**EXPLANATORY STATEMENT**

Approved by the Australian Communications and Media Authority

*Broadcasting Services Act 1992*

***Television Licence Area Plan (Melbourne) Variation 2024 (No. 1)***

**Authority**

The Australian Communications and Media Authority (the **ACMA**) has made the *Television Licence Area Plan (Melbourne) Variation 2024 (No. 1)* (the **instrument**) under subsection 26(2) of the *Broadcasting Services Act 1992* (the **Act**).

Subsection 26(2) of the Act provides that the ACMA may, by legislative instrument, vary a licence area plan.

**Purpose and operation of the instruments**

Television licence area plans (**TLAPs**) are made under subsection 26(1B) of the Act and allot channels for particular broadcasting services and, where relevant, identify time frames for the clearance of spectrum through channel allotment end dates. TLAPs also determine the number, category and characteristics of television broadcasting services that are to be made available for allocation in particular areas of Australia using the broadcasting services bands (the **BSBs**).

Community television broadcasting services that transmit in the BSBs are authorised to operate radiocommunications transmitters by a transmitter licence issued under section 102 of the *Radiocommunications Act 1992* (the **Radcoms Act**) and a channel allotment in a TLAP. Transmitter licences for the Melbourne community television broadcasting service were due to cease effect on 30 June 2024, in accordance with section 103 of the Radcoms Act, as in force the last time the *Television Licence Area Plan (Melbourne) 2012* (the **Melbourne TLAP**) was amended*.* The channel allotment end dates specified in the Melbourne TLAP for the Melbourne community television broadcasting service were aligned with section 103,such that those channel allotments were set to cease on 30 June 2024.

Amendments to the Radcoms Act by the *Broadcasting Services Amendment (Community Television) Act 2024* (the **Amendment Act**) provide for continued access to the BSBs for community broadcasting services provided under a community television broadcasting licence.

In particular, the Amendment Act removed the end date of 30 June 2024 for the transmitter licence used to provide the Melbourne community television broadcasting service, until the ACMA declares that an alternative use of the broadcasting service bands spectrum has been found (new section 96C of the Radcoms Act) and determines a specified day (new subsection 96D of the Radcoms Act) that spectrum will no longer be available for the service.

The instrument is intended to amend the Melbourne TLAP to remove the channel allotment end dates for the community television broadcasting service in Melbourne, to allow the Melbourne community television broadcasting service to continue to be provided.

Under subsection 26AA(3) of the Act, if a TLAP is applicable to a television broadcasting service in a particular area (otherwise than under a commercial broadcasting service or by a national broadcaster), the provider of the service must not transmit that service in the area otherwise than in accordance with the TLAP. This subsection applies in relation to the provision of community television broadcasting services. The Federal Court may, on the application of the ACMA, grant an injunction if a person contravenes subsection 26AA(3) (section 205Q of the Act).

It is a condition of the transmitter licence, issued to the provider of a community television broadcasting service under section 102 of the Radcoms Act, that a person not operate a radiocommunications transmitter under the licence otherwise than in accordance with any relevant technical specifications determined under the TLAP that applies to the service.

Operation of a radiocommunications device is not authorised by an apparatus licence (including a transmitter licence issued under section 102 of the Radcoms Act) if it is not in accordance with the conditions of the licence (subsection 97(4) of the Radcoms Act). Under section 46 of the Radcoms 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 class licence. The Radcoms 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 Radcoms Act 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 provision, 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. The Radcoms Act prescribes the same penalties for this offence and civil penalty contravention as for the offence and civil penalty contravention in section 46.

In addition, an apparatus licensee, or a person authorised under section 114 of the Radcoms Act in relation to an apparatus licence, must not contravene a condition of the licence. Contravention is subject to a civil penalty (section 113 of the Radcoms Act). The Radcoms 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 legislative instrument for the purposes of the *Legislation Act 2003* (**the LA**), and is disallowable.

Item 13 of the table at regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that instruments made under section 26 of the Act are not subject to the sunsetting provisions in Part 4 of Chapter 3 of the LA. According to the explanatory statement to that regulation:

*Instruments made under section 26 … 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 sunsetting included:

* *where the instrument is clearly designed to be enduring and not subject to regular review…*
* *where commercial certainty would be undermined by sunsetting. 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 TLAPS were to sunset every 10 years, and which suggest that TLAPs are intended to be enduring:

* Television broadcasting services have been provided in Australia since the middle of the twentieth century and continue to be a significant part of daily life in Australia.
* There is no express power to revoke an instrument made under section 26. 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 TLAPs. As at 5 June 2023, there are 261 commercial radio broadcasting licences, 69 commercial television broadcasting licences, and 362 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 instruments under section 26 were to sunset and be remade every 10 years.

Parliament continues to have oversight of variations to TLAPs, 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**

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.

Before making the decision to vary the Melbourne TLAP, the ACMA published a consultation paper on its website on 3 May 2024 which provided the background to the proposal. The following stakeholders were notified by email about the release of the consultation paper: television broadcasting licensees and national broadcasters in the Melbourne TV1 licence area, the peak industry bodies FreeTV Australia and the Community Broadcasting Association of Australia, Federal members of Parliament whose electorates include the Melbourne area, and civic bodies including local councils and community associations.

The consultation period ended on 24 May 2024. The ACMA received three submissions in response to the consultation. The submissions were from the Community Broadcasting Association of Australia, the Australian Community Television Alliance, and an individual. All three submissions supported the proposal. After considering the submissions, the ACMA decided to make the variation.

**Regulatory impact assessment**

The ACMA considered whether a regulatory impact analysis process was required and formed the view that the changes effected by the instruments were machinery matters that would not have more than a minor regulatory impact. The Office of Impact Analysis (**OIA**) has approved a carve-out for variations to established licence area plans that are unlikely to have more than a minor regulatory impact. Therefore, no further regulatory impact analysis is required. (OIA 23-06155)).

**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 instruments***

The instrument varies the Melbourne TLAP. The variations remove the channel allotment end dates for transmitter licences for community television broadcasting services in the Melbourne licence area.

***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.

**Attachment A**

**Notes to the *Television Licence Area Plan (Melbourne) Variation 2024 (No. 1)***

**Section 1 Name**

This section provides for the instrument to be cited as the *Television Licence Area Plan (Melbourne) Variation 2024 (No. 1)*.

**Section 2 Commencement**

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

**Section 3 Authority**

This section identifies the relevant statutory provision that authorises the making of the instrument, namely subsection 26(2) of the Act.

**Section 4 Amendments**

This section provides that the *Television Licence Area Plan (Melbourne) 2012* (Registration No.F2012L02431) is varied as set out in Schedule 1 to the instrument.

**Schedule 1 Amendments**

**Item 1**

This item removes the date in column 3 of table item 1 of the table appearing after sub-item 2(3) in Schedule 3 to the *Television Licence Area Plan (Melbourne) 2012*, removing the channel allotment end date for the Melbourne community television service.

**Item 2**

This item removes the date in column 3 of table item 2 of the table appearing after sub-item 2(3) in Schedule 3 to the *Television Licence Area Plan (Melbourne) 2012*, removing the channel allotment end date for the Melbourne community television service.