
Digital radio access undertaking Submission in response to the ACCC's final decision dated 19 March 2009

Commercial Radio Australia

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1 Introduction and Statement of Interest

Commercial Radio Australia Limited (**CRA**) is the peak industry body representing commercial radio broadcasting stations in Australia. CRA has 260 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

CRA appreciates the opportunity to comment on the ACCC's final decision dated 19 March 2009 (**Final Decision**).

This submission has been prepared by CRA on behalf of the Eligible Joint Venture Companies (**EJVCs**) that have lodged digital radio access undertakings with the ACCC.

2 Executive Summary

CRA strongly supports the ACCC's decision to:

- propose a final digital radio access undertaking that is heavily based on the original access undertakings lodged by the EJVCs; and
- adopt many of the amendments to the access undertaking that have been proposed by CRA, on behalf of the EJVCs, during the consultation process.

In particular, CRA supports the ACCC's decision:

- that EJVCs should be able to earn a normal commercial rate of return on their investment;
- to allow a 2 year period between price reviews initiated by an access seeker;
- that all access seekers should be subject to the financial security provisions of the access agreement; and
- that the access agreement should not:
 - allow broadcasters to 'opt out' of any back-up transmission sites; or
 - set the terms and conditions upon which any electronic program guide (**EPG**) is to be provided.

Notwithstanding CRA's broad support for the Final Decision, CRA has some significant concerns about the Final Decision, including:

- the definition of "access seeker", which now includes incumbent commercial broadcasters, digital community broadcasters and the digital community representative company (for nomination purposes);
- the ACCC's amendments to the financial security requirements, which prevent an EJVC from drawing upon a financial security until an invoice has been outstanding for over 90 days; and
- the 30 day notice requirement for access seekers to terminate the access agreement or reduce the level of multiplex capacity being acquired.

In this submission, CRA responds to each of these issues.

3 Definition of an Access Seeker

3.1 The ACCC's interpretation of the Radiocommunications Act is overly restrictive

CRA disagrees with the ACCC's proposed definition of an 'access seeker', which includes an incumbent commercial broadcaster, digital community broadcasters and the Digital Community Radio Broadcasting Representative Company (**Representative Company**) (for nomination purposes).

In doing so, the ACCC has rejected the proposed definition of an 'access seeker' in the original access undertaking which did not include digital community broadcasters and specified the Representative Company as the 'access seeker' for the purposes of the digital community radio sector.¹

In particular, the ACCC has stated that²:

"... 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."

CRA considers that the ACCC's interpretation of the functions of the Representative Company under the Radiocommunications Act are overly restrictive and impractical.

First, CRA does not agree with the ACCC's view that the role of the Representative Company, as set out in the Radiocommunications Act and its company constitution, is limited in the manner suggested by the ACCC.

In effect, the ACCC's interpretation means that the function of the Representative Company will be limited to allocating multiplex capacity to the digital community radio sector and notifying the EJVC about those allocations.

However, the role of the Representative Company under the Radiocommunications Act is wider than simply notifying an EJVC of capacity nominations for the digital community radio sector – it also extends to undertaking activities that are incidental or related to this purpose.

Section 9C(1)(k)(ii) of the Radiocommunications Act provides for the constitution of the Representative Company to make provision for the Representative Company to exercise *"the powers conferred by this Act"*.

Section 9C(1)(k)(iii) of the Radiocommunications Act, however, goes on to state constitution of the Representative Company should also provide for the Representative Company to carry out *"activities incidental to the purposes mentioned³"* under the Act.

The power of corporations to exercise powers that are 'incidental' to the main purpose enshrined in legislation have been given a wide interpretation by the courts.

Australian courts have adopted the following position (which is based on English law)⁴:

¹ ACCC, Final Decision, section 5.3.6.

² ACCC, Final Decision, page 46.

³ Section 9C(1)(K)(iii).

“... this doctrine ought be reasonably, and not unreasonably, understood and applied; and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires”⁴.

Accordingly, the Radiocommunications Act provides for the Representative Company to carry out its primary responsibilities (i.e. nominating capacity for the digital community radio sector), as well as matters that are incidental or related to this purpose.

For that reason, CRA considers that it would be incidental to the Representative Company’s role as the nominator of multiplex capacity allocations for the digital community sector for the Representative Company to act as the interface through which individual community broadcasters can obtain access to their multiplex capacity allocations.

For example, as the Representative Company is responsible for nominating which digital community broadcasters are to be allocated multiplex capacity, it would be incidental for the Representative Company, following receipt of an invoice from the EJVC, to invoice and procure payment from individual community broadcasters based on those nominations of multiplex capacity that have been made by the Representative Company.

Secondly, CRA does not agree with the ACCC’s interpretation of the Explanatory Memorandum to the digital radio provisions of the Radiocommunications Act, which it has relied upon to support its definition of an ‘access seeker’.

There is nothing in the Explanatory Memorandum that is inconsistent with the definition of ‘access seeker’ that has been proposed in the original access undertaking.

In its Final Decision, the ACCC has stated:⁵

“This view is further supported by the relevant Explanatory Memorandum, 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”.

While the Representative Company may act as the interface between the EJVC and individual community broadcasters for invoicing and payment purposes under the original access undertaking, it will ultimately be individual community broadcasters (as content service providers) that will pay (and will be liable for) the access charges for multiplex capacity.

Accordingly, there is no basis for the ACCC’s assertion that individual community broadcasters will not be liable for access charges to the EJVC. The fact that individual community broadcasters must pay these charges to the EJVC indirectly through the Representative Company does not negate from the fact that individual digital community

⁴ *Civic co-operative permanent building society Ltd v Registrar of co-operative societies and agents (1974) 2 ACTR 49, at page 5.*

⁵ *Attorney-General v Great Eastern Railway Co (1880) 5 App Cas 473 at 478.*

⁶ ACCC, Final Decision, page 46.

broadcasters are ultimately liable for the payment of access charges for multiplex capacity.

3.2 The ACCC's interpretation does not distinguish between access entitlements and mechanism for claiming those entitlements

The ACCC has stated that the definition of an 'access seeker' should be extended to include a digital community broadcaster.

CRA submits that this is not necessary.

It is possible for digital community broadcasters to obtain the benefits associated with holding a standard access entitlement or excess capacity access entitlement without being an 'access seeker' for the purposes of the access agreement.

In making its Final Decision, the ACCC has failed to distinguish between access entitlements that are held by digital community broadcasters and the process through which these access entitlements are claimed (i.e. through the Representative Company).

As the ACCC is aware, the Radiocommunications Act grants digital community broadcasters that are nominated by the Representative Company a standard access entitlement or excess capacity access entitlement.

However, it does not necessarily follow that the holder of that access entitlement needs to be an 'access seeker' for the purposes of the access agreement. Indeed, the benefit of the access entitlement accrues to individual community broadcasters, even where the Representative Company provides the interface for the realisation of those entitlements.

The definition of 'access seeker' proposed in the original access undertaking provides for digital community broadcasters to obtain the benefit of their access entitlements through the Representative Company, while ensuring that EJVCs avoid the costs associated with the implementation of separate access agreements, billing processes and other administrative arrangements with each individual digital community broadcaster.

3.3 Implications from the ACCC's proposed definition of 'access seeker'

Digital community broadcasters have indicated that they will undertake time sharing and time shifting in respect of the reserved two-ninths of multiplex capacity.

CRA is concerned that the ACCC's proposed changes to the definition of 'access seeker' fail to properly consider this important issue.

The time sharing and time shifting of multiplex capacity between individual community broadcasters will have significant implications for EJVCs in the event that they are required to enter into direct contractual relationships with each individual community broadcaster as a consequence of the ACCC's proposed definition of an 'access seeker'.

Unlike the commercial broadcasting sector, which will have a single broadcaster for each one-ninth of multiplex capacity offered as a standard access entitlement, there will be no such limit in the case of the community radio sector, where individual community broadcasters will time share and time shift amongst themselves in respect of the two-ninths of multiplex capacity.

This will result in potentially dozens of community station blocks, with individual digital community broadcasters acquiring multiplex capacity for very small time periods (e.g. a couple of hours each week at disparate times).

The ACCC's proposed definition gives rise to a situation where there is a strong risk that each EJVC will need to enter into separate access agreements with each individual digital community broadcaster that acquires multiplex capacity on a time share basis. The EJVC will also need to issue individual invoices for each time block, regardless of how small it may be (e.g. two hours of multiplex capacity per week).

There is also a risk that it will not be readily possible for the EJVCs to know which digital community broadcaster has been allocated capacity as a consequence of the time sharing arrangements, thereby raising uncertainty about which digital community broadcaster is to be invoiced for particular multiplex capacity allocations.

Given the significance of these implications, CRA considers that it is necessary to discuss these issues in greater detail with the ACCC to ensure that the ACCC understands the implications of its Final Decision on the industry.

4 Financial security

CRA supports the ACCC's decision that financial security requirements should be applicable to all access seekers⁷. As the ACCC has correctly noted, the purpose of this requirement is to ensure that the EJVCs are paid for the provision of multiplex capacity⁸.

However, CRA is concerned that the ACCC's proposed amendments to the financial security requirements raise considerable commercial risks for the EJVCs.

In particular, the ACCC has proposed that clause 14.3 of the access agreement should be amended to limit the ability of the EJVCs to call upon the financial security only where an amount is owing for more than 90 days⁹.

CRA considers that the proposed 90 day timeframe is too long.

While CRA appreciates that financial security should only be required to protect the "legitimate business interests" of the EJVCs, the Final Decision fails to take sufficient account of the fact that the EJVCs operate a wholesale only business and their sole revenue is derived from the supply of multiplex capacity to access seekers.

Therefore, in the event of non-payment by an access seeker for a period of 90 days, it would not necessarily be possible for the EJVCs to recover their costs associated with the supply of multiplex capacity during this period. This is particularly problematic in light of the fact that:

- access seekers are invoiced monthly in arrears;¹⁰ and
- tower site access, which represents one of the largest costs for EJVCs, is paid by EJVCs on a quarterly basis in advance.

CRA submits that there should not be any time period for drawing upon a security deposit – the test should simply be whether the financial security is necessary to protect the legitimate business interests of EJVCs.

⁷ ACCC, Final Decision, page 76.

⁸ ACCC, Final Decision, page 76.

⁹ ACCC, Final Decision, page 77.

¹⁰ Access Agreement, clause 12.2(b).

This is consistent with the ACCC's approach in other industries.

For example, in the ACCC's *Model Non-Price Terms & Conditions Determination 2008 (Model Determination)* for the telecommunications sector, the ACCC does not impose a timing condition in respect of a financial security.

The Model Determination simply provides that¹¹:

"B.3 The Security (including any varied Security) shall only be requested when it is reasonably necessary to protect the legitimate business interests of the access provider and shall be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security shall be calculated by reference to the aggregate value of all Services likely to be provided to the access seeker under this agreement over a reasonable period or the value of amounts invoiced under this agreement but unpaid (excluding any amounts in respect of which there is a current Billing Dispute)."

In light of the above, CRA submits that the financial security requirements should be amended to reflect the ACCC's model terms and conditions for the telecommunications sector.

5 Termination and reduction of multiplex capacity

CRA is concerned that the requirement for an access seeker to provide 30 days written notice of its intention to terminate the agreement or change the amount of multiplex capacity is unreasonable for other access seekers.

As the ACCC is aware, the amount of access charges payable by access seekers will vary depending on:

- the amount of multiplex capacity that is being utilised by all access seekers; and
- the increase or decrease in the number of access seekers on the multiplexer.

The practical effect of the ACCC's proposed amendment is that those remaining access seekers would be required to adjust their payments of access charges virtually immediately in order to respond to the change in the number of access seekers.

CRA submits that this would be unfair for other access seekers on a digital radio multiplex, which would be subject to potential access charge increases on very short notice.

Given the likelihood that access seekers will budget over a longer timeframe (e.g. a financial year), it would be unfair for these access seekers to be given such a short period of notice.

Accordingly, CRA submits that the notice requirement for termination of an access agreement or a reduction in the amount of multiplex capacity being acquired by an access seeker should be 6 months. In CRA's view, this would allow greater certainty for access seekers in respect to the level of charges payable and enable them to budget ahead accordingly.

¹¹ ACCC, Model Determination, section B.3.