



Access undertaking for digital radio multiplex transmission services in the Gold Coast

ACCC Decision

March 2022



Australian Competition and Consumer Commission

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Abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACT	Australian Competition Tribunal
Broadcasting Services Act	<i>Broadcasting Services Act 1992</i>
CCA	<i>Competition and Consumer Act 2010 (CCA)</i>
Decision-Making Criteria	<i>Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018</i>
DRM	Dispute resolution mechanism
DRMT	Digital Radio Multiplex Transmitter
JVC	Joint Venture Company
Procedural Rules	<i>Digital Radio Multiplex Transmitter Licence Procedural Rules 2018</i>
The Act	<i>Radiocommunications Act 1992</i>
WACC	Weighted Average Cost of Capital

Executive Summary

On 3 November 2021 the ACCC received an access undertaking in relation to the commencement of Digital Radio services in the Gold Coast, Queensland.

The proposed undertaking was submitted by Digital Radio Broadcasting Gold Coast Pty Ltd, the Digital Radio Multiplex Transmitter (DRMT) Licensee for the Gold Coast.

The ACCC released a consultation and position paper on the undertaking on 16 November 2021 and requested submissions by 15 December 2021. The ACCC's preliminary position was to accept the undertaking. We received no submissions in response to our consultation and position paper.

The ACCC administers the access regime for digital radio access services under the *Radiocommunications Act 1992* (the Act). The regime allows broadcasters to receive access to digital radio multiplex transmission services on reasonable terms and conditions and ensures DRMT licensees do not discriminate anti-competitively between broadcasters.

The proposed access undertaking for the Gold Coast is substantially similar to previous undertakings accepted by the ACCC for access to DRMT services in capital and regional cities, which we consider have operated effectively.

Our assessment is that the proposed undertaking meets the criteria in the ACCC's *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*.¹

The ACCC's decision is to accept the digital radio access undertaking for the Gold Coast pursuant to section 118NF of the Act.

¹ <https://www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services..>

1. Introduction

On 3 November 2021 the ACCC received an access undertaking in relation to the commencement of Digital Radio services in the Gold Coast, Queensland. The proposed undertaking was submitted by Digital Radio Broadcasting Gold Coast Pty Ltd, the Digital Radio Multiplex Transmitter (DRMT) Licensee for the Gold Coast,² pursuant to section 118ND of the *Radiocommunications Act 1992*.

This paper outlines the ACCC's decision to accept this undertaking and the matters considered in assessing the undertaking. The undertaking comes into force at the time of acceptance by the ACCC.³

1.1. The access regime

The ACCC is responsible for implementing and enforcing the digital radio access regime which is a part of the legislative framework introduced by the Australian Government in 2007 through amendments to the *Radiocommunications Act 1992* (the Act), *Broadcasting Services Act 1992* (BSA) and the *Competition and Consumer Act 2010* (CCA – then known as the *Trade Practices Act 1974*).

The access regime allows broadcasters to receive access to digital radio multiplex transmission services on reasonable terms and conditions and ensures licensees do not discriminate anti-competitively between broadcasters. The access undertaking is assessed against the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*.

Digital radio services commenced in Adelaide, Brisbane, Melbourne, Perth and Sydney in July 2009 after the ACCC accepted an undertaking relating to eight DRMT licenses from five joint venture companies (JVCs) in April 2009. The JVCs represent commercial and community broadcasters and are 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 ACCC accepted access undertakings for Canberra, Darwin and Hobart in March 2019 and for Mandurah in November 2019. Other than Mandurah, the areas serviced by digital radio have multiple access seekers from both the commercial and community radio sectors.

Pursuant to section 102C of the Act, the Australian Communications and Media Authority (ACMA) can only issue a foundation category 1 Digital Radio Multiplex Transmitter (DRMT) licence to an eligible JVC. An eligible JVC is formed if, among other things, paragraph 102C(5)(a) of the Act is met, which requires the JVC to invite each incumbent digital commercial radio broadcasting licensee and the digital community radio broadcasting representative company (if one exists) for the designated BSA radio area⁴ to subscribe for shares in the company.

The JVC represents commercial and community digital radio broadcasters and is responsible for multiplexing together the separate streams of content from individual broadcasters and transmitting a combined stream to end users in each licence area. Ideally, a JVC for each digital radio licence area should be made up of both commercial and

² The relevant licence for this access undertaking is the "Broadcasting – Foundation Category 1 DRMT Licence" issued by the Australian Communications and Media Authority to Digital Radio Broadcasting Gold Coast Pty Ltd on 17/09/2021. This is referred to as the DRMT Licence throughout this decision.

³ The ACCC must accept the access undertaking before the ACMA can declare a digital radio start-up day for the licence area.

⁴ A BSA radio area is also known as a licence area in accordance with the Act. These areas define where a commercial or community digital radio broadcaster, or a service licensed under s40 of the BSA is authorised to operate.

community digital radio broadcasters.⁵ Community broadcasters have chosen not to take up any share in the Gold Coast JVC, in line with their previous decisions to not take up shares in any of the other JVCs.⁶

1.2. The ACCC's consultation process

On 3 November 2021 the ACCC received an access undertaking from Digital Radio Broadcasting Gold Coast Pty Ltd in relation to the commencement of Digital Radio services in the Gold Coast.

The ACCC released a consultation and position paper on the Gold Coast digital radio services access undertaking on 16 November 2021 and requested submissions by 15 December 2021. The ACCC's preliminary position was to accept the undertaking subject to our assessment of submissions received from stakeholders.

The ACCC received no submissions in response to its consultation and position paper.

⁵ Pursuant to sub-section 102C(5)(v) and (vi) of the Act, assuming that the invitation (to hold shares in the JVCs to Community and Commercial broadcasters) were to be accepted by each invitee, the commercial radio broadcasting licensees would hold in aggregate seven-ninths of the shares and community radio broadcasting representative company would hold two-ninths of the shares.

⁶ The current Gold Coast JVC shareholders are Sea FM Gold Coast Pty Ltd, Gold Coast F.M. Pty Ltd and Hot Tomato Australia Pty Ltd.

2. The ACCC's assessment of the access undertaking

Appendix A of this decision outlines the criteria applied by the ACCC in deciding whether to accept access undertakings for digital radio services. The ACCC must apply the criteria and have regard to other relevant matters when deciding to accept an access undertaking or a variation of an access undertaking.

The sections below outline the ACCC's assessment of whether the undertaking meets the requirements in the decision-making criteria.

The ACCC considers that the Gold Coast digital radio access undertaking meets the decision-making criteria we apply in deciding whether to accept access undertakings for digital radio services.

2.1. Compliance with Division 4B of Part 3.3

The ACCC considers that the undertaking complies with Division 4B of Part 3.3 of the Act.⁷ Our reasons for this view include the following:

- The DRMT Licensee provided the access undertaking to the ACCC within 50 days after the issue of their DRMT Licences in compliance with section 118ND of the Act.
- Clause 4.2 of the access agreement complies with section 118NO of the Act by stating that the DRMT Licensee must provide each Digital Broadcaster with access to Multiplex Capacity to which it is entitled as a Standard Access Entitlement. Clause 5.2 also complies with section 118NO of the Act by stating that the DRMT Licensees must provide each digital community broadcaster and incumbent commercial broadcaster with access to the fraction of multiplex capacity to which it may be entitled as an Excess-Capacity Access Entitlement.
- Clause 7.3 of the access agreement complies with section 118NP of the Act by providing that the DRMT Licensee must not discriminate between access seekers to which it provides the multiplex transmission service for the purposes of facilitating the use of the service in relation to:
 - the technical and operational quality of the multiplex transmission service supplied to access seekers
 - the technical and operational quality and timing of the fault detection, handling and rectification supplied to access seekers.
- The terms and conditions in the undertaking in relation to complying with Division 4B of Part 3.3 of the Act are similar to those previously accepted by the ACCC in the 2019 Mandurah digital radio access undertaking.
- The access undertaking and access agreement are consistent with the Procedural Rules.⁸ The measures in the Procedural Rules promote transparency surrounding the operation of the regime and facilitate the disclosure of key information about the access arrangements, including non-compliance.

⁷ A simplified outline of Division 4B of Part 3.3 of the Act as set out in section 118N of the Act are:

- This Division sets out an access regime for digital radio multiplex transmitter licences.
- A digital radio multiplex transmitter licensee is required to comply with access obligations in relation to multiplex capacity under the licence.
- The access obligations facilitate the provision of access to multiplex capacity by content service providers in order that the content service providers can provide content services.

⁸ *Digital Radio Multiplex Transmitter Licences Procedural Rule 2018* was remade on 14 May 2018 and repealed the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008* which was in place before remaking this instrument, see <https://www.legislation.gov.au/Details/F2018L00642>.

2.2. Whether the undertaking unduly restricts competition

For the following reasons, the ACCC considers that the undertaking does not unduly restrict competition in related markets:

- The proposed undertaking does not unreasonably restrict the ability of an access seeker to provide a service or allow the access provider to favour particular access seekers. The undertaking supports equivalent access to DRMT services for both commercial and community broadcasters.
- This is supported by section 7.2 of the access agreement, which provides that the DRMT Licensee must not prevent an access seeker from obtaining access to multiplex transmission service in accordance with the applicable terms of the access agreement.
- Sections 7.3(a) and 7.3(b) of the access agreement provide that the DRMT Licensee must not discriminate between access seekers in relation to technical and operational quality of the service supplied or in relation to fault detection, handling and rectification supplied on the basis that the access seeker is or is not a shareholder of the DRMT Licensee.
- The terms and conditions in the undertaking and access agreement do not restrict competition in related markets and are similar to those accepted by the ACCC in previous digital radio access undertakings. The previous undertakings have not been the subject of disputes and we consider they have operated effectively.

2.3. Reasonable terms and conditions of access

The ACCC considers that the terms and conditions specified in the access undertaking are reasonable. We note:

- Section 2.2 of the access agreement provides that the DRMT Licensee will develop an operational manual in consultation with all access seekers to deal with technical and operational matters that arise in connection with the access agreement, or the supply of the multiplex transmission service.
- Section 7.6 of the access agreement provides that each party is responsible for the safe operation of the systems, equipment and facilities used by that party in connection with the multiplex transmission service. Both parties - the DRMT Licensee and access seeker must take all reasonable steps to ensure that the systems, equipment and facilities used by them in connection with the multiplex transmission service do not:
 - endanger the health or safety of any person
 - damage, threaten, interfere with, degrade or result in the deterioration of the operation or performance of the systems, equipment or facilities.
- Section 14 of the access agreement provides that a party may terminate the agreement by giving the other party 30 days written notice of its intention to do so. Upon termination, the DRMT Licensee must refund any amount pre-paid by the access seeker and/or the access seeker must pay all sums payable to DRMT Licensee under the access agreement up to the date of termination.
- The terms and conditions in the undertaking and access agreement in relation to access are similar to those accepted by the ACCC in previous digital radio access undertakings.

2.4. Fair and reasonable pricing methodology

The ACCC considers that the pricing methodology in the access undertaking is fair and reasonable. We note:

- Schedule 2 of the access agreement clearly sets out the pricing principles applicable to the provision of the multiplex transmission service by the DRMT Licensee and the methodology for determining the standard charges payable by access seekers to the DRMT Licensee for the multiplex transmission service.
- Section 3.1 of Schedule 2 of the access agreement provides that as a general overarching principle, a DRMT Licensee may supply the multiplex transmission service at a price that allows the DRMT Licensee to:
 - recover no more than its efficient costs and
 - earn a normal commercial rate of return on its investment.
- Section 4 of Schedule 2 provides that fixed recurring charges will be levied based on the multiplex capacity allocated to an access seeker, irrespective of whether that capacity is used or not and irrespective of the type of use.
- Section 5 of Schedule 2 provides that as at the effective date,⁹ the DRMT Licensee will provide the access seeker with a price list setting out the fixed recurring charges that are applicable in respect of multiplex capacity allocated to the access seeker and if applicable, the period for which the fixed recurring charges are valid. Section 5.2(a) states that the DRMT Licensee may review the fixed recurring charges payable by access seekers who acquire the multiplex transmission service to ensure consistency with the pricing principles.
- Sub-clause 3.4(c)(iii) of Schedule 2 states that the DRMT Licensee will initially set the weighted average cost of capital (WACC) upon acceptance of the Access Undertaking and then review the WACC for the next financial year and then every 5 years thereafter. Sub-clause 3.4(c)(iv) provides that the DRMT Licensee will determine the WACC on each occasion by having regard to the most up-to-date final regulatory decision or determination issued by the ACCC or AER in respect of the telecommunications, electricity or gas industries in Australia (as at the date the DRMT Licensee conducts its review of the WACC).
- Sub-clause 5.2(h)(iv) of Schedule 2 enables the default 30-day consultation and 30-day implementation period for new charges to be reduced where there is prior agreement to this between the DRMT Licensee and the access seeker(s).
- The terms and conditions in the undertaking and access agreement in relation to access prices and pricing methodologies are similar to those accepted by the ACCC in the 2019 Mandurah digital radio access undertaking.

2.5. The proposed undertaking should not hinder access

The ACCC considers that the undertaking meets the criteria to fulfil an obligation of the DRMT Licensee to not hinder access. This is based on:

- Section 7.2 of the access agreement provides that the DRMT 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.

⁹ Effective date is defined in the proposed access agreement as the date that the access agreement is executed by both parties

- The terms and conditions in the undertaking and access agreement in relation to the obligation on the DRMT Licensee to not hinder access are similar to those accepted by the ACCC in previous digital radio access undertakings.

2.6. Reasonable dispute resolution mechanism

The ACCC considers that the undertaking includes a reasonable dispute resolution mechanism (DRM) and procedures which are set out in the access agreement.

Clause 20 of the access agreement provides that all disputes arising in relation to the access agreement are to be resolved in accordance with the dispute resolution procedures (DRP) except billing disputes which are to be resolved in accordance with section 11 of the access agreement.

Section 11 of the access agreement provides that an access seeker may notify the DRMT Licensee of a billing dispute within 180 days after the date of an invoice. The parties must use their best endeavours to resolve the dispute within 30 days of the date of the notice or such period that may be agreed by the parties. If the parties are unable to resolve the dispute within 30 days, the dispute may be escalated to higher level of management. If the billing dispute is still not resolved, either party may refer the matter for resolution in accordance with the DRP.

The DRP is provided in Schedule 3 of the access agreement. The DRP sets out the terms and conditions in case of a dispute and provides that if the dispute cannot be resolved even after it has been considered at the CEO level, after 10 business days, either party may refer the dispute to mediation. If the parties cannot agree on the selection of a mediator within 5 business days, either party may apply to the president of the Australian Disputes Centre requesting the appointment of an independent mediator. The settlement reached through mediation is final and binding on the parties.

2.7. Other matters that the ACCC may consider

The ACCC's consultation and position paper requested stakeholders to submit, in addition to the six matters listed in the Decision-making criteria, any other matters which the ACCC may consider in relation to the assessment of the proposed undertaking.

The ACCC received no submissions in response to its consultation and position paper and our position to accept the undertaking is unchanged from that paper.

3. ACCC Decision

The ACCC's decision is to accept the digital radio access undertaking for the Gold Coast pursuant to section 118NF of the Act.

Appendix A – Legislative framework and Decision-making criteria

Digital radio legislative framework

The legislative framework for the provision of digital radio services was introduced by the Australian Government in 2007 through the Broadcasting Legislation Amendment (Digital Radio) Act 2007. This Act amended the *Radiocommunications Act 1992* (the Act), the BSA and the CCA (then known as the *Trade Practices Act 1974*).

Digital radio services are intended to operate alongside, rather than replace, existing analog (AM and FM) radio services. There are currently no plans to switch off analog radio services, nor is there any requirement to simulcast both analog and digital radio services.

Digital radio was designed to be introduced in stages, commencing first in metropolitan areas, where new services were considered most likely to be commercially viable, before being rolled out to regional licence areas. The technology currently being used to provide digital radio services in Australia is an advanced form of Digital Audio Broadcasting (DAB) technology known as DAB+.

The Act does not specify the basis on which the ACCC is required to make its decision to accept or reject an undertaking, but it does enable the ACCC to determine relevant decision-making criteria.¹⁰ The ACCC made the decision-making criteria¹¹, as well as the procedural rules¹² in relation to the assessment process on 23 May 2018.¹³ This was done by setting out the criteria the ACCC must apply in deciding whether to accept an access undertaking or a variation of an access undertaking in relation to a digital radio multiplex transmitter licence.

Division 4B of Part 3.3 of the Act sets out an access regime for the DRMT licences. The access regime, which is administered by the ACCC is designed to ensure that eligible broadcasters have access to the multiplex transmission service on reasonable terms and conditions.

The access regime is discussed in further detail below.

General requirements

The Act sets out a range of requirements and procedures, including:

- A DRMT Licensee must, within 50 days after the issue of the licence, give the ACCC a written access undertaking (section 118ND).
- The ACCC may request the DRMT Licensee to provide further information about the access undertaking once the initial access undertaking is lodged with the ACCC, which must be provided within 14 days from the date of the request (section 118NE and the Procedural Rules).
- The undertaking comes into force at the time it is accepted by the ACCC and remains in force while the licence is in force and the undertaking also remains in force if the licence is renewed (section 118NG).
- The ACCC must maintain a register of the undertakings (section 118NK).

¹⁰ Section 118NJ of the Act.

¹¹ *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018*

¹² *Digital Radio Multiplex Transmitter Licences Procedural Rules 2018*

¹³ The ACCC made the decision-making criteria and procedural rule in 2008 which were due to expire in 2018. The ACCC repealed and remade these instruments before their expiry dates ([link](#)).

- DRMT 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 in compliance with the relevant access obligations (section 118PN).
- Enforcement arrangements, including that the ACCC or a person affected may apply to the Federal Court for orders (sections 118P and 118NZ). The ACCC can also apply for injunctions or interim injunctions (sections 118PI and 118PJ).
- A person whose interests are affected by specified decisions by the ACCC relating to these undertakings may apply within 21 days to the Australian Competition Tribunal for a review of that decision (section 118PE).

ACCC procedural rules and decision-making criteria

Procedural Rules

Section 118PO of the Act provides for the ACCC to make rules in relation to the practice and procedure to be followed by the ACCC in performing functions under Division 4B of Part 3.3 of the Act. The ACCC made these Procedural Rules on 23 May 2018. The rules provide details regarding matters such as the format of documents to be given to the ACCC, the ACCC's requests for further information, the treatment of confidentiality claims over information, and matters to be included in the annual reports provided under section 118PN of the Act.

Decision-making criteria

Section 118NJ of the Act provides that the ACCC may by legislative instrument, determine the criteria to be applied by the ACCC in deciding whether to accept access undertakings. The ACCC made these decision-making criteria on 23 May 2018. The ACCC must apply the criteria and have regard to other relevant matters when deciding to accept an access undertaking or a variation of an access undertaking. These are set out in more detail in Section 2.2 below.

ACCC to accept or reject access undertakings

In accordance with section 118NF of the Act, once a DRMT Licensee submits an access undertaking to the ACCC, the ACCC must either accept or reject the undertaking. Before accepting, the ACCC must publish a copy of the access undertaking on the ACCC's website and invite members of the public to make submissions to the ACCC within a specified period. The ACCC must consider any submissions received within this period.

If the ACCC accepts the access undertaking, the ACCC must give the DRMT Licensee a written notice stating that the access undertaking has been accepted. Section 8AC of the BSA states that the ACCC must accept the access undertaking before the ACMA can declare a digital radio start-up day for the licence area.

Access obligations

Section 118NL of the Act sets out the standard access obligations. Section 118NM sets out the excess-capacity access obligations. Both sections outline that DRMT Licensees must provide access to specified fractions of multiplex capacity that satisfy both standard access entitlements and excess-capacity access entitlements, to particular content service providers. DRMT Licensees must also provide access to services that facilitate the use of that fraction of multiplex capacity for the purpose of providing content services.

DRMT 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 supplied to the access seekers.¹⁴

Standard access entitlements and excess-capacity entitlements

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

Sections 118NQ and 118NR of the Act sets out standard access entitlements for incumbent commercial and community broadcasters. 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.

Standard access entitlements for both commercial broadcasters and community broadcasters cannot be transferred to other broadcasters.¹⁵ 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 of the Act.

Capacity cap

Section 118NV of the Act sets out the capacity cap for commercial broadcasters. In regional 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.

Criteria for assessing undertakings

In addition to the provisions in section 2.1, the legislative framework also enables the ACCC to determine the criteria on which it will assess whether to accept or reject an access undertaking. The criteria are described below.

Whether the access undertaking complies with Division 4B Part 3.3 of the Act

Under section 118ND, a DRMT Licensee must provide an access undertaking to the ACCC within 50 days after the issue of a licence.

In assessing whether to accept an access undertaking the ACCC must consider whether the terms and conditions of access in the access undertaking comply with the access framework set out in Division 4B of Part 3.3 of the Act. The terms and conditions in an access undertaking must include terms and conditions that relate to standard access obligations and excess capacity obligations that are or may become applicable to a DRMT Licensee. The DRMT 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).

DRMT Licensees also have an obligation under the Act to not discriminate between content service providers who have access to multiplex capacity under the licence. Licensees must not discriminate in the technical and operational quality of the services supplied, and the

¹⁴ Section 118NP, *Radiocommunications Act 1992*

¹⁵ Sections 118NQ(2)(e) and 118NR(3)(e), *Radiocommunications Act 1992*

technical and operational quality and timing of fault detection, handling and rectification processes (section 118NP).

Whether the access undertaking unduly restricts competition in related markets

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 JVC holding the DRMT License, 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 member of the JVC.

Under this criterion, a DRMT Licensee would, for example, be prevented from including provisions in its access undertaking that artificially inflated some access seekers' costs or enabled a DRMT Licensee to provide inferior services to some access seekers compared to others in a manner that was unreasonable. It may be appropriate for the ACCC to consider whether the undertaking provides for the efficient use of the Radiocommunications spectrum allocated for the purposes of the service.

In applying this criterion, the ACCC recognises that DRMT 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.

Whether the terms and conditions of access specified in the access undertaking 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.

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 DRMT Licensee and its investment in facilities used to supply the service
- The interests of persons who have rights to use the service
- The standard of transmission facilities or services offered, including the compatibility or inter-operability of the equipment and facilities of the access providers (i.e., licensees) with those of potential access seekers
- 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

- The economically efficient operation of the network

This criterion will not be applied unreasonably, as the ACCC accepts that DRMT Licensees may impose reasonable requirements on access seekers in certain circumstances.

Whether the access prices or pricing methodologies are fair and reasonable

All prices or pricing methodologies in the 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, and to ensure that access seekers are not disadvantaged for reasons which are anticompetitive.

If the actual access costs are known, it may be possible to specify prices in the access undertaking. However, if the DRMT 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 been concluded.

Whether there is an obligation on the DRMT 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 DRMT Licensee or a person authorised by a DRMT Licensee could do and act (or fail to do an act) that has the effect of hindering access to services.

For example, a DRMT Licensee or a person authorised by a DRMT 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. A licensee should offer an appropriate standard of transmission facilities or service for access seekers.

However, an obligation to not hinder access would not be applied unreasonably. As an example, DRMT Licensees may require access seekers to be creditworthy or may require access seekers to demonstrate the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

Whether the undertaking provides for a reasonable dispute resolution mechanism

In considering the dispute resolution mechanism (DRM) 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 DRM, the ACCC may consider, among other things, whether the DRM:

- 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 DRM 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
- 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.

Other matters which the ACCC may consider

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