclauses 41G(2)

and (4) of Schedule 4 to the Act), the primary service for each commercial television broadcasting licensee. The declared primary services are identified in the Schedules to the 2020 Declaration by the on-air tags used by the relevant licensees. However, as a result of the new affiliation agreements, some licensees are no longer providing the primary services identified by these tags and, consequentially, amendments to the 2020 Declaration are required.

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

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

Documents incorporated by reference

The instrument does not incorporate any documents by reference.

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.

A targeted consultation was carried out by contacting relevant commercial television broadcasting licensees, who were asked to provide updated information about whether their multi-channelled commercial television broadcasting services had changed due to the recent affiliation agreements, and to otherwise confirm whether information in the 2020 Declaration was up-to-date and accurate.

After the targeted consultation and before making the decision to amend the 2020 Declaration, the ACMA undertook a second round of consultation from 14 July 2021 to 27 July 2021 which provided the licensees with an opportunity to comment on the proposed changes. The ACMA received two submissions in support of the proposal.

No objections were raised with the proposal to amend the 2020 Declaration and the instrument is consistent with the information provided by licensees in response to the 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. The OBPR has determined that regulatory changes of a minor or machinery nature such as amending the 2020 Declaration do not require a further RIS (OBPR reference number 44043).

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 with human rights to be prepared in respect of that legislative instrument.

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

Overview of the instrument

The instrument amends the 2020 Declaration as a consequence of the new affiliation agreements signed between Nine and WIN, and SCA and Network 10, which have resulted in changes to the description of the primary services provided by the commercial television broadcasting licensees controlled by those entities in the 2020 Declaration. The 2020 Declaration declares specified multi-

channelled commercial television broadcasting services to be the primary services of the relevant commercial television broadcasting licensees in particular licence areas. The licensee of the primary service has additional obligations in relation to its primary service.

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.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.

Notes to the *Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2021 (No.1)*

Section 1 Name

This section provides for the instrument to be cited as the *Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2021 (No.1) (the instrument)*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the instrument, namely clause 41G of Schedule 4 to the *Broadcasting Services Act 1992*.

Section 4 Amendments

This section provides that the *Broadcasting Services (Primary Commercial Television Broadcasting Service) Declaration 2020 (the 2020 Declaration)* is amended in the manner set out in the Schedule to the instrument.

Schedule

The Schedule sets out the amendments to the 2020 Declaration as follows:

- Items 1, 3, 5, 7, 10, 13, 14, 17 and 22 omit 'WINHD', and substitute '9' in column 3 of table items 1, 10, 13, 17, 20, 25, 29, 40 and 49 of Table 1 of Schedule 1 to the 2020 Declaration.
- Items 2, 4, 6, 8, 9, 11, 12, 16, 18, 19, 20 and 21 omit '9', substitute '10' in column 3 of table items 3, 11, 14, 18, 19, 22, 23, 38, 42, 44, 46 and 48 of Table 1 of Schedule 1 to the 2020 Declaration.
- Item 15 omits '9 TDT' and substitutes '10 TDT' in column 3 of table item 31 of Table 1 of Schedule 1 to the 2020 Declaration.
- Item 23 omits 'WINHD' and substitutes '10' in column 3 of table item 55 of Table 1 of Schedule 1 to the 2020 Declaration.
- Item 24 omits 'WINHD' and substitutes '10' in column 3 of table item 3 of Table 1 of Schedule 2 to the 2020 Declaration.