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Commission

Assessment of undertakings in relation to digital radio multiplex transmission services

Final decision

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Executive summary

Digital radio services are due to commence in several state capital cities by 1 July 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 for the provision of services to commercial and community broadcasters. The multiplex licensees 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 transmission services on reasonable terms and conditions. Each multiplex licensee is required to provide the ACCC with an undertaking specifying the terms and conditions on which it will provide access to broadcasters.[1] 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.[2]

The eight multiplex licensees 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* (the Decision-Making Criteria).

The ACCC makes the following conclusions in relation to each Decision-Making Criteria:

- The ACCC is not satisfied that the undertakings comply with Division 4B of Part 3.3 of the *Radiocommunications Act* because:
    - provisions appear to contemplate the multiplex licensee varying the undertaking otherwise than in accordance with Division 4B of Part 3.3 of the *Radiocommunications Act*; and
    - provisions relating to consultation on excess capacity and the allocation of capacity to incumbent commercial broadcasters do not appear to be consistent with Division 4B of Part 3.3 of the *Radiocommunications Act*.

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1 The multiplex licensees referred to in this paper are those with Category 1 digital radio multiplex transmission licences, which relate to the provision of services to eligible commercial and community radio broadcasters. Category 2 licences have not been issued. Category 3 licences relate to the provision of services to the national broadcasters ABC and SBS and are not subject to the access regime.

2 Section 8AC, *Broadcasting Services Act*

- Subject to its findings regarding the reasonableness of the access terms and conditions, and the reasonableness and fairness of the pricing methodology in the undertakings, the ACCC is otherwise satisfied that the undertakings do not unduly restrict competition.

- The ACCC is not satisfied that the terms and conditions of access in the undertakings are reasonable because:

    - provisions relating to variation appear to allow a multiplex licensee and access seeker to agree to opt out of variations to undertakings that have been accepted by the ACCC, which could lead to anti-competitive discrimination;

    - the definition of access seeker does not specifically include individual digital community broadcasters, nor acknowledge the limitations in the role of the representative company;

    - certain provisions erroneously state that it is a 'community broadcaster nominated by the representative company' that should acknowledge its responsibility for certain matters, rather than the representative company itself;

    - the absence of provisions that provide access seekers with the right to terminate the Access Agreement for convenience or change their allocated capacity.

- The ACCC is not satisfied that the pricing methodology in the undertakings is fair and reasonable because:

    - there is no mechanism to ensure that the multiplex licensee does not recover more than its efficient costs through access charges;

    - there is no mechanism that enables access seekers to trigger a review of the access charges, nor for reviews to be instigated because of decreases in underlying costs of providing the service; and

    - there is no mechanism by which access seekers can obtain information to verify that the access charges are consistent with the pricing principles.

- 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.

Based on the conclusions above and the reasons outlined in the chapters below, the ACCC has decided to reject the undertakings under subsection 118NF(2) of the *Radiocommunications Act*.

Upon rejection, the *Radiocommunications Act* provides the ACCC with the following alternatives:

- give the licensees a written notice advising that it will accept the undertakings if the licensees make such alterations to the undertakings as are specified in the notice (subsection 118NF(4)), or

- give the licensees a written notice determining that undertakings in the terms specified in the determination are the access undertakings in relation to the licence (subsection 118NF(5)). This would give the modified undertaking the same status as an undertaking that had been accepted by the ACCC. The ACCC is required to consult on the notice before it is given to the multiplex licensees (subsection 118NF(6)).

The ACCC has decided to follow the second option, and begin consultation on a notice that the ACCC intends to provide to the multiplex licensees. The proposed notice will outline the undertaking proposed to be determined by the ACCC that will become the undertaking in relation to the licence. The undertaking in the proposed notice will reflect the changes that the ACCC considers are necessary for the submitted undertakings to meet the requirements under the Decision-Making Criteria.

The ACCC chose the option pursuant to subsection 118NF(5) because it provides for additional consultation before the exact provisions of the undertaking are finalised. The ACCC considers this further consultation is important because the ACCC's views on some issues changed as a result of submissions in response to the draft decision, and parties have not had an opportunity to comment on the specific changes that the ACCC considers is necessary to address its concerns.

The proposed notice will be made available at www.accc.gov.au. The deadline for submissions is **Friday 3 April 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 for the provision of services to commercial and community broadcasters, and a further five licences will be allocated to the national broadcasters—ABC and SBS. The multiplex licensees 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 multiplex licensees providing access to digital radio services to commercial and community broadcasters in each capital city, the multiplex licensees 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 on reasonable terms and conditions. Each multiplex licensee for 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.

Section 118NF of the *Radiocommunications Act* provides for the ACCC to either accept or reject the access undertaking following a consultation process. 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.[3]

The *Radiocommunications Act* does not specify the basis on which the ACCC must make its decision to accept or reject an undertaking, but section 118NJ enables the ACCC to determine Decision-Making Criteria. The Decision-Making Criteria were developed by the ACCC through a legislative instrument made in May 2008 following a consultation process. The criteria are:

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[3] Section 8AC, *Broadcasting Services Act*

- 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 which 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. [4]

The eight multiplex licensees submitted their access undertakings to the ACCC on 3 October 2008. The multiplex licensees are:

- Digital Radio Broadcasting Adelaide Pty Ltd (ACN 128 742 772) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901330
- Digital Radio Broadcasting Brisbane Pty Ltd (ACN 128 742 950) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901423
- Digital Radio Broadcasting Brisbane Pty Ltd (ACN 128 742 950) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901424
- Digital Radio Broadcasting Melbourne Pty Ltd (ACN 128 742 898) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901421
- Digital Radio Broadcasting Melbourne Pty Ltd (ACN 128 742 898) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901422
- Digital Radio Broadcasting Perth Pty Ltd (ACN 128 742 638) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901331
- Digital Radio Broadcasting Sydney Pty Ltd (ACN 128 742 978) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901419
- Digital Radio Broadcasting Sydney Pty Ltd (ACN 128 742 978) – Foundation Category 1 Digital Radio Transmitter Licence Number 1901420.

All eight undertakings were identical. The undertakings and supporting submission were submitted on behalf of the multiplex licensees by the commercial radio industry

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[4] Subrule 5(1) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008* (the Decision-Making Criteria)

body Commercial Radio Australia (CRA). CRA also took the lead role in the development of the undertakings.

2. Summary of assessment process

The process the ACCC has followed for assessing the undertakings is in accordance with Division 4B of Part 3.3 of the *Radiocommunications Act*, Decision-Making Criteria 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.

The process has been:

1. Receive the undertakings on 3 October 2008

2. Release a discussion paper on 23 October 2008 outlining the undertakings, explaining the Decision-Making Criteria by which the ACCC will assess the undertakings, and seek views from stakeholders on whether or not the undertakings should be accepted

3. Release a draft decision on 18 December 2008 to accept or reject the undertakings based on the Decision-Making Criteria, and seek views from stakeholders on the draft decision, and

4. Release a final decision to accept or reject the undertakings based on the Decision-Making Criteria.

The ACCC does not have a statutory timeframe within which it must reach a decision on the undertakings. Despite this, the ACCC has been aware of the urgency for a decision to be reached at a time that was consistent with the statutory deadline of 1 July 2009 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 digital radio legislative framework provides the ACCC with alternatives 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[5], or

- determine that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence,[6] after conducting a consultation process under subsection 118NF(6).

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

[6] Subsection 118NF(5), *Radiocommunications Act*

2.1 Consultation on the discussion paper

The ACCC released a discussion paper on 23 October 2008 in order to seek submissions from stakeholders on whether it should accept or reject the undertakings.[7]

The ACCC received 16 submissions in response to the discussion paper. Substantive submissions were provided by CRA and the Community Broadcasting Association of Australia (CBAA), while the other submissions were letters of support for the undertakings from commercial radio stations. All submissions are available on the ACCC website.

The following organisations made a submission in response to the discussion paper:

- 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, and
- Southern State Broadcasters.

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[7] ACCC, *Undertakings in relation to digital radio multiplex transmission services: ACCC discussion paper*, October 2008

2.2 Consultation on the draft decision

2.2.1 ACCC draft decision

The ACCC released its draft decision on the undertakings on 18 December 2008.[8] The draft decision set out the ACCC's preliminary view to reject the undertakings for the following reasons:

- The ACCC was not satisfied that the access undertaking complied with Division 4B of Part 3.3 of the *Radiocommunications Act* because:
    - The undertakings appear to raise the possibility that variations to the Access Agreement may occur without going through the formal approval process in the legislation.
    - The undertakings state 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 undertakings state that an eligible incumbent can claim access to one-ninth of the multiplex capacity 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters'.[9] However, this overlooks the requirement that two-ninths of multiplex capacity is to be reserved for community broadcasters.
- The ACCC was not satisfied that the flexibility provided by the undertaking provisions that relate to variation could not be used by the multiplex licensee to unduly restrict competition.
- The ACCC was not satisfied that the terms and conditions specified in the undertakings are reasonable because:
    - The undertakings do 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 undertakings erroneously state that a digital community broadcaster nominated by the representative company should acknowledge certain responsibilities, when these responsibilities instead relate to the representative company.

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8 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008

9 Clause 6.3(b) of the Access Agreement

- The ACCC was not satisfied that the terms and conditions specified in the undertakings include access prices or pricing methodologies that are reasonable because:
    - There was concern that there is little incentive for the multiplex licensee to operate at an efficient level, and therefore concern that there was no mechanism that prevented the multiplex licensee from recovering more than its efficient costs through access charges.
    - There is no mechanism by which access seekers can obtain information in order to verify that the prices charged for access to the service are consistent with the pricing principles.[10]
    - 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.

However, the ACCC considered 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 expressed a preliminary intention to provide the multiplex licensees with a notice under subsection 118NF(4) of the *Radiocommunications Act* that states that the ACCC would accept the undertakings if specified changes were made.

2.2.2 Submissions in response to the draft decision

The ACCC received submissions from 15 organisations in response to its draft decision. Once again, the more substantive submissions were from CRA and the CBAA, with other submissions taking the form of letters of support for the CBAA's views from community broadcasters. Both CRA and the CBAA provided multiple submissions, with CRA also submitting a suggested revised undertaking for the ACCC's consideration.

The following organisations make a submission in response to the draft decision:

- 1197 RPH Adelaide
- 2RPH
- Radio 3CR
- Triple R Broadcasters
- 3ZZZ
- 6RPH Information Radio

[10] Schedule 2 of the Access Agreement

- Christian Broadcasting Association (Hope 103.2)
- Community Broadcasting Association of Australia (CBAA)
- Commercial Radio Australia (CRA)
- Radio 3PBS
- Radio2000
- Radio Adelaide
- RTRFM 92.1
- SYN Media, and
- Vision Australia Radio.

3. Legislative framework

3.1 Digital radio legislative framework

3.1.1 General overview

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 Act amended the *Radiocommunications Act*, the *Broadcasting Services Act* and the *Trade Practices Act*.

The arrangements provided for the Australian Communications and Media Authority (ACMA) to allocate 13 digital radio multiplex transmitter licences in the five nominated capital cities. The licences were allocated to joint venture companies that will operate the digital radio multiplex infrastructure. The multiplex licensees 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 multiplex licensees consist of broadcasters that are expected to use the multiplex transmission service to provide digital radio content services.

The legislative framework provides for three different categories of licences:

- Category 1 licences were allocated to joint venture companies that are to provide services to commercial and community broadcasters.[11] These licences are subject to the digital radio access regime. The undertakings submitted to the ACCC, which form the focus of this decision, have been submitted by category 1 licensees, i.e. the multiplex licensees.

- Category 2 licences could be offered to joint venture companies that are to provide services to commercial, community and national broadcasters.[12] The licences are also subject to the access regime. The ACCC understands that they have not been issued and are not likely to be issued in the foreseeable future.

- Category 3 licences will be allocated to the national broadcasters, the ABC and SBS. These licences are not subject to the access regime.[13]

For category 1 foundation licences, the multiplex licensee was intended to include incumbent commercial broadcasters and a digital community radio broadcasting

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11 Section 102C, *Radiocommunications Act*

12 Section 102D, *Radiocommunications Act*

13 Section 102E, *Radiocommunications Act*

representative company (the representative company) as shareholders.[14] The representative company would represent the interests of community broadcasters, which in turn could become shareholders in the representative company.[15] Incumbent commercial broadcasters and the representative company were able to 'opt in' to the multiplex licensee joint venture; becoming a shareholder was not compulsory. If the invitation to subscribe for shares were to be accepted by each invitee, the community broadcasting representative company would hold two-ninths of the shares in the multiplex licensee joint venture, while the incumbent commercial broadcasters would hold the remaining seven-ninths.

The ACCC notes that at the time of this decision, representative companies were not shareholders in the multiplex licensees. However, legislative amendments were introduced in December 2008 to provide the representative companies with further opportunity to take up shares in the multiplex licensee companies.[16]

A multiplex licensee itself is not permitted to provide digital radio content services. In this regard, there is a degree of separation between the control of the licence and the provision of content services in the downstream retail market.

Within three months of being awarded the licence, each multiplex licensee was required to submit an access undertaking to the ACCC that specifies the terms and conditions on which it will provide access to the broadcasters.[17] The access regime regarding digital radio services is described in more detail in section 3.1.2 of this decision.

Once access undertakings have been accepted by the ACCC, multiplex licensees are required to allocate standard access entitlements to broadcasters. Under the legislation, existing commercial broadcasters in the licence area are each entitled to one-ninth of the total multiplex capacity[18], while community broadcasters are entitled to share a total of two-ninths of the total multiplex capacity as determined by the representative company.

The ACCC understands that there will be excess capacity on each of the eight multiplexes after the allocation of standard access entitlements (see Table 1). In this situation, each multiplex licensee is then required by legislation to assess demand for the excess capacity amongst broadcasters in that licence area.[19] If demand for the excess capacity falls short of that available, then the broadcasters wanting that capacity

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14 Subsection 102C(5), *Radiocommunications Act*

15 Section 9C, *Radiocommunications Act*

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

17 Section 118ND, *Radiocommunications Act*

18 Capacity relates to a particular licence area. For example, one-ninth of the multiplex capacity in Sydney allows a broadcaster to provide services in the Sydney licence area.

19 Section 118NT, *Radiocommunications Act*

will receive it. If demand for excess capacity is greater than the excess capacity, then the multiplex licensee will be required to conduct an open and transparent auction process to allocate the excess capacity between broadcasters. The assessment of demand and the establishment of excess-capacity access entitlements are provided for on the digital radio start-up day for the area, or at any time after the 12-month period beginning on the digital radio start-up day for the area.

Table 1 Distribution of capacity at each multiplex relating to foundation category 1 licences

Multiplex	Standard access entitlements		Excess-capacity entitlements
	Community b'casters	Commercial b'casters	
Adelaide			
Category 1 multiplex	2	6	1
Brisbane			
Category 1 multiplex	2	4	3
Category 1 multiplex	2	4	3
Melbourne			
Category 1 multiplex	2	6	1
Category 1 multiplex	2	5	2
Perth			
Category 1 multiplex	2	6	1
Sydney			
Category 1 multiplex	2	6	1
Category 1 multiplex	2	5	2

The digital radio start-up day refers to the day on which the foundation multiplex transmitter licensees in that licence area are required to commence providing digital radio services.[20] ACMA must only determine a digital radio start-up day for a particular licence area when it is satisfied that, amongst other things, an access undertaking under Division 4B of Part 3.3 of the *Radiocommunications Act* is in force for the licensee/s in that area.[21] ACMA is required to provide at least 30 days notice of its intention to declare a digital radio start-up day. It must also ensure that the start-up day is not later than 1 July 2009.[22]

3.1.2 The access regime for digital radio

An access regime for digital radio multiplex transmitter licences is contained in Division 4B of Part 3.3 of the *Radiocommunications Act*. The access obligations are to ensure that content service providers can obtain access to digital radio multiplex capacity on appropriate terms, and therefore to facilitate the provision of digital radio content services to end-users.

[20] Subsections 109B(1)(i) & (j), *Radiocommunications Act*

[21] Subsection 8AC(1)(d), *Broadcasting Services Act*

[22] Subsection 8AC(3), *Broadcasting Services Act*

Under section 109B, the concept of 'content services' for category 1 licences relates to one of the following:

- a digital commercial radio broadcasting service, which operates in accordance with a commercial radio broadcasting licence authorising the provision of the service in the designated area concerned

- a digital community radio broadcasting service, which operates in accordance with a community radio broadcasting licence authorising the provision of the service in the designated area concerned, or

- a restricted datacasting service, which operates in accordance with a restricted datacasting licence.

As mentioned above, access seekers obtain access to multiplex capacity. 'Multiplex capacity' is defined in section 118NB of the *Radiocommunications Act* to mean:

> …so much of the gross transmission capacity of the main [and/or repeater] multiplex transmitter[s] as is available for the transmission of content services.

The primary element of the access regime is the requirement on the multiplex licensees to submit an access undertaking to the ACCC. ACMA cannot determine a digital radio start-up day unless the ACCC has accepted an undertaking for the licensee/s in the area.[23] The access regime is discussed in further detail below.

Requirement to submit an access undertaking

Section 118ND provides that a digital radio multiplex transmitter licensee must, within three months after the issue of the licence, give the ACCC a written access undertaking.

The access undertaking is an undertaking that a multiplex licensee (or a person authorised to operate a multiplex transmitter under the licence) will comply with the terms and conditions relating to the relevant access obligations applicable to the licence. There are both standard access obligations and excess-capacity access obligations for the initial eight category 1 licences.

Access obligations

Section 118NL sets out the standard access obligations and section 118NM sets out the excess-capacity access obligations. Both sections provide that multiplex licensees must provide access to specified fractions of multiplex capacity that satisfy the entitlements—standard access entitlements or excess-capacity access entitlements—of particular content service providers. Multiplex licensees must also provide access to services that facilitate the use of that fraction of multiplex capacity for the purpose of providing content services.

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[23] Paragraph 8AC(1)(d), *Broadcasting Services Act 1992*.

Multiplex licensees must not discriminate between access seekers on the basis of:

- the technical and operational quality of the services supplied to the access seekers; and

- the technical and operational quality and timing of the fault detection, handling and rectification processes supplied to the access seekers.[24]

Standard access entitlements and excess-capacity access entitlements

Content service providers can have standard access entitlements and excess-capacity access entitlements.

Sections 118NQ and 118NR set out standard access entitlements for incumbent commercial and community broadcasters. In relation to the initial eight category 1 licences, each incumbent commercial broadcaster has a standard access entitlement equal to one-ninth of the total transmission capacity under the licence. Community broadcasters share a total of two-ninths of total transmission capacity under the licence. The distribution of the reserved capacity between the community broadcasters is determined through nomination by the representative company to the multiplex licensee.

Standard access entitlements for both commercial broadcasters and community broadcasters cannot be transferred to other broadcasters.[25] However, different community broadcasters can be nominated by the community broadcaster representative company to use these access entitlements.

Excess-capacity access entitlements are set out in section 118NT. As discussed in 3.1.1, the ACCC understands that there will be excess capacity at each of the eight multiplexes under the initial eight category 1 licences.

Capacity cap

Section 118NV sets out the capacity cap for commercial broadcasters. In the licence areas where there is only one category 1 multiplex, a commercial broadcaster is not entitled to more than two-ninths of the total transmission capacity available under the licence. Where there are two category 1 multiplexes, a commercial broadcaster is not entitled to more than one-ninth of the total transmission capacity under the two licences.

Process to be followed for assessing the undertakings

Section 118NF requires the ACCC to make the undertaking available on its website and invite members of the public to make submissions before accepting or rejecting an undertaking.

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[24] Section 118NP, *Radiocommunications Act*

[25] Subsections 118NQ(2)(e) and 118NR(3)(e), *Radiocommunications Act*

The ACCC may request a multiplex licensee to provide further information about the access undertaking under section 118NE.

Section 118NJ provides that the ACCC may determine Decision-Making Criteria to be applied in deciding whether to accept access undertakings or variations of access undertakings. The ACCC made such a determination on 21 May 2008.[26] The criteria are discussed further in section 3.2.

Section 118PO provides for the ACCC to make rules making provision for, or in relation to, the practice and procedure to be followed by the ACCC in performing functions under Division 4B of Part 3.3. The ACCC made these 'procedural rules' on 21 May 2008.[27] The rules provide details regarding matters such as the format of documents to be given to the ACCC, ACCC's requests for further information, the treatment of confidentiality claims over information, and matters to be included in annual reports provided under section 118PN.

ACCC must accept or reject an access undertaking

The ACCC must either accept or reject an access undertaking. If the ACCC rejects an undertaking, it has two further options under section 118NF.

One option is that the ACCC may give the licensee a written notice advising that if the licensee makes such alterations to the undertaking as are specified in the notice, the ACCC will accept the undertaking.[28]

The other option is that the ACCC may give the licensee a written notice that determines that an undertaking in the terms specified in the determination is the access undertaking in relation to the licensee.[29] Before giving this notice, the ACCC must publish a copy of the notice on its website and consider any submissions it receives from the public.[30]

Variation of access undertakings

Section 118NH provides for a multiplex licensee to decide to give the ACCC a variation of an undertaking that is already in force. The process followed is similar to that used when an undertaking is submitted to the ACCC.

The ACCC can require a multiplex licensee to give a variation of an undertaking on or after 1 January 2015. The ACCC can only do this if it is satisfied that the undertaking would be rejected if it were given to the ACCC when the requirement to give a variation is imposed.

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[26] *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

[27] *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008*

[28] Subsection 118NF(4), *Radiocommunications Act*

[29] Subsection 118NF(5), *Radiocommunications Act*

[30] Subsection 118NF(6). *Radiocommunications Act*

Enforcement

Section 118NZ provides that where a licensee (or person authorised by a licensee) contravenes the standard access obligations, the excess-capacity access obligations or other obligations set out in section 118NP, the ACCC or any person who is affected by the contravention may apply to the Federal Court for orders to be made.

Section 118P provides that the ACCC or any person whose interests are affected by an access undertaking that is in force may apply to the Federal Court for orders against another person who has breached the undertaking. If the Federal Court is satisfied a breach has occurred, it may make orders such as to direct the person who has breached the undertaking to comply with it or to compensate those who have suffered loss or damage as a result of the breach.

Review of decisions by the Australian Competition Tribunal

Section 118PE provides that a person whose interests are affected by one of the following decisions by the ACCC may apply within 21 days to the Australian Competition Tribunal (ACT) for a review of that decision:

- to accept or reject an access undertaking (subsection 118NF(2))
- to determine unilaterally the terms of an access undertaking after it has been rejected (subsection 118NF(5))
- to accept or reject a variation of an access undertaking (subsection 118NH(3))
- to unilaterally vary an access undertaking after it has been rejected (subsection 118NH(6)), and
- to unilaterally vary an access undertaking after a licensee has not complied with a request to vary (subsection 118NH(11)).

The ACT can affirm, set aside or substitute the decision of the ACCC. The ACT's decision must be made within six months of receiving the application for review. The ACT's decision-making period can be extended by a further three months.

Injunctions

Section 118PI provides that the ACCC may apply to the Federal Court for an injunction to restrain a person from engaging in conduct in contravention of Division 4B of Part 3.3 of the *Radiocommunications Act*. Interim injunctions are also available under section 118PJ.

Annual reports

Section 118PN provides that multiplex licensees must, within 60 days after the end of the financial year, provide an annual report to the ACCC in relation to matters specified in the procedural rules and which relate to compliance with the relevant access obligations.

3.2 Criteria for assessing undertakings

The legislative framework enables the ACCC to determine the criteria on which it will assess whether to accept or reject undertakings. The ACCC made these Decision-Making Criteria on 21 May 2008 in accordance with section 118NJ of the Act.[31] The criteria are described below in accordance with the explanatory statement to the Decision-Making Criteria.[32] The Decision-Making Criteria do not, by implication, limit the matters to which the ACCC may have had regard in deciding whether to accept or to not accept an access undertaking.[33]

3.2.1 Whether the undertaking complies with Division 4B of Part 3.3

In assessing whether to accept an access undertaking the ACCC must consider whether the terms and conditions of access comply with the access framework set out in Division 4B of Part 3.3 of the *Radiocommunications Act*. The terms and conditions in an access undertaking must include terms and conditions that relate to standard access obligations and excess-capacity access obligations that are, or may become applicable to a digital radio multiplex transmitter licence. The licensee will be under an obligation to comply with those access obligations that are applicable to the licence on such terms and conditions as are ascertained in accordance with the accepted access undertaking (section 118NO).

Further obligations that a licensee must comply with in accordance with the *Radiocommunications Act* concern an obligation not to discriminate between content service providers who have access to multiplex capacity under the licence, in relation to the technical and operational quality of the services supplied, and the technical and operational quality and timing of fault detection, handling and rectification processes (section 118NP).

3.2.2 Whether the undertaking unduly restricts competition

An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker (a person with either a standard access entitlement and/or an excess-capacity access entitlement) to provide services, including in competition with any services provided by other parties. Similarly, an access undertaking should not favour particular access seekers. For example, access seekers that are not constituent members of a licensee should not be charged unreasonably high prices or provided with unreasonably low quality services or be unreasonably disadvantaged in any other way relative to access seekers that are constituent members of a licensee.

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31 Subrule 5(1) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

32 *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008—Explanatory statement*, pp. 4-7

33 Subrule 5(2) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

Under this criterion, a licensee would, for example, be prevented from including provisions in its access undertaking that artificially inflated some access seekers' costs or enabled a licensee to provide inferior services to some access seekers compared to those it offers to other access seekers, where this is not reasonable.

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

This criterion complements existing criteria in Part IIIA and Part XIC of the *Trade Practices Act*. For example, any unreasonable restriction on competition would not be in the public interest or would not promote competition.

3.2.3 Whether the terms and conditions of access are reasonable

The ACCC notes the objective in the explanatory memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* that multiplex services (including bit rate) are provided to commercial, wide coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.[34]

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

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

This criterion will not be applied unreasonably as the ACCC accepts that licensees may impose reasonable requirements on access seekers in certain circumstances. For example these circumstances may include:

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[34] *Broadcasting Legislation Amendment (Digital Radio) Bill 2007—Explanatory memorandum*, p. 25

- evidence that an access seeker is not creditworthy;

- repeated failures by an access seeker to comply with the terms and conditions on which the same or similar access has been provided; or

- requiring access seekers to demonstrate that they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

This criterion is consistent with the requirements of both Part XIC and Part IIIA of the *Trade Practices Act*.

3.2.4 Whether the access prices or pricing methodologies are fair and reasonable

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

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

If the actual access costs are known it may be possible to specify prices in the access undertaking. However, if the licensee does not know the actual access costs at the time of lodging an undertaking, it may instead provide a fair and reasonable pricing methodology. This might be the case, for example, if agreement with infrastructure owners/operators has not yet concluded.

If including a fair and reasonable pricing methodology, the ACCC would prefer that the access undertaking be supported by the licensee's estimates of indicative prices, based on reasonable assumptions.

This criterion complements existing criteria in Part IIIA and Part XIC of the *Trade Practices Act*. For example, any fair and reasonable pricing is in the public interest.

3.2.5 Whether there is an obligation on the licensee to not hinder access

An obligation to not hinder access should be included in the access undertaking. The rationale for this obligation is that it is possible that a licensee or a person authorised by a licensee could do an act (or fail to do an act) that has the effect of hindering access to services.

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

However, an obligation to not hinder access would not be applied unreasonably. As an example, multiplex licensees may require access seekers to be creditworthy or may

require access seekers to demonstrate that they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

This criterion is consistent with the requirements of both Part XIC and Part IIIA of the *Trade Practices Act*.

3.2.6 Whether the undertaking provides for a reasonable dispute resolution mechanism

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

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

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

This criterion ensures that the objectives of the other Decision-Making Criteria may actually be enforced.

3.2.7 Other matters which the ACCC may consider

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

4. Summary of the undertakings

The eight digital radio multiplex licensees submitted identical undertakings on 3 October 2008 through the coordination of 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 the undertakings. Each part of the undertaking is discussed below.

The full undertakings are available at www.accc.gov.au and a more detailed summary can be found in the ACCC discussion paper on the digital radio undertakings.[35]

4.2 Access Undertaking

The main body of the undertakings (Access Undertaking) actually forms only a small part of the complete document. The Access Undertaking[36] states that the multiplex licensee undertakes to:

- be bound by the obligations set out in Division 4B of Part 3.3 of the *Radiocommunications Act*;[37]
- 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;[38] and
- 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.[39]

4.3 Service description (Attachment A)

This part of the undertaking provides a description of the multiplex transmission service. This is described as a service provided by the multiplex licensee to access

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35 ACCC, *Undertakings in relation to digital radio multiplex transmission services: ACCC discussion paper*, October 2008, pp. 22-30

36 CRA, *Access Undertaking pursuant to Part 3.3, Division 4B, Subdivision B of the Radiocommunications Act 1992 (Cth)*, October 2008

37 Subclause 3.1(a) of the Access Undertaking

38 Subclause 3.1(b) of the Access Undertaking

39 Subclause 3.2(a) of the Access Undertaking

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)

The Access Agreement[40] provides the bulk of the details of the undertaking, including many of the specifics that underpin the statements in Access Undertaking. 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 multiplex licensee will allocate both standard access entitlements and excess-capacity access 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; and
- dispute resolution procedures.

[40] CRA, *Access Agreement: Attachment B of Access Undertaking pursuant to Part 3.3, Division 4B, Subdivision B of the Radiocommunications Act 1992 (Cth)*, October 2008

5. Assessment against the Decision-Making Criteria

This section assesses the undertakings against the Decision-Making Criteria. Detailed explanation of the Decision-Making Criteria is in section 3.2 of this decision.

Some of the Decision-Making Criteria overlap in their application. For example, an undertaking that failed to include an obligation on the licensee to not hinder access to the service would also likely be considered as unduly restricting competition in related markets. For simplicity, matters considered by the ACCC in its assessment are generally discussed in this final decision under the heading of only one decision-making criterion, even if the ACCC also considered that matter in relation to other criteria.

5.1 Assessment of compliance of undertakings with Division 4B of Part 3.3

In assessing whether to accept or reject the undertakings, the ACCC must consider whether the terms and conditions of access in the undertakings comply with the access framework set out in Division 4B of Part 3.3 of the *Radiocommunications Act*.[41]

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;[42]
- the obligation on the multiplex licensees to provide multiplex capacity to content service providers with standard access entitlements[43] or excess-capacity access entitlements;[44] and
- the obligation on the multiplex licensees to not discriminate between content service providers in relation to:
    - the technical and operational quality of the services supplied; and

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41 Subrule 5(1)(a) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

42 Subsection 118ND(1), *Radiocommunications Act*

43 Sections 118NQ and 118NR, *Radiocommunications Act*

44 Section 118NT, *Radiocommunications Act*

- the technical and operational quality and timing of the fault detection, handling and rectification processes for the purposes of facilitating the use of the multiplex capacity.[45]

The ACCC considers that the undertakings, as lodged, are largely in compliance with Division 4B of Part 3.3 of the *Radiocommunications Act*. However, the ACCC considers that some minor amendments should be made to the following clauses to more accurately reflect the wording of the legislation:

- subclause 6.3(g)(i) and subclauses 6.4(a), (b) and (c);
- clause 7.2, subclauses 7.3(a) and (b), clause 7.4, subclause 7.5(c), clause 7.6; and
- Schedule 1 – Definitions.

The Access Undertaking states that the multiplex licensee undertakes to be bound by the obligations set out in Division 4B,[46] and that it will provide the multiplex transmission service to access seekers on the terms and conditions specified in the Access Agreement.[47]

The Access Agreement provides details regarding how the multiplex licensee will provide access to standard and excess-capacity access entitlements (clauses 6 and 7 of the Access Agreement), 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 *Radiocommunications Act*. Specific matters are explored in further detail below.

5.1.1 Variations of the undertakings

The ACCC's draft decision indicated its concern that particular provisions of the undertakings that refer to variation were not in full compliance with Division 4B of Part 3.3 of the *Radiocommunications Act*. The relevant provisions of the undertakings are set out below: (ACCC's emphasis)

> **4.1 General[48]**

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45 Section 118NP, *Radiocommunications Act*

46 Subclause 3.1(a) of the Access Undertaking

47 Subclause 3.2(a) of the Access Undertaking

48 Clause 4.1 of the Access Undertaking

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[49]

(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.

The ACCC is concerned that these clauses do not comply with Division 4B of Part 3.3 of the *Radiocommunications Act*. Firstly, clause 4.1 of the Access 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*. The ACCC would be satisfied if the words 'or otherwise' were deleted from this clause to ensure compliance with Division 4B of Part 3.3.

Secondly, subclause 23.9(a) of the Access Agreement appears to contemplate a multiplex licensee and individual access seekers agreeing to vary the Access Agreement, without the need for ACCC approval. Sections 118NH and 118NI of the *Radiocommunications Act* contain detailed provisions dealing with the process to be followed if the multiplex licensee wishes to vary an existing undertaking. This process entails the ACCC conducting an assessment of the proposed variation 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) in such a way as to contravene its non-discrimination obligation under section 118NP. The ACCC would be satisfied if the words 'and accepted by the ACCC under section 118NH of the *Radiocommunications Act'*[50] were inserted at the end of clause 23.9(a) of the Access Agreement.

The CRA submitted that there is nothing within the undertakings that is inconsistent with section 118NH of the *Radiocommunications Act*.[51] Further information on the CRA's views of the variation provisions can be found in section 5.3.1 of this decision, which considers the issue in the context of whether the provisions are reasonable.

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49 Clause 23.9 of the Access Agreement

50 The suggested modification is slightly different to that provided in the draft decision, which was 'and approved by the ACCC'.

51 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, pp.3-6.

Despite not agreeing with the ACCC's concerns on this matter, CRA stated that it would not necessarily object to the changes requested in the draft decision.[52]

Consequently, the ACCC has not changed its views on this matter.

5.1.2 Consultation on excess capacity

An important aspect of Division 4B of Part 3.3 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 Access Undertaking together with clauses 6 and 7 of the Access Agreement.

The ACCC draft decision noted that 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.

On the basis of this difference, the ACCC expressed a view that the undertakings did not comply with the *Radiocommunications Act*. It stated that the word 'may' in clause 7.4(a) of the Access Agreement would need to be replaced with 'must'. CRA's submission in response to the discussion paper agreed, stating that this had been a typographical error.[53]

However, CRA's submission in response to the draft decision highlighted the fact that the undertakings were still not entirely consistent with the legislation.[54] It noted that section 118NT of the *Radiocommunications Act* states that:

- within 90 days of the digital radio start up day, the multiplex licensee must ascertain the initial level of demand for access to excess capacity;[55] and

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52 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 9

53 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 6

54 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, pp. 9-10

55 Subsection 118NT(2)(b), *Radiocommunications Act*

- at any time after the 12 month period beginning on the digital start up day, the multiplex licensee may ascertain the subsequent level of demand for access to excess capacity.[56]

After further consideration of the issue, the ACCC agrees with CRA's submission and it would be satisfied if clause 7.4 of the Access Agreement was changed accordingly.

5.1.3 Allocation of capacity to eligible commercial broadcasters

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

The ACCC draft decision noted that clause 6.3(b) of the Access Agreement states that an incumbent commercial broadcaster can claim access to one-ninth of multiplex capacity 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters'.

The ACCC's preliminary view was that clause 6.3(b) of the Access Agreement does not comply with Division 4B of Part 3.3.[57] The legislative framework enables incumbent commercial broadcasters to claim standard access entitlements of one-ninth of the total capacity at the multiplex.[58] However, because two-ninths of this capacity is reserved for community broadcasters and not available to commercial broadcasters,[59] each commercial broadcaster can claim access to one-seventh of the multiplex capacity that is only available to commercial broadcasters. This means the words 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters' would need to be removed from clause 6.3(b) of the Access Agreement in order to achieve consistency with Division 4B of Part 3.3.

CRA submitted that clause 6.3(b) is consistent with the *Radiocommunications Act* when the Access Agreement is viewed in its totality.[60] Despite this, the CRA also stated that it would not object to the amendments proposed by the ACCC in its draft decision.

The ACCC has therefore not changed its views on this matter from those presented in the draft decision.

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56 Subsection 118NT(3)(b), *Radiocommunications Act*

57 ACCC, Assessment of undertakings in relation *to digital radio multiplex transmission services: Draft decision*, December 2008, p. 19

58 Subsection 118NQ(2), *Radiocommunications Act*

59 Subsection 118NR(2) *Radiocommunications Act*

60 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 10

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

The ACCC is not satisfied that the undertakings comply with Division 4B of Part 3.3 of the *Radiocommunications Act*.

As discussed in section 5.1.1, certain provisions seem to suggest that the multiplex licensee is able to amend or vary the undertaking otherwise than in accordance with the *Radiocommunications Act*, and that the undertaking can be varied without ACCC oversight as required by legislation. The ACCC would be satisfied if the words 'or otherwise' were deleted from clause 4.1 in the Access Undertaking, and the words 'and accepted by the ACCC under section 118NH of the *Radiocommunications Act'* were inserted at the end of subclause 23.9(a) of the Access Agreement.

As discussed in section 5.1.2, the undertaking's provisions for consultation on excess capacity are not consistent with the multiplex licensee's obligations under the *Radiocommunications Act*. The ACCC would be satisfied if clause 7.4 of the Access Agreement was changed to reflect section 118NT of the *Radiocommunications Act* and provide that:

- within 90 days of the digital radio start up day, the multiplex licensee must ascertain the initial level of demand for access to excess capacity[61]
- at any time after the 12 month period beginning on the digital start up day, the multiplex licensee may ascertain the subsequent level of demand for access to excess capacity.[62]

As discussed in section 5.1.3, the undertaking appears to misrepresent the amount of capacity that is available to incumbent commercial broadcasters. The ACCC would be satisfied if the words 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters' were deleted from subclause 6.3(b) of the Access Agreement.

5.2 Assessment of whether the undertakings unduly restrict competition

In assessing whether to accept an undertaking, the ACCC must consider whether the access undertaking unduly restricts competition in related markets.[63] An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker

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61 Subsection 118NT(2), *Radiocommunications Act*

62 Subsection 118NT(3), *Radiocommunications Act*

63 Subrule 5(1)(b) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

to provide services, including in competition with any services provided by other parties.[64] Similarly, an undertaking should not favour particular access seekers.

This decision-making criterion only relates to aspects of the undertaking that do unduly restrict competition, rather than the potential to do so. An issue that only relates to the potential for such a restriction in competition—the multiplex licensee's ability to vary the undertaking—is addressed in section 5.3.1 in relation to whether the terms are fair and reasonable.

CRA's submission in response to the ACCC discussion paper claimed that the undertaking does not restrict the ability of eligible access seekers in providing digital radio content services, nor does it discriminate against access seekers (or a particular class of access seekers).[65] 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.[66]

The ACCC agrees that the four characteristics of the undertakings mentioned above supports the claim that the undertakings do not unduly restrict competition in related markets. The first three characteristics encourage the development of competition in the market for digital radio content services by helping to enable all access seekers to obtain the multiplex transmission service on an equal basis. Enabling access seekers to obtain a lower bit rate service means the undertakings provide scope for a broadcaster to provide digital radio content services even though it does not want to acquire a standard bit rate service. This also means more capacity is available to other access seekers, which further promotes competition in the provision of content services.

However, there are other aspects of the undertaking which require more detailed discussion as to whether they unduly restrict competition in related markets. These are considered below.

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64 *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008—Explanatory statement*, pp. 5

65 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 6

66 Ibid, p. 7

5.2.1 Providing capacity at lower bit-rates

The undertakings state that the non-discrimination obligation outlined in 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.[67]

CRA submitted that it was wrong for the ACCC discussion paper to equate the availability of lower bit rate services with discrimination between access seekers.[68] It noted 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 noted 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). CRA stated 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.

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

5.2.2 The auction process

Clause 7.6 of the Access Agreement discusses the auction process that the multiplex licensee will use to allocate excess capacity when demand for that excess capacity is greater than supply.

The CBAA claimed that while the use of an auction process is a requirement of the *Radiocommunications Act*, an auction unfairly disadvantages community broadcasters.[69] It stated that the capacity allocated to community broadcasters is insufficient to meet the requirements of the sector. It also claimed that community broadcasters will find it difficult, if not impossible, to compete with commercial broadcasters in an auction process.

The CBAA argued that all access seekers should not have to compete for the same capacity. It submitted that subsection 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 considers that the only requirement in relation to the auction process is that the undertaking complies with the access framework set out in Division 4B of Part 3.3

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67 Clause 9.3(c) of the Access Agreement

68 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 7

69 Community Broadcasting Association of Australia (CBAA), *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 2

of the *Radiocommunications Act*[70], for example, by complying with the requirement that the auction process is open and transparent.[71] This is because section 118ND of the *Radiocommunications Act* provides that the undertaking is to set out terms and conditions in relation to standard access obligations, excess capacity access obligations and distributed capacity access obligations. Rather than relate to the terms and conditions of access to the service, the auction process determines the creation of excess capacity entitlements. The creation of access entitlements and the allocation of capacity are separate from the terms and conditions of access to the service, and are specified by the legislation.

Accordingly, the ACCC does not consider changes to Clause 7.6 of the Access Agreement are necessary.

Summary of the assessment of whether the undertakings unduly restrict competition

Subject to its findings regarding the reasonableness of the access terms and conditions, and the reasonableness and fairness of the pricing methodology in the undertakings, the ACCC is otherwise satisfied that the undertakings do not unduly restrict competition.

5.3 Assessment of whether the terms and conditions of access are reasonable

The Decision-Making Criteria requires the ACCC to have regard to whether the terms and conditions of access in the undertakings are reasonable.[72] 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.

5.3.1 Variations of the undertakings

The ACCC draft decision drew attention to the provisions in the undertakings that dealt with the ability of the multiplex licensee to vary the access undertaking. This section considers whether these provisions can be considered reasonable, while section 5.1 considers whether the provisions comply with Division 4B of Part 3.3 of the *Radiocommunications Act*.

The Access Undertaking includes the following clause: (ACCC emphasis)

> **4.2 Effect of replacement or variation**

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70 Subrule 5(1)(a) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

71 Subsection 118NT(6)(a), *Radiocommunications Act*

72 Subrule 5(1)(c) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*.

> 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.

As already discussed in section 5.1, clause 23.9(a) of 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 as required by section 118NH of the *Radiocommunications Act*. In addition to appearing inconsistent with the legislation, it also raises concerns that the multiplex licensee could vary an Access Agreement in favour of a particular access seeker (or seekers). It is possible that an undertaking that has been varied without ACCC oversight would not meet the requirements of the Decision-Making Criteria.

With respect 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 a variation to the undertaking which has been lodged with and approved by the ACCC. As digital radio is a new technology and future demand is uncertain, it is quite possible that industry players and structure could change significantly in the future. In response to changed circumstances, the multiplex licensee may seek to vary an existing undertaking in a fairly substantial way. It is possible that the varied undertaking would entail less favourable terms for access seekers although the variation is ultimately approved by the ACCC as being appropriate to the altered circumstances. In this situation, enabling a particular access seeker to agree with the multiplex licensee to opt out of the varied undertaking could raise concerns of discrimination.

CRA stated in its response to the draft decision that while it did not agree with the ACCC's concerns, it would not necessarily object to the inclusion of the ACCC's requested amendments.[73]

The ACCC is not satisfied that the provisions relating to variation of the undertaking are reasonable. It would be satisfied if:

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

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[73] CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 9.

- the words 'and accepted by the ACCC under section 118NH of the *Radiocommunications Act'* were inserted at the end of clause 23.9(a) of the Access Agreement, and

- the words 'unless otherwise agreed between the Parties' were deleted from clause 23.9(b) of the Access Agreement.

The proposed change to section 23.9(a) of the Access Agreement is also discussed in section 5.1.1 of this decision.

5.3.2 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 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 subclauses 2.2(b) and (c)[74].

In its submission in response to the discussion paper, the CBAA recognised 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 Transmission Services.[75]

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.[76]

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.

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[74] Subclause 2.2(d) of the Access Agreement

[75] CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 3

[76] Ibid

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 considers this process would be unnecessarily bureaucratic and would not be required to ensure that the terms and conditions of the undertaking are reasonable. It is sufficient that the multiplex licensee must consult with all access seekers prior to any changes.

The ACCC is also of the view that the undertakings do not need to specifically enable access seekers to use the dispute resolution mechanism to challenge terms in the operational manual in order for it to be considered reasonable. In the ACCC's view, parties would be entitled to invoke dispute resolution mechanisms regarding the development, implementation and variation of the operational manual.

In terms of the existing provisions in the undertaking, the ACCC considers that it is sufficient that the multiplex licensee is required under subclauses 2.2 (a) and 2.2 (b) of the Access Agreement to consult with access seekers in good faith on the contents of the operational manual and to use its reasonable endeavours to accommodate any reasonable requests made during this consultation process. However, the ACCC considers it appropriate to amend subclauses 2.2(a) and 2.(b) to make it clear that "all" access seekers are to be consulted during this process.

The ACCC also notes that the Access Agreement provides access seekers with additional protection regarding 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.

5.3.3 Inclusion of certain technical specifications and determinations

The service description in Attachment A to the Access Undertaking sets out the three bundled components of the multiplex transmission service:

- multiplexing Digital Channels from more than one Access Seeker into a single Transport Stream (Multiplexing Service);
- modulating that Transport Stream using OFDM in preparation for radio frequency transmission (Modulation Service); and
- radio frequency transmission of the OFDM modulated Transport Stream (RF Service).

In relation to the first of these, the multiplexing service, the CBAA submits that the service description would benefit from the inclusion of a number of technical specifications and determinations.[77] 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.

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[77] Ibid, p. 4

The ACCC considers 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.

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

Further to the issue discussed in section 5.3.3 above concerning the definition of the RF service, the CBAA stated that it is possible that at some future time the multiplex licensee will seek to implement a fully redundant second site to back-up the main transmission site.[78] The CBAA argued that the standard service should include the main site only, and that individual access seekers should be able to opt in or opt out for additional service levels (such as the backup transmission site).

Submissions

In supporting its argument, the CBAA claimed that the primary site will involve an already high level of redundancy. However, it recognises that at some point it may suit the business model of some broadcasters to invest in the additional comfort of a completely alternative main transmission site. It claimed that this would more or less double the cost of supplying the RF service.[79]

The CBAA claimed that as it currently stands, the undertaking would force all access seekers to pay for redundancy that they may not require and cannot afford.[80] The CBAA submitted that an access seeker may wish to bear the 'very small risk of an unavoidable outage should the main RF transmission site fail in its entirety, or to tolerate occasional planned outages and/or short term re-configurations for maintenance purposes'. It stated that while this issue is particularly acute for a not for profit community broadcaster, there is no reason why a commercial broadcaster might not wish to exercise the same judgement. The CBAA proposed for the undertaking to include an opt in/out arrangement to allow access seekers to choose whether they wish to contribute to, and benefit from, the costs of a backup transmission site.

CRA acknowledged in a submission that investment in a backup transmission tower facility would only occur over the medium and long term.[81] It argued that the proposal in CBAA's submission is overly simplistic and would raise a number of technical and operational issues for the multiplex licensees should the investment be made.

CRA submitted that a back transmission tower facility would ordinarily be designed to replicate the first tower facility, including the ability to accommodate the same number of access seekers and the various fractions of multiplex capacity and bit rates that they

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78 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services,* submission in response to the ACCC discussion paper, November 2008, p. 5

79 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services* submission in response to the ACCC draft decision, January 2008 paper, p. 2

80 Ibid

81 CRA, *Digital radio access undertaking: further issues*, 23 February 2009, p. 3

would require on the first site.[82] CRA argued that having the option to 'opt out' raises a number of issues:

- there will be costs associated with having different equipment designs between the two sites, which would need to be recovered from access seekers that opted out of the investment;

- the multiplex transmission stream will not be identical between the sites and it will not be possible to have seamless cutover of services from the first transmission tower to the second transmission tower in the event of an outage. This will result in a loss of service for all access seekers that have decided to opt in. CRA also claimed 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 associated with the testing and maintenance of the services.

ACCC view

The ACCC recognises that community broadcasters and commercial broadcasters currently operate different business models. In particular, commercial broadcasters appear to place a high value on reliability afforded by having a redundant second site, while community broadcasters do not. With advertising revenues at stake, commercial broadcasters may be willing to pay a premium to ensure that the radio signal will rarely, if ever, fail. In contrast, community broadcasters could be expected to operate on a significantly lower cost base and are therefore more tolerant of lower service reliability if it means there is a corresponding fall in operating costs. Even within these two general categories, there will be some broadcasters that view the risk/cost trade-off in different ways.

The ACCC understands that the analogue transmission of radio services is reasonably conducive to these divergent business models, because each broadcaster has some discretion over the level of redundancy at which it wishes to operate and pay for. This situation is different in the digital radio context because broadcast services are being transmitted by the same operator (i.e. the multiplex licensee).

The ACCC therefore needs to consider whether it is reasonable for the multiplex licensee to simply offer the same redundancy/cost option to all access seekers, or whether the undertaking should permit some access seekers to opt out of receiving the benefits and costs of investment in a backup transmission site.

The ACCC has concluded that it is reasonable for the undertakings to not include arrangements that allow access seekers to opt in or opt out of certain investment (such as a backup transmission site). Reasons for this view are discussed below:

- The *Radiocommunications Act* is quite specific in how capacity is to be allocated between access seekers[83]. It is not clear how this would translate to

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[82] Ibid

the allocation of capacity at a backup site if an opt out arrangement were provided. It is therefore 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 not be in a position to use their capacity at the backup site because they had opted out. Furthermore, it is unclear what could be done with the extra capacity freed up by parties who have chosen to opt out of the redundant site.

- The ACCC accepts CRA's claims about the costs of introducing an opt out arrangement, as well as the technical and operational challenges that would need to be overcome. Of particular note is that introducing the arrangement would impact on the quality of service afforded to access seekers that had agreed to the investment.

- The concept of allowing an opt out provision in effect treats the services provided via the redundant site as distinct from the primary service. However, the ACCC considers a decision to construct a backup transmission site as simply a decision about the manner in which the multiplex licensee has chosen to provide the transmission service, rather than as an additional service. The multiplex licensee should have the freedom to determine what investment is required in order for it to be able to provide the service, within the limitation that any such investment is efficient (see section 5.4.2 of this decision). There is a stronger argument that access seekers should be given a choice if the opt out arrangement was considered a new or premium service, however, this would raise a range of other issues. For example, as described above it is unclear how capacity allocations for a 'second service' would operate given the provisions of the *Radiocommunications Act*.

- The ACCC has some concerns about the effect that having an opt out arrangement could have on incentives for the multiplex licensee to maintain the primary transmission site in certain circumstances. For example, if the only access seekers that had opted out of the backup site were those without a shareholding interest in the multiplex licensee, it could be argued that the multiplex shareholders would have an interest in seeing the backup infrastructure used as often as possible. To help protect against the other broadcasters from being off air for too long, there would also need to be some requirement on the multiplex licensee to have the primary site operating again as soon as possible. Furthermore, this would mean there could be no scope for the multiplex licensee to adopt the backup transmission site as its primary site on a more permanent basis if the original site was completely destroyed (such as by fire), which should be one of the benefits of investing in such backup infrastructure.

- The ACCC does 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. Although an access seeker would incur some

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[83] Subdivision C of Division 4B of Part 3.3, *Radiocommunications Act*

upfront fixed costs in order to commence broadcasting in digital, it may cease to do so at any time it believes that it is not satisfied with the service or the costs.[84] Furthermore, access seekers already know the design of the service and technology, and have already been informed by CRA that it is 'quite likely' that the multiplex licensees will invest in backup infrastructure in the medium term.[85] This means there is less need for access seekers to have the choice to opt out of such investment in the future.

In summary, the ACCC considers that it is reasonable for the undertakings to not include arrangements that allow access seekers to opt in or opt out of certain investment (such as a backup transmission site). It should be noted that access seekers remain protected from inefficient investment by the provisions proposed in section 5.4.2 of this decision.

5.3.5 Provision of an electronic program guide

An electronic program guide (EPG) lists each station's program feed on digital radio receivers, and can also provide individual program listings and other information.

The CBAA has submitted that the carriage of EPG data on a per station program feed is inefficient and a significant overhead cost, especially for community broadcasters already subject to limited capacity.[86] A preferred approach, in CBAA's view, is for all broadcasters' EPG data to be aggregated and delivered as an ensemble wide EPG.[87] It also argued that leaving the development of an EPG to the market, in the absence of a clear mechanism to identify the capacity over which an EPG can be transmitted, leaves open the possibility that consumer demands in this area will not be met.[88] It recommended that if the undertakings do not include an ensemble wide EPG as part of the multiplex transmission service, then the undertakings should at least state that if a common EPG platform is developed, it should become part of the service and that all access seekers must be treated equally.

Undertakings must relate to the terms and conditions of a multiplex licensees access obligations. If a content service provider has a standard access entitlement,[89] an excess

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84 The ability for access seekers to cease to provide digital radio services is also discussed in section 5.3.10 of this decision.

85 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 3

86 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 6

87 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 46

88 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 3

89 Section 118NL, *Radiocommunications Act*

capacity access entitlement[90] or a distributed access entitlement,[91] then the licensee must give the provider:

- access to a fraction of multiplex capacity;[92] and
- access to services that facilitate the use of that fraction of multiplex capacity for that purpose [i.e. access entitlements].[93]

The legislation does not specify that the transmission service should include an ensemble wide EPG. Furthermore, a general principle of access regulation is to regulate only where the service cannot be economically duplicated. If it is indeed likely that consumers will demand EPG services as the CBAA suggests, the ACCC would not wish to preclude the development of an EPG by the market through the imposition of regulation.

The ACCC therefore considers that it is reasonable for the multiplex licensees to have submitted undertakings without specifying that an ensemble wide EPG is part of the service. While the industry may obtain capacity efficiencies from an ensemble wide EPG, it is not necessary for the undertakings to provide for an ensemble wide EPG.

5.3.6 The definition of an access seeker

The undertakings define 'access seeker' as meaning:[94]

> '…an access seeker under this Agreement and may include:
>
> (a) an Incumbent Commercial Broadcaster;
>
> (b) the Representative Company (acting on behalf of Digital Community Broadcasters); and
>
> (c) a Restricted Datacaster.

The CBAA submitted that there is no logical or legitimate reason for the undertaking to treat the digital community radio broadcasting representative company as an access seeker.[95] CBAA argued that this is against the intention of the legislation, as it would mean that representative company would need to pay for the full two-ninths of the reserved capacity even if some had not been allocated to broadcasters;[96] and it was

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90 Section 118NM, *Radiocommunications Act*

91 Section 118NN, *Radiocommunications Act*

92 Subsections 118NL(2)(c); 118NM(2)(c) and 118NN(2)(c) *Radiocommunications Act*

93 Subsections 118NL(2)(d); 118NM(2)(d) and 118NN(2)(d) *Radiocommunications Act*

94 See clause 1.1 of the Access Undertaking and clause 1 of schedule 1 of the Access Agreement.

95 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 7

96 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 7

unfair to make a representative company undergo a creditworthiness review.[97] CBAA's reasoning is considered below.

- Intention of the legislation

  The CBAA stated that Division 4B of Part 3.3 of the *Radiocommunications Act* confers access entitlements on both commercial and community broadcasters, but not on the representative company.[98] It argued that the role of the representative company is limited to allocating capacity to community broadcasters and notifying those allocations to the multiplex licensee.

  The ACCC acknowledges 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. Accordingly, the ACCC considers that any reference to the representative company in the definition of an access seeker should explicitly state this limitation.

  This view is further supported by the relevant Explanatory Memorandum,[99] which states that 'the consideration payable for shares at issue [by the representative company] is separate from any fees charged by a joint venture company to content service providers for access to multiplex capacity'. This statement suggests that the Explanatory Memorandum envisaged that content service providers, that is, individual community broadcasters (not their representative company), would be liable for payment of fees for access to multiplex capacity.

  Further, the ACCC is not satisfied that, in all cases, a definition which is, on its face, limited to the representative company is reasonable. Although the drafting of the current definition is not exclusive (i.e. an access seeker 'may' include), as clause 3.2 of the Access Undertaking currently stands the multiplex licensee has no obligation to enter into an Access Agreement with a community broadcaster (although arguably it may enter into an Access Agreement if it chooses to) but appears to contemplate that an individual digital community broadcaster may be an access seeker in its own right. For example, clause 8 provides that an access seeker must be responsible for the content of broadcasts; as representative companies do not broadcast content and are not content service providers; this clause reflects the responsibilities of community broadcasters. However, for the avoidance of doubt, the definition of 'access seeker' and subclause 3.2(b) should be amended to enable both individual digital community broadcasters and their representative company to be 'access seekers'.

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97 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 10

98 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 7

99 *Broadcasting Legislation Amendment (Digital Radio) Bill 2007—Explanatory memorandum*, p. 60.

- The representative company would need to pay for the full two-ninths of the reserved capacity even if some had not been allocated to broadcasters

  The CBAA submission notes that clause 4.1 of the pricing principles[100] states that the access charge will be levied based on the capacity allocated to an access seeker, irrespective of whether that capacity is used or not and irrespective of the type of use. It claims that if the representative company is treated as an access seeker, it would therefore need to pay for the two-ninths of capacity reserved for community broadcasters.[101] This would be the case even if less than two-ninths of the reserved capacity was being used by community broadcasters.

  The ACCC does not agree with the CBAA's reasoning. The undertaking only requires access seekers to pay for *allocated* capacity. Although two-ninths of the total capacity may be *reserved* for the community broadcasters under the legislation,[102] the representative company can advise the multiplex licensee that it does not require the full two-ninths to be allocated.[103] In this situation, the representative company would only be required to pay (on behalf of the community broadcasters) for the capacity that is actually allocated.

  However, as the constitutional powers of the representative company are yet to be established, the ACCC considers that it is not appropriate that clause 12 of the Access Agreement apply to representative companies. Clause 12 places an obligation on the access seeker to 'pay all amounts due in respect of the supply of the Multiplex Transmission Service'.[104] It is unclear whether a representative company will have the power to incur debts on behalf of community broadcasters. Therefore, the ACCC requires a narrower definition of 'access seeker' (that excludes representative companies) for the purposes of clause 12 in order to be satisfied that the undertakings are reasonable.

- The representative company would not have the capacity to undergo a creditworthiness review to provide financial security

  The CBAA submission in response to the ACCC's draft decision argued that the community broadcasting sector would struggle to satisfy the creditworthiness and financial security provisions of the undertakings. It said that changing these provisions were even more pressing if an accepted undertaking defined 'access seeker' to include the representative company.[105] It argued that the representative

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100 Schedule 2 of the Access Agreement

101 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 8

102 Subsection 118NR(2), *Radiocommunications Act*.

103 Subsection 118NR(3), *Radiocommunications Act*.

104 Clause 12, Access Agreement.

105 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 10

company would not have, nor should it have, the capacity to undergo a creditworthiness review or provide financial security.

As discussed in section 5.5.2, while the ACCC appreciates that community broadcasters are very different entities to commercial broadcasters, the multiplex licensee is a commercial operator and is reasonably entitled to seek a degree of surety over credit. The ACCC considers that it is reasonable for the multiplex licensee to assess the credit worthiness of both the representative company and its shareholders. This is analogous, in a commercial sense, to a supplier requiring the directors of a company to satisfy the supplier of the creditworthiness of the company and those directors who will be providing personal guarantees to cover the debts of the company.

On the basis of the discussion above, the ACCC considers that the definition of access seeker in the Access Agreement should:

- only refer to the representative company where the representative company is exercising powers specified in its constitution or the powers referred to in paragraph 9C(1)(k) of the *Radiocommunications Act*, and

- include a digital community broadcaster.

The ACCC also considers it reasonable to change the obligation to enter into an Access Agreement[106] to reflect this definitional change.

This decision does not have any effect on the price of the service for access seekers. The implications are administrative and legal in nature, as it will impact on whether the multiplex licensee has a direct contractual relationship (and the consequences that arise from this relationship) with the representative company or individual community broadcasters.

Further changes to the undertaking as a consequence of the modified definition of access seeker

The decision that the definition of access seeker should include community broadcasters and explicitly state the limitations of the representative company as an access seeker has consequences for other parts of the undertaking.

Subclause 3.2(b)(i) of the Access Undertaking currently states that the multiplex licensee has no obligation to enter into an Access Agreement except with an incumbent commercial broadcaster, the representative company and a restricted datacaster. This clause will need to explicitly state the limitations of the representative company as an access seeker, and also include a digital community broadcaster.

Subclause 6.4(e)(i) provides a digital community broadcaster nominated by the representative company with a right to outsource transmission services and the management of spectrum. This clause will need to be amended to extend this right to the representative company.

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[106] Subclause 3.2(b) of the Access Agreement.

Subclause 6.4(f) provides that a digital community broadcaster nominated by the representative company acknowledges its responsibility for matters set out in that subclause. This clause will need to be amended to ensure both the representative company and digital community broadcasters (as the access seeker) acknowledge who is responsible for the allocation of multiplex capacity for community broadcasters.

Clause 1 of Attachment A—Conditions Precedent of the Access Agreement states that a condition precedent is that the access seeker must be either an incumbent commercial broadcaster, the representative company or a restricted datacaster. This clause will need to explicitly state the limitations of the representative company as an access seeker, and also include a digital community broadcaster.

Further amendments will also need to be made to the definitions of "Access Seeker" and "Representative Company" in clause 1.1 of the Access Undertaking and Schedule 1 – Definitions of the Access Agreement to reflect the decision taken by the ACCC.

5.3.7 The ability to outsource transmission and management of spectrum

Subclause 6.4(e) of the Access Agreement states:

> 'For the avoidance of doubt:
>
> (i) nothing prevents a Digital Community Broadcaster nominated by the Representative Company from granting a third party the right to:
>
> > (A) provide outsourced transmission services on behalf of that Digital Community Broadcaster in the Designated BSA Radio Area; or
> >
> > (B) manage the digital spectrum on behalf of that Digital Community Broadcaster in the Designated BSA Radio Area; and
>
> (ii) the granting of such rights to a third party does not constitute a transfer of a Standard Access Entitlement to another entity for the purposes of clause 6.4(d)(ii).

The CBAA submission in response to the ACCC discussion paper drew attention to the fact that while subclause 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.[107]

The ACCC indicated in its draft decision that the representative company should have the right to outsource transmission services and the management of digital spectrum to a third party. It stated that the clause should be amended to 'instead grant this outsourcing right to the representative companies which act on behalf of the community broadcasters'.[108] This view reflected the ACCC's opinion at the time that it

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[107] CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 7

[108] ACCC, Assessment of undertakings in relation *to digital radio multiplex transmission services: Draft decision*, December 2008, p. 47

was reasonable for the representative company to be the access seeker, rather than individual community broadcasters. CRA submitted that it agreed with the ACCC's draft decision to amend clause 6.4(e) in this manner.[109]

However, as discussed in section 5.3.6 of this decision, the ACCC now considers that both the representative company and individual community broadcasters can be considered access seekers in the undertakings. Accordingly, the ACCC now considers that subclause 6.4(e) should provide the rights to outsource transmission services and the management of digital spectrum to both community broadcasters and the representative company. It is noted that the undertaking also provides commercial broadcaster access seekers with these rights through subclause 6.3(h) of the Access Agreement.

5.3.8 Acknowledgement of responsibility for determining the allocation of capacity to community broadcasters

Subclause 6.4(f) of the Access Agreement states:

> The Digital Community Broadcaster nominated by the Representative Company acknowledges that:
>
> (i) the Representative Company is responsible for determining the allocation of the Multiplex Capacity made available to each Digital Community Broadcaster (**Digital Community Broadcaster Allocations**);
>
> (ii) Digital Community Broadcaster Allocations are determined in accordance with criteria set out in section 118NR of the Radiocommunications Act; and
>
> (iii) the Multiplex Licensee is not responsible (and bears no liability) for Digital Community Broadcaster Allocations that are notified by the Representative Company and implemented by the Multiplex Licensee.

The ACCC's draft decision noted that this clause should 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 matters set out in the clause. As discussed in 5.3.6 above, this is an example of the Access Agreement contemplating that an individual digital community broadcaster may be an access seeker in its own right. CRA submitted that it agreed with the ACCC's draft decision in respect of clause 6.4(f).[110]

However, as discussed in section 5.3.6 of this decision, the ACCC now considers that both the representative company and individual community broadcasters can be considered access seekers in the undertakings. Accordingly, the ACCC now considers that subclause 6.4(f) should ensure that the both the community broadcasters and the

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[109] CRA, *Digital radio access undertaking: Submission* in response to the ACCC*'s* draft decision *dated 18 December 2008*, 23 January 2009, p. 10

[110] CRA, *Digital radio access undertaking: Submission* in response to the ACCC*'s* draft decision *dated 18 December 2008*, 23 January 2009, p. 10.

representative company (as the access seeker) acknowledge who is responsible for the allocation of multiplex capacity for community broadcasters.

5.3.9 Billing issues

The CBAA submission in response to the ACCC discussion paper proposed that to facilitate the start up of new broadcasters, the undertakings should provide that the billing of transmission services be undertaken three months in arrears, rather than the monthly requirement in clause 12.2 of the Access Agreement.[111]

The CBAA also requested the inclusion of explicit provisions in the undertakings 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.[112]

The ACCC considers that a billing period of monthly in arrears is reasonable. It also considers that the other billing issues mentioned above are matters for negotiation between the parties, and it is reasonable for the undertaking to not include such provisions.

The ACCC considers that it is appropriate to restrict the operation of clause 12 of the Access Agreement to the following parties:

(i) an Incumbent Commercial Broadcaster;

(ii) a Digital Community Broadcaster; or

(iii) a Restricted Datacaster.

The ACCC considers that it is inappropriate to include the representative company in clause 12 as it is unclear about whether the representative company is entitled to incur or discharge debts on behalf of individual digital community broadcasters. This view is supported by the relevant Explanatory Memorandum,[113] which states that 'the consideration payable for shares at issue [by the representative company] is separate from any fees charged by a joint venture company to content service providers for access to multiplex capacity'. This statement suggests that the Explanatory Memorandum envisaged that content service providers, that is, individual community broadcasters (not their representative company), would be liable for payment of fees for access to multiplex capacity.

The ACCC therefore considers it appropriate to incorporate a new clause 12.1 to expressly state the operation of clause 12 and amend current subclause 12.2(a) of the Access Agreement to allow access seekers to nominate in writing an authorised

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111 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 7.

112 Ibid

113 *Broadcasting Legislation Amendment (Digital Radio) Bill 2007—Explanatory memorandum*, p. 60.

representative to receive invoices on their behalf. This could include the representative company.

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

After submissions had been received on the ACCC's draft decision, the ACCC sought clarification from CRA that clause 16 of the Access Agreement did not allow an access seeker to cease receiving the multiplex transmission service other than in certain circumstances, such as the multiplex licensee breaching the terms of the Access Agreement.

CRA subsequently wrote to the ACCC stating that it would be amenable to revising the Access Agreement to provide access seekers with the following:

- a right to terminate the Access Agreement for convenience on six months notice; and

- a right to request a reduction in the amount of multiplex capacity being acquired pursuant to the Access Agreement on six months notice, with the multiplex licensee to reduce the amount of capacity being acquired by the access seeker in accordance with the request.[114]

CRA noted that the second option covered circumstances where an access seeker only wishes to hand back a portion of the multiplex capacity, but does not wish to terminate the Access Agreement or cease obtaining all the multiplex capacity being acquired.

As a result of this response, renewed attention was given by the ACCC to CBAA's submission that the undertakings should include an obligation on the multiplex licensee to respond to capacity change requests in a timely manner.[115] The CBAA submitted that the multiplex licensee would need to modify a service to respond to certain requests regarding capacity changes, and that the timeliness of such modifications is critical for community broadcasters' successful shared access to limited capacity.[116] The ACCC notes that CRA's proposed modifications effectively require the multiplex licensee to act on a request within six months.

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[114] CRA submission, *Access seeker right of termination*, 5 February 2009

[115] CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 7; CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 4, CBAA submission, *Capacity changes: Termination for convenience digital radio multiplex transmission services*, submission in response to the ACCC draft decision paper, 23 February 2009

[116] CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 4

The ability for access seekers to request capacity changes

The ACCC considers that the terms and conditions in the undertakings cannot be considered reasonable unless there is scope for the access seeker to exit the market or change its allocated capacity. If it was intended for broadcasters to be obligated to provide digital radio content services and therefore have no freedom to choose whether to broadcast, it would have been specified in the legislation.

The ACCC notes that CRA's second proposed provision only enables access seekers to voluntarily reduce the amount of capacity being acquired, but not voluntarily increase their capacity.

This is appropriate for commercial broadcasters. Commercial broadcasters have already decided to take up their standard access entitlements, and any increase in their allocated capacity can only occur through the multiplex licensee's allocation of excess capacity. As a result, commercial broadcasters cannot voluntarily increase their allocated capacity. Commercial broadcasters can decide to reduce their allocated capacity, although this would mean they forego their standard access entitlements and would need to obtain excess capacity if they decided to recommence broadcasting in digital.

However, the provision does not recognise that it is possible for community broadcasters to voluntarily increase their allocated capacity within certain limitations. For example, CBAA advised that it is highly likely that not all community broadcasters will be in a position to acquire capacity on the digital radio start-up day,[117] which means the representative company is likely to advise the multiplex licensee that not all of the two-ninths capacity reserved for community broadcasters will be allocated. However, over time the representative company may advise the multiplex licensee that it is ready to acquire more of the reserved capacity[118]. Accordingly, the ACCC considers that the provision in the undertakings should state 'change the amount of multiplex capacity', rather than a 'reduction in the amount of multiplex capacity'.

Notice period required for requesting capacity changes

The ACCC notes that the provisions proposed by CRA require the access seeker to provide the multiplex licensee with six months notice before the capacity change is required to take place. CRA stated that a six month period provides:

- access seekers with the flexibility to terminate the Access Agreement or change their capacity within a reasonable timeframe, and

- the remaining access seekers with greater certainty as to the level of access charges that are payable, as any change in the total amount of capacity allocated

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[117] CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 4

[118] Subsection 118NR(3), *Radiocommunications Act*.

to access seekers will lead to a change in access charges as per clause 4.3 of the pricing principles in Schedule 2 of the Access Agreement.[119]

The CBAA submitted that six months notice of capacity re-allocation is not appropriate for community broadcasters. It provided an example of an individual access seeker wishing to broadcast material such as a live festival broadcast event with images and data.[120] It also claimed that there is a low limit to the capacity available for community broadcasters. It argued that providing capacity sufficient for acceptable audio quality and associated data will therefore require temporary re-allocation of capacity to that access seeker and a concomitant reduction in capacity allocated to other access seekers for the duration of the event (typically two to four hours). The CBAA also stated that re-allocation and/or channel splitting for other reasons is also likely to be an operational requirement and would usually occur in day parts.

The CBAA submitted that such capacity changes would be planned ahead, and that a one month notice period is workable as the usual pattern, with short notice changes being possible for special circumstances.[121]

The ACCC notes that section 118NR of the *Radiocommunications Act* sets out the process by which the representative company nominates how the reserved capacity is to be allocated by the multiplex licensee to community broadcasters. This process includes the representative company providing the multiplex licensee with a formal notice, which must be revoked by the representative company before it can provide a new notice with different allocation arrangements. The new notice takes effect immediately after the previous notice is revoked. Subsection 118NR(15) states that the revocation of the notice takes effect at the start of the 30th day after the day on which the notice of revocation is given.

The ACCC considers that section 118NR essentially requires the multiplex licensee to allocate capacity on the basis of the representative company's notice as soon as it takes effect, which is the start of the 30th day after the previous notice is revoked. This means the multiplex licensee is legislatively required to respond to notifications by the representative company about changes in the allocation of capacity within 30 days. It is possible that the change in capacity could involve community broadcasters being allocated no capacity at all.

The *Radiocommunications Act* does not specify a timeframe for the multiplex licensee to respond to notifications from commercial broadcasters for changes in capacity. However, the ACCC considers that a similar timeframe should apply to these notifications as it does for notifications from the representative company. A longer timeframe, as suggested by CRA, would represent an advantage to community broadcasters.

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119 CRA submission, *Access seeker right of termination*, 5 February 2009

120 CBAA submission, *Capacity Changes-Termination for convenience digital radio multiplex transmission services*, submission in response to the ACCC draft decision paper, 23 February 2009

121 Ibid

In summary, the ACCC considers that the terms and conditions of the undertakings are not reasonable unless access seekers have the right to terminate the Access Agreement or notify the multiplex licensee of a change in allocated capacity being sought. The ACCC considers that a notice period of 30 days is required for notifications by the representative company and reasonable for notifications by commercial broadcasters.

5.3.11 Changes to the definition of "Force Majeure Event"

The ACCC considers that the current definition of a Force Majeure Event in Schedule 1 of the Access Agreement that applies to 'the change or introduction of any law or regulation or an act or omission of any Regulator' is too broad. It does not specify which laws will activate the force majeure clause and it is not reasonable to allow a party to avoid its obligations because of 'the change or introduction of any law or regulation or an act or omission of any Regulator'.

The ACCC would be satisfied if the words 'the change or introduction of any law or regulation or an act or omission of any Regulator' were deleted from the definition of a Force Majeure Event.

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

The ACCC is not satisfied that all the terms and conditions of access in the undertakings are reasonable.

As discussed in section 5.3.1, the ACCC is not satisfied that the provisions relating to variation of the undertaking are reasonable because of concerns that they could be used to favour particular access seekers in an anti-competitive manner. It would be satisfied if:

- the words 'unless agreed otherwise between the Multiplex Licensee and an Access Seeker' were deleted from clause 4.2 of the Access Undertaking
- the words 'and accepted by the ACCC under section 118NH of the *Radiocommunications Act'* were inserted at the end of clause 23.9(a) of the Access Agreement, and
- the words 'unless otherwise agreed between the Parties' were deleted from clause 23.9(b) of the Access Agreement.

As discussed in section 5.3.6, the ACCC considers that the definition of access seeker in the Access Agreement should:

- only refer to the representative company where the representative company is exercising powers specified in its constitution or the powers referred to in paragraph 9C(1)(k) of the *Radiocommunications Act*, and
- include a digital community broadcaster.

The ACCC also considers it reasonable to change the obligation to enter into an Access

Agreement[122] to reflect this definitional change.

As also discussed in section 5.3.6, this change will also need to be reflected in subclause 3.2(b)(i) of the Access Undertaking, subclause 6.4(e)(i), subclause 6.4(f) and clause 1 of Attachment A—Conditions Precedent of the Access Agreement.

Further amendments will also need to be made to the definitions of "Access Seeker" and "Representative Company" in clause 1.1 of the Access Undertaking and Schedule 1 – Definitions of the Access Agreement to reflect the decision taken by the ACCC

As discussed in section 5.3.7, the ACCC considers that subclause 6.4(e) should provide the right to outsource transmission services and the management of digital spectrum to both community broadcasters and the representative company.

A discussed in section 5.3.8, clause 6.4(f) of the Access Agreement should be amended to ensure that the both the community broadcasters and the representative company (as the access seeker) acknowledge who is responsible for the allocation of multiplex capacity for community broadcasters.

As discussed in section 5.3.9 the ACCC considers it appropriate to restrict the operation of clause 12 of the Access Agreement to an Incumbent Commercial Broadcaster, a Digital Community Broadcaster or a Restricted Datacaster because it is unclear what status the representative company has in respect of incurring or discharging debts on behalf of the individual community broadcasters.

The ACCC also considers it appropriate to incorporate a new clause 12.1 to expressly state the operation of clause 12 and amend current subclause 12.2(a) of the Access Agreement to allow access seekers to nominate in writing an authorised representative to receive invoices on their behalf.

As discussed in section 5.3.10, the ACCC considers that the terms and conditions of the undertaking are not reasonable unless access seekers have the right to terminate the Access Agreement or notify the multiplex licensee of a change in allocated capacity being sought. The ACCC considers that a notice period of 30 days is required for notifications by the representative company and reasonable for notifications by commercial broadcasters.

As discussed in section 5.3.11, the ACCC considers the current definition of a Force Majeure Event in Schedule 1 of the Access Agreement is too broad. The ACCC would be satisfied if the words 'the change or introduction of any law or regulation or an act or omission of any Regulator' were deleted from the definition of a Force Majeure Event.

[122] Subclause 3.2(b) of the Access Agreement.

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

In considering whether to accept an undertaking, the ACCC must consider whether the terms and conditions specified in the access undertaking include access prices or pricing methodologies that are fair and reasonable.[123]

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.

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

5.4.1 Pricing principles rather than specific prices

The undertakings do not specify prices to apply for the multiplex transmission service, but rather provide principles in Schedule 2 of the Access Agreement through which the prices would be developed. The ACCC discussion paper sought 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 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 undertakings.[124] 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 statement for the Decision-Making Criteria as justification for the ACCC approving the undertakings in the absence of actual prices.[125] It noted that the explanatory statement suggests 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 stated 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 determine their costs or set indicative prices in the undertakings.[126]

In its draft decision, the ACCC suggested that there should have been sufficient information for the multiplex licensee to provide estimates of access charges at the time

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123 Subrule 5(1)(d) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

124 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 8

125 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 10

126 Ibid, p. 9

of lodging its undertaking.[127] The draft decision also requested for CRA to provide estimates of access charges as part of the consultation process, but this information was not provided. This is despite CRA's stated intentions to do so if it was possible in the context of finalising downstream supply arrangements,[128] and its public announcements in December suggesting that the roll-out of infrastructure is reasonably well advanced.[129] 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.

However, the explanatory statement for the Decision-Making Criteria states that if the licensee does not know the actual access costs at the time of lodging an undertaking, it may instead provide a fair and reasonable pricing methodology.[130] The ACCC accepts that these costs would not have been known when the undertakings were lodged on 3 October 2008.

The ACCC therefore considers that it is reasonable for the undertaking to include a pricing methodology as specified in Schedule 2 of the Access Agreement rather than specific prices.

5.4.2 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.[131] The following section discusses whether the proposed pricing methodology in Schedule 2 of the Access Agreement will reflect the efficient costs of providing the service, prior to the addition of a 'normal commercial rate of return' as envisaged by the pricing principles.

CRA submitted, in support of its original draft undertaking, that the proposed pricing principles meet this requirement.[132] It stated 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, operating expenditure, and expenditure on corporate overheads.

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127 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 31

128 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 10

129 CRA, *Digital Radio Switch-On Set for May 2009*, media release, 9 September 2008

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

131 Ibid

132 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 10

In its draft decision, the ACCC acknowledged that the undertaking would in principle allow the multiplex licensee to recover the costs of supplying the service.[133] The ACCC's view was (and remains) that it is fair and reasonable that the access pricing methodology allow the access provider to recover its costs of providing the service, so long as these are efficient costs.

However, the ACCC's draft decision expressed the concern that the proposed pricing principles had not included sufficient provision to ensure that the access provider could only recover its efficient costs (as opposed to being able to recover all costs).[134] It was, and remains the ACCC's view, that it is fair and reasonable that the multiplex licensee be permitted to recover its efficient costs of providing the service, but that it would not be fair and reasonable to permit the multiplex licensee to recover all of its costs.

In response to the ACCC's draft decision, CRA submitted that the ACCC's decision in this respect is not correct.[135] Specifically, it argued that the multiplex licensees do have sufficient incentives to engage only in efficient expenditure, for reasons including: that most access seekers are themselves shareholders, that financial benefits during the start up phase were likely to be limited, the expected stability of demand for digital radio multiplex services, and certain technical constraints together with the six year moratorium on new digital only entrants.

The CBAA submitted that it is overly simplistic and inappropriate for CRA to presume that external incentives and the notion of 'common shareholding' between multiplex licensees and access seekers are sufficient to ensure costs incurred by the multiplex licensees are efficient.[136] It argued that not only is there the possibility that community broadcasters will not take up a shareholding in the multiplex licensee, but the constitution of the multiplex licensees is discriminatory. It claims the constitution only provides for the representative company to receive one vote despite holding two-ninths of capacity, while commercial broadcasters that only hold one-ninth of capacity also receive one vote.

The CBAA also submitted that access seekers should be able to opt out of contributing to and benefiting from investment in a backup transmission site.[137] This issue is discussed specifically in section 5.3.4 of this decision.

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133 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 32

134 Ibid

135 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, pp. 1-7

136 CBAA, *Shareholding in EJVC: Efficient costs digital radio multiplex transmission services*, 23 February 2009

137 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 5

The ACCC has not changed its views on whether there are sufficient incentives on the multiplex licensee to operate on an efficient basis, independently of the undertaking. The ACCC here briefly restates the relevant reasoning from its draft decision. In its draft decision the ACCC acknowledged that there are specific structural circumstances which may mitigate the likelihood of inefficiently high costs being expended on the relevant facilities. These factors, discussed in more detail in the draft decision, include the degree of vertical integration between the multiplex licensee and the commercial broadcaster access seekers, and the fact that most of the facilities would be new and built with current technology.[138]

The ACCC also acknowledges without further comment CRA's other reasons for stating that the risk of inefficient investment may not be high. However, as previously stated, this does not mean that it does not exist as a risk. A multiplex licensee may have certain inherent incentives not to engage in inefficient investment, but this does not guarantee that it will not do so, whether deliberately or inadvertently. Further, the ACCC in its draft decision was not persuaded that these structural factors were of themselves sufficient to guard access seekers against inefficiently high access prices resulting from inefficient 'gold-plating' of the relevant facilities.[139] This remains the ACCC's position.

In consequence, the ACCC's view is that it would be fair and reasonable for the pricing principles to contain a mechanism to ensure, in the event (even if not likely) that the multiplex licensee incurs inefficient costs, that access seekers are not required to pay them. Conversely, it would not be fair or reasonable for the pricing principles to contain no such provision.

CRA suggested modifications to address the ACCC's concerns

In response to the ACCC's draft decision, CRA proposed a set of amendments to the pricing principles for the purpose of addressing these concerns in relation to efficient costs.[140] These are contained in clause 3.3 of the pricing principles in Schedule 2 of the revised Access Agreement (the revised pricing principles), along with certain specific amendments to clauses 3.1 and 3.2 of the same schedule.

The following represents the ACCC's views on whether an undertaking containing the revised pricing principles would satisfy the Decision-Making Criteria that the pricing methodology be fair and reasonable.

Clause 3.1 of the revised pricing principles provides that the multiplex licensee may 'recover no more than its Efficient Costs'. Similarly, clause 3.2 of the revised pricing principles clarifies that it is the 'Efficient Costs' that are recoverable, rather than the 'costs' more generally. The ACCC considers that these amendments clarify that the

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138 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, pp. 32-33

139 Ibid

140 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009—revised undertaking (the revised Access Agreement)

efficient costs are the maximum costs that the multiplex licensee may recover through access charges. The ACCC is satisfied that clauses 3.1 and 3.2 of the revised pricing principles are fair and reasonable.

Clause 3.3 of the revised pricing principles proposes a set of factors to which regard should be had in evaluating 'efficient costs'. The ACCC is satisfied with this general approach of defining efficient costs and clarifying the factors that should be considered in determining whether or not costs are efficient. The specific provisions are discussed below.

In relation to capital expenditure, it is fair and reasonable in this specific context that regard should be had as to whether capital expenditure is efficient with regard to the overall economic life of the relevant asset and the long term planning in respect of supply of the service.[141] The ACCC considers that it is also fair and reasonable that regard should be had to whether the capital expenditure was consistent with 'Good Industry Practice' at the relevant time[142], whether a relevant competitive procurement process applied[143], and the value of the relevant assets in audited accounts[144]. Similarly, in relation to operational expenditure and expenditure on corporate overheads, it is fair and reasonable that regard should be had to whether the expenditure was reasonably necessary to meet or manage the expected demand at the relevant time[145], and whether it was reasonably necessary to establish and maintain the quality, reliability and security of the supply at the relevant time.[146]

However, the ACCC has some concerns in relation to paragraphs 3.3(a)(i) and 3.3(b)(i) of the revised pricing principles as currently drafted. CBAA sought the deletion of these two paragraphs.[147] Each of these paragraphs refers to 'the need for the multiplex licensee to recover its *costs*' [emphasis added], rather than the need to recover *efficient* costs. The ACCC is concerned that these provisions may operate to negate the efficient costs requirements of the remainder of the revised pricing principles, if these paragraphs were interpreted to mean that the multiplex licensee was entitled to recover its actual costs, notwithstanding the efficient costs elements of other relevant sections of the revised pricing principles. As such, the ACCC does not consider paragraphs 3.3(a)(i) and 3.3(b)(i) of the revised pricing principles to be consistent with a fair and reasonable pricing methodology.

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141 Paragraph 3.3(a)(ii) of Schedule 2 of the revised Access Agreement.

142 Paragraph 3.3(a)(iii) of Schedule 2 of the revised Access Agreement.

143 Paragraph 3.3(a)(iv) of Schedule 2 of the revised Access Agreement.

144 Paragraph 3.3(a)(v) of Schedule 2 of the revised Access Agreement.

145 Paragraph 3.3(b)(ii) of Schedule 2 of the revised Access Agreement.

146 Paragraph 3.3(b)(iii) of Schedule 2 of the revised Access Agreement.

147 CBAA letter to ACCC, 'Shareholding in EJVC – Efficient Costs Digital Radio Multiplex Transmission Services', 23 February 2009

However, the ACCC's view is that its concern with paragraphs 3.3(a)(i) and 3.3(b)(i) of the revised pricing principles could be easily remedied, by the substitution of 'efficient costs' for 'costs' in paragraphs 3.3(a)(i) and 3.3(b)(i).

In conclusion, the ACCC is not satisfied that the pricing principles in Schedule 2 of Access Agreement are fair and reasonable. It would be satisfied if the undertakings included provisions that clarified that the multiplex licensee could not recover more than its efficient costs, and provided some guidance as to what costs could be considered to be efficient. The ACCC would be satisfied with Schedule 2 of the revised Access Agreement if clauses 3.1, 3.2 and 3.3 of the revised pricing principles were amended to change the word 'costs' to 'efficient costs' in paragraphs 3.3(a)(i) and 3.3(b)(i).

5.4.3 Earning a normal commercial rate of return

In its submission in response to the ACCC discussion paper, 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.[148] 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.

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.[149]

The ACCC's position is that it is acceptable for the multiplex licensees to earn a normal commercial rate of return on their investment, in the manner contained within the pricing principles.

Firstly, this is explicitly contemplated by the explanatory statement for the Decision-Making Criteria.[150]

Further, it is generally within the legitimate business interests of any company to be able to earn a return that is commensurate with the risk of the project, subject to any regulatory requirements and limits.

Further, the ACCC notes that the cost of the capital used by a business in meeting other expenditures (including capital expenditure, operating expenditure, and other) is itself a cost of doing business. This can be an express cost actually paid (for example, borrowing costs, costs of any equity issuance, and similar), or an opportunity cost (the

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148 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 8

149 Ibid

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

cost of foregoing potential returns from other potential investments). In both cases, the cost is an actual and genuine cost that the business bears in undertaking its activities.

In this case, the operation of the proposed pricing principles would limit the multiplex licensee's return on its capital expenditures to being the multiplex licensee's weighted average cost of capital (WACC), that is, to its risk-adjusted cost of capital. The 'normal commercial rate of return on [the multiplex licensee's] investment' envisaged in the pricing principles would therefore be limited, in relation to capital expenditures, to permitting the multiplex licensee to recoup only its costs of capital, which as explained above are genuine costs of undertaking its business activity. In relation to operating expenditures and corporate overheads, the multiplex licensee would be limited to recouping solely its actual efficient costs. The multiplex licensee would therefore not be permitted under the pricing principles to earn a rate of return above its risk-adjusted cost of capital (i.e. the WACC).

The ACCC's view therefore is that it is fair and reasonable that the undertaking permits the multiplex licensee (and its shareholders) to recover its risk-adjusted cost of capital in relation to capital expenditures, by being permitted to earn a return on its efficient capital expenditure costs equal to its risk-adjusted cost of capital (i.e. the WACC).

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, by being provided with access to the service at charges that do not incorporate a return on investment for the multiplex licensee.[151] However, not all broadcasters using the multiplex licensee's infrastructure will also be a shareholder of the multiplex licensee. 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 costs of capital associated with the investment.

The ACCC's view is that the costs of capital are properly seen as forming part of the total underlying costs of undertaking this investment and running the operation (in addition to the costs of capital expenditure, operating expenditure etc). Consequently, if one or more access seekers were charged an access price that excluded the cost of capital, this would amount to that access seeker being exempt from paying for a part of its share of the total costs, which include the costs of capital (as they are genuine costs, as explained above), on an equal basis. This would in turn result in an effective subsidy being paid to that access seeker, by the other access seekers who would be required to pay prices that do reflect the underlying cost of capital. The Decision-Making Criteria do not provide for the ACCC to contemplate such a subsidy.

Further, the ACCC considers that the CBAA's proposed approach would not be an efficient pricing approach. Under the CBAA's proposed approach, the cost associated with the risk of the investment would need to be borne disproportionately 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-adjusted cost of capital of making the investment,

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[151] CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 8

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.

The ACCC notes that, 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 through artificially changing prices that distort decisions to invest in facilities or obtain capacity. The Decision-Making Criteria relevant to the present decision do not encompass such distributional considerations.

5.4.4 Access charges to community broadcasters not including a normal commercial rate of return

Section 5.4.3 of this decision discusses why it is reasonable for the multiplex licensees to earn a normal commercial rate of return.

The CBAA submitted in response to the ACCC discussion paper that, if multiplex licensees are permitted to allow for a commercial rate of return in its access charges, then community broadcasters should be treated as a special case and only charged at a rate which covers their multiplex licensee providers' efficient costs.[152] In other words, the CBAA argued that the multiplex licensees should only be able to earn a normal commercial rate of return from commercial broadcasters, but not community broadcasters.

The explanatory statement for the Decision-Making Criteria states that 'fair access prices ensure that access seekers are not disadvantaged for reasons which are anti-competitive'.[153] The ACCC notes that the pricing principles in Schedule 2 of the Access Agreement results in an access seeker paying the same access charge for a given amount of capacity as another access seeker, regardless of the type of access seeker. The ACCC does not consider that this constitutes any disadvantage for reasons that are anti-competitive. In fact, the ACCC would be more concerned about anti-competitive effects and competitive non-neutrality in the opposite case, that is, where different access seekers were charged according to different pricing methodologies for a given amount of capacity.

Accordingly, the ACCC's view is that it is fair and reasonable for community broadcasters to be subject to the same pricing methodology as other access seekers.

5.4.5 Calculating the weighted average cost of capital (WACC)

The pricing principles provide that the multiplex licensee's return on its capital expenditures will be limited to being its weighted average cost of capital (WACC),

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[152] CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 8

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

calculated on the basis of the depreciated value of assets.[154] The pricing principles also provide that the WACC of the multiplex licensee will be set so as to be commensurate with the WACC of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business cycle.[155]

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 in the pricing principles.

CRA's response 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.[156] 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 on capital expenditures.

The ACCC stated in its draft decision that it accepts CRA's reasons why it cannot yet reasonably commit to a specific WACC that will be used in the calculations to determine access charges.[157] However, the ACCC also stated in its draft decision that this places greater emphasis on the need for indicative prices and costing information to be made public within the undertaking assessment process.[158] This remains the ACCC's position.

The ACCC considers that the method for setting the WACC is sound in principle, but that it 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 may leave some scope for interpretation and judgment. This could lead to disputes between the multiplex licensees and access seekers.

However, the ACCC notes that the proposed methodology of determining the WACC is commonly applied and is fair and reasonable in principle. The ACCC 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 ACCC's position in this respect is unchanged from its draft decision.

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154 Subclause 3.3(c)(i) of Schedule 2 of the Access Agreement

155 Ibid

156 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 11

157 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 35

158 Ibid

The dispute resolution mechanism is considered separately in section 5.6 of this decision.

5.4.6 Access charges being determined by an access seeker's share of total allocated capacity

The ACCC discussion paper characterised the pricing methodology as determining prices on a per-access seeker basis, rather than a per-capacity basis.[159] Upon further consideration, this may have been an oversimplification of the pricing principles. In its simplest form, the pricing methodology could be described as adding up all the efficient costs incurred by a multiplex licensee in providing the service, with these costs (plus a normal rate of return) passed on to access seekers based on their share of total allocated capacity. The access charges therefore reflect both the amount of capacity acquired by the particular access seeker, as well as the extent to which the residual capacity at the multiplex has been allocated to other access seekers.

An alternative approach that could have been proposed by the multiplex licensees in the undertaking is for a specific amount of capacity to have 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 ACCC has considered whether it is fair and reasonable for access seekers to pay access charges that are determined in part by the total amount of capacity allocated by the multiplex licensee.

Submissions

CRA claimed that the proposed methodology ensures that access seekers that acquire the same amount of multiplex capacity pay the same level of access charges.[160] It also stated 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 submitted that the per-access seeker charging methodology is especially unreasonable for the community radio sector. It claimed that because the community broadcasters do not have the financial resources to purchase excess capacity, they will be paying higher access charges for unallocated capacity that they 'can never, in practical terms, access.'[161]

ACCC view

Before discussing the relative merits or otherwise of the pricing methodology, it should be noted that the access charges determined in accordance with the pricing principles are actually an upper limit on the charges that could be implemented. The multiplex

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159 Ibid

160 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008,* 21 November 2008, p. 12

161 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 9

licensees may choose to waive their rights to implement an access charge as determined by the pricing principles. For example, it may choose to charge a lower price if it is concerned that there is insufficient demand from access seekers and the future of digital radio was in jeopardy.

There are advantages and disadvantages to the pricing approach proposed by the multiplex licensees. The access charges are determined through an objective calculation methodology that results in all access seekers at a multiplex paying the same access charge for the same amount of capacity. The ACCC considers this to be a strong argument in favour of the proposed methodology given the need for it to ensure that access seekers are not disadvantaged for reasons which are anti-competitive. The ACCC also notes that a key underlying objective of the design of the legislative framework is to ensure that all access seekers are treated equally by the multiplex licensee.

The ACCC has considered whether the proposed approach passes some of the risk from the multiplex licensee to the access seekers. This is because the multiplex licensee could receive the same revenue regardless of whether there is only one access seeker or if all of its capacity is in use. Each access seeker faces the possibility that other access seekers would cease to use the capacity, and therefore that their access charge would increase. Should it become the only access seeker using the service, it could be required to pay all of the costs associated with providing the service and the commercial rate of return.

The pricing approach proposed by the undertaking does not, however, remove all risk from the multiplex licensee. As mentioned above, the charge for each access seeker can increase if other access seekers cease to use the service. However, as the increase in the access charge also increases the risk that the remaining broadcasters will also cease to obtain the service, it could in the extreme case lead to all access seekers abandoning the multiplex licensee. This would leave the shareholders in the multiplex licensee with unused infrastructure and no opportunity to recover the costs of investment. As discussed above, this possibility could lead to the multiplex licensee choosing to charge access seekers a lower price than that allowed under the proposed pricing principles.

The ACCC recognises that multiplexes in some capital cities may be more likely to have more excess capacity than others because of the different ratios of multiplex capacity to incumbent broadcasters. For example, each of the multiplexes in Brisbane is expected to have three-ninths of its capacity still available after the allocation of standard access entitlements.[162] This compares to one one-ninth of capacity at the multiplexes in Adelaide and Perth.

This means access seekers in Brisbane are more likely to pay higher access charges to cover unallocated capacity than access seekers in Adelaide and Perth. On the other hand, access seekers at these multiplexes receive the benefit of having greater access to excess capacity. This may result in access seekers being able to obtain excess capacity without the need to bid at an auction. The ACCC notes that the CBAA submitted that shortage of capacity is an issue and that the community would find it difficult, if not

[162] More information on the expected availability of excess capacity is available in the table on page 18.

impossible, to compete with commercial broadcasters in an auction process.[163] Furthermore, not having to bid at an auction reduces the cost associated with obtaining additional capacity, and therefore encourages access seekers to take up more capacity. This in turn reduces the problem of access seekers needing to pay for unused capacity at their multiplex.

In summary, the ACCC considers it is fair and reasonable for the undertakings to partly determine access charges according to the total amount of capacity allocated by the multiplex licensee.

Adjusting the WACC to reflect the risk to the multiplex licensee

The ACCC noted in its draft decision that the passing of some risk from multiplex licensees to access seekers, as described above, should be borne in mind when establishing an appropriate WACC.[164] In simple terms, any matter that lowers the risk for the multiplex licensee should also lower the return on investment in may earn (i.e. the WACC). The CBAA argued that because the ACCC noted that the pricing methodology reduces the risk for the multiplex licensee, the ACCC needed to modify the undertaking to lower the WACC. [165]

This is not the case. The pricing principles do not specify a specific figure for the WACC. Instead, the undertaking provides that the multiplex licensee should adopt a WACC figure that is commensurate with the weighted average cost of capital of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business.[166] Any matter that has the effect of reducing the risk faced by the multiplex licensee—in this case, its proposed methodology for allocating costs—would therefore result in a corresponding decline in the normal commercial rate of return.

5.4.7 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;
- increases in the cost incurred by the multiplex licensee;

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163 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 2

164 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 37

165 CBAA submission, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, response to the ACCC draft decision, January 2008, p. 5

166 Subclause 3.3(c)(i) of Schedule 2 of the Access Agreement

- 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 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.[167] 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 ACCC agrees that it is reasonable for the access charges to be reviewed in order to ensure they reflect changes in the underlying costs of providing the service. However, on the basis of arguments put forward by the CBAA,[168] the ACCC draft decision stated that the provisions in the undertakings regarding reviews of the access charges were not fair and reasonable.[169]

Firstly, the undertakings currently provide for the multiplex licensee to review charges if there have been cost increases, but not cost decreases. The ACCC's preliminary view was that the undertakings should not be accepted unless there was scope for reviews of the access charges based on changes in costs generally, including cost decreases.[170] The ACCC has not changed its views on this matter.

Secondly, the ACCC's draft decision proposed that the undertakings not be accepted unless access seekers also had the right to trigger a review of access charges.[171] The draft decision suggested that this right be subject to some limitation, and suggested that it would be reasonable if the provisions could only be used if it has been 12 months since the previous review. The reason for this view was that the multiplex licensee would not be expected to 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 in the multiplex licensee and are therefore not recipients of the compensation through higher returns on their share of the licensee.

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167 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 13

168 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 11

169 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, pp. 38-40

170 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 39

171 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 40

CRA submitted that there is no tangible benefit in enabling access seekers to trigger reviews of the access charges.[172] In particular, CRA stated that it had significant concerns about the potential for certain access seekers to engage in 'regulatory gaming' as a means of reducing the level of access charges that are payable. However, the CRA also said that it would not necessarily object if the ACCC required the undertakings to include a modified price review mechanism as set out in the revised undertaking provided as part of the CRA submission.[173]

The ACCC welcomed CRA providing a revised undertaking with modifications to address the ACCC's concerns about the absence of a mechanism to allow access seekers to trigger a review of the access charges. However, the new provisions suggested by CRA include a number of restrictions on when the access seekers can trigger a review. One restriction—that only the access seeker that seeks the price review is given underlying cost information and may participate in the review—was proposed to be removed following an addition submission from CRA on 23 February 2009.[174] The remaining restrictions are explored below.

- *The access seeker must provide an estimate of the charges it believes should apply and supporting reasons*[175]

The ACCC does not consider this requirement to be reasonable. The need for access seekers to trigger a price review is to ensure that the multiplex licensee cannot ignore falling costs of providing the service over time. An access seeker may still have a valid concern that it is time for a review, even if it does not have information showing that costs are declining, let alone all the information necessary for calculating specific access charges. In any matter generally, a party can make a valid request for a review even if it does not have a view as to what the outcome of the review should be.

The ACCC would be satisfied if the requirement for the access seeker to provide an estimate of charges were deleted from the undertakings.

- *It must have been at least two years since the last review*[176]

The ACCC considers this requirement to be reasonable. The draft decision suggested a period of 12 months, but the ACCC is prepared to accept CRA's proposal for two years.

As mentioned above, the provision for access seekers to trigger price reviews is to protect against the possible but unlikely situation whereby costs are falling over time

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172 CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 7

173 Ibid

174 CRA, *Digital radio access undertaking: further issues*, 23 February 2009

175 Subclause 5.3(c) of Schedule 2 of the revised Access Agreement

176 Subclause 5.3(d)(i) of Schedule 2 of the revised Access Agreement

and the multiplex licensee refuses to review the access charges. It was not to give access seekers the same rights to review the access charges as the provider of the service. It is therefore reasonable for access seekers to not have the ability to trigger price reviews at the same or possibly greater frequency that what is likely to occur based on decisions by the multiplex licensees themselves. The ACCC considers that the multiplex licensees are likely to review prices every year, which means the suggestion of enabling access seekers to trigger a review after 2 years appears reasonable. This provision may also mean access seekers need to be selective about when to use the mechanism.

- *The multiplex licensee must consider that the request was made in good faith*[177]

The ACCC does not consider this requirement to be reasonable. This suggested provision obviously relates directly to CRA's concerns that certain access seekers will engage in regulatory gaming. The ACCC does not consider that the ability to trigger a review of access charges provides access seekers with an opportunity to game the system. At most, this ability would only result in a price review occurring every two years. If it has been two years since the last review, it is not unreasonable for the multiplex licensee to investigate the underlying costs and determine new charges.

Further, the ACCC does not consider that the multiplex licensee should be able to exercise what is effectively a subjective "veto" power in relation to whether requests are or are not made in good faith.

- *Only one access seeker can use dispute resolution in relation to the access charges*

Schedule 3 of the Access Agreement provides for a mechanism to resolve any dispute that may arise between the multiplex licensee and an access seeker. However, CRA's revised undertaking proposes that only one access seeker can use the general dispute resolution mechanism in relation to a dispute over the access charges arising from a price review ('the First-In Access Seeker'). [178]

The ACCC does not consider this limitation to be reasonable.

Once again, this suggested provision relates to CRA's concerns about regulatory gaming. The ACCC does not consider these concerns are valid. The ACCC notes that most forms of regulatory gaming occur when a party stands to benefit from the uncertainty or delay associated with an appeal or request for review. Digital radio access seekers do not benefit from either of these outcomes.

Access seekers would only invoke the dispute resolution mechanism if they believe the outcome would be a reduction in access charges, but that could only occur if the access charges are above the level stipulated by the pricing methodology. Furthermore, taking a matter to expert determination involves costs associated with both paying for the

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[177] Subclause 5.3(d)(iii)(A) of Schedule 2 of the revised Access Agreement

[178] Subclauses 5.2(h) and 5.3(j) of Schedule 2 of the revised Access Agreement

expert and preparing arguments. Access seekers will not be willing to pay these expenses if there is little chance of the access charges being revised downwards.

Furthermore, the restriction suggested by CRA may actually lead to the outcome it is meant to avoid. This is because it may create the incentive for access seekers to invoke the dispute resolution mechanism to ensure that it can participate in the process, rather than having another access seeker get in first.

The ACCC also has concerns that this suggested restriction lends itself to potential gaming by the multiplex licensee. It would be possible for the multiplex licensee to arrange for one of its shareholders to invoke the dispute resolution mechanism on a non-genuine basis, thereby locking other access seekers with genuine concerns out of the process.

Furthermore, the ACCC considers it unreasonable that clause 5.4 specifically excludes bringing a dispute under the Dispute Resolution Procedures 'other than in accordance with clauses 5.2 or 5.3' 'unless agreed otherwise'. Subclauses 5.2(h) and 5.3(j) provide that a single access seeker is eligible to invoke the Dispute Resolution Procedures in relation to fixed recurring charges notified by the multiplex licensee (under subclauses 5.2(f) and 5.3(h)). As outlined above, the ACCC does not agree with the single access seeker approach and therefore clause 5.4 should be deleted and any access seeker entitled to notify a dispute under the general Dispute Resolution Procedures in Schedule 3.

In summary, the ACCC considers that the undertakings could be considered fair and reasonable if:

- there is scope for reviews of the access charges based on changes in costs generally, including cost decreases, and

- access seekers were able to trigger a review of the access charges if there had not been one for two years. The process for such a review should be the same as if it had been triggered by the multiplex licensee

and that other limitations set out in CRA's revised undertaking are not included.

5.4.8 Access to information to verify access charges

As discussed earlier, the undertakings set out pricing principles but do not specify actual prices. The ACCC's draft decision stated the undertakings could not be considered as fair and reasonable without some mechanism by which the access charges can be verified as being consistent with the pricing methodology. It said that 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.[179]

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[179] ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 38

CRA submitted that it had previously advised that it would provide indicative prices once its downstream supply arrangements were finalised and all the costs associated with the supply of digital radio multiplexing services are known.[180] It argued that given that there are already sufficient incentives on the multiplex licensees to ensure that their costs are efficiently incurred, the provision of indicative prices would be sufficient, in itself for access seekers.

The ACCC does not consider that any of the CRA's arguments are justification for the undertakings to not include a mechanism to verify access charges. In particular:

- CRA has not provided any prices as part of the consultation process, despite a request from the ACCC to do so.

- The prices that CRA states that it will provide will be indicative only and not hold any real significance.

- Over time there may be changes in the underlying costs of providing the service, the number of access seekers and/or the capacity allocated, and therefore the access charges. In the future, the fact that CRA provided indicative prices in the past will be of little benefit to access seekers.

Despite its arguments, the revised Access Agreement provided by CRA as part of its submission in response to the ACCC draft decision includes provisions that are designed to address the ACCC's concerns. The suggested provisions would require the multiplex licensee to provide such data that it considers is reasonably necessary to verify that the access charges are consistent with the pricing principles. However, there are limitations:

- it only needs to provide this information as part of a price review, but not with regards to the initial price list that the multiplex licensee will provide to access seekers at the commencement of the Access Agreement; [181] and

- if the price review was initiated by an access seeker, the multiplex licensee only needs to provide this information to the access seeker that triggered the review.[182]

The ACCC does not consider these limitations to be fair and reasonable. Accordingly, the undertaking could only be accepted if there are provisions allowing all access seekers to be provided with information to verify that the access charges are consistent with the pricing principles. This information should be provided when the access charges are introduced by the multiplex licensee or reviewed (regardless of whether the review was initiated by the multiplex licensee or access seekers).

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[180] CRA, *Digital radio access undertaking: Submission in response to the ACCC's draft decision dated 18 December 2008*, 23 January 2009, p. 8

[181] Subclauses 5.1, 5.2(c)(iii) and 5.3(e)(C) of Schedule 2 of the revised Access Agreement

[182] Subclauses 5.3(e) of Schedule 2 of the revised Access Agreement

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

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 section 5.4.2, the ACCC does not consider the pricing methodology is fair and reasonable without a mechanism to ensure that the multiplex licensee could not recover more than its efficient costs in access charges. It would be satisfied if the undertakings included provisions that clarified that the multiplex licensee could not recover more than its efficient costs, and provided some guidance as to what costs could be considered to be efficient. The ACCC would be satisfied with Schedule 2 of the revised Access Agreement if clauses 3.1, 3.2 and 3.3 of the revised pricing principles were amended to change the word 'costs' to 'efficient costs' in paragraphs 3.3(a)(i) and 3.3(b)(i).

As discussed in section 5.4.7, the ACCC considers that the undertakings could not be considered fair and reasonable unless:

- there is scope for reviews of the access charges based on changes in costs generally, including cost decreases, and
- access seekers were able to trigger a review of the access charges if there had not been one for two years. The process for such a review should be the same as if it had been triggered by the multiplex licensee.

As discussed in section 5.4.8, the ACCC considers that the undertaking could only be accepted if there were provisions allowing all access seekers to be provided with information to verify the access charges are consistent with the pricing principles. This information should be provided when the access charges are introduced by the multiplex licensee or reviewed (regardless of whether the review was initiated by the multiplex licensee or access seekers).

The ACCC also considers that it is unreasonable to limit dispute resolution to the First-In Access Seeker and 'in accordance with 5.2 and 5.3' as contemplated by clause 5.4. Therefore, the ACCC would be satisfied if references to 'First-In Access Seeker'; clauses 5.2(h); 5.3(j); 5.3(d)(C); and 5.4 be deleted.

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

In assessing whether to accept an undertaking, the ACCC must consider whether it includes an obligation on the licensee to not hinder access to services.[183]

[183] Subrule 5(1)(e) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

The undertakings should include an obligation to not hinder access to services. However, the explanatory statement for the Decision-Making Criteria states that the ACCC should not apply this requirement unreasonably.[184] It provides an example, stating that the multiplex licensee may require access seekers to be creditworthy or technically capable of providing a content stream.

5.5.1 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 phrase '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.[185]

After not receiving any submissions on this issue, the ACCC concludes that the undertaking satisfies the requirement in the Decision-Making Criteria.

5.5.2 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, according to the multiplex licensee, it does not meet the security requirements. 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 CBAA submission in response to the ACCC discussion paper argued 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.[186]

In its draft decision, the ACCC stated that it was reasonable to have appropriate financial security provisions applying to all access seekers.[187] It also stated that it does not consider the financial security provisions in the undertaking provide the multiplex licensees with an opportunity to hinder access inappropriately.

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184 ACCC, *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008— Explanatory Statement*, p. 7

185 Paragraph 5(1)(e) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*.

186 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services*, submission in response to the ACCC discussion paper, November 2008, p. 3

187 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 42

The CBAA responded to the draft decision by claiming that the ACCC has failed to give adequate weight to the fact that community broadcasters are not for profit enterprises.[188] It also argued that the need to amend this aspect of the Access Agreement is even more pressing if the ACCC does not adopt CBAA's recommendation that the definition of 'Access Seeker' needs to exclude the digital community radio broadcasting representative company.

While the ACCC appreciates that community broadcasters are very different entities to commercial broadcasters, the multiplex licensee is a commercial operator and is reasonable entitled to seek a degree of surety over credit. In fact, this right is specifically allowed for in the explanatory statement for the Decision-Making Criteria.[189] The ACCC also appreciates that such terms may be necessary to protect the multiplex licensees' interest in being paid for its services. However, the ACCC is concerned that such terms also have the potential to delay or frustrate an access seeker's ability to acquire access to its access entitlement.

The ACCC has reviewed the submissions of the parties and considers that fair and reasonable terms of access would balance these considerations and would be satisfied if additional amendments were made to Clause 14 and Condition 3 of Attachment A of the Access Agreement to address these considerations.

The ACCC considers that the multiplex licensee should not as a matter of course require a financial security to be given. Rather, in the ACCC's view, these steps should only be taken when, on an objective basis, they can be considered necessary to protect the legitimate business interests of the multiplex licensee. The ACCC is satisfied that such an assessment can occur when the access seeker first acquires services from the multiplex licensee, and hence does not have a credit history with the multiplex licensee, or on the occurrence of a subsequent event that could give rise to genuine concerns around the access seeker's ability to pay its debts.

When balancing the interests of the multiplex licensee and access seekers, the ACCC also considers that an access seeker should be able to request a reduction in security where the access seeker can demonstrate an improvement in the creditworthiness of the access seeker or can demonstrate that there has been a material change in the circumstances that gave rise to the security. The ACCC further considers that the access provider should treat such a request in good faith and not withhold its agreement to changes in security arrangements unreasonably.

Therefore, the ACCC would be satisfied if amendments were made to Clause 14 and Condition 3 of Attachment A of the Access Agreement which balances the interests of both the multiplex licensees and the access seekers. The ACCC has suggested changes in the proposed modified undertaking that are more consistent with the model non-price terms and conditions the ACCC released in November 2008 under Part XIC of the *Trade Practices Act.*[190]

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188 CBAA, *Assessment of Access Undertakings in relation to digital radio multiplex transmission services,* submission in response to the ACCC draft decision paper, January 2008, p. 10

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

190 ACCC, *Model Non-Price Terms and Conditions Determination 2008*

As discussed in section 5.3.6, the ACCC considers it reasonable for the representative company to be considered as an access seeker. While the representative company is defined as the access seeker and therefore must undergo a creditworthiness check, the multiplex licensee will ultimately be assessing the creditworthiness of the shareholders in the multiplex licensee.

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

The ACCC is satisfied that the undertakings include an appropriate obligation to not hinder access to services.

However the ACCC notes that amendments to Clause 14 and Condition 3 of Attachment A of the Access Agreement should be made which balances the interests of both the multiplex licensees and the access seekers.

5.6 Assessment of whether the undertakings provide for a reasonable dispute resolution mechanism

In considering whether to accept an undertaking, the ACCC must consider whether the terms and conditions of access provide for a reasonable dispute resolution mechanism.[191] In that regard, the ACCC is required to 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.[192]

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.[193] 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.

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191 Subrule 5(1)(f) of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

192 ACCC, *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008— Explanatory Statement*, p. 7

193 ACCC, *Undertakings in relation to digital radio multiplex transmission services: ACCC discussion paper*, October 2008, pp. 37-38

In its response to the ACCC discussion paper, the CRA insisted that the functions and roles of the expert in the expert determination process were identical to those of an arbitrator.[194]

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.[195]

The ACCC considers the expert determination process specified in the undertaking would facilitate the fair, timely and efficient resolution of any disputes that occur.[196] It also considers that should any outcome of the dispute resolution mechanism provide evidence that the multiplex licensee was in breach of its obligations under its undertaking or the *Radiocommunications Act*, the ACCC may take enforcement measures as appropriate under sections 118NZ and 118P of the *Radiocommunications Act*. Therefore, the undertakings provide for a reasonable dispute resolution mechanism.

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194 CRA, *Digital radio access undertaking: Submission in response to the ACCC discussion paper dated 23 October 2008*, 21 November 2008, p. 15

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

196 ACCC, *Assessment of undertakings in relation to digital radio multiplex transmission services: Draft decision*, December 2008, p. 44

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

The ACCC is satisfied that the undertakings provide for a reasonable dispute resolution mechanism.

6. Final decision on the digital radio access undertakings

6.1 Final decision

The analysis in the preceding chapters leads the ACCC to make the following decision:

- the ACCC is not satisfied that the undertakings comply with Division 4B of Part 3.3 of the *Radiocommunications Act*
- subject to its findings regarding the reasonableness of the access terms and conditions, and the reasonableness and fairness of the pricing methodology in the undertakings, the ACCC is otherwise satisfied that the undertakings do not unduly restrict competition
- 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, and
- the ACCC is satisfied that the undertakings provide for a reasonable dispute resolution mechanism.

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

- reject the undertakings under subsection 118NF(2)(b) of the *Radiocommunications Act*, and
- begin consultation on a notice that the ACCC intends to provide to the multiplex licensees pursuant to subsection 118NF(5). The proposed notice would determine that the undertaking in the notice is the undertaking in relation to the licence. The undertaking in the proposed notice would reflect the changes that the ACCC considers need to be made to the submitted undertaking in order for it to meet the requirements under the Decision-Making Criteria.

6.2 ACCC specific concerns with the undertakings

The ACCC's final decision to not accept the undertaking was based on the following concerns:

- provisions that appear to contemplate the multiplex licensee varying the Access Agreement otherwise than in accordance with the *Radiocommunications Act*
- provisions relating to consultation on excess capacity and the allocation of capacity to incumbent 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 a multiplex licensee and an access seeker to opt out of variations to undertakings that have been accepted by the ACCC

- the definition of the access seeker does not specifically include individual digital community broadcasters, nor acknowledge the limitations in the role of the representative company

- provisions that state that it is a community broadcaster nominated by the representative company that should acknowledge its responsibility for certain matters, rather than the representative company itself

- the absence of provisions that provide access seekers with the right to terminate the Access Agreement for convenience or change their allocated capacity

- the absence of any mechanism to ensure that the multiplex licensee could not recover more than the efficient costs of providing the service through its access charges

- the absence of any mechanism that enables access seekers to trigger a review of the access charges, nor for reviews to be instigated because of changes in costs generally rather than just cost increases

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

The following section discusses these concerns and what changes would be necessary for the undertakings to satisfy the Decision-Making Criteria.

Changes to provisions for consistency with the Act

Sections 5.1.1, 5.1.2 and 5.1.3 of this final decision discussed the ACCC's view that some provisions of the undertaking do not comply with Division 4B of Part 3.3 of the *Radiocommunications Act*.

Section 5.1.1 discussed certain terms included in clause 4.1 in the Access Undertaking and subclause 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 subclause 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 as required by legislation. Both of these suggested meanings are not in full compliance with Division 4B of Part 3.3 of the *Radiocommunications Act*. The ACCC would be satisfied if the words 'or otherwise' were deleted from clause 4.1 in the Access Undertaking, and the words 'and accepted by the ACCC under section 118NH of the *Radiocommunications Act*' were inserted at the end of subclause 23.9(a) of the Access Agreement.

Section 5.1.2 discussed the ACCC's view that the undertaking's provisions for consultation on excess capacity are not consistent with its obligations under the

Radiocommunications Act. It would be satisfied if clause 7.4 of the Access Agreement was changed to reflect s118NT of the *Radiocommunications Act* and provide that:

- within 90 days of the digital radio start up day, the multiplex licensee must ascertain the initial level of demand for access to excess capacity;[197] and

- at any time after the 12 month period beginning on the digital radio start up day, the multiplex licensee may ascertain the subsequent level of demand for access to excess capacity.[198]

Section 5.1.3 discussed the undertaking's terms relating to the allocation of capacity to incumbent commercial broadcasters. The ACCC considers that subclause 6.3(b) of the Access Agreement does not comply with Division 4B of Part 3.3. It considers 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 that the ACCC would be satisfied if the words 'made available by the Multiplex Licensee to Incumbent Commercial Broadcasters' were deleted from subclause 6.3(b) of the Access Agreement.

Changes to provisions relating to variation

Section 5.3.1 of this decision discussed the ACCC's concerns with provisions in the undertaking that refer to variation.

Firstly, it is considered 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 the 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 ACCC would be satisfied if the following changes were made:

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

- the words 'and accepted by the ACCC under 118NH of the *Radiocommunications Act*' were inserted at the end of subclause 23.9(a) in the Access Agreement, and

- the words 'unless otherwise agreed between the Parties' were deleted from subclause 23.9(b) from the Access Agreement.

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[197] Subsection 118NT(2), *Radiocommunications Act*

[198] Subsection 118NT(3), *Radiocommunications Act*

Changes in the definition of access seeker

Section 5.3.6 of this decision discussed the ACCC's concerns with the existing definition of access seeker in the Access Agreement. The ACCC would be satisfied if the definition of 'access seeker' was changed to:

- only refer to the representative company where the representative company is exercising powers specified in its constitution or the powers referred to in paragraph 9C(1)(k) of the *Radiocommunications Act*, and
- include a digital community broadcaster.

The ACCC also considers it reasonable to change the obligation to enter into an Access Agreement[199] to reflect this definitional change.

This change will also need to be reflected in:

- the definitions of "Access Seeker" and "Representative Company" in clause 1.1 of the Access Undertaking;
- subclause 3.2(b)(i) of the Access Undertaking;
- subclause 6.4(e)(i) of the Access Agreement;
- subclause 6.4.(f) of the Access Agreement;
- Schedule 1 – Definitions of the Access Agreement; and
- clause 1 of Attachment A—Conditions Precedent of the Access Agreement.

Changes to allow the representative company to outsource transmission and management of spectrum

Section 5.3.7 of this decision noted that the Access Agreement provides commercial broadcasters (in subclause 6.3(h)) and a community broadcaster nominated by the representative company (in subclause 6.4(e)) with the right to outsource transmission services and the management of digital spectrum to third parties. The ACCC also considers that subclause 6.4(e) should also be amended to extend this right to the representative company.

Changes to acknowledge who is responsible for the allocation of multiplex capacity for community broadcasters.

Section 5.3.8 of this decision noted that the ACCC's considers that both the representative company and individual community broadcasters can be considered access seekers in the undertakings.

Accordingly, subclause 6.4(f) should be amended to ensure that the both the community broadcasters and the representative company (as the access seeker)

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[199] Subclause 3.2(b) of the Access Agreement

acknowledge who is responsible for the allocation of multiplex capacity for community broadcasters.

Changes in the operation of clause 12 – Billing Issues

Section 5.3.9 of this decision noted that the ACCC considers that it is appropriate to restrict the operation of clause 12 of the Access Agreement to an Incumbent Commercial Broadcaster, a Digital Community Broadcaster and a Restricted Datacaster and that it was inappropriate to include the representative company.

The ACCC therefore considers it appropriate to incorporate a new clause 12.1 to expressly state the operation of clause 12 and amend current subclause 12.2(a) of the Access Agreement to allow access seekers to nominate in writing an authorised representative to receive invoices on their behalf.

Changes to enable access seekers to cease to obtain multiplex services for convenience or change their allocated capacity

Section 5.3.10 of this decision discussed the lack of a mechanism for access seekers to cease to obtain multiplex services for convenience, or to change their allocated capacity within the limitations imposed by the *Radiocommunications Act*. The ACCC would be satisfied if the undertaking was amended to include such provisions. The ACCC considers that that a notice period of 30 days is required for notifications by the representative company and reasonable for notifications by commercial broadcasters.

Changes to the definition of "Force Majeure Event"

Section 5.3.11 of this decision noted that the ACCC considers that the current definition of a Force Majeure Event in Schedule 1 of the Access Agreement is too broad. The ACCC would be satisfied if the words 'the change or introduction of any law or regulation or an act or omission of any Regulator' were deleted from the definition of a Force Majeure Event.

Changes to introduce a mechanism to ensure costs being recovered are efficient costs

Section 5.4.2 of this decision discussed the lack of any mechanism to ensure that the multiplex licensee cannot recover more than its efficient costs through access charges. The ACCC would be satisfied if the undertaking included provisions that clarified that the multiplex licensee could not recover more than its efficient costs, and provided some guidance as to what costs could be considered to be efficient. The ACCC would be satisfied with clauses 3.1, 3.2 and 3.3 of the revised pricing principles in Schedule 2 of CRA's revised Access Agreement if they were amended to change the word 'costs' to 'efficient costs' in paragraphs 3.3(a)(i) and 3.3(b)(i).

Changes to provisions for review of standard charges

Section 5.4.7 of this decision discussed the ACCC's concerns with the provisions regarding the review of access charges. The ACCC considers that the undertakings could not be considered fair and reasonable, unless:

- there is scope for reviews of the access charges based on changes in costs generally, including cost decreases, and

- access seekers were able to trigger a review of access charges if there had not been one for two years. The process for such a review should be the same as if it had been triggered by the multiplex licensee.

Changes to require the provision of information to verify charges

Section 5.4.8 of this final decision discusses the ACCC's concerns that there is no mechanism that allows access seekers to verify that the prices charged for access to the service are consistent with the pricing principles in Schedule 2 of the Access Agreement. The ACCC considers that the undertaking could only be accepted if all access seekers were provided with information to verify that the access charges are consistent with the pricing principles, with this information to be provided when the access charges are introduced by the multiplex licensee or reviewed (regardless of whether the review was initiated by the multiplex licensee or access seekers).

Changes to provisions regarding financial security provisions

As discussed in section 5.5.2, the ACCC considers that amendments to the financial security provisions in Clause 14 and Condition 3 of Attachment A of the Access Agreement are required to balance the interests of both the multiplex licensees and the access seekers. The ACCC has suggested changes in the proposed modified undertaking that are more consistent with the model non-price terms and conditions the ACCC released in November 2008 under Part XIC of the *Trade Practices Act*.[200]

6.3 Notice to multiplex licensees pursuant to subsection 118NF(5)

6.3.1 ACCC options following decision to reject the undertakings

Legislation provides the ACCC with options should it determine that the undertakings cannot be accepted in their current form. The ACCC can:

- give the licensees a written notice advising that it will accept the undertakings if the licensees make such alterations to the undertakings as are specified in the notice (subsection 118NF(4)), or

- give the licensees a written notice determining that undertakings in the terms specified in the determination are the access undertakings in relation to the licences (subsection 118NF(5)). This would give the modified undertaking the same status as an undertaking that had been accepted by the ACCC. The ACCC is required to consult on the notice before it is given to the multiplex licensees.[201]

The ACCC has decided to take the option provided by subsection 118NF(5). This decision is in contrast to the ACCC's draft decision, which was to provide a notice to the multiplex licensees under subsection 118NF(4).

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[200] ACCC, *Model Non-Price Terms and Conditions Determination 2008*

[201] Subsection 118NF(6)

Both options result in the ACCC specifying changes to the submitted undertakings that it considers are necessary for acceptance. However, the main reason for the change of approach taken in this decision is that it provides for additional consultation before the exact provisions of the undertakings are finalised. The ACCC considers this further consultation is important because the ACCC's views on some issues changed as a result of submissions in response to the draft decision, and parties have not had an opportunity to comment on the specific changes that the ACCC considers is necessary to address its concerns. For example, the ACCC considers it is necessary for parties to have an opportunity to comment on the ACCC's proposed notice periods in relation to access seekers requesting changes to their allocated capacity (see section 5.3.10 of this decision).

6.3.2 Consultation on the proposed notice and modified undertaking

The notice that the ACCC proposes to give to the multiplex licensees under subsection 118NF(5) is at Appendix A to this final decision.

The notice includes an undertaking that the ACCC proposes will become the undertakings in relation to the eight multiplex licensees. The proposed undertaking represents the changes that the ACCC considers need to be made to the undertakings submitted by the multiplex licensees, as summarised in section 6 of this final decision.

All submissions on the proposed notice should be forwarded by email by **Friday 3 April 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 David Cranston, Assistant Director, Convergence & Coordination Team, on (03) 9290 1971 or david.cranston@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).

Confidentiality claims on submissions

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

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.[202]

[202] 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