

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Variation to Licence Area Plan – Armidale Radio – 2023 (No. 1)

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Variation to Licence Area Plan – Armidale Radio – 2023 (No. 1)* (**the instrument**) under subsection 26(2) of the *Broadcasting Services Act 1992* (**the Act**).

The ACMA may, by legislative instrument, vary a licence area plan (**LAP**) under subsection 26(2) of the Act.

Purpose and operation of the instrument

LAPs determine the number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia with the use of the broadcasting services bands.

The Australian Broadcasting Authority determined the *Licence Area Plan – Armidale Radio* (**the Armidale LAP**) on 27 August 1998.

The instrument makes spectrum available for a total of six new infill transmitters, for two commercial radio broadcasting services in the Armidale RA1 licence area. The main variations are to:

- make spectrum available for one FM infill transmitter for each of the 2AD and 2NEB commercial radio broadcasting services at Armidale Town;
- make spectrum available for one FM infill transmitter for each of the 2AD and 2NEB commercial radio broadcasting services at Guyra;
- make spectrum available for one FM infill transmitter for each of the 2AD and 2NEB commercial radio broadcasting services at Uralla;
- deal with the *Broadcasting Services (Technical Planning) Guidelines 2017* (**2017 Guidelines**) (discussed below).

The instrument removes specific references to the 2017 Guidelines, and replaces them with provisions that:

- refer to any guidelines made under section 33 of the Act; and
- are intended to make express the relationship between the technical specifications determined in the Armidale LAP and any guidelines made under section 33 of the Act.

These changes, in relation to the guidelines under section 33 of the Act, do not affect the operation of radiocommunications transmitters under a licence issued under section 102 of the *Radiocommunications Act 1992* (**Radiocommunications Act**).

It is a condition of each transmitter licence issued under section 102 of the Radiocommunications Act that the licensee:

- must not operate a radiocommunications transmitter otherwise than in accordance with any relevant technical specifications determined under subsection 26(1) of the Act (paragraph 109(1)(d) of the Radiocommunications Act); and
- must comply with guidelines developed by the ACMA under section 33 of the Act (paragraph 109(1)(e) of the Radiocommunications Act).

Operation of a radiocommunications device is not authorised by an apparatus licence (including a transmitter licence issued under section 102 of the Radiocommunications Act) if it is not in accordance with the conditions of the licence (subsection 97(4) of the Radiocommunications Act). Under section 46 of the Radiocommunications Act, it is an offence, and subject to a civil penalty, to operate a radiocommunications device otherwise than as authorised by a spectrum licence, apparatus licence or a class licence. The Radiocommunications Act prescribes the following maximum penalties for the offence:

- if the radiocommunications device is a radiocommunications transmitter, and the offender is an individual – imprisonment for 2 years;
- if the radiocommunications device is a radiocommunications transmitter, and the offender is not an individual – 1,500 penalty units (which is \$469,500 based on the current penalty unit amount of \$313);
- if the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$6,260).

The Radiocommunications Act under subsection 46(3) prescribes the following maximum civil penalties:

- if the radiocommunications device is a radiocommunications transmitter – 300 penalty units (\$93,900);
- if the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$6,260).

It is an offence, and subject to a civil penalty, to possess a radiocommunications device for the purpose of operating the device otherwise than as authorised by a spectrum licence, apparatus licence or class licence (section 47 of the Radiocommunications Act). The Radiocommunications Act prescribes the same penalties for this offence and civil penalty contravention as for the offence and civil penalty contravention in section 46 of the Radiocommunications Act.

In addition, an apparatus licensee must not contravene a condition of the licence. Contravention is subject to a civil penalty (section 113 of the Radiocommunications Act). The Radiocommunications Act prescribes a maximum civil penalty of 100 penalty units (\$31,300).

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**).

Item 13 of the table at regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that LAPs are not subject to the sunset provisions in Part 4 of Chapter 3 of the LA. According to the explanatory statement to that regulation:

Instruments made under section 26 of the Broadcasting Services Act include licence area plans ... These instruments provide for the planning of broadcasting services. They are intended to be enduring to provide certainty for industry in making significant investment decisions concerning the provision of broadcasting services in the relevant licence areas.

The Explanatory Memorandum for the Legislative Instruments Bill 2003 stated that some of the rationales for exemption from sunset included:

- *where the instrument is clearly designed to be enduring and not subject to regular review...*

- *where commercial certainty would be undermined by sunseting. For example, the table includes plans of management made under the Fisheries Management Act 1991 – substantial investments are made in reliance on plans that are intended to be in force for substantially longer periods than 10 years.*

There are a number of factors that point to the benefit of commercial certainty being undermined if LAPs were to sunset every 10 years, and which suggest that LAPs are intended to be enduring:

- Broadcasting services have been provided in Australia since the first half of the twentieth century and continue to be a significant part of daily life in Australia.
- There is no express power to revoke a licence area plan. The bulk of the services provided are intended to be for long duration. Commercial and community broadcasting licences are allocated for five years and are subject to regular renewal after that time. Under section 47 of the Act, the ACMA must renew a commercial broadcasting licence unless it is satisfied that allowing the licensee to continue to provide commercial broadcasting services would lead to a significant risk of an offence or a breach of a civil penalty provision under the Act occurring, or a breach of the licence conditions occurring. The regulatory regime clearly intends that generally, once commenced, these services continue uninterrupted, where possible.
- A person must not be in a position to exercise control of more than two commercial radio broadcasting licences, or one commercial television broadcasting licence, in the same licence area (sections 53 and 54 of the Act). Particular considerations apply to overlapping licence areas (section 51 of the Act). A change to a licence area may cause section 51 of the Act to operate in circumstances where it did not previously operate, and place a person in breach of section 53 or section 54 of the Act.
- The provision of broadcasting services involves the deployment of significant infrastructure, especially the radiocommunications transmitters used to provide the services that are planned in licence area plans. As of 15 September 2023, there were 261 commercial radio broadcasting licences, 70 commercial television broadcasting licences and 361 community radio broadcasting licences in force. Combined with the national broadcasters and open radio narrowcasting services, this is a substantial group of stakeholders who would be compelled to make submissions to advance their interests and protect their significant investments if licence area plans were to sunset and be remade every 10 years.

Parliament continues to have oversight of variations to licence area plans, as these instruments are subject to disallowance under the LA. It also has oversight through other mechanisms (e.g., the relevant Senate Estimates Committee). The Minister has the power to give the ACMA a direction about the exercise of the ACMA’s powers to make or vary a licence area plan for a particular area (see subsection 26(8) of the Act).

Documents incorporated by reference

In accordance with section 14 of the LA, the instrument incorporates the Radiocommunications Act, and guidelines made under section 33 of the Act, as in force from time to time. The Radiocommunications Act, and the current guidelines, the *Broadcasting Services (Technical Planning) Guidelines 2017*, may be accessed from the Federal Register of Legislation at: www.legislation.gov.au.

The instrument also incorporates the Geodetic Datum of Australia known as GDA94, gazetted in the Commonwealth of Australia *Gazette* No. GN 35 on 6 September 1995, as existing at the time the instrument commenced. *Gazette* No. GN 35 can be accessed, free of charge, at: www.legislation.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.

Before making the decision to vary the Armidale LAP, the ACMA published a consultation paper on the ACMA website on 20 October 2023, which included background to each individual proposal, proposed technical specifications for the relevant attachments and a map of the affected licence area, and invited comment on the proposals to vary the Armidale LAP.

The ACMA wrote to relevant stakeholders, including peak bodies, the community radio broadcasting licensee for the Armidale RA1 licence area, commercial and community broadcasting licensees and national broadcasters in overlapping and adjacent radio licence areas, and others who had shown interest in one or more of the proposals previously, notifying them that the consultation paper had been published and invited comments.

The consultation period ended on 17 November 2023. The ACMA received no submissions and decided to proceed with the proposals.

Regulatory impact assessment

The Office of Impact Analysis (OIA), in a guidance note entitled ‘Carve-outs’ (available free of charge at: <https://oia.pmc.gov.au/resources/guidance-oia-procedures/carve-outs>), has established a ‘carve-out’ for variations to LAPs where those variations are unlikely to have more than a minor regulatory impact (reference number: 13301). A carve-out is a standing agreement between OIA and a government agency, which sets aside the requirement for a preliminary assessment to be sent to OIA for certain types of proposed regulatory change. The ACMA has formed the opinion that the instrument falls within the terms of the carve-out.

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 below has been prepared to meet that requirement.

Overview of the instrument

The instrument varies the *Licence Area Plan – Armidale Radio*. The instrument adds a total of six new FM transmitters for two commercial radio broadcasting services serving Armidale Town, Guyra and Uralla in New South Wales. In addition, the instrument makes other minor amendments to the Armidale LAP.

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 *Variation to Licence Area Plan – Armidale Radio – 2023 (No. 1)*

Section 1 Name

This section provides for the instrument to be cited as the *Variation to Licence Area Plan – Armidale Radio – 2023 (No. 1)*.

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 subsection 26(2) of the Act.

Section 4 Amendments

This section provides for the Armidale LAP (F2005B00587) to be varied as set out in Schedule 1 to the instrument.

Schedule 1–Amendments

Item 1 omits the words ‘Six national’ from clause (2) and substitutes them with ‘Seven national’.

Item 2 inserts four additional clauses after clause (4):

- Clause (5) makes it clear that radiocommunications transmitters planned for the Armidale RA1 licence area are identified in Schedule One by their corresponding Attachment, frequency, approximate geographic area they are planned to serve, technical specification number, and for a transmitter planned for provision of a service under a broadcasting services bands licence, the licence number.
- Clause (6) makes it clear that each Attachment, except for an attachment describing an area where broadcasting services are to be available, determines the technical specification of a radiocommunications transmitter, which are:
 - a description, and the coordinates of, the nominal location from which the transmitter is to be operated;
 - the frequency on which the transmitter to be operated, and the frequency band containing that frequency, and the mode of transmission the transmitter must use;
 - the required polarisation, maximum antenna height, and maximum effective radiated power or cymomotive force for the transmitter;
 - any special conditions that apply to the operation of the transmitter, and any circumstances in which a transmitter must not operate, or in which a transmitter may operate.
- Clause (7) makes it clear that a radiocommunications transmitter may be operated from an alternative site to the nominal location, if such operation complies with guidelines for the transmitter and operation of the transmitter made under section 33 of the Act in relation to operation from an alternative site.

- Clause (8) provides that ‘radiocommunications transmitter’ has the meaning given by the Radiocommunications Act.

Item 3 omits a reference to the Australian Broadcasting Authority and the date of determination.

Item 4 omits the word ‘National’ from the first column of the table in Schedule One for the row for each of the Attachments 1.3 to 1.7. In the same table, it also inserts three new rows under each of Attachments 1.8B and 1.9, incorporating the corresponding frequency, broadcasting service licence number, technical specification number, relevant attachment in the instrument and area served of a radiocommunications transmitter.

Item 5 omits the nominal co-ordinates of Attachments 1.2 to 1.4 and substitutes the most up to date GDA94 co-ordinates: a latitude of -30.377020 and longitude of 151.601930.

Item 6 omits references to the *Broadcasting Services (Technical Planning) Guidelines 2017* for each of Attachments 1.2 to 1.8B.

Item 7 omits the nominal co-ordinates of Attachments 1.5A and 1.8A and substitutes the most up to date co-ordinates.

Item 8 inserts new Attachments 1.8C, 1.8D and 1.8E after Attachment 1.8B. These Attachments are found at Schedule Two of the variation instrument. They contain the technical specifications for the three new infill transmitters at Armidale Town, Guyra and Uralla. These transmitters are for the transmission of the 2ADcommercial radio broadcasting service.

Item 9 omits the nominal co-ordinates of Attachment 1.9 and substitutes the most up to date co-ordinates.

Item 10 omits the reference to the *Broadcasting Services (Technical Planning) Guidelines 2017* for Attachment 1.9.

Item 11 inserts Attachments 1.9A, 1.9B and 1.9C after Attachment 1.9. These Attachments are found at Schedule Three of variation instrument. They contain the technical specifications for the three new infill transmitters at Armidale Town, Guyra and Uralla. These transmitters are for the transmission of the 2NEBcommercial radio broadcasting service.

Item 12 omits references to the *Broadcasting Services (Technical Planning) Guidelines 2017* from each of Attachments 1.10 to 1.13 and 2.2.

Schedule 2–Attachments 1.8C to 1.8E

This Schedule contains the Attachments inserted into the Armidale LAP by item 8 of Schedule 1.

Schedule 3–Attachments 1.9A to 1.9C

This Schedule contains the Attachments inserted into the Armidale LAP by item 11 of Schedule 1.