



Australian
Competition &
Consumer
Commission

ACCC final decision on the request for a variation of the digital radio access undertakings

December 2013

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Glossary of terms and abbreviations

Access Agreement	The access agreement incorporated in the access undertakings approved by the ACCC in April 2009.
Access Seekers	Commercial and community broadcasters who seek access to the Multiplex Transmission Service.
Access Undertaking	The eight modified access undertakings approved by the ACCC in April 2009 for the provision of digital radio multiplex transmission services.
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
Broadcasting Services Act	<i>Broadcasting Services Act 1992 (Cth)</i>
CBAA	Community Broadcasting Association of Australia
CCA	<i>Competition & Consumer Act 2010 (Cth)</i>
Decision-Making Criteria	<i>Digital Radio Multiplex Transmitter Licensees (Decision-Making Criteria) Determination 2008</i>
DRMT	Digital radio multiplex transmitter
Initial Variation Request	The formal request to vary the Digital Radio Access Undertaking submitted by the Licensees on 19 June 2013 in accordance with section 118NH of the <i>Radiocommunications Act 1992</i> .
Licensees	The joint venture companies holding digital radio multiplex transmitter licences.
Multiplex Transmission Service	The process of multiplexing (or bringing together) separate streams of content from individual commercial and community radio broadcasters and transmitting a combined stream to end users.
Procedural Rules	<i>Digital Radio Multiplex Transmitter Licenses Procedural Rules 2008</i> .
Proposed Amendments	The six substantive amendments proposed in the formal request to vary the Digital Radio Access Undertaking.
JVCs	Digital radio joint venture companies that may comprise of both commercial and community radio broadcasters.
Radiocommunications Act	<i>Radiocommunications Act 1992 (Cth)</i>
Representative Company	A digital radio broadcasting representative company is constituted by incumbent community radio broadcasters in a particular licence area.
RF service	Radio Frequency service
Variation Request	The revised formal request to vary the Digital Radio Access Undertaking submitted by the Licensees on 7 November 2013 in accordance with section 118NH of the <i>Radiocommunications Act 1992</i> .

1. Introduction

The Australian Competition and Consumer Commission (ACCC) administers the access regime for the digital radio access service contained in Division 4B Part 3.3 of the *Radiocommunications Act 1992* (Radiocommunications Act).

The access undertaking for the digital radio service was established in April 2009, permitting digital radio services to commence shortly after. Further background on the establishment of the regime is contained in section 1.1 and 1.2 below.

On 19 June 2013 the ACCC received a request from the access providers to vary the access undertakings in place for the digital radio access service under section 118NH of the Radiocommunications Act.¹ After an initial consultation period, the variation request was withdrawn and a new variation request subsequently submitted on 7 November 2013. As described below, the ACCC's framework for consideration of the variation request is substantively similar to that which it assessed the access undertakings.

After considering the variation request against the relevant framework, the ACCC accepts the request to vary the digital radio access undertaking. The ACCC considers that the proposed amendments to the undertaking satisfy the relevant decision-making criteria.

This document sets out the ACCC's final decision in relation to the variation and the steps and relevant matters the ACCC had regard to in arriving at a final decision.

1.1 Overview of the Digital Radio Access Regime

In July 2009, digital radio services commenced in Adelaide, Brisbane, Melbourne, Perth and Sydney.

The legislative framework enabling the advent of the digital radio services was introduced by the Australian Government in 2007 through amendments to the Radiocommunications Act, the *Broadcasting Services Act 1992* (Broadcasting Services Act) and the then *Trade Practices Act 1974* (now the *Competition & Consumer Act 2010*) (CCA). The legislative framework provides for the Australian Communications and Media Authority (ACMA) to allocate digital radio multiplex transmitter (DRMT) licences to joint venture companies (JVCs) to multiplex (or bring together) separate streams of content from individual commercial and community radio broadcasters and transmit a combined stream to end users in each licence area (Multiplex Transmission Service). Shares in JVCs can be held by incumbent commercial digital radio broadcasters and digital community radio broadcasting representative companies (Representative Company).² The ACCC notes that while the Representative Companies have first right to acquire a shareholding in a JVC, at the time of this decision, Representative Companies were not shareholders in a JVC.³

¹ WebbHenderson [acting for the Licensees], *Variation of digital radio access undertaking under section 118NH of the Radiocommunications Act 1992*, 19 June 2013 (Licensee's Initial Variation Request).

² Under section 9C of the Radiocommunications Act, a digital community radio broadcasting representative company is a body constituted by incumbent community radio broadcasters in a particular licence area.

³ Community Broadcasting Association of Australia (CBAA), *Proposed variation of Access Undertakings in relation to digital radio multiplex transmission services: Submission by the Community Broadcasters Association of Australia in response to the ACCC consultation*, 9 August 2013 (CBAA August submission), p.1 [1.6].

The ACMA allocated eight DRMT licenses across Adelaide, Brisbane, Melbourne, Perth and Sydney.⁴ There are currently five JVCs holding DRMT licences (Licensees); the Licensees in Brisbane, Melbourne and Sydney hold two DRMT licences. Each Licensee offers Multiplex Transmission Services in their own geographic area.

The legislative framework includes an access regime to help both commercial and community broadcasters (Access Seekers) obtain access to the Multiplex Transmission Service on reasonable terms and conditions. Under section 118ND of the Radiocommunications Act, Licensees were required to provide the ACCC with an undertaking specifying the terms and conditions on which it would provide access to Access Seekers. Once undertakings were accepted by the ACCC, the ACMA could determine that digital radio services could commence in that area.

1.2 Digital Radio Access Undertakings

As required by section 118ND of the Radiocommunications Act, the Licensees jointly submitted eight access undertakings to the ACCC on 3 October 2008. Each undertaking was identical in substance.⁵

The Radiocommunications Act does not specify the basis on which the ACCC had to make its decision to accept or reject an undertaking but it does enable the ACCC to determine relevant decision-making criteria.⁶ In May 2008, the ACCC published the *Digital Radio Multiplex Transmitter Licensees (Decision-Making Criteria) Determination 2008* (Decision-Making Criteria) and the *Digital Radio Multiplex Transmitter Licenses Procedural Rules 2008* (Procedural Rules).⁷ The Decision-Making Criteria sets out the criteria that the ACCC is to apply in determining whether to accept an undertaking. The Procedural Rules deal with matters such as the form in which the documents must be provided, time limits for the provision of certain information and confidentiality. Further detail regarding the Decision-Making Criteria is contained in section 4 below.

As such, the ACCC decision to accept or reject the eight undertakings submitted by Licensees in 2008 was based on its assessment of the undertakings against the Decision-Making Criteria. As part of the process of making this assessment, the ACCC released a discussion paper on the undertakings and sought submissions from interested stakeholders. Seventeen submissions were received.

In March 2009, following consultation with interested parties, the ACCC decided to reject the undertakings, and instead proposed modified undertakings.⁸ The modified undertakings, while based on the undertakings originally submitted by the Licensees, included modifications to enable the undertakings to satisfy the requirements set out in the Decision-Making Criteria.

⁴ ACMA website, *Digital radio licensing*, ACMA, last updated 22 July 2013, viewed 28 August 2013, <http://www.acma.gov.au/Industry/Broadcast/Community-radio-and-TV/Community-licensing/digital-radio-licensing-community-licensing-i-acma>.

⁵ ACCC website, *Licensee's October 2008 access undertaking*, <http://www.accc.gov.au/system/files/Digital%20radio%20undertaking%E2%80%9494undertaking%20%28October%202008%29.pdf>; *Licensee's October 2008 access agreement*, <http://www.accc.gov.au/system/files/Digital%20radio%20undertaking%E2%80%9494access%20agreement.pdf>.

⁶ Section 118NJ of the Radiocommunications Act.

⁷ ACCC website, *Decision-Making Criteria*, <http://www.accc.gov.au/system/files/Final%20decision-making%20criteria.pdf>; *Procedural Rules*, <http://www.accc.gov.au/system/files/Final%20procedural%20rules.pdf>.

⁸ ACCC website, *Proposed modified undertaking*, <http://www.accc.gov.au/system/files/Proposed%20modified%20undertaking.pdf>.

In April 2009, following the consideration of further submissions, the ACCC determined that the ACCC-modified undertakings (the Access Undertaking) were to apply to the DRMT licenses.⁹

The Access Undertaking incorporates an access agreement, which sets out the prices, terms and conditions on which the Licensees are to supply the Multiplex Transmission Service to Access Seekers (the Access Agreement).¹⁰ Except where indicated otherwise, references to the Access Undertaking include the incorporated Access Agreement.

1.3 Provision for varying the Access Undertaking

The Radiocommunications Act provides two mechanisms to vary an existing digital radio access undertaking:

- (1) A Licensee applies to the ACCC for a variation under section 118NH(2)(a); or
- (2) The ACCC requires a Licensee to provide a variation under section 118NH(2)(b).

The first mechanism for variation (such as that being assessed in this document) can be requested by the Licensee at any time.

The second mechanism, where the ACCC may initiate the process to vary an access undertaking is subject to a number of restrictions:

- the ACCC cannot require a variation of an access undertaking before 1 January 2015;
- the ACCC must be satisfied that the current access undertaking would be rejected if given to the ACCC at the time a variation request under this mechanism is requested; and
- this type of variation request cannot be issued more than once in any five year period.

Any request to vary an access undertaking under the Radiocommunications Act requires the ACCC to invite members of the public to make submissions and consider these views and/or proposals in the ACCC's decision making process.¹¹

After considering the variation, the ACCC must decide whether to accept or reject the variation. In the circumstances where the ACCC decides to reject a request to vary, the Radiocommunications Act enables the ACCC to issue a notice to the Licensees to alter the variation request,¹² or for the ACCC to vary the access undertaking itself (subject to public consultation).¹³

⁹ ACCC website, *Notice to multiplex licensees under 118NF(5)*, <http://www.accc.gov.au/system/files/Notice%20to%20multiplex%20licensees%20under%20118NF%285%29.pdf>; *the Access Undertaking*;

<http://www.accc.gov.au/system/files/ACCC%20Modified%20Access%20Undertaking.pdf>.

¹⁰ ACCC website, *the Access Agreement*,

<http://www.accc.gov.au/system/files/ACCC%20Modified%20Access%20Agreement.pdf>.

¹¹ Section 118NH(4) of the Radiocommunications Act.

¹² Section 118NH(5) of the Radiocommunications Act.

¹³ Section 118NH(6)(7) of the Radiocommunications Act.

2. Request to vary the Access Undertaking

On 19 June 2013, the Licensees submitted a formal request to vary the Access Undertaking under section 118NH(2)(a) of the Radiocommunications Act (the Initial Variation Request). After public consultation conducted by the ACCC, the Licensees withdrew the Initial Variation Request on 4 November 2013.

On 7 November 2013, the Licensees submitted a revised request to vary the Access Undertaking (the Variation Request).¹⁴

The Variation Request proposes the same amendments as the Initial Variation Request with an additional amendment to the Access Agreement. This additional amendment was made in response to submissions received during the consultation process on the Initial Variation Request, which the Licensees have chosen to adopt in the Variation Request.

The proposed amendments are set out in detail in section 4 of this document. In the submission accompanying the Variation Request, the Licensees broadly categorised the variations they seek as follows:

- variations to reflect changes to the Multiplex Transmission Service arising from the upcoming deployment of on-channel repeaters in each capital city to improve the coverage and quality of digital radio services;
- variations to allow the Licensees to put new access arrangements in place with Access Seekers;
- variations that seek to reflect the operational experience gained by the Licensees in the supply of the Multiplex Transmission Service to Access Seekers since the official launch of digital radio services in July 2009; and
- variations to remove redundant provisions that no longer have effect or are no longer required.¹⁵

2.1 Public Consultation Process

In accordance with section 118NH(4) of the Radiocommunications Act, the ACCC, in response to the Initial Variation Request, published a consultation letter on 3 July 2013 and invited submissions on the amendments proposed by the Licensees.

The ACCC received submissions from one stakeholder, the Community Broadcasting Association of Australia (CBAA). The CBAA is the peak body for community broadcasters in Australia, representing over 350 licensed community broadcasters.¹⁶

The CBAA submitted to the consultation process on 9 August 2013. The Licensees provided a submission in response to issues raised by the CBAA on 6 September 2013. The CBAA then made a further submission on 11 October 2013.¹⁷

¹⁴ WebbHenderson [acting for the Licensees], *Revised application to vary digital radio access undertaking under section 118NH of the Radiocommunications Act 1992*, 7 November 2013 (Licensee's Variation Request).

¹⁵ Licensee's Variation Request, pp.1-2.

¹⁶ CBAA August submission, p.1 [1.3].

Following the withdrawal of the Initial Variation Request and the submission of the Variation Request, the ACCC initiated a public consultation process on 11 November 2013 in relation to the Licensee's proposed amendments to the Access Undertaking. In response to the ACCC's request for submissions on the Variation Request, the CBAA made a further submission on 18 November 2013.¹⁸

The ACCC consultation letters and submissions received during public consultations are available on the ACCC website.¹⁹

3. Assessment process and Decision-Making Criteria

The process the ACCC has followed for assessing the variation requests has been in accordance with Division 4B of Part 3.3 of the Radiocommunications Act, the Decision-Making Criteria and the Procedural Rules.

3.1 Criteria for assessing variation requests

Similar to the assessment of an access undertaking, the Radiocommunications Act enables the ACCC to determine the criteria on which it will assess whether to accept or reject a request to vary an access undertaking. As outlined above, the ACCC made the Decision-Making Criteria in May 2008 under section 118NJ of the Radiocommunications Act. Section 6 of the Decision-Making Criteria states that, in deciding whether to accept or reject a variation to an access undertaking, the ACCC must have regard to the matters set out in section 5 of the Decision-Making Criteria.

Section 5 of the Decision-Making Criteria sets out the following matters:

- a) whether the access undertaking complies with Division 4B of Part 3.3 of the Radiocommunications Act;
- b) whether the access undertaking unduly restricts competition in related markets;
- c) whether the terms and conditions of access specified in the access undertaking are reasonable;
- d) whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable;
- e) whether the access undertaking includes an obligation on the licensee to not hinder access to services;
- f) whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism.

¹⁷ WebbHenderson [acting for the Licensees], *Response to the CBAA submission on the proposed variation of the digital radio access undertaking under section 118NH of the Radiocommunications Act 1992*, 6 September 2013 (Licensee's September submission); and CBAA, *Proposed variation of Access Undertakings in relation to digital radio multiplex transmission services: Further comments*, 11 October 2013 (CBAA October submission).

¹⁸ CBAA, *Revised variation of Access Undertakings in relation to digital radio multiplex transmission services: CBAA Further comments*, 18 November 2013 (CBAA November submission).

¹⁹ ACCC website at: <http://www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services/variation-request>.

It is important to recognise that the matters listed above is not an exhaustive list and the ACCC may have regard to any matter it considers relevant.²⁰

While this section provides an overview of each criterion in section 5 of the Decision-Making Criteria, not all matters have been relevant to assessing each proposed amendment in the Variation Request.

3.1.1 Whether the access undertaking complies with Division 4B of Part 3.3 of the Radiocommunications Act

In assessing whether to accept a request to vary an existing access undertaking the ACCC must consider whether the varied terms and conditions of access comply with the access framework set out in Division 4B of Part 3.3 of the Radiocommunications Act. The terms and conditions in an access undertaking must include terms and conditions that relate to standard access obligations and excess-capacity access obligations that are, or may become, applicable to a DRMT licence. A Licensee must comply with access obligations relevant to the licence on such terms and conditions as are ascertained in accordance with the accepted access undertaking.²¹

Further obligations that a Licensee must comply with in accordance with the Radiocommunications Act include the obligation not to discriminate between content service providers who have access to multiplex capacity under the licence (in relation to the technical and operational quality of the services supplied) and the technical and operational quality and timing of fault detection, handling and rectification processes.²²

3.1.2 Whether the access undertaking unduly restricts competition in related markets

The proposed varied access undertaking should not have the effect of frustrating or unreasonably restricting the ability of an Access Seeker to provide services, including in competition with any services provided by other parties. Similarly, the proposed varied access undertaking should not favour particular Access Seekers. For example, Access Seekers that are not constituent members of a Licensee²³ should not be charged unreasonably high prices or provided with unreasonably low quality services or be unreasonably disadvantaged in any other way relative to Access Seekers that are constituent members of a Licensee. This means a Licensee would be prevented from including provisions in its access undertaking that artificially inflated some Access Seekers' costs or enabled a Licensee to provide inferior services to some Access Seekers compared to those it offers to other Access Seekers, where this is not reasonable.

In applying this criterion, the ACCC recognises that Licensees have a right to conduct their businesses in accordance with normal commercial standards, free from any undue or unfair interference caused by the rights of Access Seekers to access the multiplex capacity and associated services specified in the Access Undertaking.

²⁰ Section 118NJ(4) of the Radiocommunications Act .

²¹ Section 118NO of the Radiocommunications Act.

²² Section 118NP of the Radiocommunications Act.

²³ This relates to the shareholding of the Licensees, i.e. the JVCs holding DRMT licences; as noted in section 2.1 of this document, JVCs are currently comprised of incumbent commercial digital radio broadcasters.

3.1.3 Whether the terms and conditions of access specified in the access undertaking are reasonable

The explanatory memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* states that the objective of the digital radio framework is to ensure multiplex services (including bit rate) are provided to commercial, wide coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.²⁴

In the context of this objective, the ACCC considers that the terms and conditions of access, and any subsequent variations to those terms and conditions in the Access Undertaking, should be reasonable.

The ACCC considers that the attributes characterising ‘reasonable’ terms and conditions include certainty, fairness and balance, timeliness and the removal of any potential for delaying access. Without limiting the range of issues that may be taken into account, the following examples are the types of issues which the ACCC may take into account in assessing the reasonableness of the terms and conditions contained in an access undertaking:

- the legitimate business interests of the Licensee and its investment in facilities used to supply the service;
- the interests of persons who have rights to use the service;
- the public interest in having competition in markets and efficient investment in facilities and services;
- the operational and technical requirements necessary for the safe and reliable operation of the service; and
- the economically efficient operation of the network.

The ACCC accepts that in certain circumstances, Licensees may impose requirements on Access Seekers which may at first appear contrary to what is reasonable. However, in practice, these requirements are reasonable. For example these circumstances may include:

- evidence that an Access Seeker is not creditworthy;
- repeated failures by an Access Seeker to comply with the terms and conditions on which the same or similar access has been provided; or
- requiring Access Seekers to demonstrate that they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

3.1.4 Whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable

All prices or pricing methodologies in an access undertaking must be fair and reasonable.

²⁴ See Explanatory Memorandum of the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007*: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2761_ems_62b2210e-2e44-4fc7-b80c-891931a19747%22; note, this Bill was assented in May 2013.

Fair and reasonable access prices included in an access undertaking should reflect the efficient and prudent costs of providing access to the multiplex capacity and associated services including a normal commercial rate of return. Reasonable access prices are required to ensure that the pricing of access to multiplex capacity is not excessive.

3.1.5 Whether the access undertaking includes an obligation on the licensee to not hinder access to services

An obligation not to hinder access should be included in an access undertaking. Any proposed variation of an access undertaking should therefore not conflict with this obligation. The rationale for this obligation is that without the obligation being explicitly included in an access undertaking it is possible that a Licensee or a person authorised by a Licensee could do an act (or fail to do an act) that has the effect of hindering access to services.

For example, a Licensee or a person authorised by a Licensee may adopt certain technology or standards that have the effect of hindering access to some Access Seekers under the terms of an access undertaking.

However, an obligation not to hinder access should not be applied unreasonably. As an example, Licensees may require Access Seekers to be creditworthy or may require Access Seekers to demonstrate that they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting. In these circumstances, while these obligations may have the effect of hindering access, they may still be reasonable.

3.1.6 Whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism

In considering the dispute resolution mechanism included in an access undertaking, the ACCC will assess whether the provisions facilitate the fair, timely and efficient resolution of disputes, including through the appointment of an appropriate arbitrator within a reasonable timeframe.

In assessing the reasonableness of the dispute resolution mechanism, the ACCC may consider, among other things, whether the mechanism:

- sets out the appropriate triggers and timeframes for dispute resolution, including the process for dispute notification and dispute termination;
- describes the process that will govern any dispute, including the definition and ambit of matters that may be resolved pursuant to the dispute resolution mechanism and details of any differences between price and non-price processes;
- identifies an appropriate arbitrator, or outlines a process for the selection of an appropriate arbitrator, taking into account the arbitrator's independence and impartiality, appropriate credentials and industry-specific knowledge and skills;
- identifies (without limiting) the factors to which the arbitrator should have regard in considering a dispute, which should include the terms and conditions of the access undertaking;
- defines the duties, functions, liability, authority and jurisdiction of the arbitrator; and

- defines the enforceability of any dispute resolution mechanism on the parties, including the enforceability of an arbitrated settlement.

3.1.7 Other matters which the ACCC may consider

As noted previously, the criteria listed above do not, by implication, limit the matters to which the ACCC may have regard to in deciding whether to accept or reject a request to vary a digital radio access undertaking.

4. Assessment of the Variation Request

The ACCC has considered each of the proposed amendments that constitute the Variation Request and their effect on the Access Undertaking against the matters discussed above.

The Variation Request proposes six substantive amendments to the Access Undertaking and incorporated Access Agreement (Proposed Amendments):

- (1) Align the operational term of the Access Agreement (clause 5) to the term of the Access Undertaking.
- (2) Vary the service description for the Multiplex Transmission Service; specifically, to clause 1.4 of the Access Undertaking (RF service).
- (3) Insert new clause 9.6 in the Access Agreement to ensure the safe operation of systems, equipment and facilities in connection with the Multiplex Transmission Service.
- (4) Amend the suspensions provisions in the Access Agreement (clause 15) to take account of the upcoming launch of on-channel repeater services in each capital city.
- (5) Amend the invoicing provision (clause 12.3(b) of the Access Agreement) to align the invoicing obligations of the Licensees with that which has been agreed between the Licensees and the Access Seekers.
- (6) Delete a range of redundant provisions (including clause 3 and parts of clauses 6.3, 7.3, and 7.4, as well as clause 17.9 of the Access Agreement).

4.1 Proposed Amendment (1) - Align the operational term of the Access Agreement (clause 5) with the term of the Access Undertaking

4.1.1 Background and submissions

Under existing arrangements, the Access Agreement has a definitive term (a notional expiry of December 2012) while the Access Undertaking remains in force as long as a Licensee holds a DRMT licence. In the Licensee's Variation Request, the Licensees submitted that the proposed alignment of the terms of both instruments will provide increased contractual certainty for the Licensees and

Access Seekers.²⁵ They also submitted that Proposed Amendment (1) will reduce the administration costs associated with the implementation of periodic extensions to access agreements.²⁶

In the current Access Agreement, prior to the term of its expiry, parties are able to extend, replace or renegotiate the Access Agreement. If no agreement was reached prior to the expiry of the term, the Access Agreement continues to be in force until another agreement is entered in to by the parties. While the current Access Agreement had an expiry date of 31 December 2012, it continues to be in force as no new Access Agreement has been made.

CBAA submission

The CBAA noted in its submission during the public consultation process that they had no objections to the alignment of the term of the Access Agreement with the term of the Access Undertaking.²⁷

4.1.2 ACCC assessment

Proposed Amendment (1) will align the term of the Access Agreement with the term of the Access Undertaking. As a result, the Access Agreement will remain in force for the duration of the DRMT licence granted to a Licensee.

The ACCC considers that the Licensee's request for amendment is reasonable (as per section 5(1)(c) of the Decision-Making Criteria) to the extent that the request for this variation is to ensure certainty and efficiency in the supply of the Multiplex Transmission Service. The lack of any objection from the CBAA also suggests that an alignment of the terms of the Access Agreement and the Access Undertaking reflects reasonable terms and conditions of access for Access Seekers and does not conflict with the interests of Access Seekers.

The ACCC recognises the potential for terms and conditions to become unreasonably locked in if the Access Agreement stands indefinitely. However, the ACCC notes that review mechanisms in the Access Undertaking and the access regime more generally remain in place. As a result, the ACCC considers that Proposed Amendment (1) does not affect the current ability of parties to vary the Access Agreement in the future.

In particular, as described in section 1.3 above, section 118NH of the Radiocommunications Act allows that existing arrangements in the Access Undertaking (including the Access Agreement) be varied either:

- at the request of the Access Provider, a consultation process and approval by the ACCC; or
- at the direction of the ACCC, subject to a number of conditions, should the ACCC consider that existing access arrangements are no longer consistent with the Decision-Making Criteria.²⁸

The Access Undertaking and the Access Agreement both provide that any variation of the Access Undertaking through section 118NH will automatically form part of the Access Agreement.²⁹

²⁵ Licensee's Variation Request, p.2.

²⁶ Licensee's Variation Request, p.2.

²⁷ CBAA August submission, p. 2 [2.1].

²⁸ Section 118NH(2) Radiocommunications Act.

²⁹ Clause 4.2 of the Access Undertaking; clause 23.9(b) of the Access Agreement.

Therefore, these provisions allow for the Access Agreement (and Access Undertaking) to be varied in the future, if necessary.

The ACCC notes these provisions only enable a variation to be implemented by approval from the ACCC. Therefore, the consultation and approval process provide a check and balance on the potential for Licensees to unilaterally make or lock in terms and conditions that are unreasonable or conflict with the Decision-Making Criteria. The ACCC also notes the Dispute Resolution Processes in the Access Agreement as another mechanism to address potential issues that arise.³⁰

As such, the ACCC considers that the proposal to align the operational term of the Access Agreement with the term of the Access Undertaking is reasonable and is unlikely to have the effect of unreasonably locking in access terms and conditions. The ACCC considers that the proposed amendment satisfies the Decision-Making Criteria.

4.2 Proposed Amendment (2) - Vary the service description for the Multiplex Transmission Service; specifically, to clause 1.4 of the Access Undertaking (RF service)

4.2.1 Background and submissions

The Multiplex Transmission Service has three bundled components, defined separately in the Access Undertaking: the Multiplexing Service, the Modulation Service, and the Radio Frequency (RF) service.

Proposed Amendment (2) seeks to amend the RF service definition to facilitate changes in the way Licensees deliver the underlying transmission services following the roll out of on-channel repeaters in each capital city. The Licensees submitted that the on-channel repeaters are being deployed to improve the coverage and quality of digital radio services.³¹ The Licensees also noted that the locations for the rollout of on-channel repeaters have been determined on the basis of identified black spots.³²

CBAA submission

In both its August and October submissions the CBAA raised broader concerns in relation to the definition of the RF service as described in clause 1.4 of the Access Undertaking.

In its submissions, the CBAA agreed that the deployment of on-channel repeaters should be considered as part of the RF definition, provided that there is agreement between both Licensees and Access Seekers that the deployment of on-channel repeaters are necessary and efficient to ensure adequate quality and coverage of digital radio services.³³

As outlined above, the RF service is one component of the Multiplex Transmission Service supplied to Access Seekers. The CBAA noted that excess deployment of repeaters where they are not required to improve the quality and coverage of digital radio services will increase the total cost of operating the multiplex, and therefore increase prices for Access Seekers. The CBAA also raised concerns that

³⁰ Schedule 3 of the Access Agreement.

³¹ Licensee's Variation Request, p.1.

³² Licensee's September submission, p.3.

³³ CBAA August submission, pp.2-7 [3.7 – 3.34].

the costs of on-channel repeaters are not being re-couped from national broadcasters (the ABC and the SBS), in effect resulting in commercial and community broadcasters subsidising the national broadcasters.

The CBAA proposed that any variation to the Access Undertaking include the establishment of a separate consultation mechanism in the Access Agreement which incorporates an explicit obligation on Licensees to consult with Access Seekers in the event that the Licensees wish to make additional investments in on-channel repeaters.³⁴

Licensee's response to CBAA's submission

In response to the CBAA's proposal, the Licensees made the following submissions:

- Deployment of the on-channel repeaters sites is already well progressed, with capital costs already incurred for the first 11 of the 15 sites; the CBAA's proposals risks a retrospective challenge to the decisions already made on these sites.³⁵
- On-channel repeaters site deployments are optimal and efficient with costs prudently incurred.³⁶
- Initial capital costs have been met by revenues through the auction of excess-capacity entitlements and therefore additional capital costs will not be incorporated into fixed recurring charges for some time.³⁷
- National broadcasters are not currently benefiting from coverage improvements arising from on-channel repeaters deployments.³⁸

CBAA's further response

In its October 2013 submission, the CBAA acknowledged the Licensee's submission regarding the national broadcasters. However, the CBAA maintained the view that on-channel repeater deployment has led to increased access prices. The CBAA reiterated its proposal for a consultation process prior to additional on-channel repeaters investment.³⁹

4.2.2 ACCC assessment

The ACCC considers that the changes in the service description of the Multiplex Transmission Service are consistent with the legitimate business interests of the Licensees and their investment in facilities used to supply the service.

The Access Undertaking (and Access Agreement) envisages investment (i.e. capital expenditure) to be undertaken by the Licensees that is efficient for the ongoing supply of the service. To the extent

³⁴ CBAA August submission, pp.5-9 [3.33-3.34].

³⁵ Licensee's September submission, p.3.

³⁶ Licensee's September submission, p.3.

³⁷ Licensee's September submission, pp.3-4.

³⁸ The repeater transmission service will initially be provided to the national broadcasters for interference management purposes only. The Licensees state that this service should not be charged: Licensee's September submission, pp. 4-5.

³⁹ CBAA October submission, pp.2-3 [3.1-5.3].

that the deployment of the on-channel repeaters is consistent with the Access Undertaking framework for investment, it is reasonable for the service definition to be amended to reflect this new investment.

To the extent that this investment has been made in accordance with the Access Undertaking, then the existing provisions enabling reasonable access to the Multiplex Transmission Service should ensure that in general the interests of Access Seekers will continue be served.

The CBAA has expressed concerns about the flow on of costs from the rollout of on-channel repeaters on access prices. The ACCC notes, that under the Access Agreement, it may be open to the CBAA to pursue these concerns via an Access Seeker initiated review of pricing.⁴⁰ The review could include a binding, independent dispute resolution determination (e.g. conducted by an independent expert) that would be made having regard to the pricing principles in the Access Agreement.⁴¹ This is the primary process specified in the Access Undertaking framework for reviewing specific concerns regarding prices negotiated between the Licensees and Access Seekers.

In its assessment of the Access Undertaking in 2009, that the ACCC declined to include a mechanism proposed by the CBAA which would have permitted them to ‘opt out’ of investment in the service.⁴² As such, the substance of the amendments currently proposed by the CBAA has already been considered by the ACCC. At this time, the ACCC does not consider that circumstances appear to have changed to warrant departure from the decision it made in 2009.

Based on the considerations above, the ACCC considers the request by Licensees to vary the service description for the Multiplex Transmission Service, in particular variations to the RF definition to reflect the deployment of on-channel repeaters, satisfies the Decision-Making Criteria.

4.3 Proposed Amendment (3) - Insert new clause 9.6 in the Access Agreement to ensure the safe operation of systems, equipment and facilities in connection with the Multiplex Transmission Service

4.3.1 Background and submissions

Proposed Amendment (3) seeks to insert an additional clause 9.6 in the Access Agreement in relation to the safe operation of the Multiplex Transmission Service.

The Licensee submitted that Proposed Amendment (3) seeks to ensure that a party to the agreement cannot engage in conduct that negatively impacts on the operation of the Multiplex Transmission Service or the systems, equipment and facilities that are used in connection with the service. The Licensees noted that this proposed amendment reflects the operational experience they have gained since services were launched in 2009.⁴³

⁴⁰ Schedule 2, clause 5.3 of the Access Agreement.

⁴¹ See Schedule 3 and Schedule 2, clause 5.3(i)(ii)(B) of the Access Agreement.

⁴² ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services – Final Decision*, March 2009, pp.41-44,

<http://www.accc.gov.au/system/files/ACCC%20final%20decision%20on%20the%20submitted%20undertakings.pdf>.

⁴³ Licensee’s Variation Request, p.1.

CBAA submission

While the CBAA had no material objection to the proposed inclusion of clause 9.6 to the Access Agreement, the CBAA proposed an additional subclause (at 9.6(d)) that is intended to remove ambiguity over whether an Access Seeker can operate its own system, equipment or facilities in a manner of its own choosing provided such operation complies with the clause (which seeks to ensure the safe operation of connected systems, equipment and facilities).⁴⁴

Licensee's response

In a submission in response to the CBAA, the Licensees submitted that they have no objection to the CBAA's proposed subclause.

As discussed above, as a result of this consultation process, the Initial Variation Request was withdrawn. The CBAA's proposed subclause was included in the revised Variation Request that was submitted to the ACCC.

4.3.2 ACCC assessment

Both the Licensees and the CBAA support the inclusion of clause 9.6 in the Access Undertaking (now that the CBAA's proposed subclause 9.6(d) has been included).

Clause 9.6 refers to conduct that may impact on the systems, equipment and facilities used in the provision of the Multiplex Transmission Service. This is a reasonable term to be incorporated in the Access Agreement under section 5(c) of the Decision-Making Criteria, as it relates to the safe and reliable operation of the service.

The ACCC notes that Proposed Amendment (3), by including subclause 9.6(d) in the Access Agreement, now clarifies that Access Seekers will still be able to use their own equipment so long as this use complies with the remainder of clause 9.6. The ACCC considers that this will address the interests of Access Seekers in being able to use the service in conjunction with their own equipment, which further supports a view that Proposed Amendment (3) is reasonable.⁴⁵

The ACCC considers that the proposed amendment satisfies the Decision-Making Criteria.

4.4 Proposed Amendment (4) - Amend the suspensions provisions in the Access Agreement (clause 15) to take account of the upcoming launch of on-channel repeater services in each capital city

4.4.1 Background and submissions

As part of the deployment of on-channel repeaters, the Licensees have entered, or will enter, into agreements with tower and facility owners. As a result, the Licensees seek to amend clause 15 of the Access Agreement to address the potential disruptions to the provision of Multiplex Transmission Services.⁴⁶ The proposed amendments include:

- the right for the Licensees to power down services or suspend all or part of the Multiplex Transmission Service in the circumstance that on-channel repeaters are being installed;

⁴⁴ CBAA August submission, p.8 [4.1-4.2].

⁴⁵ Section 5(c) Decision-Making Criteria.

⁴⁶ Licensee's Variation Request, pp.3-4.

- the ability for the Licensees to choose to power down, rather than to suspend the Multiplex Transmission Service where this can be done; and
- additional rights of suspension to permit the third party owners of the sites to access the site when it is not feasible for them to do so without suspending or powering down services.

CBAA submission

The CBAA had no objection to the amendments as proposed.⁴⁷

4.4.2 ACCC assessment

Given the nature of Proposed Amendment (4), the ACCC considers it will support the operational and technical requirements necessary for the safe and reliable operation of the service. Proposed Amendment (4) appears to support the Licensee's legitimate business interests and investment in the Multiplex Transmission Service.

Proposed Amendment (4) may also support section 5(e) of the Decision-Making Criteria in that it provides for services to be powered down rather than necessarily suspended where this is possible; this may reduce periods where access to the service is hindered.

The ACCC considers that the proposed amendment satisfies the Decision-Making Criteria.

4.5 Proposed Amendment (5) - Amend the invoicing provision (clause 12.3(b) of the Access Agreement) to align the invoicing obligations of the Licensees with that which has been agreed between the Licensees and the Access Seekers

4.5.1 Background and submissions

The Licensees submitted that Proposed Amendment (5) aligns the invoicing arrangements in the Access Agreement with the arrangements agreed between the Licensees and Access Seekers.⁴⁸ In particular, this will result in invoicing occurring in advance rather than in arrears (as is currently contemplated by the Access Agreement). The Licensees submitted that this amendment will reflect the current invoicing practices as agreed to by Licensees and Access Seekers.

CBAA submission

The CBAA had no objection to the amendments as proposed.⁴⁹

4.5.2 ACCC assessment

Proposed Amendment (5) reflects the current invoicing practices agreed to by Licensees and Access Seekers. The ACCC considers that it is reasonable, as per section 5(c) of the Decision-Making Criteria, to amend the Access Agreement on the basis of the legitimate business interests of the Licensees and in the interests of Access Seekers.

⁴⁷ CBAA August submission, p.8 [5.2].

⁴⁸ Licensee's Variation Request, p.4.

⁴⁹ CBAA August submission, p.8 [6.4-6.5]

4.6 Proposed Amendment (6) - Delete of a range of redundant provisions (including clause 3 and parts of clauses 6.3, 7.3, and 7.4, as well as clause 17.9 of the Access Agreement)

4.6.1 Background and submissions

The Licensees propose the deletion of a number of provisions in the Access Agreement. The Licensees submitted that the deletion of these provisions will remove provisions that no longer have effect or remove provisions relating to obligations that have already been discharged.⁵⁰

CBAA submission

The CBAA had no objection to the amendments as proposed.⁵¹

4.6.2 ACCC assessment

The ACCC has examined the provisions identified for removal under Proposed Amendment (6).

In relation to proposed removal of clause 3, the ACCC is satisfied that the removal of this provision does not materially affect the ongoing operation of the Access Undertaking and Access Agreement. Clause 3 of the Access Agreement provides an outline of provisions and is not intended to have an operative effect.

For the remaining clauses, the ACCC agrees with Licensees that the excised provisions relate to functions that have been discharged or are adequately addressed by other elements of the access framework set out in the Radiocommunications Act.

- Clause 6.3 sets out the process for commercial broadcasters to initially claim standard access entitlements as required under the Radiocommunications Act; these entitlements have now been allocated and as such the provision is redundant.
- Similarly, the parts proposed for removal in clauses 7.3 and 7.4 relate to the initial allocation of excess capacity as required under the Radiocommunications Act; these obligations have also been discharged by Licensees and are no longer applicable.
- Clause 17.9 of the Access Agreement provides that Licensees may, subject to the ACCC's approval, propose changes to clause 16.5 of the Access Agreement (where Access Seekers can request changes in the allocation of multiplex transmission capacity), to take into consideration the Licensee's upstream supply arrangements or the manner in which Licensee's supply the Multiplex Transmission Service. The ACCC is satisfied that clause 17.9 is redundant as the process for varying the Access Undertaking (and, in effect, the Access Agreement) is already specified in section 118NH of the Radiocommunications Act.

As such, the ACCC considers that Proposed Amendment (6) is consistent with the Decision-Making Criteria, in particular that the terms and conditions of the Access Undertaking (and Access Agreement) are reasonable.⁵²

⁵⁰ Licensee's Variation Request, pp.4-5.

⁵¹ CBAA August submission, p.9 [7-1-7.11].

⁵² Section 5(c) of the Decision-Making Criteria.

5. Final decision

As discussed above, the ACCC has assessed the Variation Request against the Decision-Making Criteria and considered the submissions it received from the Licensees and the CBAA. Specifically, the ACCC has assessed whether accepting the Variation Request will vary the Access Undertaking in a way that will satisfy the matters listed in the Decision-Making Criteria.

Based on the assessment set out in section 5 above, the ACCC considers that the variation to the undertaking (as specified in the Variation Request) satisfies the Decision-Making Criteria.

The ACCC's final decision is to accept the Variation Request sought by the Licensees.

6. Commencement of varied Access Undertaking

The variation to the Access Undertaking and Access Agreement will be effective from the date that the ACCC decided to accept the variation. The ACCC will provide written notice to the Licensees that the variation has been accepted and setting out the terms of the variation. The ACCC will publish the varied Access Undertaking and Access Agreement on the ACCC website.