

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Regional Commercial Radio - Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021 (the instrument)* under paragraph 8AE(1)(a) of the *Broadcasting Services Act 1992 (the BSA)*. The instrument has also been made in accordance with subsection 33(3) of the *Acts Interpretation Act 1901 (the AIA)*. The instrument repeals the *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Instrument 2012 (the 2012 instrument)*.

Paragraph 8AE(1)(a) of the BSA provides that the ACMA may, by legislative instrument, specify a **local content exemption period** for a period that does not exceed 5 weeks, during which the obligations on a regional commercial radio broadcasting licensee (**a licensee**) to comply with the requirement to broadcast minimum amounts of ‘material of local significance’, and to meet the ‘minimum service standards’ for local news and information (together, **local content requirements**), do not apply.

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.

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

Purpose and operation of the instrument

Background to the 2012 instrument

In 2012 the *Broadcasting Services Amendment (Regional Commercial Radio) Act 2012* amended the BSA to include 2 types of 5-week exemption periods for regional commercial radio broadcasting licensees, one that exempted licensees from the obligation to broadcast minimum amounts of material of local significance (in subsection 43C(1A) of the BSA) and one that exempted licensees from the obligation to meet the minimum service standards (in subsection 61CD(1) of the BSA).

At that time, and in accordance with paragraphs 43C(1A)(c) and 61CD(2)(c) of the BSA, the default exemption periods were to commence, respectively, on the second Monday in December (in relation to material of local significance) and the second Sunday in December (in relation to minimum service standards) each year. However, subsections 43C(1A) and 61CD(2) of the BSA also provided that the ACMA may, by legislative instrument, determine an alternative five-week period in relation to one or more specified licensees.

In 2012, the ACMA made the 2012 instrument under subsections 43C(1A) and 61CD(2) of the BSA. Since then, the ACMA has varied the 2012 instrument 5 times. On each occasion when making and varying the 2012 instrument, the ACMA did so only in response to requests from licensees seeking to include a licence in, or remove it from, the 2012 instrument.

Amendments to the BSA – section 8AE

On 18 December 2020, the *Broadcasting Services Amendment (Regional Commercial Radio and Other Measures) Act 2020 (the Amendment Act)* amended subsections 43C(1A) and 61CD(2) of the BSA to repeal provisions establishing 5-week exemption periods in relation to the local content requirements from, and to include a new section 8AE in, the BSA. The Amendment Act made amendments which provided that:

- the local content requirements are subject to the same local content exemption period, rather than separate periods for the material of local significance requirement and for the minimum service standards requirement;
- licensees may self-nominate an alternative local content exemption period (or periods – see below) not exceeding 5 weeks to replace the default local content exemption period specified in the BSA, by giving written notice to the ACMA, but without the requirement for the ACMA to make a legislative instrument to that effect;
- the ACMA may make a legislative instrument to specify an alternative local content exemption period (or periods) to the default local content exemption period specified in the BSA, which takes precedent over any written notice given to the ACMA by a licensee;
- when nominating an alternative local content exemption period, licensees or the ACMA may nominate 2 alternative local content exemption periods in a year, provided that, in aggregate, the periods do not exceed 5 weeks.

Paragraph 8AE(1)(g) of the BSA provides that the default local content exemption period for each regional commercial radio licence begins on the second Sunday in December each financial year. In accordance with paragraph 18(1)(a) of the Amendment Act, the 2012 instrument was taken to remain in force under paragraph 8AE(1)(a) of the BSA (as amended by Schedule 1 to the Amendment Act) even after the relevant provisions in subsections 43C(1A) and 61CD(2) were repealed.

By including the option for licensees to self-nominate either one or two alternative exemption periods, without needing to make an application to the ACMA, the Amendment Act was intended to give more flexibility to licensees.

The effect of repealing the 2012 instrument is that the regional commercial radio licences that were listed in the 2012 instrument will be subject to the default local content exemption period specified under paragraph 8AE(1)(g) of the BSA and the relevant licensees are not prevented from self-nominating an alternative local content exemption period if they choose under paragraphs 8AE(1)(e) or (f) of the BSA. If the 2012 instrument had remained in force, these licensees would have been required to apply to the ACMA for a variation of the 2012 instrument if they wanted a different local content exemption period.

The ACMA is not aware of any current circumstances which would warrant it making or maintaining an instrument under paragraph 8AE(1)(a) of the BSA and denying licensees the opportunity to set their own alternative local content exemption period.

In the ACMA's view, the instrument will allow all licensees to benefit from the flexibility of specifying an alternative exemption period if they wish, without being constrained by the 2012 instrument, which is the most resource-efficient way for licensees to be afforded the flexibility they are intended to have under section 8AE of the BSA, as introduced by the Amendment Act.

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

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 17 August 2021, the ACMA published on its website a consultation paper outlining a proposal to repeal the 2012 instrument and inviting submissions on the proposal. On the same date, the ACMA advised the licensees for each licence listed in the 2012 instrument and the industry representative body, Commercial Radio Australia (**CRA**) that the consultation paper had been published.

The consultation period closed on 31 August 2021. The ACMA received one response from CRA that supported the proposed repeal of the 2012 instrument.

Regulatory impact assessment

The ACMA prepared a preliminary regulatory impact assessment for the purposes of making the instrument. On 2 August 2021, the Office of Best Practice Regulation (**OBPR**) considered that the changes were unlikely to have a more than minor regulatory impact. The OBPR reference number for this matter is 44308.

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 set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021*

Section 1 Name

This section provides for the instrument to be cited as the *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021*.

Section 2 Commencement

This section provides for the instrument to commence on the day after 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 paragraph 8AE(1)(a) of the *Broadcasting Services Act 1992*.

Section 4 Repeal

This section provides that the instrument specified in Schedule 1, namely the *Broadcasting Services (Regional Commercial Radio - Specification of Periods for Subsections 43C(1A) and 61CD(2)) Instrument 2012* is repealed.

Schedule 1–Repeal

Item 1 The whole of the instrument

This item provides for the repeal of the *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Instrument 2012*.

Statement of compatibility with human rights

Prepared by the Australian Communications and Media Authority under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021

Overview of the instrument

Amendments to the *Broadcasting Services Act 1992 (the BSA)* that commenced on 18 December 2020, introduced greater flexibility for regional commercial radio licensees (**licensees**) with respect to the operation of 5-week exemption periods during which the obligations on licensees to broadcast minimum amounts of ‘material of local significance’, and to meet the ‘minimum service standards’ for local news and information, do not apply.

The amendments had the following effects:

- to make both the material of local significance obligation and the minimum service standards obligation subject to the same ‘local content exemption period’ specified in the BSA, rather than separate exemption periods;
- allowing licensees to self-nominate an alternative local content exemption period not exceeding 5 weeks (or periods – see below) to the default local content exemption period specified in the BSA, by giving written notice to the ACMA, but without the requirement for the ACMA to make a legislative instrument to that effect;
- preserving the ACMA’s power to make a legislative instrument to specify an alternative local content exemption period (or periods) to the default local content exemption period specified in the BSA, and specifying that such an instrument would take precedent over any written notice given to the ACMA by a licensee;
- allowing licensees or the ACMA to nominate 2 alternative local content exemption periods in a year, provided that, in aggregate, the periods do not exceed 5 weeks.

The amendments also provided that a legislative instrument made by the ACMA under the BSA prior to its being amended, specifying local content exemption periods, would continue to be in force as if it had been made under paragraph 8AE(1)(a) of the BSA. Consequently, the *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Instrument 2012 (the 2012 instrument)* remained in force and, in accordance with the BSA as amended, prevented licensees for licences listed within it to self-nominate an alternative local content exemption period with respect to those licences.

The *Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021 (the instrument)* was made by the ACMA to repeal the 2012 instrument and allow all licensees (including licensees for licences listed in the 2012 instrument) to self-nominate their own local content exemption period if they do not wish to be subject to the default period specified in the BSA.

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.

Explanatory Statement to the Broadcasting Services (Regional Commercial Radio – Specification of Periods for Subsections 43C(1A) and 61CD(2)) Repeal Instrument 2021

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 potentially engages the following rights/freedoms:

- the right to freedom of opinion and expression in Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*
- the right to enjoy and benefit from culture in Article 27 of the ICCPR and Article 15 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

The right to freedom of opinion and expression: Paragraph 2 of Article 19 of the ICCPR relevantly provides that everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.

The Explanatory Memorandum for the Bill that introduced the BSA amendments that were made on 18 December 2020 stated that the Bill's objectives are consistent with Article 19 of the ICCPR and are 'directed at continuing to support the ability of regional commercial radio [broadcasters] to deliver material of local significance (local content) to their audiences.' The Explanatory Memorandum goes on to state that:

[The Bill] achieves this by reducing the regulatory and compliance obligations placed on licensees, and as such, is consistent with Article 19 of the ICCPR by allowing licensees to focus their limited resources on improving the quality of the local content and information services they offer. This in turn enables better access to content relevant to regional and remote audience's interests.

As amended, subsection 43C(1A) of the BSA exempts licensees from the obligation to broadcast specified amounts of material of local significance during a local content exemption period. Subsections 61CD(4) and (5) of the BSA exempt licensees from the obligation to comply with the minimum service standards for local news and information during a local content exemption period. Paragraphs 8AE(1)(e) and (f) of the BSA allow licensees to self-nominate one or 2 local content exemption periods with respect to a licence by providing a written notice to the ACMA, unless the licence is subject to a legislative instrument made by the ACMA in accordance with paragraphs 8AE(1)(a) or (b) of the BSA.

By repealing the 2012 instrument the ACMA is providing greater flexibility to the licensees for licences that were listed in that instrument, consistent with the objectives of the amending legislation that introduced the provision into the BSA (as set out in the Explanatory Memorandum to the Bill).

The ACMA considers that this will promote the right to freedom of expression in Article 19 of the ICCPR by giving licensees additional flexibility in meeting their obligations to impart local content to their audiences, without decreasing the number of weeks each year during which audiences in regional Australia can expect local licensees to meet their local content obligations.

The right to culture: Article 27 of the ICCPR protects the right of ethnic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language. Article 15(1) of the ICESCR protects the right of everyone to take part in cultural life.

The legislative provision under which the instrument is made is designed to give licensees greater flexibility to self-nominate when local content exemption periods occur and to allow them to select up to 2 periods in a year when the exemption will apply. The Explanatory Memorandum for the Bill that introduced this provision notes that, if required, a licensee could choose not to meet its local content obligations over 2 different culturally significant periods (the examples given are Easter and Christmas),

which means that ‘the Bill will enable licensees to offer more flexibility to their staff who will be better able to take part in cultural life, including culturally significant holidays relevant to them’.

By repealing the 2012 instrument, the ACMA is supporting the objectives of Article 27 of the ICCPR and Article 15 of the ICESCR by giving all licensees the flexibility of self-nominating up to 2 local content exemption periods across different cultural periods, without making an application to the ACMA.

Conclusion

The instrument is compatible with human rights because to the extent that it may engage rights in the ICCPR and ICESCR, as outlined above, it enhances those rights and/or is reasonable and proportionate in that it reduces the regulatory burden on regional commercial radio broadcasters without lessening their obligations to broadcast local content to their audiences.