Australian
Competition &
Consumer
Commission

Assessment of undertakings in relation to digital radio multiplex transmission services

Draft decision

December 2008

Contents

Executive summary

Digital radio services are due to commence in several state capital cities in the first half of 2009.

The legislative framework introduced by the Australian Government in 2007 provides for the Australian Communications and Media Authority (ACMA) to allocate eight digital radio multiplex licences to joint venture companies representing commercial and community broadcasters. The joint venture companies will be responsible for multiplexing together the separate streams of content from individual broadcasters and transmitting a combined stream to end users in each licence area.

The legislative framework includes an access regime to allow broadcasters to receive access to digital radio multiplex transmissions services on reasonable terms and conditions. Each joint venture company representing commercial and community broadcasters is required to provide the ACCC with an undertaking specifying the terms and conditions on which it will provide access to broadcasters. It is only after the undertaking has been accepted by the ACCC that ACMA can determine that digital radio services may commence in that area.

The eight joint venture companies representing commercial and community broadcasters submitted their access undertakings to the ACCC on 3 October 2008. All eight undertakings were identical. The undertakings and supporting submission were submitted on behalf of the multiplex licensees by the commercial radio industry body Commercial Radio Australia (CRA).

The ACCC has considered the access undertakings against the decision-making criteria set out in the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008* (Cth).

Based on these criteria, the draft decision of the ACCC is not to accept the submitted access undertakings for the following reasons:

- The access undertaking does not comply with Division 4B of Part 3.3 of the *Radiocommunications Act 1992* (Cth) (the Radiocommunications Act) as:
    - The undertaking appears to raise the possibility that variations to the Access Agreement may occur without going through the formal approval process in the legislation.
    - The undertaking states that the multiplex licensee *may* undertake certain procedures to ascertain the level of demand for access to excess capacity, whereas section 118NT of the Radiocommunications Act states that these procedures are mandatory.
    - The undertaking states that an eligible incumbent can claim access to one-ninth of the multiplex capacity ‘made available by the Multiplex Licensee to Incumbent Commercial Broadcasters’. However, this overlooks the requirement

that two-ninths of multiplex capacity is to be reserved for community broadcasters.

- The ACCC is not satisfied that the flexibility provided by the undertaking provisions that relate to variation could not be used by the multiplex licensee to unduly restricting competition.

- The terms and conditions specified in the access undertaking are not reasonable as:

    - The undertaking does not confer the right on a community broadcaster representative company to outsource transmission services and the management of digital spectrum to a third party.

    - The undertaking does not acknowledge that it is the representative company, not a digital community broadcaster nominated by the representative company, that is responsible for the allocation of multiplex capacity to each digital community broadcaster.

- The terms and conditions specified in the access undertaking include access prices or pricing methodologies which are not reasonable as:

    - There is concern that there is little incentive for the multiplex licensee to operate at an efficient level, and therefore whether the multiplex licensee would only recover *efficient* costs through access charges.

    - There is no mechanism to provide access seekers with transparency as to the multiplex licensees' costs, in order to verify that the prices charged for access to the service are in accordance with the pricing principles;

    - The lack of provisions for a review of access charges to be triggered by access seekers, and that reviews could only be instigated through increases in costs rather than decreases in costs.

The ACCC considers that none of the issues listed above would require major changes to the undertakings in order for them to be accepted. Accordingly, the ACCC's draft decision includes the intention to provide the multiplex licensees in its final decision with a notice under s118NF of the Act that states that the ACCC would accept the undertakings if specified changes were made. Under the Radiocommunications Act, the ACCC is able to accept modified undertakings in this manner, rather than require the multiplex licensees to re-submit new undertakings and begin a new consultation process.

The ACCC is seeking submissions from interested stakeholders on its draft decision before making its final decision on the whether to accept the undertakings. The deadline for submissions is **Friday 23 January 2009**.

1. Introduction

Digital radio services will commence in Adelaide, Brisbane, Melbourne, Perth and Sydney by no later than 1 July 2009.

Digital radio provides for a more efficient use of radiofrequency spectrum, as well as potentially offering better sound quality, reduced interference, the ability to pause or rewind, the provision of still images, and data services such as news, traffic and weather updates.

The legislative framework was introduced by the Australian Government in 2007 through amendments to the Radiocommunications Act, *Broadcasting Services Act 1992* (the Broadcasting Services Act) and the *Trade Practices Act 1974* (the Trade Practices Act).

The arrangements provide for ACMA to allocate 13 digital radio multiplex transmitter licences. Eight licences were allocated to joint venture companies representing commercial and community broadcasters, and a further five licences will be allocated to national broadcasters. The joint venture companies will be responsible for multiplexing together the separate streams of content from individual broadcasters and transmitting a combined stream to end users in each licence area.

With only one or two joint venture companies providing access to digital radio services to commercial and community broadcasters in each capital city, the joint venture companies may be in a position of market power. This could potentially allow them to misuse this position by offering access to broadcasters on unreasonable terms and conditions, or by discriminating anti-competitively between broadcasters.

The legislative framework therefore includes an access regime to allow broadcasters to receive access to digital radio multiplex transmission services at reasonable terms and conditions. Each joint venture company representing commercial and community broadcasters was required to provide the ACCC with an undertaking specifying the terms and conditions on which it will provide access to broadcasters. It is only after the undertaking has been accepted by the ACCC that ACMA can determine that digital radio services may commence in that area.

The eight joint venture companies representing commercial and community broadcasters submitted their access undertakings to the ACCC on 3 October 2008. All eight undertakings were identical. The undertakings and supporting submission were submitted on behalf of the multiplex licensees by the commercial radio industry body Commercial Radio Australia (CRA). CRA also took the lead role in the development of the undertakings.

The ACCC released a discussion paper on 23 October 2008 in order to seek submissions from stakeholders on whether it should accept the undertakings. The ACCC received the following submissions in response to the discussion paper, all of which are available on the ACCC website:

- 3UZ

- 5AD Broadcasting Company
- ARN Broadcasting
- ARN Communications
- Austereo
- Australian Radio Network
- Brisbane FM Radio
- Community Broadcasting Association of Australia (CBAA)
- Commercial Radio Australia (CRA)
- Commonwealth Broadcasting Corporation
- DMG Radio (Australia)
- Double T Radio
- Broadcasting Station 4IP (RadioTAB)
- Pacific Star Network
- Radio 2SM
- Southern State Broadcasters

This paper presents the ACCC's draft decision on whether it will accept or reject the undertakings. It also provides discussion of the reasons for the decision with specific reference to the decision-making criteria, as well as to views contained in the submissions received in response to the discussion paper.

2. Timetable and assessment process

2.1 Process

The process the ACCC has adopted for assessing the undertakings is in accordance with Division 4B of Part 3.3 of the Radiocommunications Act and the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008* (the Procedural Rules). The Procedural Rules deal with matters such as the form in which documents must be provided, time limits for the provision of certain information, and confidentiality. More generally, the process is similar to that used for assessing telecommunications access undertakings under Part XIC of the Trade Practices Act.

The process being followed is:

- Receive the undertakings—this occurred on 3 October 2008
- Release a discussion paper outlining the undertakings, explaining the criteria by which the ACCC will assess the undertakings, and seek views from stakeholders on whether the undertakings should be accepted—this occurred on 23 October 2008
- Release a draft decision to accept or reject the undertakings, and seek views from stakeholders on the draft decision—this is the current document[1]
- Release a final decision to accept or reject the undertakings.

The ACCC does not have a statutory timeframe within which it must reach a decision on the undertakings. This is different to the process for undertakings under Part XIC of the Trade Practices Act which must be completed within six months.[2]

Despite this, the ACCC is aware of the urgency for a decision to be reached before 1 July 2007, the statutory deadline for the introduction of digital radio services. ACMA is required by legislation to determine the digital radio start-up day in each licence area prior to the deadline, but it cannot do this until the ACCC has accepted an undertaking for that area. The ACCC's timing will also be mindful of the intentions of industry for the introduction of digital radio services.

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1 The ACCC discussion paper on the digital radio undertakings stated that the ACCC was likely to progress straight from the discussion paper to a final decision if the deadline for the digital radio start-up day in each area remained at 1 January 2009. Legislation was passed that extended this deadline to 1 July 2009 and therefore the ACCC is able to consult on a draft decision. The associated legislation is discussed in section 3.1.1 in this draft decision paper.

2 It is noted that in practice the process for assessing telecommunications undertakings under the Trade Practices Act takes longer than six months because of the possibility of extensions of time and the fact that the timeframe excludes the time in which the ACCC is awaiting submissions.

Unlike when it assesses undertakings under Part XIC, the ACCC has some options should it determine that the undertakings cannot be accepted in their current form. The ACCC can either:

- give the licensee a written notice advising that it will accept the undertaking if the licensee makes such alterations to the undertaking as are specified in the notice[3], or

- determine that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence.[4]

It is noted that the ACCC's decision to accept or reject the undertaking can be subject to review by the Australian Competition Tribunal (ACT). The ACT's decision must be made within six months of receiving the application for review but can be extended by a further three months. This would have consequences for the timeframe for the introduction of digital radio services.

2.2 Submissions in response to the draft decision

All submissions in response to this draft decision paper should be forwarded by email by **Friday 23 January 2009** to:

Richard Home
General Manager
Strategic Analysis and Development Branch
Australian Competition and Consumer Commission
richard.home@accc.gov.au

Submissions should also be copied to digitalradio@accc.gov.au.

Enquiries may be directed to Julian Scarff, Assistant Director, Convergence & Coordination Team, on (03) 9290 1850 or julian.scarff@accc.gov.au.

The ACCC prefers all written submissions to be in an electronic format (MS Word or PDF format) that is text-searchable and allows a 'copy and paste' function.

It is in the submitter's interest that the submission be lodged within the time specified by the ACCC. In some cases, the ACCC may not consider a late submission, or may give less weight to that submission (e.g. where the timeframe precludes a full and timely analysis of the submission).

2.2.1 Confidentiality claims on submissions

Submissions will generally be treated as public documents and posted on the ACCC website.

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[3] Subsection 118NF(4), *Radiocommunications Act 1992* (Cth) (Radiocommunications Act)

[4] Subsection 118NF(5), Radiocommunications Act

In general, a party that provides information to the ACCC should:

(i) For all information, clearly identify the part of the information that it regards as confidential—a blanket claim for confidentiality over the entirety of the information provided should not be made unless all such information is truly regarded as confidential. The identified information must be genuinely of a confidential nature and not otherwise publicly available.

(ii) In the case of a submission (and, where appropriate, other documents), submit both a public and confidential version of the document. The public version of the document should clearly identify the confidential material by replacing the material with the word 'Confidential'. Deleted text should be left blank to retain the same formatting and page numbers as the confidential version.

(iii) In the case of all documents, clearly mark 'Confidential' on the relevant part(s) of the document (to reduce the risk of inadvertent disclosure).

(iv) Unless otherwise indicated, provide reasons in support of the confidentiality claim.

For more details on the use and disclosure of information by the ACCC, submitting parties should see the ACCC/AER *Information Policy* at section 1.3 and generally.[5]

[5] Australian Competition and Consumer Commission/Australian Energy Regulator, *Information Policy: The collection, use and disclosure of information*, <http://www.accc.gov.au/content/index.phtml/itemId/846791> at 9 December 2008.

3. Legislative framework

3.1 Digital radio legislative framework

The legislative framework for the provision of digital radio services was introduced by the Australian Government in 2007 through the *Broadcasting Legislation Amendment (Digital Radio) Act 2007*. This legislation amended the Radiocommunications Act, the Broadcasting Services Act and the Trade Practices Act.

The legislative framework includes provisions covering the following matters:

- ACMA's allocation of licences to joint venture companies to operate the digital radio multiplex transmission infrastructure
- the process by which current broadcasters can become members of the joint venture companies
- the process for allocating both initial and excess multiplex capacity to broadcasters
- the requirement for the joint venture companies to submit access undertakings to the ACCC and the ACCC's role in administering the access regime
- the requirements that must be met before ACMA can determine the digital radio start-up day in each licence area.

A detailed explanation of the legislative framework can be found in the ACCC's discussion paper on the digital radio undertakings.

3.1.1 Legislative changes since the ACCC discussion paper

The ACCC discussion paper noted that Parliament was considering amendments to the digital radio legislative framework at the time of publication. These proposed amendments were adopted on 31 October 2008.

The *Broadcasting Legislation Amendment (Digital Radio) Act 2008*:

- extended the deadline for the commencement of digital radio services in mainland state capital cities from 1 January 2009 to 1 July 2009.
- deferred the commencement of digital radio services in Hobart by redefining Hobart as a regional licence area; and
- provided community broadcasters with a second opportunity to become shareholders in the multiplex licensee companies.

The extension of the deadline for the introduction of digital radio services has given the ACCC sufficient time in which to seek submissions on a draft decision on the undertakings, rather than moving directly to a final decision.

3.2 Criteria for assessing undertakings

The legislative framework enables the ACCC to determine the criteria to be applied in deciding whether to accept or reject undertakings. The ACCC made these decision-making criteria on 21 May 2008 in accordance with section 118NJ of the Radiocommunications Act.[6]

The criteria are as follows:

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

These criteria do not, by implication, limit the matters to which the ACCC may have regard in deciding whether to accept or to not accept an access undertaking.

A more detailed explanation of the decision-making criteria can be found in the ACCC's discussion paper on the digital radio undertakings.

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6 *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008* (Cth) (Decision-making criteria)

4. Summary of the undertakings

The eight digital radio multiplex licensees submitted identical undertakings on 3 October 2008 through the coordination of the CRA.

The undertakings comprise a main body and two attachments called Service Description (Attachment A) and Access Agreement (Attachment B). The attachments are considered to be part of each undertaking. Each part of the undertakings is discussed below.

The full undertakings are available at www.accc.gov.au, while a more detailed summary can be found in the ACCC discussion paper on the digital radio undertakings.

4.2 Main body of the undertakings

The main body of the undertakings actually form only a small part of the complete document. It is in this part of the document that the multiplex licensee states that it undertakes to:

- be bound by the obligations set out in Part 3.3, Division 4B of the Radiocommunications Act.
- supply the multiplex transmission service in accordance with the applicable provisions of the Radiocommunications Act, including but not limited to the obligation of non-discrimination in section 118NP of the Act.
- provide the multiplex transmission service to access seekers on the terms and conditions specified in the Access Agreement to enable broadcasters to obtain the capacity to which they are entitled.

4.3 Service description (Attachment A)

This part of each undertaking provides a description of the multiplex transmission service. This is described as a service provided by the multiplex licensee to access seekers who have access to multiplex capacity, for the transmission over that multiplex capacity of digital channels supplied by access seekers to the multiplex licensee.

4.4 Access Agreement (Attachment B)

This part of each undertaking provides the bulk of the details in the document, and provides many of the specifics that underpin the statements in the main body. Matters covered by the Access Agreement include:

- a statement that the multiplex licensee will develop an operational manual to deal with technical and operational matters

- provisions setting out the manner in which the licensee will allocate both standard access entitlements and excess-capacity entitlements
- provisions regarding the supply of the multiplex transmission service, such as the obligation on the multiplex licensee to not discriminate between access seekers
- a methodology for determining the charges payable by the access seekers for using the service
- dispute resolution procedures.

5. Assessment of compliance of undertakings with Division 4B of Part 3.3

In assessing whether to accept an undertaking, the ACCC must consider whether the terms and conditions of access in the undertaking comply with the access framework set out in Division 4B of Part 3.3 of the Radiocommunications Act.

Division 4B of Part 3.3 sets out the access regime for multiplex licensees. This includes:

- the obligation on each multiplex licensee to submit an access undertaking to the ACCC and the processes regarding its acceptance or otherwise
- the obligation on the multiplex licensees to provide multiplex capacity to content service providers with standard access entitlements or excess-capacity access entitlements
- the obligation on the multiplex licensee to not discriminate between content service providers in relation to:
    - the technical and operational quality of the services supplied and
    - the technical and operational quality and timing of the fault detection, handling and rectification.

The ACCC considers that the undertakings comply with Division 4B of Part 3.3 of the Radiocommunications Act to a large degree. The main body of the undertaking states that the multiplex licensee undertakes to be bound by the obligations set out in Division 4B, and that it will provide the multiplex transmission service to access seekers on the terms and conditions specified in the Access Agreement.

The Access Agreement provides details regarding how the multiplex licensee will provide access to standard and excess-capacity access entitlements (clauses 6 and 7 respectively), and the terms and conditions on which it will supply the service to access seekers. Clause 9.3 of the Access Agreement reflects the requirement under 118NP of the Radiocommunications Act for the multiplex licensee to not discriminate between content service providers on technical and operational matters.

However, the ACCC does have some concerns about whether the undertakings fully comply with Division 4B of Part 3.3 of the Act. Specific matters are explored in further detail below.

5.1 Variations of the undertakings

The ACCC discussion paper asked for views on whether particular provisions of the undertakings that refer to variation are in full compliance with Division 4B of Part 3.3 of the Radiocommunications Act. The relevant provisions are set out below: (ACCC's emphasis)

4.1 General

Nothing in this access undertaking limits the Multiplex Licensee's rights to amend, replace or vary this access undertaking in accordance with the Radiocommunications Act *or otherwise*.

23.9 Variation

(a) Subject to clause 23.9(b), *no variation of this Agreement is effective unless made in writing and signed by each Party*.

The CRA submitted that there is nothing within the undertaking that is inconsistent with section 118NH of the Radiocommunications Act. Further information on the CRA's views of the variation provisions can be found in section 6.1 of this paper, which considers the issue in the context of whether they would enable the multiplex licensee to unduly restrict competition.

The ACCC has some concerns about these provision. First, clause 4.1 in the main body of the undertaking appears to suggest that the multiplex licensee is able to amend or vary the access undertaking otherwise than in accordance with the statutory regime contained in the Radiocommunications Act. Such a suggestion is not in compliance with Division 4B of Part 3.3, therefore the ACCC's draft decision is to request the deletion of the words 'or otherwise' pursuant to section 118NF(4).

Second, clause 23.9(a) in the Access Agreement appears to contemplate a multiplex licensee and individual access seekers agreeing to vary their Access Agreement, without the need for ACCC approval. Division 4B of Part 3.3 contains detailed provisions dealing with the process to be followed if the multiplex licensee wishes to vary an existing undertaking: see sections 118NH and 118NI. This process entails the ACCC conducting an assessment in a similar manner to that carried out in assessing an undertaking in the first instance. Any contemplation of variation without ACCC approval is not in compliance with Division 4B of Part 3.3. Furthermore, if there is any possibility of variation without ACCC oversight, then the ACCC cannot be certain that the multiplex licensee will not, at some point in time in the future, vary an Access Agreement in favour of a particular access seeker (or seekers) over others in such a way as to contravene its non-discrimination obligation under section 118NP. For example, the multiplex licensee may offer a shareholder access seeker a higher quality service than that offered to others.

Taking all these considerations into account, the ACCC's draft decision is to request the insertion of the words 'and approved by the ACCC' at the end of clause 23.9(a) pursuant to section 118NF(4) which provides that the ACCC may, if it decides to not accept an access undertaking, give a multiplex licensee a written notice advising the licensee that if it makes such alterations to the access undertaking as are specified in the notice and lodges the altered access undertaking with the ACCC within a specified time limit, the ACCC will accept that altered access undertaking.

5.2 Consultation on excess capacity

An important aspect of this part of the Radiocommunications Act is the requirement for the licensee to provide access to the multiplex capacity to content service providers with standard and excess capacity access entitlements.

The undertakings set out the obligations on the multiplex licensee in relation to standard and excess capacity access entitlements in clause 3.2 of the main body of the undertaking together with clauses 6 and 7 of the Access Agreement.

More specifically, section 118NT of the Radiocommunications Act requires the multiplex licensee to ascertain the level of demand for access to excess capacity, and sets out mandatory requirements for how this process is to occur. However, the ACCC discussion paper noted that clause 7.4(a) of the Access Agreement states that the multiplex licensee *may*, by way of notice on its website:

- set out the amount of the excess multiplex capacity that is available;
- provide at least 30 days notice of its intention to ascertain the level of demand for excess multiplex capacity; and
- invite expressions of interest in accessing the excess multiplex capacity.

The ACCC discussion paper asked whether this means the undertakings do not comply with the Radiocommunications Act.

The CRA submission stated that the 'may' in clause 7.4(a) of the Access Agreement is a typographical error and should be replaced with 'must'.[7] The ACCC considers that the undertaking in its current form does not fully comply with Division 4B of Part 3.3 of the Act, and that this correction must be made.

5.3 Allocation of capacity to eligible commercial broadcasters

Subsection 118NQ(2) of the Radiocommunications Act states that an eligible incumbent commercial broadcaster is entitled to one-ninth of multiplex capacity through standard access entitlements.

The ACCC discussion paper noted that clause 6.3(b) of the Access Agreement states that an eligible incumbent commercial broadcaster can claim access to one-ninth of multiplex capacity 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters'. The discussion paper requested submissions on whether this meant the undertaking did not comply with Division 4B of Part 3.3 of the Act.

CRA submitted that the terms within clause 6 of the Access Agreement have been modeled on the relevant provisions of the Radiocommunications Act, including those

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[7] CRA submission, p. 6

that provide for individual incumbent commercial broadcasters to claim one-ninth of the allocated multiplex capacity as a standard access entitlement.

The ACCC considers that clause 6.3(b) of the Access Agreement does not comply with Division 4B of Part 3.3. The legislative framework enables individual commercial broadcasters to claim standard access entitlements of one-ninth of the multiplex capacity, but two-ninths is reserved for community broadcasters.[8] This is not the same as the individual incumbent commercial broadcasters claiming entitlements to one-ninth of the multiplex capacity allocated to incumbent commercial broadcasters. This means clause 6.3(b) of the Access Agreement would need to change with the removal of the words 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters' in order to achieve consistency with Division 4B of Part 3.3.

Summary of the draft assessment of whether the undertakings comply with Division 4B of Part 3.3

In its draft view, the ACCC is not satisfied that the undertakings comply with Division 4B of Part 3.3 of the Radiocommunications Act. As discussed in sections 5.1, 5.2 and 5.3 above, the ACCC's draft view is that clause 4.1 in the main body of the undertaking and clauses 6.3(b), 7.4(a) and 23.9(a) of the Access Agreement do not comply with the relevant sections of the Act.

[8] s.118NR(2) of the Radiocommunications Act

6. Assessment of whether the undertakings unduly restrict competition

An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker to provide services, including in competition with any services provided by other parties. Similarly, an undertaking should not favour particular access seekers.

The ACCC discussion paper requested views on this matter, including specifically on whether the non-discrimination clause at clause 9.3 of the Access Agreement was sufficient protection against this occurring. It also asked whether provisions regarding the supply of capacity at lower bit rates provide scope for the licensee to unreasonably discriminate between access seekers.

The CRA submission claimed that the undertaking does not restrict the ability of eligible access seekers from providing digital radio content services, nor does it discriminate against access seekers (or a particular class of access seekers).[9] It stated:

> In particular:
>
> - the access agreement explicitly prohibits discrimination against access seekers that do not hold a shareholding interest in the Multiplex Licensee;
> - the access undertaking prohibits discrimination in respect of the operational and technical quality of services, and in respect of fault detection, handling and rectification;
> - the pricing principles provide for the equal treatment of all access seekers in the same situation, with each access seeker paying an identical access charge to another access seeker that acquires the same amount of multiplex capacity; and
> - the access undertaking provides access seekers with the option of acquiring a lower bit rate service, in which case the access seeker will receive a proportionate reduction in the level of access charges that are payable.[10]

The CBAA submission raised one matter in relation to this decision-making criterion, in that the auction process could have the potential to disadvantage community broadcasters.[11]

The ACCC believes the undertakings generally do not unduly restrict competition in the provision of digital radio content services, and acknowledges the presence of a non-discrimination clause. However, the ACCC does not believe that this clause alone provides a sufficient safeguard, and it has therefore considered other provisions within the undertaking to ensure they satisfy the requirement of this decision-making criterion. Some of these provisions are explored in further detail below.

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9 CRA submission, p. 6

10 Ibid, p. 7

11 CBAA submission, p. 2

6.1 Variations of the undertakings

The ACCC discussion paper brought attention to the provisions in the undertaking that dealt with the ability of the multiplex licensee to vary the access undertaking. This section of the draft decision paper will consider whether these provisions have the effect of unduly restricting competition whilst section 5.1 of this draft decision paper considered whether the provisions comply with Division 4B of Part 3.3 of the Radiocommunications Act, another decision-making criterion.

The main body of the undertaking includes the following: (ACCC emphasis)

> **4.2 Effect of replacement or variation**
>
> Any replacement of, or variation to, this access undertaking will, *unless agreed otherwise between the Multiplex Licensee and an Access Seeker*, automatically form part of an Access Agreement that has been entered into between those parties.

Further, clause 23.9 of the Access Agreement states as follows:

> **23.9 Variation**
>
> (a) Subject to clause 23.9(b), *no variation of this Agreement is effective unless made in writing and signed by each Party*.
>
> (b) Pursuant to clause 4.2 of the Access Undertaking, any replacement or variation of the Access Undertaking will, *unless otherwise agreed between the Parties*, automatically form part of this Agreement.

Submissions

CRA was the only stakeholder to provide views on this matter in its submission. Firstly, it claimed that for the purposes of implementation of the commitments in the undertaking, the Access Agreement is a contractual arrangement between two parties. It argued that commencement of legal obligations pursuant to an access agreement take effect on execution by the parties. It argued that in the event that a variation to the undertaking required a change to an Access Agreement, it would be necessary for the parties to implement that change through a formal variation, and this is reflected in clause 23.9.

Secondly, CRA submitted that the words 'unless agreed otherwise' in clause 23.9 were included to ensure flexibility in how changes to the Access Agreement are implemented. It provided an example whereby the parties may agree to continue with the existing arrangement until the multiplex licensee procures a new billing platform, from which date the access charges could be backdated to take account of changes to the undertaking. It argued that any such variations that are agreed by the parties pursuant to clause 23.9(b) would remain subject to the applicable terms of the access undertaking and the Radiocommunications Act.

Thirdly, the CRA submission claimed that there are various aspects of the proposed Access Agreement that would not be capable of proper implementation unless each and

every access seeker is subject to the same terms and conditions of access (e.g. access charges).

ACCC view

As already discussed in section 5.1 of this draft decision paper, clause 23.9(a) in the Access Agreement appears to contemplate a multiplex licensee and individual access seekers agreeing to vary their Access Agreement, without the need for ACCC approval. If there is any possibility of variation without ACCC oversight, then the ACCC cannot be certain that the multiplex licensee will not, at some point in time in the future, vary an Access Agreement in favour of a particular access seeker (or seekers) over others. For example, the multiplex licensee may offer a shareholder access seeker a higher quality service than that offered to others. As pointed out earlier in section 5.1, this would be in breach of section 118NP. Furthermore, this would unduly restrict the ability of the other access seekers to provide content services in competition with the access seekers which are provided with a higher quality service by the multiplex licensee. Without access to the higher quality service, the other access seekers are not able to compete for customers desiring services of a higher quality.

Turning to clauses 4.2 and 23.9(b), these provisions appear to contemplate an access seeker, with the agreement of the multiplex licensee, opting out of variations to the undertaking which have been lodged with and approved by the ACCC. In the case of digital radio, it is possible that industry players and structure could change radically in the future in unexpected ways. In response to changed circumstances, CRA may well seek to vary an existing undertaking in a fairly substantial way. It is possible that the varied undertaking entails less favourable terms for access seekers although the variation is ultimately approved by the ACCC as being appropriate to the altered circumstances.

The possibility of an access seeker opting out an ACCC approved variation means that the ACCC cannot be absolutely certain that the multiplex licensee will not, at some point in time in the future, favour particular access seekers over others by allowing some access seekers to retain the more favourable terms of the pre-existing undertaking whilst other access seekers have to accept the less favourable terms of the varied undertaking. This would in turn unduly restrict the ability of those access seekers enjoying less favourable terms to provide content services in competition with the access seekers which are provided with more favourable terms by the multiplex licensee.

With regard to the criterion of whether the access undertaking unduly restricts competition in related markets, the ACCC's draft decision is to request pursuant to section 118NF(4):

- the deletion of the words 'unless agreed otherwise between the Multiplex Licensee and an Access Seeker' from clause 4.2

- the insertion of the words 'and approved by the ACCC' at the end of clause 23.9(a)

- the deletion of the words 'unless otherwise agreed between the Parties' from clause 23.9(b)

Finally, the ACCC notes that the varying of the access agreements of access undertakings need not be as restrictive as in the case of the multiplex licensees' undertakings. The ACCC has previously approved access undertakings in which the access provider and access seeker have a significant degree of flexibility in terms of the variations to the access agreement they can agree to, without having to submit to a formal ACCC variation approval process.

Foxtel's *Special access undertaking for the Digital Set Top Unit Service*, accepted by the ACCC in December 2006, allows Foxtel to vary any of the provisions of its access agreement – excluding those price-related – in the event of certain circumstances impacting its service delivery, after only providing the ACCC with one month's notice of the planned variations.[12]

An access undertaking submitted by Australian Rail Track Corporation (ARTC), an infrastructure provider of rail, provides access to businesses wishing to run trains on ARTC's interstate rail network. This undertaking was accepted by the ACCC in July 2008. The provisions in its 'Indicative Access Agreement' (IAA) are intended to serve as minimum terms for a contractual agreement between ARTC and individual businesses seeking rail access, which can be freely varied by the parties to the extent that terms of access are not imposed on the access seeker which are of a lower standard than those allowed for under IAA.[13]

6.2 Providing capacity at lower bit-rates

The undertakings state that the non-discrimination obligation clause at clause 9.3 of the Access Agreement does not prevent an access seeker from requesting access at a lower bit rate than that provided to other access seekers.[14]

CRA submitted that it was wrong for the ACCC discussion paper to equate the availability of lower bit rate services with the possibility of discrimination between access seekers.[15] It notes that it is up to the individual access seeker to specify the bit rate of the digital radio services that it wishes to supply, not the multiplex licensee. It also notes that an access seeker that selects a lower bit rate will receive a proportionate reduction in the access charge (excluding direct cost of the required line/codec card). It states that the bit rate chosen by an access seeker will depend on a number of factors, including its business model and the nature of its content services. It argues that the availability of lower bit rate services is pro-competitive.

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12 FOXTEL *special access undertaking for the Digital Set Top Unit Service*, <http://www.accc.gov.au/content/index.phtml/itemId/772632> at 9 December 2008.

13 Australian Rail Track Corporation (ARTC), *2008 access undertaking*, <http://www.accc.gov.au/content/index.phtml/itemId/789738> at 9 December 2008.

14 Clause 9.3(c) of the Access Agreement

15 CRA submission, p. 7

The ACCC agrees that the availability of lower bit rate services increases the flexibility with which access seekers can obtain multiplex capacity. It therefore believes that it does not unduly restrict competition.

6.3 The auction process

The CBAA submission claimed that while the use of an auction process is a requirement of the Radiocommunications Act, an auction could have the potential to unfairly disadvantage community broadcasters.[16] It states that the capacity allocated to community broadcasters is insufficient to meet the requirements of the sector. It also claims that community broadcasters will find it difficult, if not impossible, to compete with commercial broadcasters in an auction process.

The CBAA argues that all Interested Parties (as defined in Schedule 1 to the Access Agreement) should not have to compete for the same capacity. It submits that section 118NT(6) of the Radiocommunications Act permits a multiplex licensee to allocate specific 'fractions of multiplex capacity' between different types of access seekers, and to conduct separate auctions for each set of capacity.

The ACCC does not believe that section 118NT(6) of the Radiocommunications Act evinces any intention of Parliament for separate auctions of excessive capacity for community and commercial broadcasters. It expects that had this been Parliament's intention, this purpose would have been explicitly allowed for in the legislation.

Summary of the draft assessment of whether the undertakings prevent the multiplex licensees from unduly restricting competition

In its draft view, the ACCC is not satisfied that the undertakings prevent the multiplex licensees from unduly restricting competition. As discussed in section 6.1, the ACCC's draft view is that it cannot be satisfied that the flexibility provided by the provisions that relate to variation could not be used to favour particular access seekers in an anti-competitive manner.

7. Assessment of whether the terms and conditions of access are reasonable

The terms and conditions of access in the undertakings must be considered to be reasonable. The ACCC considers that attributes characterising 'reasonable' terms and conditions include certainty, fairness and balance, timeliness and the removal of any potential for delaying access.

[16] CBAA submission, p. 2

7.1 Adoption and modification of an operational manual

The undertakings currently do not include an operational manual that deals with technical and operational matters that arise in connection with the Access Agreement or the supply of the multiplex transmission service. However, clause 2.2 of the Access Agreement states that the multiplex licensee must develop such an operational manual and use its reasonable endeavours to accommodate any reasonable requests from access seekers during a consultation process. It also states that any operational manual forms part of the Access Agreement, and may be amended by the multiplex licensee from time to time subject to clause 2.2.

The ACCC discussion paper asked for views on whether there was sufficient safeguard in the undertakings that the operational manual subsequently developed will be consistent with the decision-making criteria.

None of the submissions commented on whether the subsequent development of the operational manual was consistent with the decision-making criteria.

The CBAA did recognise the need for multiplex licensees to develop an operational manual and to be able to modify that manual from time to time. However, it argued that:

> the procedures for developing and amending operational manuals in clause 2.2 of the Access Agreement provided too much scope for unilateral variation by the Multiplex Licensee of the terms and conditions upon which Access Seekers can acquire Multiplex Transmissions Services.[17]

As a solution, the CBAA proposed that the adoption or modification of an operational manual would require the approval of the bulk of the users of its capacity. The CBAA suggested the support of 80 per cent of users as the requisite level of approval. The CBAA also contended that access seekers should be able to use the Access Agreement's dispute resolution procedures to obtain a review or modification of an operational manual if an access seeker believes any of its requirements are unfairly prejudicial.[18]

In relation to the non-inclusion of an operational manual with the undertakings, the ACCC considers that this omission is reasonable at this stage, as long as there are obligations on the multiplex licensees to provide a complete operational manual to access seekers within a reasonable time in the future and within certain boundaries. The ACCC is satisfied that the undertaking imposes such a requirement.

The ACCC does not support the CBAA proposal that the adoption and modification of operational manuals be subject to the approval of access seekers by an 80 per cent majority. The ACCC believes this process would be unnecessarily bureaucratic and

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17 Ibid, p. 3

18 Ibid

would not be required to ensure that the terms and conditions of the undertaking are reasonable.

The ACCC is also of the view that the obligation that the terms and conditions of the undertaking be reasonable, does not require that access seekers be able to use the Access Agreement's dispute resolution procedures to challenge terms in the operational manual. The ACCC believes that it is sufficient that the multiplex licensee is required under clauses 2.2 (a) and 2.2 (b)(iii) of the Access Agreement to consult with access seekers on the contents of the operational manual and to use its reasonable endeavours to accommodate any reasonable requests they make during this consultation process.

The ACCC also notes that the Access Agreement provides access seekers with additional protection in relation the adoption and modification of operational manual content. Under clause 2.2 (b)(iv) of the Access Agreement, the multiplex licensee is obliged to ensure that the operational manual is consistent with the Access Agreement, including clause 9 which contains the obligation to not hinder access to services and the obligation of non-discrimination.

7.2 Liability and indemnity

Clause 17 of the Access Agreement deals with liability and indemnity. There are also provisions that enable the multiplex licensee to propose changes to the liability regime under clause 17, subject to approval by the ACCC. The proposed changes can be to take account of changes in the multiplex licensee's liability to suppliers or vendors under third party agreements, or in the manner in which the licensee supplies the service.

The ACCC discussion paper asked whether the clauses relating to liability and indemnity were reasonable.

None of the submissions commented on clause 17 of the Access Agreement. The ACCC considers the provisions relating to liability and indemnity to be reasonable.

7.3 Additions to the service description

The service description in Attachment A to the main body of the undertaking sets out the three bundled components of the multiplex transmission service.

In relation to the first of these, the multiplexing service, the CBAA submission argues that the service description would benefit from the inclusion of a number of technical specifications and determinations.

These include the explicit commitment to a specific audio coding compliance standard, the full description of an interface standard, details about storage space for the interface equipment and its connectivity options.[19]

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[19] Ibid, p. 4

Furthermore, in relation to the RF service, the CBAA acknowledges that at some future time, some of access seekers and/or the multiplex licensee may seek to implement further transmission sites for the RF Service, to provide back-up to the service, extend its coverage and/or to fill in coverage.

In case of such an event, the CBAA argues that individual access seekers should be permitted to opt in or opt out of the additional service levels provided by these extra transmission sites, and so not incur the corresponding increased service charges.

In relation to the CBAA's request for more information and specific standard commitments in respect of the multiplexing service's technical specifications, the ACCC believes that these are matters for further consultation between multiplex licensees and access seekers for inclusion in the operational manual. The ACCC does not regard the absence of these technical details from the multiplex licensees' undertakings as unreasonable.

The ACCC also takes the view that access seekers should not be granted the discretion to opt in or opt out of additional service levels and charges in relation to additional transmission sites for the RF service built to back-up or in-fill the existing transmission service footprint.

In the case of the commissioning of transmission sites which extend the RF service footprint however, the ACCC would be interested in further submissions from interested stakeholders on matters such as to what extent the RF service footprint can be expanded in the existing licence areas, the likely costs involved in doing this, and to what extent these costs will flow through to access seekers in the form of increased service charges. However, based on its current understanding of this issue, the ACCC does not see this as sufficient grounds to find the relevant terms and conditions of access as unreasonable.

7.4 Provision of an electronic program guide

The CBAA in its submission proposes that the multiplex licensees' services should include the delivery of an ensemble wide Electronic Program Guide (EPG) and commit in the undertaking documents to a service which shares EPG data among all access seekers in the same licence area on a multi-lateral basis.[20]

An EPG lists each station's program feed on digital radio receivers, and can also provide individual program listings and other information. The CBAA submits that the carriage of EPG data on a per station program feed is inefficient and a significant cost overhead, especially for community broadcasters already subject to limited capacity. The CBAA also argues that the reliance on individual stations providing their own EPG feeds is not in the best interests of digital radio end users, as end users may not receive information on all the programming available in their reception area.

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[20] Ibid, p. 4, 6-7

The ACCC does not believe the non-inclusion of a commitment to an ensemble wide EPG and the sharing of EPG data is unreasonable. The ACCC views the inclusion of this service as part of the multiplex transmitters' standard services and the sharing of data as matters to be agreed on by the multiplex licensees and access seekers.

The ACCC understands that to require multiplex licensees to provide an ensemble wide EPG and oblige each access seeker to provide their EPG data for this service would close a potential niche market to third party enterprises who could offer EPG services and force access seekers to provide this data for combined distribution, who might otherwise choose not to do so. The ACCC also notes that the requirement, referred to by the CBAA in its submission, that an ensemble wide EPG would need to be run over excess capacity by agreement between the multiplex licensees and their access seekers, further suggests that this matter should be one for negotiation between these parties, rather than one for prescription under the access undertaking.

7.5 The role of the representative company

The CBAA submission draws attention to the fact that while clause 6.4(e) of the Access Agreement provides that a digital community broadcaster can outsource transmission services and the management of digital spectrum to third parties, there is no such right conferred on a representative company.[21] A representative company represents all the community broadcasters in the multiplex licensee joint venture.

The ACCC agrees that it is reasonable that representative companies share this same right as incumbent commercial broadcasters under clause 6.3(h) of the Access Agreement to outsource transmission services and the management of digital spectrum to a third party.

The ACCC also notes that clause 6.4(f) of the Access Agreement should also be amended to state that it is the representative company itself, and not a digital community broadcaster nominated by the representative company, that should acknowledge its responsibility for determining the allocation of multiplex capacity made available to each Digital Community Broadcaster, that these allocations as determined in accordance with section 118NR of the Radiocommunications Act and that the multiplex licensee bears no liability for the representative office's allocations.

7.6 Billing issues

The CBAA submission proposes that to facilitate the start up of new broadcasters, the undertaking should provide that the billing of transmission services be undertaken three months in arrears, rather than the requirement under clause 12.2 of the Access Agreement that they are undertaken monthly.[22]

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[21] Ibid, p. 7

[22] Ibid, p. 7

The CBAA also seeks the inclusion of explicit declarations in the undertaking that third parties may be invoiced for transmission services and may make payments on behalf of an access seeker, and that payment in advance shall not be required.

The ACCC believes that the above billing issues should only be matters for negotiation between the parties, and it is not unreasonable for the licensee to exclude the declarations sought from the undertaking.

7.7 Timely response to capacity changes

The CBAA submission suggests that it is unreasonable that there is no requirement in the access undertaking for the multiplex licensee to respond to capacity change requests in a timely matter.[23]

The ACCC understands that it is the nature of the transmission technology that the multiplex transmitters do not need to make any alterations to their services to process a capacity change, but simply needs to be notified of this change in the signal received.

Accordingly, based on that view, the ACCC does not believe that the undertaking documents need to contain the proposed requirement.

Summary of the draft assessment of whether the terms and conditions of access in the undertakings are reasonable

It is the ACCC's draft view that it is not satisfied that all the terms and conditions of access in the undertakings are reasonable.

As discussed in section 7.5, community sector representative companies should have the same right as commercial broadcaster access seekers to outsource transmission services and the management of digital spectrum. Clause 6.4(f) of the Access Agreement also requires amendment, to state that it is the representative company, not a digital community broadcaster nominated by the representative company, that is responsible for determining how multiplex capacity is to be allocated among digital community broadcasters, for making these determinations in accordance with the applicable Radiocommunications Act criteria and for indemnifying the multiplex licensee against any liability for these allocations.

[23] Ibid

8. Assessment of whether the access prices or pricing methodologies are fair and reasonable

Schedule 2 of the Access Agreement sets out the pricing principles applicable to the service, and the methodology for determining the standard charges payable by access seekers for the service. The ACCC discussion paper asked for views on whether the pricing principles represented a fair and reasonable methodology for the multiplex licensee to set prices so as to recover its efficient costs, including a normal commercial rate of return. The prices or pricing methodologies in the access undertaking must be fair and reasonable for the ACCC to accept the undertaking.

Specific issues in relation to the pricing principles are explored below.

8.1 Pricing principles rather than specific prices

The ACCC discussion paper noted that the undertaking did not specify prices to apply for the multiplex transmission service, but rather provided principles by which the prices would be developed. The discussion paper asked for views on whether it was reasonable for the multiplex licensees to take this approach, and whether there is sufficient assurance that the prices will be fair and reasonable. The discussion paper also asked whether access seekers will be able to access the necessary information to verify that any prices proposed at a later date by the multiplex licensee do in fact accurately reflect the pricing principles in the undertaking.

The CBAA submitted that the ACCC should require an estimation of costs and charges that will be imposed by the multiplex licensee before deciding whether to accept the undertaking.[24] It argued that without such an estimation, there is a significant risk that the ACCC will approve an undertaking that provides for charges in excess of those that would reflect efficient costs.

In contrast, the CRA submission pointed to the explanatory memorandum for the decision-making criteria as justification for the ACCC approving the undertakings in the absence of actual prices.[25] It noted that that the explanatory memorandum states that if the licensee does not know the actual costs at the time of lodging an undertaking, it may instead provide a fair and reasonable pricing methodology. The submission states that the multiplex licensees (through CRA) are still in the process of finalising their downstream supply arrangements, and it is not possible for them to fully know their costs or set indicative prices in the undertaking.[26]

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[24] Ibid, p. 8

[25] CRA submission, p. 10

[26] Ibid, p. 9

While the inclusion of actual prices in the undertaking would obviously provide a greater level of certainty for the ACCC and access seekers alike, the ACCC accepts that it is difficult for the multiplex licensees to be sufficiently certain at this stage with the service still a number of months away from being provided. The ACCC considers, however, that there should be sufficient information available for the multiplex licensees to provide an estimate of access charges.

Recent announcements suggest the roll-out of necessary infrastructure is reasonably well advanced. The Chair of the Commercial Radio Australia Digital Technical Advisory Committee, Des DeCean said on 9 December 2008: 'All of our transmission equipment has been ordered and is in production. The finalisation of the antenna design and installation will allow us to move forward to complete the infrastructure build.'[27]

A public estimate of costs would help industry stakeholders to comment on not only whether the estimated access charges reflect underlying costs, but also whether the multiplex licensees will be providing the service in an efficient manner. This is discussed in section 8.2 of this paper.

Furthermore, not including at least indicative prices in the undertaking potentially makes it substantially more difficult to later verify that the charges eventually paid by the access seekers do in fact reflect the pricing methodology in the undertaking. This issue is explored in section 8.6 of this draft decision paper.

The ACCC notes that the explanatory statement for the decision-making criteria allows for an undertaking to be accepted without binding the licensees to specific prices,[28] but the ACCC would like for at least an estimate of access charges to be made publicly available for comment prior to the ACCC making a final decision on the undertakings.

8.2 Efficient costs of providing the service

The explanatory statement for the decision-making criteria states that the prices for the service should reflect the efficient costs of providing access to the multiplex capacity and associated services, including a normal commercial rate of return. This section of the draft decision paper will consider whether pricing methodology will reflect efficient costs of providing the service, prior to the addition of a normal commercial rate of return.

The CRA submitted that the pricing principles meet this requirement. It states that the pricing principles identify a breakdown of the following cost categories incurred in the supply of the multiplex transmission service, which are recoverable by the multiplex licensee from access seekers:

- capital expenditure

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[27] Commercial Radio Australia, *Digital Radio Switch-On Set for May 2009*, media release, 9 September 2008

[28] ACCC, Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008— Explanatory Statement, p. 6

- operating expenditure
- expenditure of corporate overheads.

The ACCC's view is that while the undertaking may allow the multiplex licensee to recover the costs of supplying the service, there are some concerns that those costs may not be the efficient costs as required by the decision-making criteria. Without specific prices within the undertaking, the ACCC must be sure that there are sufficient mechanisms within the undertaking, legislation or the market environment that will require or provide the incentives for the multiplex licensee to pursue cost efficiencies.

At the most basic level, the proposed pricing principles add up all the costs incurred by a multiplex licensee in providing the service, and pass these costs (plus a normal rate of return) on to access seekers based on their share of total capacity in use. These arrangements alone mean the multiplex licensee has very little incentive for minimising costs—even if the multiplex licensee spent double of what was necessary to provide the service efficiently, under the presently proposed pricing principles it would still be able to recover these costs with a return as long as there was at least one access seeker. This raises the potential of the multiplex licensee 'gold-plating' the facilities.[29]

The ACCC has considered whether there are influences on the multiplex licensee's incentive to minimise costs other than the pricing principles within the undertaking.

One relevant factor is the vertical integration between the multiplex licensee and the access seekers. This means that any inefficient supply by the multiplex licensee would result in higher access charges to its own shareholders, which are also access seekers. The degree to which this provides incentives to operate efficiently depends on two factors:

- *Firstly, the degree to which access seekers are also shareholders in the multiplex licensee joint venture company.*

  If all access seekers are shareholders, then there should be reasonable incentives for the multiplex licensee to minimise the costs of supply and therefore the access charges. Conversely, if few access seekers are shareholders, then there is very little incentive for the multiplex licensee to minimise the costs.

  Such a situation could in fact see gold-plating used in an anti-competitive manner by the multiplex licensee increasing access charges to the point that they are unaffordable by some non-shareholder broadcasters. However, while the community broadcasters would be considered the most vulnerable, the ACCC considers it is unlikely that such a strategy would provide sufficient benefit to the commercial broadcasters, given they would have to pay for the unused capacity reserved for the community broadcasters if all community broadcasters ceased acquiring the transmission service.

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[29] 'Gold-plating' refers to the practice of investing in infrastructure far in advance of what is required for the effective delivery of services.

At the time of publication, the ACCC understands that the majority of commercial broadcaster access seekers have taken up the opportunity to become shareholders in the multiplex licensees, but the community broadcasters have not. It remains to be seen whether the community broadcasters will take advantage of legislative amendments which enable them to become shareholders.[30]

- *Secondly, the degree to which access seekers can pass higher access charges on to their customers (i.e. advertisers).*

  If the broadcasters can pass higher access charges on to advertisers through higher advertising charges, then there is less incentive for the multiplex licensee to operate efficiently. If advertisers are likely to seek other forms of advertising (eg. television, newspaper, internet) if faced with higher prices, then broadcasters that are shareholders in the multiplex licensee are more likely to push for lower access charges.

Another factor that has some influence over whether the costs recovered by the multiplex licensee would be efficient is that the facilities are new. This means that it is somewhat more likely that the infrastructure chosen is based on modern technology and design, than if the infrastructure in question had been installed in the past. However, this does not protect against gold-plating, nor does it provide incentive for the multiplex licensee to make cost-saving upgrades in the future.

The ACCC's draft position is that it considers that the degree of vertical integration between a multiplex licensee and access seekers, and to a lesser degree the facts that the facilities are new and that alternative media might provide some constraints on the extent to which costs could be passed through, provide the multiplex licensee with some incentive to operate efficiently. However, the ACCC would have reservations about relying completely on these factors for driving efficiency in the context of the proposed pricing principles and a lack of specific indicative prices within the undertaking.

8.3 Earning a normal commercial rate of return

In its submission, the CBAA questioned the need for the multiplex licensee to earn a commercial rate of return in addition to covering the cost of providing access to the service. It stated that the establishment of digital radio transmission facilities on a shared basis would logically result in a pricing approach that does not include a commercial rate of return. This is because the effect would be that the multiplex shareholders would essentially just be charging themselves more than necessary as access seekers.

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30 *Broadcasting Legislation Amendment (Digital Radio) Act 2008*

Within this context, the CBAA submission noted that community broadcasters operate on a not for profit basis and therefore the proper approach to pricing of services for community broadcasters is one in which only efficient costs are recovered.[31]

The ACCC's draft position is that it is acceptable for the multiplex licensees to earn a normal commercial rate of return on their investment. This is explicitly contemplated by the explanatory statement for the decision-making criteria.[32] It is within the legitimate business interests of any company to be able to earn a return that is commensurate with the risk of the project, and therefore provide sufficient incentive for the investment to occur in the first place. Furthermore, the proper risk-adjusted cost of capital (i.e. the WACC) is a cost that the multiplex licensee has to incur in any case, whether it be an express cost or an opportunity cost of capital.

The ACCC notes the CBAA's argument that investment that occurs on a shared basis between the users of those facilities could be provided at prices that simply reflect the underlying cost. However, not all broadcasters using the multiplex licensee's infrastructure will also be a shareholder. The absence of a normal commercial rate of return within the access charges would mean all access seekers benefit from the facilities, yet only some have to bear the risks associated with the investment.

With regard to the CBAA claim that community broadcasters should be provided with access to the service at charges that do not incorporate a return on investment for the multiplex licensee, the ACCC considers that this would not be an efficient pricing approach. The cost associated with the risk of the investment would need to be borne by the shareholders of the multiplex licensee, or recouped through artificially higher access charges for commercial broadcasters. The former would see the investor not fully compensated for taking the risk of the investment, while the latter may create the sub-optimal outcome whereby a commercial broadcaster may not take up multiplex capacity even though they would value the capacity more highly than the underlying cost (plus commercial rate of return) of supply.

If there is a social welfare argument that community broadcasters should have discounted access to multiplex services, it is a matter to be dealt with by the government rather than through the access regime. It might, for example, be implemented through direct funding rather than artificially changing prices that distort decisions to invest in facilities or obtain capacity.

8.4 Calculating the weighted average cost of capital (WACC)

The return on capital is the weighted average cost of capital (WACC) of the depreciated value of the assets. The pricing principles provide that the weighted average cost of capital (WACC) of the multiplex licensee will be commensurate with

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31 CBAA submission, p. 8

32 ACCC, *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008— Explanatory Statement*, p. 6

the WACC of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business cycle.[33] The ACCC discussion paper asked whether the pricing principles represent a fair and reasonable method for determining the WACC, given the possible difficulty of finding a similar business as described.

The CRA submitted that it is premature to specify a particular percentage or an overly complex formulaic process for determining a particular rate of return, given the nascent status of the digital broadcasting industry in Australia.[34] It claimed that it would be appropriate for the industry to conduct a benchmarking exercise at a later date to determine an appropriate WACC for the multiplex licensees, based on the criteria set out in the pricing principles. It assumes that more data will become available to the multiplex licensees over time that will allow them to determine an appropriate rate of return.

The ACCC accepts the CRA's reasons why it cannot yet commit to the WACC that will be used in the calculations to determine access charges. However, this does place greater emphasis on the need for indicative prices and costing information to be made public within the undertaking assessment process (as discussed in section 8.1).

The ACCC considers that the method for setting the WACC is sound in theory, but may cause some difficulty in practice. Finding other enterprises conducting a similar business, with a similar risk profile and at a similar phase of their business cycle could be a considerable challenge and leaves some scope for interpretation. This could lead to disputes between the multiplex licensees and access seekers.

The ACCC does not believe that this means the proposed approach for calculating the WACC is unreasonable. In addition, there is not a clear alternative that would better achieve this purpose. The ACCC's draft position is therefore that it is satisfied that the proposed methodology for setting the WACC is fair and reasonable, as long as the undertaking provides for a timely and effective dispute resolution mechanism. The dispute resolution mechanism is considered in section 10 of this paper.

8.5 Specifying charges on a per-access seeker basis

The pricing principles determine charges on a per-access seeker basis, rather than a per-capacity basis. This means the price paid by an access seeker will be determined in part by the number of access seekers receiving the service provided by that multiplex licensee. Clause 4.3 of Schedule 2 of the Access Agreement provides a mechanism for adjusting the charge when the number of access seekers changes.

The ACCC discussion paper asked whether it was reasonable for charges to be determined on a per-access seeker basis, rather than a per-capacity basis. It also asked

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[33] Clause 3.3(c)(i) of Schedule 2 of the Access Agreement

[34] CRA submission, p. 11

for views on whether the mechanism for adjusting prices when the number of access seekers changed was fair and reasonable.

Submissions

None of the submissions commented as to whether the price adjustment mechanism was fair and reasonable. CRA and CBAA did, however, provide views on the issue of determining service charges on a per-access seeker basis.

CRA submitted that it is not entirely correct for the ACCC to say that prices are to be calculated on a per-access seeker basis, as this oversimplifies the calculation methodology somewhat.[35] It states that while access charges may be ultimately derived on a per-access seeker basis, the calculation of those charges is a product of the amount of multiplex capacity allocated to that access seeker relative to the total amount of capacity allocated to all access seekers.

CRA states that this methodology ensures that access seekers that acquire the same amount of multiplex capacity pay the same level of access charges. It also claims that higher levels of utilisation of the multiplex capacity result in an overall proportionate reduction in the level of access charges payable by all access seekers.

The CBAA submits that the per-access seeker charging methodology is especially unreasonable for the community radio sector. This is the case, the CBAA claims, as without the financial resources to purchase the excess capacity the community sector 'can never, in practical terms, access' the unallocated channels their increased charges pay for.[36]

Elsewhere in its submission, the CBAA repeats its opposition to a per-access seeker basis for determining service charges, in this case referring to the example of a single community broadcaster being liable for the total charges due from a representative company, even if the broadcaster is only using a small proportion of the total two channels allocated to the community sector.[37] Again the CBAA does not set out why a per-access seeker basis for determining service charges is unreasonable on anti-competitive grounds, but rather it only seeks to establish that the pricing methodology disadvantages its members due to certain characteristics that some or all of them share.

ACCC view

The ACCC considers that the proposed approach to determine access charges on a per-access seeker basis has the effect of passing some of the risk from the multiplex licensee to the access seekers. This is because the multiplex licensee receives the same revenue regardless of whether there is only one access seeker or if all of its capacity is in use. Each access seeker has the risk that other access seekers would cease to use the capacity, and therefore their access charge would increase. Should it become the only

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35 CRA submission, p. 12

36 CBAA submission, p. 9

37 Ibid, p. 10

access seeker using the service, it would be required to pay all of the costs associated with providing the service and the commercial rate of return.

This contrasts with the approach whereby a specific amount of capacity has a predetermined charge. This would mean that an access seeker would pay the same amount no matter how many other broadcasters are accessing the service.

The per-access seeker approach proposed by the undertaking does not, however, remove all risk from the multiplex licensee. As mentioned above, the charge for each access seeker increases as other access seekers cease to use the service. As the increase in the access charge creates further incentive for the remaining broadcasters to also cease to obtain the service, it could quickly lead to all access seekers abandoning the multiplex licensee.

The ACCC also notes that the passing of risk from multiplex licensee to access seekers, as described above, should be borne in mind when establishing an appropriate WACC. In simple terms, the lower the risks for the licensee, the lower the WACC would need to be.

Aside from shifting some of the risk of the investment to access seekers, per-access seeker charges also limit incentives for the multiplex licensee to maximise the use of its service. This may result in end-users receiving a smaller range of digital radio content services than under a different pricing approach.

The ACCC notes that the proposed pricing principles may also lead to an under-utilisation of the facility because it does not allow some flexibility away from charges based on average costs per access seeker. These arrangements mean that should a lack of access seekers result in relatively high access charges (based on high average cost per access seeker), there may be a potential access seeker that values the capacity above its marginal cost but cannot afford the total access charge. There is no scope under the current arrangements for the multiplex licensee to offer a discounted price to this access seeker, which would increase utilisation of the resource and reduce the charge paid by all access seerkers. However, the ACCC is mindful of the overarching objective within the legislative framework of non-discrimination and believes that this rigidity with setting prices is appropriate within this context.

Despite the above, the ACCC does not agree with the CBAA argument that community broadcasters should not have to pay for any unused excess capacity because it would not be able to afford to participate in the auctions. Firstly, if there was no other demand for the excess capacity then the community broadcaster would be able to obtain this capacity without bidding. Secondly, it is not the role of the access regime to compensate particular access seekers for their relative financial disadvantage.

On the basis of the comments above, the ACCC believes that there may be some doubts as to whether per-access seeker based charges represent the most desired approach to pricing, but its draft view is that this approach is not unreasonable.

8.6 Access to information to verify correct charges

As discussed earlier, the undertakings set out pricing principles but do not specify actual prices. The ACCC discussion paper asked whether access seekers will be able to access the necessary information to verify that any prices proposed at a later date by the multiplex licensee do in fact accurately reflect the pricing principles in the undertaking.

The CBAA submitted that one of its chief concerns relating to pricing is its belief that there is a lack of oversight of the implementation of the multiplex licensee's pricing methodology.[38] It states that while a price determination can be the subject of dispute resolution, this will not be a practical option if access seekers are not armed with information about the basis on which costs and prices have been determined or the actual performance of the multiplex licensee on an annual basis.

The CBAA proposed that the multiplex licensee should be required to report to the ACCC each year on the costs incurred in each of the categories identified in Schedule 2 of the Access Agreement.[39] Failing this, the CBAA suggested that the ACCC should insert such a requirement into the procedural rules. It also stated that this information should be provided to all access seekers.

The ACCC considers there should be some mechanism by which the access charges can be verified as being consistent with the pricing principles in the undertaking. It agrees with the CBAA in that it does not appear practical for the access seekers to verify the access charges through the dispute resolution mechanism. Furthermore, there may even be a concern over whether an expert determination process (specified in the undertaking as the dispute resolution mechanism) would be able to require the disclosure of the necessary information from the multiplex licensee with which to make an informed decision.

The ACCC's draft position is that it would not accept an undertaking that does not have some mechanism for verifying that the prices charged for access to the service are in accordance with the pricing principles. It believes information necessary for this verification should be made available to access seekers at the same time that the multiplex licensee introduces, changes or reviews its charges.

8.7 Regular reviews of the fixed recurring charges

Clause 5 of Schedule 2 of the Access Agreement enables the multiplex licensee to regularly review the fixed recurring charges payable by access seekers. The review would depend on a number of factors including but not limited to:

- to reflect actual expenditure incurred by the multiplex licensee when compared with the forecast, estimated costs;

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38 Ibid, p. 10

39 Ibid

- increases in the cost incurred by the multiplex licensee;
- changes in the consumer price index; and
- technological changes that change the cost of supplying the multiplex transmission service or the number of access seekers that can be accommodated by the multiplex licensee.

The ACCC discussion paper sought comments on whether it was reasonable for the multiplex licensee to regularly review the fixed recurring charges on this basis. It also asked whether the pricing principles are too broad to ensure that the charges will be fair and reasonable.

The CRA submitted that it is reasonable for the multiplex licensees to regularly review the charges following a change in the underlying costs of supplying multiplex capacity.[40] It stated that given the single revenue stream available to multiplex licensees and the fact that the costs of providing the service will vary over time, it is reasonable and appropriate for the multiplex licensees to pass on any change in the underlying costs to access seekers in the pricing of access charges.

The CBAA submission noted that the undertaking currently provides for the multiplex licensee to review charges if there have been cost increases, but not cost decreases.[41] The CBAA also submitted that fixed recurring charges should be based on forecast costs, which should be fixed until the next review.[42] Failing this, there should be scope for access seekers to trigger a price review at least once a year.

The ACCC considers that price reviews help to ensure that the access charges reflect movements in the underlying costs of providing the service.[43] Accordingly, the ACCC's draft view is that the undertakings should not be accepted unless there is also scope for reviews of the access charges based on changes in costs generally, including cost decreases.

The ACCC has considered the frequency with which these reviews should occur, and whether access seekers should be able to trigger a price review. More regular reviews would have the benefit of most closely aligning the access charges with the underlying efficient costs of supplying the service, assuming the multiplex licensee has sufficient incentive to operate efficiently. Alternatively, less frequent reviews would reduce the administrative costs for the multiplex licensees and give access seekers greater certainty with regard to charges.

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40 CRA submission, p. 13

41 CBAA submission, p. 11

42 Ibid

43 Note that it is expected that the underlying costs will also be efficient, as discussed in section 8.2 of this paper.

The ACCC's draft position is that the frequency for review should largely be determined by the multiplex licensee who would have the best oversight of changes in costs and would have to cover the administrative expense of the reviews.

However, the ACCC is mindful that the multiplex licensee does not have a significant interest in reviewing prices if it believes that underlying costs have fallen. This is because any premium paid by access seekers over and above that required to cover costs (and a normal rate of return) would accrue back to the access seekers that are also shareholders. This creates a problem for access seekers that are not shareholders and are therefore not recipients of the compensation through higher returns on their share of the licensee. The ACCC's draft view is therefore that the undertaking cannot be deemed to be reasonable unless access seekers can trigger a review of access charges. An access seeker should only be able to trigger a price review if it has been 12 months since the previous review.

8.8 Community broadcasters pay efficient costs only

The CBAA submits that under a situation where transmission services are being provided at pricing levels that allow for a commercial rate of return, community broadcasters should be treated as a special case and only charged at a rate which covers their multiplex licensee providers' efficient costs.[44]

The ACCC's assessment of the access prices or pricing methodologies in the multiplex licensees' undertaking, considers whether the access terms and conditions therein contained are fair and reasonable in terms of them being equally applied to all access seekers. The ACCC has no power or responsibility to approve or require concession pricing for any individual or individual class of access seekers.

Accordingly, the ACCC does not view it to be unfair or unreasonable for community broadcasters to be subject to the same service pricing methodologies as other access seekers.

Summary of the draft assessment of whether the prices or pricing methodology in the undertakings is fair and reasonable

In its draft view, the ACCC is not satisfied that the terms and conditions specified in the undertakings include access prices or pricing methodologies which are fair and reasonable.

As discussed in sections 8.1 and 8.2, the ACCC's draft position is that it considers that the vertical integration between a multiplex licensee and access seekers, and to a lesser degree the fact that the facilities are new, provide the multiplex licensee with some incentive to operate efficiently. However, the ACCC would have reservations about relying completely on these factors for driving efficiency in the context of the proposed pricing principles and a lack of specific indicative prices within the undertaking.

[44] CBAA submission, p. 8

Stronger mechanisms to ensure that costs are efficient should be considered.

As discussed in section 8.6 above, the ACCC's draft position is that it would not accept an undertaking that does not have some mechanism for verifying that the prices charged for access to the service are in accordance with the pricing principles. It believes information necessary for this verification should be made available to access seekers at the same time that the multiplex licensee introduces, changes or reviews its charges.

As discussed in section 8.7 above, the ACCC's draft position is that the undertaking should not be accepted unless there is also scope for reviews of the access charges based on changes in costs generally, including cost decreases.

Also as discussed in section 8.7 above, the ACCC's draft position is that the undertaking would not be accepted unless access seekers can trigger a price review once 12 months have passed since the last review.

9. Assessment of whether there is an obligation on the licensee to not hinder access

The undertaking should include an obligation to not hinder access to services. This requirement would not be applied unreasonably. For example, the multiplex licensee may require access seekers to be creditworthy or technically capable of providing a content stream.

9.1 Inclusion of obligation to not hinder access

Clause 9.2 of the Access Agreement states that the multiplex licensee must not prevent an access seeker from obtaining access to the multiplex transmission service in accordance with the applicable terms of the Access Agreement. The ACCC discussion paper drew attention to the terms 'in accordance with the applicable terms of this Agreement', and asked whether clause 9.2 satisfies the requirement to include an obligation to not hinder access.

The ACCC did not receive any submission on whether clause 9.2 satisfies the requirement to include an obligation to not hinder access to service. However, having considered clause 9.2 in the context of the other clauses in the undertaking, the ACCC in its draft decision, believes that it satisfies this requirement. .

9.2 Financial security provisions

Clause 14 and condition 3 of Attachment A of the Access Agreement include provisions for the multiplex licensee to conduct a review of the creditworthiness of an access seeker. An access seeker must provide relevant financial information for this purpose, and provide financial security if it does not meet the security requirements

according to the multiplex licensee. The multiplex licensee may also conduct an initial review of the creditworthiness of an access seeker upon receipt of its application to enter into an agreement.

The ACCC discussion paper asked whether the financial security provisions were too onerous on access seekers, and represented in effect an ability of the multiplex licensee to hinder access.

The CBAA submitted that the community broadcasters, as not-for-profit organisations, would be unfairly prejudiced if they were subject to a credit review or a requirement to provide financial security on the same basis as commercial broadcasters.

The ACCC considers it reasonable to have appropriate financial security provisions applying indiscriminately to all access seekers. It also does not believe the financial security provisions in the undertaking provide the multiplex licensees with an opportunity to hinder access inappropriately.

Summary of the draft assessment of whether the undertakings include an obligation to not hinder access to services

In its draft view, the ACCC is satisfied that the undertakings include an obligation to not hinder access to services.

10. Assessment of whether the undertaking provides for a reasonable dispute resolution mechanism

The ACCC must assess whether the dispute resolution mechanism included in the undertakings is reasonable. In that regard, the ACCC will consider whether the mechanism facilitates the fair, timely and efficient resolution of disputes, including possibly the appointment of an appropriate arbitrator within a reasonable timeframe.

The dispute resolution procedures are set out in Schedule 3 of the Access Agreement. The procedures provide for the dispute to be resolved through discussion between the parties, before escalating to mediation or an expert determination if required. The mediation and expert determination procedures are governed by guidelines set out by the Australian Commercial Disputes Centre (ACDC).

The ACCC discussion paper noted that an expert determination process differs slightly from that of an arbitration. It asked for views on whether the process specified in the undertaking represented a reasonable dispute resolution mechanism, and whether it would facilitate the fair, timely and efficient resolution of disputes.

The CRA in its response to the ACCC discussion paper, insisted that the functions and roles of the expert in the expert determination process were identical to those of an arbitrator.

In making this claim, the CRA did not address the ACCC's observation that the ACDC guidelines for expert determination make no reference to the powers an arbitrator has in the hearing process, as set out in the ACDC *Rules for Domestic Arbitration*, to determine the submission of, or the limitation of:

- pleadings
- discovery;
- opening address and closing address;
- lodgement of sworn statements or affidavit evidence on which the parties seek to rely;
- rights of reply to documents tendered;
- attendance of deponents for cross-examination;
- expert witnesses;
- expert reports;
- calling, examining, cross-examining or re-directing witnesses and experts; and

- procedural directions.[45]

In its draft view, the ACCC believes that the expert determination process specified in the undertaking would facilitate the fair, timely and efficient resolution of any disputes that occur.

The ACCC also takes the view that should it determine that any outcome of these dispute resolute procedures is in breach of a multiplex licensee's obligations under its undertaking or the Radiocommunications Act - for example the obligations of multiplex licensees not to discriminate against particular access seekers in relation to technical quality of services under clause 3.1(b) of the undertaking and section 118NP of the Act, and not to hinder access to services, the ACCC can take enforcement measures as appropriate.

Summary of the draft assessment of whether the undertakings provide for a reasonable dispute resolution mechanism

In its draft view, the ACCC is satisfied that the undertakings in their proposed implementation of dispute resolution procedures that would include initial discussions between the disputing parties, mediation and the further escalation to expert determination when required, provides for a reasonable dispute resolution mechanism.

The ACCC also takes the view that should it determine that any outcome of these dispute resolution procedures is in breach of a multiplex licensee's obligations under its undertaking or the Radiocommunications Act, the ACCC can take enforcement measures as appropriate.

[45] Australian Commercial Disputes Centre, *Rules for Domestic Arbitration*, <https://www.acdcltd.com.au/downloads/get/64> at 9 December 2008, p. 4

11. Draft decision on the digital radio access undertakings

11.1 Draft decision

The analysis in the preceding chapters of this paper leads the ACCC to make the following draft decision:

- the ACCC is not satisfied that the undertakings comply with Division 4B of Part 3.3 of the Radiocommunications Act
- the ACCC is not satisfied that the undertakings prevent the multiplex licensees from unduly restricting competition
- the ACCC is not satisfied that the terms and conditions of access in the undertakings are reasonable
- the ACCC is not satisfied that the pricing methodology in the undertakings is fair and reasonable
- the ACCC is satisfied that the undertakings include an obligation on the multiplex licensee to not hinder access to services
- the ACCC is satisfied that the undertakings provide for a reasonable dispute resolution mechanism.

On the basis of its draft views above, the ACCC has made a draft decision to:

- not accept the undertakings under subsection 118NF(2) of the Act
- provide the multiplex licensees with the written notice under subsection 118NF(4) in its final decision that says if the licensees submit altered undertakings that reflect the alterations specified in the notice, then the ACCC will accept the altered undertakings.

11.2 Notice requesting alterations to the undertakings

The draft decision to provide the multiplex licensees with a written notice under subsection 118NF is acknowledgement that the undertakings do not require significant changes in order to receive the ACCC's acceptance.

The proposed notice would request changes to provisions in the undertakings with the ACCC has some concern:

- provisions relating to consultation on excess capacity and the allocation of capacity to eligible commercial broadcasters, that do not appear to be consistent with Division 4B of Part 3.3 of the Radiocommunications Act.

- provisions relating to variation that appear to allow an access seeker to opt out of variations to undertakings that have been accepted by the ACCC

- provisions relating to variation that appear to allow a multiplex licensee and access seeker to agree to vary their Access Agreement as a bilateral contract, without the ACCC's approval

- the lack of any provisions to ensure that the costs recovered by the access seeker would be efficient costs, in the absence of specified prices within the undertaking

- the lack of any mechanism by which access seekers can obtain information to verify that the access charges are in accordance with pricing principles

- provisions for a review of access charges to be triggered by access seekers at least 12 months after the previous review, and that reviews should be instigated through changes in costs generally rather than just cost increases

  Each matter is discussed in further detail below.

11.2.1 Requested changes to provisions for consistency with the Act

Section 5.1, 5.2 and 5.3 of this draft decision paper discusses the ACCC's concerns that some provisions of the undertaking do not comply with Division 4B of Part 3.3 of the Radiocommunications Act.

Section 5.1 discusses certain terms included in clause 4.1 in the main body of the undertaking and clause 23.9(a) in the Access Agreement. The term 'or otherwise' at the end of clause 4.1, appears to suggest that the multiplex licensee is able to amend or vary the access undertaking *otherwise* than in accordance with the statutory regime contained in the Radiocommunications Act. The statement in clause 23.9(a), that 'no variation of this Agreement is effective unless made in writing and signed by each Party', appears to contemplate a multiplex licensee and individual access seekers agreeing to vary their Access Agreement, without the need for ACCC approval. Both of these suggested meanings are not in full compliance with Division 4B of Part 3.3. Therefore, the ACCC's draft decision is to request the deletion of the terms 'or otherwise' from clause 4.1 in the main body of the undertaking, and the insertion of the terms 'and approved by the ACCC' at the end of clause 23.9(a) of the Access Agreement, pursuant to section 118NF(4) of the Radiocommunications Act.

Section 5.2 notes that CRA acknowledged in its submission that the word 'may' in clause 7.4(a) of the Access Agreement is a typographical error and should be replaced with 'must'. The ACCC believes that a failure to make this correction would result in the undertaking being inconsistent with the Act.

Section 5.3 discusses the undertaking's terms relating to the allocation of capacity to eligible commercial broadcasters. The ACCC considers that clause 6.3(b) of the Access Agreement does not comply with Division 4B of Part 3.3. It believes that the Radiocommunications Act allows for an incumbent commercial broadcaster to claim standard access entitlements of one-ninth of the total multiplex capacity, not one-ninth of the capacity made available to incumbent commercial broadcasters. This means

clause 6.3(b) of the Access Agreement would need to change with the removal of the words 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters'.

11.2.2 Requested changes to provisions relating to variation

Section 6.1 of this paper discusses the ACCC's concerns with provisions in the undertaking that refer to variation.

Firstly, it is believed that the provisions appear to allow an access seeker to opt out of variations to undertakings that have been accepted by the ACCC. This means the ACCC cannot be sufficiently certain that the multiplex licensee could not favour particular access seekers in an anti-competitive manner.

Secondly, the provisions also appear to enable a multiplex licensee and an access seeker to agree to vary their Access Agreement as a bilateral contract, without the ACCC's approval. Once again, this means the ACCC cannot be sufficiently certain that the multiplex licensee could not favour particular access seekers in an anti-competitive manner.

The following changes would need to occur to the undertaking to address the ACCC's concerns:

- the removal of the words 'unless agreed otherwise between the Multiplex Licensee and an Access Seeker' from clause 4.2 of the main body of the undertaking
- the insertion of the words 'and approved by the ACCC' at the end of clause 23.9(a) in the Access Agreement and
- the removal of the words 'unless otherwise agreed between the Parties' from clause 23.9(b) from the Access Agreement.

11.2.3 Requested changes regarding representative company role

Section 7.5 of this paper notes that clause 6.4(e) of the Access Agreement provides that a digital community broadcaster can outsource transmission services and the management of digital spectrum to third parties. This clause will need to be amended to instead grant this outsourcing right to the representative companies which act on behalf of the community broadcasters. Clause 6.4(f) of the Access Agreement also requires amendment, to state that it is the representative company, not a digital community broadcaster nominated by the representative company, that is responsible for determining how multiplex capacity is to be allocated among digital community broadcasters, for making these determinations in accordance with the applicable Radiocommunications Act criteria and for indemnifying the multiplex licensee against any liability for these allocations.

11.2.4 Mechanism for ensuring costs being recovered are efficient costs

Sections 8.1 and 8.2 of this paper discuss the ACCC's reservations that there are not strong incentives within the undertaking for the multiplex licensee to operate at an efficient level, and therefore the costs being recovered may not be efficient costs. The

ACCC's notice would require some mechanism to be introduced which would improve the incentives, in the context of the undertaking not specifying the prices that are to apply to access seekers.

11.2.5 Access to information to verify charges

Section 8.6 of this paper discusses the ACCC's concerns that there is no mechanism for verifying that the prices charged access to the service are in accordance with the pricing principles. It believes the information necessary for this verification should be made available to access seekers at the same time that the multiplex licensee introduces, changes or reviews its charges.

11.2.6 Requested changes to provisions for review of standard charges

Section 8.7 of this paper discusses the ACCC's concerns with the provisions regarding the review of access charges.

The ACCC considers that price reviews are necessary to ensure that the access charges reflect movements in the underlying costs of providing the service. The ACCC's notice to the multiplex licensees would state that the undertakings must include scope for a review of access charges for changes in costs generally, including cost decreases. The notice would propose that the word 'increases' in clause 5(b) of Schedule 2 of the Access Agreement be replaced with the word 'changes'.

Furthermore, the ACCC believes that there may be insufficient incentive for the multiplex licensee to review prices in the event that the underlying costs have decreased. The ACCC's notice would therefore state that the undertakings must enable access seekers to trigger a price review at least 12 months after the previous review. It is expected that this would form a new clause under clause 5 of Schedule 2 of the Access Agreement.