



## **SUBMISSION BY COMMERCIAL RADIO AUSTRALIA**

### **Broadcasting Legislation Amendment (2021 Measures No 1) Bill 2021**

### **Senate Environment and Communications Legislation Committee Inquiry**

**May 2021**

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 261 member stations and represents the entire Australian commercial radio industry.

CRA welcomes this opportunity to respond to the Inquiry by the *Senate Environment and Communications Legislation Committee Inquiry* (**Committee**) into the *Broadcasting Legislation Amendment (2021 Measures No 1) Bill 2021* (**Bill**).

#### **1. Summary**

CRA's key comments are:

- (i) CRA supports the extension of the Regional and Small Publisher's Innovation Fund to include the financial year commencing on 1 July 2021.
- (ii) CRA has no objection to the removal of section 44A(10) from the *Radiocommunications Act 1992*.
- (iii) CRA supports the broadening of the existing exemptions under sections 43C(4) and 52 of the *Broadcasting Services Act 1992* (**BSA**) to extend beyond the '*previous ACMA determination*' to '*the most recent determination under which the person was not in breach of the condition*'.
- (iv) However, CRA objects to the inclusion of the new sunset provisions at sections 43C(4A) and 52(2) of the BSA, particularly when combined with the current wording in the accompanying Explanatory Memorandum to the Bill.
- (v) Accordingly, CRA requests that the proposed sections 43(4A) and 52(2) are deleted from the Bill. If this is not possible, CRA would like the following wording to be inserted to the Explanatory Memorandum:

*The Government recognises the value that the exemption gives to radio broadcasters to manage their commercial interests and ability to meet regulatory requirements; and*

*It is anticipated that subsection [43C(4)/52(2)] will remain as drafted in the absence of significant population changes relating to a section 30 determination.*

## **2. Proposed changes to sections 43C(4) and 52**

Section 43C(4) and section 52 of the BSA currently provide that changes in licence area populations, as determined by the ACMA under section 30 of the BSA, are not to put persons in breach of:

- a licence condition under s43C (s43C(4)); or
- Divisions 2 or 3, Part 5 (Control) (s52).

Instead, in such circumstances, the licence condition would continue to apply ‘as if the previous ACMA determination remained in force’.<sup>1</sup>

The Bill improves the drafting of this provision to extend it beyond the ‘previous ACMA determination’ to ‘the most recent determination under which the person was not in breach of the condition’.

**CRA supports this amendment, as it recognises the value of the exemptions to broadcasters and extends the exemptions beyond the most recent ACMA determination to protect licensees into the future.**

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### <sup>1</sup> **Relevance of population to licence conditions**

- (i) *Relevance of population to conditions under section 43C*
  - Section 43 imposes a condition that requires regional licensees to broadcast material of local significance. This does not apply to remote area, regional racing services or section 40 licensees.
  - The *Broadcasting (Hours of Local Content) Declaration No 1 of 2017* is made under s43C(8) of the BSA and provides that the applicable number of hours for a small licensee is 30 minutes. A small licensee is defined as a regional commercial radio broadcasting licence located in a licence area in which the ‘total population of the licence area is fewer than 30,000 people according to the most recent determination made by the ACMA under section 30’.
  - Section 43C(4) is important as it means that a small licensee cannot be found in breach of the local content licence condition simply because the ACMA makes a new determination of the licence area population.
- (ii) *Relevance of population to section 52 (Part 5)*
  - Part 5 of the deals with the control of commercial broadcasting licences. It provides that commercial radio broadcasters may not hold more than 2 licences in a licence area (Div 2, section 54) and must comply with limitations on the number of directorships (Div 3, section 56).
  - Section 51 provides that if more than 30% of the licence area population of a licence area is attributable to an overlap then the rules in Part 5 (ie the control rules) apply to those 2 licence areas as if the 2 licence areas were one.
  - Section 52 ensures that a licensee cannot be found in breach of the provisions in Divisions 2 (two in a market) or 3 (directorship limitations) as a result of a new ACMA determination of the licence area population.

### **3. Objection to the new sunset provisions at sections 43C(4A) and 52(2) of the BSA**

The Bill also proposes the addition of a sunset clause at the end of each of sections 43C(4) and 52, which provide that each provision *'ceases to have effect at the end of 5 years after the commencement of Schedule 4'*.

CRA does not support the addition of the sunset clauses.

The Explanatory Memorandum to the Bill states that the addition of the sunset clauses *'signals the Government's commitment to undertaking a review of the exemption[s]'* to look at whether they remain *'appropriate and relevant'* (in relation to s43C(4)) and how they *'affect the market, licensees and the community'* (in relation to s52).

The combination of the new sunset clauses, together with commentary in the Explanatory Memorandum indicating the Government's intention to review whether the exemptions are appropriate, is of great concern to commercial radio broadcasters.

CRA appreciates that the drafting is shaped by general principles underlying regulatory reform and a desire to support and reflect the objects of the BSA. However, CRA submits that the removal of these exemptions in 5 years' time is likely to place regional broadcasters at a significant commercial disadvantage and may have long term negative effects.

For example, a station that currently formats its programming to achieve 30 minutes of material of local significance, by virtue of its status as a small licensee, may not survive the imposition of an obligation to provide 3 hours of local content following a new population determination by the ACMA. This may result in a situation inconsistent with the objects set out at section 3 of the BSA, as it will create inefficiencies and will mean that stations spend more time satisfying administrative burdens than on producing diverse, entertaining and informative content.

Regional commercial radio stations are undergoing a significant amount of upheaval at present, following the Covid 19 situation, contraction of local advertising budgets, the aftermath of the bushfires and digital disruption. It is important that the exemptions provided by sections 43C(4) and 52 of the BSA (as amended by the Bill) are guaranteed into the future to provide certainty for regional broadcasters.

### **4. Proposed solutions**

CRA's preferred solution is that the sunset clauses are removed completely, as they have the potential to cause ongoing uncertainty for licensees.

However, if this is not the Committee's preferred approach, CRA suggests that the Explanatory Memorandum is amended to insert the following wording:

- *The Government recognises the value that the exemption gives to radio broadcasters to manage their commercial interests and ability to meet regulatory requirements.*
- *It is anticipated that subsection [43C(4)/52(2)] will remain as drafted in the absence of significant population changes relating to a section 30 determination.*

Accordingly, the revised Explanatory Memorandum would read as follows at *Schedule 4 – Grandfathering arrangements with regard to population determinations made by ACMA*:

*Item 2 – After subsection 43C(4)*

*Item 2 adds a new subsection 43C(4A) which provides that section 43C(4) as amended by this Bill, ceases to have effect 5 years after the date of the amendment's commencement (being the day after the Act receives the Royal Assent). The effect of this is that after the sunseting date, licensees would no longer be protected from inadvertently breaching the local content rules under section 43C once ACMA determines new licence area populations. The Government recognises the value that the exemption gives to radio broadcasters to manage their commercial interests and ability to meet regulatory requirements. Nevertheless, it is appropriate that significant fluctuations in populations, particularly in regional areas, may be taken into account in considering the market in which affected licensees operate and the needs of the communities they service. This sunseting provision provides a legislative mechanism to prompt a review of the exemption in subsection 43C(4) within 5 years to ensure that the exemption remains appropriate and relevant. The review would inform a future decision of Government as to whether the sunseting arrangement remains appropriate or whether alternative action should be taken, such as the modification or removal of the sunseting arrangement. It is anticipated that subsection 43C(4) will remain as drafted in the absence of significant population changes relating to a section 30 determination.*

*Item 5 – At the end of section 52*

*Item 5 adds a new subsection 52(2) which provides that section 52, as amended by this Bill, ceases to have effect 5 years after the date of the amendment's commencement (being the day after the Act receives the Royal Assent). The effect of this is that after the sunseting date, licensees would no longer be protected from inadvertently breaching the statutory and control rules under Part 5: Division 2 and 3, once ACMA determines new licence area populations. The Government recognises the value that the exemption gives to radio broadcasters to manage their commercial interests and ability to meet regulatory requirements.*

*Similarly to Item 2, this sunseting provision is intended to ensure that the exemption remains appropriate and relevant through a review of the exemption in section 52 within 5 years. The review would lead to an assessment of how any changes to population determinations over time affect the market, licensees and the community; and articulate any further legislative change that would be required to support the policy intent and objects of the Act, with respect to section 30 (population determinations). It is anticipated that subsection 52(2) will remain as drafted in the absence of significant population changes relating to a section 30 determination.*

CRA is happy to discuss these issues in more detail with the Committee.

Commercial Radio Australia