



**Australian
Competition &
Consumer
Commission**

GPO Box 520
Melbourne Vic 3001

Level 35, The Tower
360 Elizabeth Street
Melbourne Vic 3000

tel: (03) 9290 1800
fax: (03) 9663 3699

www.accc.gov.au

Our ref: 44198
Contact officer: Louise Hird
Contact phone: 03 9290 1484

11 November 2013

Dear Sir/Madam

Consultation on proposed variation of digital radio access undertakings

On 7 November 2013, the Australian Competition & Consumer Commission (ACCC) received a request for a formal variation of the digital radio access undertakings (Access Undertakings) under section 118NH of the *Radiocommunications Act 1992* (Radiocommunications Act). The variation is sought by the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Perth and Sydney (the Licensees).

The request for a formal variation of the Access Undertakings (Revised Variation Request) is substantively similar to the request for a formal variation lodged by the Licensees on 19 June 2013 which was subsequently withdrawn on 4 November 2013 (Original Variation Request). The Revised Variation Request intends to capture additional terms which the Licensees have agreed to incorporate into the Access Undertakings in response to submissions received during the ACCC's consultation process in relation to the Original Variation Request. The additional term was proposed by the Community Broadcasters Association of Australia (CBAA) in their submission of 9 August 2013.¹

The Access Undertakings form part of the access regime administered by the ACCC, to allow broadcasters to obtain access to digital radio multiplex transmission services on reasonable terms and conditions.² Following a consultation process in 2009, the ACCC determined that ACCC-modified Access Undertakings were to apply to the service in April 2009.³

¹ Community Broadcasters Association of Australia, Digital Radio Access Undertakings – CBAA submission on proposed variations, 9 August 2013, para. 4.3. This submission is available at <http://transition.accc.gov.au/content/index.phtml/itemId/1119843>.

² Australian Competition & Consumer Commission, Digital Radio Multiplex Transmitter Licenses (Decision-Making Criteria) Determination 2008, 21 May 2007, section 5.

³ The background to the establishment of the Access Undertakings is set out on the ACCC website at <http://transition.accc.gov.au/content/index.phtml/itemId/822881>

The Access Undertakings incorporate an Access Agreement, which is a separate agreement between the Licensees and access seekers that has a different term to the Access Undertaking. The Access Agreement sets out the prices, terms and conditions on which the Licensee will supply the digital radio multiplex transmission service to access seekers. The Variation Request relates to proposed amendments to the Access Agreement.

Legislative and regulatory framework

The ACCC is consulting on the proposed variation pursuant to section 118NH(4) of the Radiocommunications Act.

In its consideration of the variation, the ACCC is guided by section 5 of the *Digital Radio Multiplex Transmitter Licensees (Decision-Making Criteria) Determination 2008* (Decision-Making Criteria) and the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008* (Procedural Rules).⁴ The ACCC requests that submissions directly address the Decision-Making Criteria, and that parties observe the process set out in the Procedural Rules.

Revised proposed variations

The Revised Variation Request and reasoning submitted by the Licensees is summarised below. The Revised Variation Request includes a copy of the proposed varied Access Undertakings, with the proposed amendments in mark-up. These documents are available on the ACCC website.⁵

The Revised Variation Request consists of the six substantive amendments to the Access Undertakings (and incorporated Access Agreement) proposed by the Licensees and one substantive amendment proposed by the CBAA:

The Licensees' proposed amendments:

1. Alignment of the **term of the Access Agreement (clause 5)** with the term of the Access Undertaking. The Access Undertakings remain in force as long as the Licensees hold the relevant licence. However, the Access Agreement had a defined term (with a notional expiry of December 2012). The Licensees submit that the proposed alignment of terms will provide increased contractual certainty for the Licensees and access seekers. They also submit that it will reduce the administrative costs associated with the implementation of periodic extensions to Access Agreements. As such, no specific date for expiry will be included in the Access Agreement.
2. Variation to the **service description** for the Multiplex Transmission Service. The Licensees submit that this variation is necessary to reflect changes in the manner in which they deliver the underlying transmission services following the roll-out of on-channel repeaters in each capital city. The Licensees submit that the on-channel

⁴ Section 6 of the Final Decision-Making Criteria provides that when considering a variation to an access undertaking, the ACCC must have regard to the criteria in section 5(1). Both the Final Decision-Making Criteria and the Final Procedural Rules are available on the ACCC website at <http://transition.accc.gov.au/content/index.phtml/itemId/82288>.

⁵ <http://transition.accc.gov.au/content/index.phtml/itemId/822881>

repeaters are being deployed to improve the coverage and quality of digital radio services.

3. Insertion of a new **clause 9.6** of the Access Agreement. This variation 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 submit that this variation reflects the operational experience they have gained since services were launched in 2009.
4. Amendments to the **suspension provisions (clause 10)** to take account of the upcoming launch of on-channel repeater services in each capital city. This includes the right for the Licensees to power down services (instead of suspension), the right to suspend part of a service only and additional rights of suspension to take account of the downstream arrangements that the Licensees put in place with site owners.
5. Amendments to 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. In particular, the proposed variation of the invoicing provision will result in invoicing occurring in advance rather than in arrears as is currently contemplated by the Access Agreement. The Licensees submit that this amendment will reflect the current invoicing practices as agreed to by Licensees and access seekers.
6. Deletion 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**). The Licensees submit 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.

The CBAA's proposed amendment in the Revised Variation request:

7. In addition to the variations proposed in the Original Variation Request, the Licensees have proposed an additional subclause in the Access Agreement in response to submissions received. The Licensees have proposed the insertion of an additional subclause 9.6(d) in the Access Agreement. The Licensees submit that this subclause seeks to clarify that nothing prevents an access seeker from operating its own systems, equipment and facilities in a manner of its own choosing provided that access seeker otherwise complies with clause 9.6. This clause deals with the safe operation of systems, equipment and facilities in connection with the Multiplex Transmission Service.

ACCC Decision making criteria

Section 5 of the Decision Making Criteria provides that the ACCC must have regard to the following matters when considering whether to accept an access undertaking or variation:

- 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.

These requirements do not however limit the matters to which the ACCC may have regard. In deciding whether the proposed variations should be accepted, the ACCC will have regard to all other matters it considers relevant.⁶

Consultation process

The ACCC commenced its consultation process on the Original Variation Request on 3 July 2013 and received a total of three submissions.⁷ The ACCC notes that the Revised Variation Request appears to differ to the Original Variation Request only to the extent of the CBAA's proposed amendment (amendment 7). The ACCC therefore proposes that, given the extensive consultation period that has already occurred on the other six amendments, an expedited consultation period of a week be provided for further submissions prior to the ACCC concluding its assessment of the proposed variations.

The ACCC notes that it has not yet formed a view as to whether the proposed variations should be accepted. The ACCC is seeking interested parties views' on the likely effect of the proposed variations. In particular, the ACCC seeks interested parties views on whether the effect of the variations will substantively alter the terms of access to the Multiplex Transmission Service previously approved by the ACCC. Parties making submissions should refer to the Procedural Rules for guidance on participating in the consultation process, including for the provision of confidential information.

All submissions will be considered as public submissions and will be posted on the ACCC's website. If parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and a confidential version of their submission. The public version of the submission should clearly identify the confidential material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC is seeking comments from interested parties by close of business **18 November 2013**. Submissions may be emailed to digitalradio@acc.gov.au. Alternatively, submissions may be faxed to 03 9290 1457 or mailed to Louise Hird at GPO Box 520 Melbourne Vic 3001.

⁶ Section 118NJ(2), *Radiocommunications Act*

⁷ The submissions are available on the ACCC website at <http://transition.acc.gov.au/content/index.phtml/itemId/1119843>.

Indicative timeframe

The ACCC will progress its assessment of the variation request in a timely manner. An indicative timetable is set out below for your information.

Indicative date	Stage in assessment process
7 November 2013	Lodgement of Revised Variation Request
11 November 2013	Public consultation process begins
18 November 2013	Closing date for submissions from interested parties
December 2013	Expected release of ACCC decision

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Louise Hird on (03) 9290 1484 or Chris Ratchford on (03) 9658 6455.

Yours sincerely



Richard Home
General Manager
NBN Engagement and Group Coordination Branch
Communications Group