Australian
Competition &
Consumer
Commission

Determination that ACCC-modified access undertakings are the access undertakings in relation to the digital radio multiplex transmission licences

Reasons for decision

April 2009

Contents

1 Introduction

Digital radio services are to commence in Adelaide, Brisbane, Melbourne, Perth and Sydney by no later than 1 July 2009. Licences were provided to eight joint venture companies to multiplex together the separate streams of content from individual commercial and community radio broadcasters and transmit a combined stream to end users in each licence area.

The *Radiocommunications Act 1992* (Cth) (Radiocommunications Act) provides for each multiplex licensee to be owned by commercial broadcasters and a company representing digital community broadcasters ('the representative company'). The representative companies are not currently shareholders in the multiplex licensees and it is not clear whether they will take up their right.

The legislative framework includes an access regime to help broadcasters obtain access to digital radio multiplex transmissions services on reasonable terms and conditions. As required, the eight multiplex licensees submitted their access undertakings to the ACCC on 3 October 2008. Each undertaking was identical in substance. The identical undertakings and supporting submission were submitted on behalf of the multiplex licensees by Commercial Radio Australia (CRA).

The Radiocommunications Act does not specify the basis on which the ACCC must make its decision to accept or reject an undertaking, but it does enable the ACCC to determine such decision-making criteria. The decision-making criteria were developed by the ACCC through legislative instrument in May 2008 following an extensive consultation process.

It is only after the undertaking has been accepted by the ACCC that the Australian Communications and Media Authority (ACMA) can determine that digital radio services may commence in that area.

On 19 March 2009, the ACCC made a decision to reject the undertakings after consulting on whether the terms and conditions of the undertakings met the requirements of the decision-making criteria (the Final Decision).[1] At the same time, the ACCC gave a notice to the multiplex licensees of its intention to implement modified versions of the eight identical undertakings (modified undertakings) submitted by the multiplex licensees pursuant to subsection 118NF(5) of the Radiocommunications Act and began a consultation process as required by the legislation.

After taking into account submissions received during this consultation process, the ACCC has determined the modified undertakings for the digital radio access regime.[2]

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[1] ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Final decision*, 19 March 2009

[2] *Radiocommunications Act 1992* (Cth), subsections 118NF(5) and (6)

The modified undertakings which the ACCC has determined address the ACCC's concerns arising from its assessment of the decision-making criteria in the Final Decision. The Final Decision's reasons for decision outlines the ACCC's detailed analysis and assessment of the terms and conditions of the submitted undertakings against the decision-making criteria; the reasons for rejection of those undertakings and also why the ACCC proposed to modify the undertakings. Accordingly, the Final Decision's reasons for decision should be read in conjunction with these reasons for decision.

Interested stakeholders were encouraged to make submissions on the modified undertakings by 3 April 2009. Three submissions were received.

These reasons consider the submissions received and responds to the views raised regarding the modified undertakings.

2 Consultation on the proposed notice and modified undertaking

The views contained in the submissions by the Consortium of Australian Media Services (CAMS), CRA and the Community Broadcasting Association of Australia (CBAA) are set out and responded to below.

2.1 Digital radio legislative framework

In its submission, CAMS criticised the digital radio legislative framework as being 'flawed' for requiring commercial and community broadcasters to share multiplex facilities and in allowing them to together form 'profit making enterprises' (joint venture companies) which CAMS claims is prohibited under the *Broadcasting Services Act 1992* (Cth).[3]

CAMS argues that the digital radio legislative framework should permit the community sector to independently operate their own multiplex services and that the ACCC advise the Australian Government to postpone the rollout of the digital radio joint venture scheme.

The allocation of multiplex transmission licenses to joint venture companies for the provision of services to commercial and community broadcasters and the forming of joint venture companies owned by commercial and community broadcaster shareholders are both key components of the digital radio legislative framework as originally promulgated by the Australian Parliament in the *Broadcasting Legislation Amendment (Digital Radio) Act 2007* (Cth).

The ACCC considers that the arguments made by CAMS are a matter for the Australian Government, rather than the ACCC's decision regarding the access undertakings.

2.2 The definition of an access seeker

In the course of their submissions, CRA and the CBAA made submissions on potential amendments to the definition of an access seeker as it appears in the modified undertaking, The submissions were as follows:

- the definition of representative companies as access seekers is overly restrictive (CRA)
- digital community broadcasters should not be included in the access seeker definition (CRA) and

[3] Consortium of Australian Media Services (CAMS) submission, *Digital Radio Multiplex Access – CAMS Comment*, April 2009, p. 3.

- representative companies should be expressly excluded from the definition of an access seeker (CBAA).

2.2.1 Definition of representative companies as access seekers is overly restrictive

In section 3.1 of its submission, CRA argues that the modified undertaking's definition of an access seeker is 'overly restrictive and impractical', based on the ACCC's statement in its Final Decision on the CRA-submitted access undertakings that:

> … the powers of the representative company may be limited by the operation of the Radiocommunications Act, including subsection 9C(1)(k), or by the operation of the powers specified in its constitution.[4]

According to CRA, this interpretation limits the function of the representative company to the role of allocating multiplex capacity to digital radio broadcasters and notifying the multiplex licensees of these allocations.[5] CRA argues that the role of representative companies is much wider, based on subsections of 9C(1)(k).[6]

Section 9C(1)(k) of the Radiocommunications Act requires that the representative company's constitution provides that the purposes of the company are:

(i) holding shares in the companies that hold or will apply for certain licenses; and

(ii) exercising the powers conferred by the Radiocommunications Act on a representative company; and

(iii) carrying out activities incidental to the purposes mentioned in subparagraphs (i) and (ii).

According to CRA, 'activities incidental' to the representative companies' primary responsibilities of nominating capacity for the digital community radio sector should be given a broad interpretation. CRA states, by way of example, that, as representative companies are responsible for nominating which digital community broadcasters are to be allocated multiplex capacity, it would be incidental for the representative company, following receipt of an invoice from the joint venture company, to invoice and procure payment from individual digital community broadcasters based on their respective allocations. The ACCC agrees that such a role may be an incidental activity which falls within paragraph 9C(1)(k)(iii). However, whether or not the representative company is actually given this power by its shareholders is a matter for the shareholders.[7]

The ACCC's view is that the reference to "section 9C(1)(k)" in the ACCC's modified undertaking is a reference to the entire provision, *including* the incidental activities

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[4] CRA, p. 2 citing ACCC final decision, p. 46.
[5] CRA, p. 2.
[6] Ibid.
[7] The ACCC notes that the constitutions of the representative companies have already been established. CBAA letter to ACCC, 3 April 2009.

referred to in paragraph 9C(1)(k)(iii). Therefore, the ACCC believes its modified undertaking accurately captures the purposes of the representative company.

2.2.2 Digital community broadcasters should not be included in the access seeker definition

In section 3.2 of its submission, CRA asserts that it is not necessary to extend the access seeker definition to cover individual digital community broadcasters.[8] CRA argues that without such an extension digital community broadcasters can still obtain the same benefits associated with holding a standard access or excess capacity access entitlement and that the ACCC has failed to distinguish between the holding of these access entitlements and the process by which they can be claimed through a representative company.

The ACCC notes — in addition to its arguments made in its Final Decision on the CRA-submitted undertaking — that the CRA-submitted access undertaking actually contemplated that individual digital community broadcasters would, in certain circumstances, be the relevant access seeker (notwithstanding that there were not expressly included in the definition of "access seeker").

For example, if individual broadcasters were not included (either expressly or impliedly) in the definition of access seeker, clause 8 of the CRA-submitted undertaking relating to representations and warranties would have required the representative company to be responsible for any content that is broadcast. However, as CRA submits in section 3.1 of its submission, it is the individual broadcasters, rather than the representative company, who are the relevant content providers.

Accordingly, amending the definition of "Access Seeker" to expressly include individual broadcasters does nothing more than expressly recognise what was implied by the practical operation of clause 8 in the CRA-submitted undertaking.

It is particularly important to note that the CRA-submitted undertaking did not expressly exclude individual broadcasters from the definition of "Access Seeker". If this had been the intention of CRA, then it should have made this clear and ensured that no provision could be seen to be referring to individual broadcasters as access seekers.

CRA also argues that by so dealing with the digital community broadcasters through their representative companies, the multiplex licensees will

> avoid the costs associated with the implementation of separate access agreements, billing processes and other administrative arrangements with each individual digital community broadcaster.[9]

CRA takes up this point further in section 3.3 of its submission, noting that this will be especially the case in light of time sharing and time shifting involved in digital community broadcasters' use of multiplex capacity.[10]

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[8] Ibid, p. 4.
[9] CRA, p. 4.
[10] Ibid, pp. 4-5.

CRA argues that as many digital community broadcasters will be using different amounts of capacity for different periods of time, multiplex licensees will face additional administrative burdens if required to deal directly with them. CRA notes that individual service agreements will need to be concluded with each and every digital community broadcaster no matter how briefly or infrequently the use multiplex capacity. CRA also claims that there will often be some uncertainty for the multiplex licensees as to which digital community broadcaster is liable for the capacity used.[11]

Within the context of the ACCC's statements in the Final Decision and above, the ACCC does not consider the additional administrative burden of dealing directly with individual digital community broadcasters as being sufficient for excluding digital community broadcasters from being access seekers.

The ACCC notes too that there should be ways for the multiplex licensees to manage the additional administrative measures required to service digital community broadcasters directly without this amounting to a significant additional burden. For example, the resources required for contractual negotiations could be negligible if standard contracts are used. The ACCC would also suggest that the multiplex licensees already need to be fully informed of the time sharing and time shifting as it needs to allocate capacity on this basis (on which it is notified of 30 days in advance). Billing accordingly does not appear to be significantly more burdensome if based on these allocation notifications.

Even allowing that invoicing a number of digital community broadcasters is more burdensome than invoicing a single representative company, the ACCC considers that this is not overly burdensome. The ACCC also notes that this role has to be undertaken by one of the parties – either the multiplex licensee or the representative company and can see no reason why it should require that this must be done by the representative company. Finally, it observes that the representative company can be empowered to undertake this invoicing task if this is agreed between the parties.

2.2.3 Representative companies should be expressly excluded from the definition of an access seeker.

CBAA argues in its submission for the reference to representative companies to be removed entirely from clauses 1.1 of the modified undertaking and clause 1 of Schedule 1 of the access agreement.[12] It asserts that neither the digital community broadcasters' shareholdings in the representative company nor the possibility that the representative companies might in future own shareholdings in the multiplex transmitter joint ventures should make them an access seeker.

The ACCC takes the view that the mere fact that the representative company is included in the definition does not mean that it will necessarily be an access seeker for all purposes. This is reinforced by the new definition, and its references to "acting on behalf of Digital Community Broadcasters" and the constitutional and Radiocommunications Act powers.

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[11] Ibid.
[12] CBAA, p. 8.

Consistent with the view taken in 2.2.1, the ACCC sees no need to expressly exclude representative companies as access seekers in the modified undertaking as in each case the representative company constitution will determine what powers and responsibilities this will include. In turn, how the representative company interacts with the multiplex licensees can be negotiated between the parties.

2.3 Access seekers being able to opt-in/out of future investment

In its submission, the CBAA reiterates its earlier recommendation that the undertaking should allow for individual access seekers to choose whether they benefit from, and contribute to the costs of, any future investment in a backup transmission site. It provides a number of arguments for this recommendation, which are considered in turn below.

2.3.1 Allocation of capacity at the backup transmission site

The CBAA notes that the ACCC stated in its Final Decision that while the Radiocommunications Act is quite specific in how capacity is to be allocated between access seekers, it is not clear how this would translate to the allocation of capacity at a backup site if an opt out arrangement were provided.

The CBAA submits that the Radiocommunications Act is quite clear, and that subsection 118NO(2) provides that a licensee must comply with these obligations 'on such terms and conditions as are ascertained in accordance with an access undertaking in force in relation to the licence.[13]

The ACCC considers that the CBAA may have misunderstood the statement in the Final Decision. The statement from the Final Decision relates to the uncertainty regarding the allocation of capacity to the backup site, not the terms and conditions on which access is provided. It is not clear whether access seekers should receive the same share of capacity at the backup site as at the primary site (even though some access seekers would have opted out and could not use their capacity), or whether capacity should only be distributed in some manner amongst those that have not opted out.

2.3.2 The costs and challenges associated with introducing an opt out mechanism

The CBAA argues that it is incorrect to say that there are large costs, or serious technical and operational challenges of an opt out arrangement.[14] It claims that the only operational requirement is to essentially reallocate capacity to zero for those that have opted out whenever the backup site is in use. It also argues that the establishment of a duplicate transmission facility for backup would only consist of trivial costs over that required to pay for the backup facility itself.

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[13] CBAA, p. 3.
[14] CBAA, p. 4.

The CBAA's claims are in contrast to the arguments put forward by CRA in its letter of 23 February 2009 to the ACCC. As outlined in the Final Decision, CRA claimed that the design of the backup site would be different from the primary site, and that this would increase costs. It also claimed that the multiplex transmission stream will be different between the two sites, and cutover would result in a time lag/loss of service for all access seekers that had decided to opt in. It also argued that it would not be possible for engineering staff to undertake operations and maintenance procedures in accordance with standard engineering practice, as this would result in some access seekers being offline for extended periods of time and would increase the cost and complexity with the testing and maintenance of the services.

The ACCC notes the divergent views of the two stakeholders. It considers that there is likely to be some costs and operational challenges brought about by an opt-out arrangement, even if they are not as significant as argued by CRA. The ACCC is particularly mindful of the maintenance issues affecting access seekers that have not elected to opt out of the redundant site.

2.3.3 Whether a backup transmission site is simply the manner in which the service is provided, or whether it represents a new service

The CBAA argues that the ACCC's reasoning is circular.[15] It argued that the decision to construct a backup site is only a decision about the way the transmission service is supplied because of the way the transmission service is defined in the undertaking.

The ACCC has not changed its view that the multiplex licensee should be able to determine what necessary efficient investment is required to provide the service, and that any future investment in a backup transmission site should be considered in this context.

2.3.4 Incentives for the multiplex licensee to maintain the primary transmission site

The CBAA submits that that while a multiplex licensee might have an incentive to use the backup infrastructure as often as possible, this is a risk that the access seeker must take into consideration before deciding to opt out of a backup transmission site.[16]

The ACCC considers that it would be possible to simply leave it up to each individual access seeker to weigh up the risk that the multiplex licensee may regularly use the backup site and therefore significantly impact its broadcasting. However, it would not be a good outcome for consumers if this occurred on a widespread basis. It also appears contradictory to go through a rigorous undertaking assessment process, yet for there still to be such an opportunity for some access seekers to have their access to the service curtailed in such a way. Further, were such behaviour to occur, it could largely undermine the access undertaking. This appears contrary to the overall regime, and therefore it is a risk that should be avoided.

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[15] CBAA, p.5
[16] CBAA, p. 5.

2.3.5 Whether the multiplex licensee is asking access seekers to commit to a service on which they have very little information

The CBAA notes that the ACCC said that it did not believe that a multiplex licensee that fails to provide an opt out arrangement is asking access seekers to commit to a service on which they have very little information. It argues that the ACCC's proposition has no bearing on the key issue, namely, whether an access seeker should be forced to pay for a service level that it neither needs nor wants.

The ACCC still believes that this is a relevant consideration. It is recognised that some broadcasters may not place a high priority on redundancy and therefore not wish to pay the additional costs associated with a backup transmission site. However, whether it is fair and reasonable for the access seeker to pay these costs is influenced by:

- the adverse consequences of any decision by the access seeker to cease to broadcast digital radio because of the higher charges as a result of the investment in the backup infrastructure, such as loss of sunk investment; and

- the degree to which the access seeker was aware in advance of committing to broadcasting digital radio of the likelihood that such investment would be undertaken, and the relative impact it would have on the costs associated with broadcasting in digital.

As outlined in the Final Decision, the ACCC considers that access seekers can decide to pull out of digital radio at any time without significant adverse consequences, and that they have already been informed by CRA that it is 'quite likely' that the multiplex licensee will invest in backup infrastructure in the medium term.[17] This means there is less need for access seekers to have the choice to opt out of certain investment in the future.

2.3.6 ACCC's view in summary

Despite the CBAA submission outlining arguments for why the costs and operational challenges of introducing an opt out arrangement may not be as significant as claimed by CRA, the ACCC believes that there remain a number of arguments of varying significance for why opt out arrangements should not be introduced. For the reasons set out in the Final Decision and above, the ACCC considers that it is reasonable for the undertakings to not include such an arrangement. The ACCC believes there would need to be strong arguments in favour of an opt out arrangement in order for it to include it in the modified undertaking when the multiplex licensees chose not to do this in the originally submitted undertakings.

[17] ACCC final decision, p. 43

2.4 Financial security provisions

Clause 14.3 of the modified Access Agreement limits the ability of the multiplex licensees to call upon a financial security only where an amount is owing for more than 90 days.

CRA submits that the proposed 90 day timeframe is too long. CRA states that the amended clause is particularly problematic in light of the fact that access seekers are invoiced monthly in arrears. CRA submits that there should not be any time period for drawing upon a security deposit; the test should simply be whether the financial security is necessary to protect the legitimate business interests of the multiplex licensees. CRA states that this is the ACCC's approach in other industries, pointing to the ACCC's *Model Non-Price Terms & Conditions Determination 2008* (the Determination) as an example of where the ACCC did not impose a timing condition in respect of a financial security on the telecommunications sector.

Having taken into account CRA's submissions on this issue and balancing the interests of the multiplex licensee and access seekers, the ACCC considers it appropriate to reduce the timeframe of 90 days. In its current form the clause would in effect not operate until an amount had been due or payable for longer than 120 days, given that access seekers are invoiced monthly in arrears. The ACCC therefore considers that it is reasonable to reduce the timeframe to 30 days or as otherwise agreed between the parties.

In regard to CRA's submission that there should not be any time period for drawing upon a security deposit and that the test should simply be whether the financial security is necessary to protect the legitimate business interests of the multiplex licensees, the ACCC notes that different considerations apply to the different access regimes.

The telecommunications access regime under Part XIC of the *Trade Practices Act 1974* (Cth) (TPA) is a negotiate/arbitrate model which permits an access seeker to notify the ACCC of a dispute concerning access to services if there has been a failure by the parties to reach agreement on the terms and conditions of access to services.

The Determination contains a series of clauses which are intended to provide a guide to the telecommunications industry indicating the views of the ACCC on what it considers to be fair and reasonable terms and conditions of access to telecommunications services and how the ACCC would take certain issues into account if it was to arbitrate an access dispute.[18] Model terms and conditions are 'non-binding' and so parties remain able to agree on other terms and conditions of access. The clauses are not 'imposed' on participants in the telecommunications industry as CRA's submission suggests.

The ACCC notes that the amendment it has made to clause 14.3 permits the parties to also agree the appropriate timeframe.

Accordingly, the ACCC intends to amend clause 14.3 to read as follows:

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[18] Subsection 152AQB(9) provides that the Commission must have regard to a determination under section 152AQB if it is required to arbitrate an access dispute.

14.3 Call on Financial Security

The Multiplex Licensee may on reasonable notice in writing to the Access Seeker call on the Financial Security or use the Financial Security (or part of it) to settle any amount due or payable to the Multiplex Licensee by the Access Seeker under this Agreement if the amount has been due or payable for longer than 30 days or as otherwise agreed between the parties.

2.5 Provision of an electronic program guide

In arguing for the inclusion in the modified undertaking of a requirement to incorporate an electronic program guide (EPG) as part of the multiplex transmission or, at the very least, a clause that specifies that all access seekers should be treated equally in respect of the use of the EPG, the CBAA only reiterates the reasons for these inclusions provided in earlier submissions.

These arguments were considered in the Final Decision. For the reasons contained in the Final Decision the ACCC considers it reasonable for the modified undertaking to not include measures pertaining to an EPG.

2.6 Access seekers ceasing to obtain multiplex services or changing their allocated capacity

In its submission, CRA argues that the requirement that an access seeker need only give a multiplex licensee 30 days written notice of its intention to cease to obtain multiplex services or to change their allocated capacity is unreasonable for other access seekers.

As the access charges payable by access seekers vary depending on the amount of multiplex capacity that is being utilised by all access seekers and the increase or decrease in the number of access seekers on the multiplexer, CRA submits that the practical effect of the 30 day notice period will be to impose virtually immediate changes in access charges on other access seekers and to deny them the opportunity to budget for their access charges over the longer timeframes, such as a financial year.

CRA's proposal is that the notice period for the cessation of services or the changing of allocated capacity be extended to a period of 6 months.

The ACCC does not view the CRA submission on this issue as adding substantially to the arguments that CRA made in response to inquiries made by the ACCC earlier in the undertakings assessment process. The ACCC also notes that CRA's submission does not address the legislative requirement cited by the ACCC in its Final Decision which requires multiplex licensees to respond to requests from representative companies for changes or the cessation of capacity within 30 days of receiving formal notice of such a request. The ACCC has therefore not changed its views on this matter.

2.7 Efficient expenditure and overhead costs

2.7.1 Efficient expenditure in supplying the service

In paragraph 5.1 of the submission, the CBAA quotes clause 3.2 in Schedule 2 of the modified undertaking which states:

> **3.2 Cost categories**
>
> The Multiplex Licensee may recover all Efficient Costs it incurs in relation to the supply of the Multiplex Transmission Service. The Efficient Costs that the Multiplex Licensee may incur and recover is presently anticipated to include:
>
> (a) **capital expenditure**, being the capital outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service including **all** expenditure…
>
> …
>
> (b) **operating expenditure**, being the operational outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service, including **all** expenditure on…[19]

CBAA proposes that the word 'all' in the phrases '…including all expenditure…', which is included in clauses 3.2(a) and 3.2(b) of the modified undertaking, should be deleted. The stated reason is that the inclusion of the word 'all' might lead to an interpretation of "efficient costs" that would include all actual expenditure, whether efficiently incurred or not. The CBAA wishes to prevent such interpretation.

The ACCC broadly agrees with the CBAA's proposal for an amendment to 3.2 (a) and (b) but takes the view that rather than deleting 'all' from the above phrases, they should be changed to read 'all efficient expenditure'.

The ACCC considers that this change would result in the relevant clauses better reflecting the intended effect of the overall 'efficient costs' provisions, namely that the multiplex licensee only be able to recover all efficient costs through the fixed recurring charges, rather than being able to recover all its costs whether efficient or not. The ACCC notes that broadly similar considerations and concerns led the ACCC to require the replacement of the word 'costs' with the words 'efficient costs' in clauses 3.3(a)(i) and 3.3(b)(i) of the modified undertaking. The CBAA's proposition is therefore broadly consistent with the ACCC's intentions regarding the operation of the 'efficient costs' provisions.

2.7.2 Efficient expenditure on corporate overheads

In paragraphs 5.4 of its submission, the CBAA proposes that the following underlined words should be inserted into clause 3.2(c) of the Pricing Principles in Schedule 2 of the modified undertaking:

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[19] CBAA, p. 6.

The Multiplex Licensee may recover all Efficient Costs it incurs in relation to the supply of the Multiplex Transmission Service. The Efficient Costs that the Multiplex Licensee may incur and recover is presently anticipated to include:

…

(c) **expenditure on corporate overheads** properly allocated to the Multiplex Transmission Service incurred by the Multiplex Licensee.

The CBAA believes this is necessary to prevent the multiplex licensee from being able to recover from access seekers corporate overhead costs that were not incurred in the provision of the multiplex transmission service.

The ACCC understands the CBAA's concerns, and throughout the assessment process has requested amendments be made to the undertakings so that the multiplex licensees be permitted to recover only efficient costs incurred. However, the ACCC disagrees that this specific amendment is warranted.

The ACCC judges that this amendment may lead to under-recovery of efficient costs by the multiplex licensee. As a general statement, the ACCC considers corporate overheads to be those costs that are not directly attributable to the provision of a product or service by a firm, but that are nonetheless necessarily incurred (if efficient) by the firm in its activities. The ACCC considers it reasonable and fair, as a general principle, that the multiplex licensee be permitted to recover costs that it incurs in conducting its operations that ultimately lead to the provision of the multiplex transmission service, even if those costs are not directly incurred in the provision of this service.

As an example, the multiplex licensee ought to be able to recover the costs of office space of an efficient scale required to conduct its operations, even though those office costs are not directly incurred in providing the service. The ACCC judges that there is a reasonable prospect that the CBAA's proposed amendment might lead to the multiplex licensee being prevented from recovering costs that it has reasonably and efficiently incurred in the provision of the multiplex transmission service – that is, to it being prevented from recovering some of its efficient costs. The ACCC considers, in light of the criteria evinced elsewhere in the ACCC's deliberations on this matter, that this would not be fair and reasonable from the perspective of the multiplex licensee.

2.8 Calculating the Weighted Average Cost of Capital

In paragraph 6.5 of its submission, the CBAA proposed that the undertaking should be amended so that there is a specific clause requiring that any calculation of the weighted average cost of capital (WACC) takes into account the reduced risk for the multiplex licensee as a result of the specific pricing methodology. The CBAA notes that the pricing principles are based on a pro-rata of allocated capacity, rather than pro-rata of total capacity.

In light of this situation and to otherwise avoid the need for access seekers pursue a 'lengthy and expensive fight on the proper calculation of the WACC' through the

undertaking's dispute resolution mechanisms, the CBAA proposes that the undertaking includes a clause requiring that the agreed commercial rate of return 'take into account the reduced risk profile of the Multiplex License'.[20]

As stated in the ACCC's Final Decision, the undertakings provide that the multiplex licensee should adopt a WACC figure that is commensurate with the WACC of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business.[21] Any matter that has the effect of reducing the risk faced by the multiplex licensee—in this case, its proposed methodology for determining charges—would therefore result in a corresponding decline in the normal commercial rate of return. There is no need for an explicit clause as recommended by the CBAA.

Conclusion

As proposed in the Final Decision, the ACCC has determined modified undertakings pursuant to subsection 118NF(5) of the Radiocommunications Act.

The modified undertakings are largely the same as that on which the ACCC consulted following the rejection of the submitted undertakings. However, after taking into account the submissions received, changes were made to two areas of the modified undertakings.

As outlined in section 2.4 of these reasons, CRA recommended changes to the financial security provisions. The ACCC decided to reduce the period for drawing on a security deposit from 90 days to 30 days. The ACCC considers that this is a reasonable time period given that billing will occur 30 days in arrears. The ACCC has also amended clause 14.3 to allow parties to agree the requisite timeframe if they so choose.

As outlined in section 2.7.1 of these reasons, the ACCC considers that some amendments are required to address concerns that the multiplex licensee will be able to recover more than just its efficient costs of providing the service. These amendments would consist of the insertion of the word 'efficient' in the following clauses:

> **3.2 Cost categories**
>
> The Multiplex Licensee may recover all Efficient Costs it incurs in relation to the supply of the Multiplex Transmission Service. The Efficient Costs that the Multiplex Licensee may incur and recover is presently anticipated to include:
>
> (a) capital expenditure, being the capital outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service including all ***efficient*** expenditure on…
>
> …
>
> (b) operating expenditure, being the operational outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service, including all ***efficient*** expenditure on…

[20] CBAA, p. 7.
[21] ACCC final decision, p. 67.