



Digital radio multiplex transmission services in Canberra, Darwin and Hobart

Consultation and position paper

19 November 2018

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1. Introduction

On 30 October 2018, the ACCC received three new access undertakings in relation to the commencement of Digital Radio services in Canberra, Darwin and Hobart. The three undertakings lodged by Digital Radio Multiplex Transmitter (DRMT) Licensees of Canberra, Darwin and Hobart are identical.

Digital radio services¹ commenced in Adelaide, Brisbane, Melbourne, Perth and Sydney in July 2009 after the ACCC accepted an undertaking by eight 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.²

The ACCC administers the access regime for the digital radio access service under Division 4B of Part 3.3 of the *Radiocommunications Act 1992* (the Act). The access regime allows broadcasters to receive access to DRMT services at reasonable terms and conditions. Under the Act, the ACCC is responsible for implementing and enforcing the access regime. Section 118ND of the Act provides that a DRMT Licensee must, within fifty days after the issue of the licence from the Australian Communications and Media Authority (ACMA), give the ACCC a written access undertaking specifying the terms and conditions on which it will provide access to broadcasters. A “Digital radio start-up day”³ may be declared only after an access undertaking under Division 4B of Part 3.3 of the Act is in force.⁴

This consultation and position paper is designed to seek stakeholders’ views on the degree to which the undertakings meet the legislative requirements, and pursuant to those, the decision-making criteria developed by the ACCC. These views will be used to inform the ACCC’s decision on whether to accept or reject the undertakings.

¹ 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.

² Sub-section 102C(5) of the *Radiocommunications Act 1992* states that for a company to be an eligible joint venture company, the promoters of the company must initially invite commercial licensees and community broadcasting representative company. The incumbent digital commercial radio broadcasting licensees who accepted the invitation would be issued with an equal number of shares. Also, assuming that the invitation were to be accepted by each invitee – the commercial radio broadcasting licensees would hold 7/9th and the community radio broadcasting representative would hold 2/9th of the shares. However, in the existing digital radio regions community broadcasters have not elected to become licensees or join a JVC. Instead opting only to seek access via each undertaking as required. The community broadcasters are adopting the same approach to access in Canberra, Darwin and Hobart.

³ Section 8AC (1) of the *Broadcasting Services Act 1992* provides that the ACMA may, by writing, declare a specified day to be the **digital radio start-up day** for the licence area.

⁴ See section 8AC(1)(d) of the *Broadcasting Services Act 1992*. Also see Appendix A for Key Statutory Licensing Steps for Digital Radio services in Australia.

2. Timeline and assessment process

2.1. Purpose and consultation approach

The ACCC will adopt a process for assessing the undertakings in accordance with Division 4B of Part 3.3 of the *Radiocommunications Act 1992* (the Act), the *Digital Radio Multiplex Transmitter Licence Procedural Rules 2018* (the Procedural Rules) and the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018* (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 notes the submission made by the DRMT Licensees and industry seeks the digital radio start-up day in Canberra, Darwin and Hobart to be on 1 March 2019. The digital radio start-up day can only be declared by ACMA once the ACCC conducts public consultation and accepts the access undertakings.

If the ACCC considers that the undertakings cannot be accepted in their current form, we will either:

- give the DRMT Licensee a written notice advising that it will accept the undertaking if the DRMT Licensee makes such alterations to the undertaking as are specified in the notice, or
- make a determination and give the DRMT Licensee a written notice advising that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence.

The ACCC's decision to accept or reject the undertaking can be subject to review by the Australian Competition Tribunal (ACT). The ACT's decision must be made within six months of receiving the application for review but can be extended by a further three months.

The ACCC considers that the three undertakings submitted for Canberra, Darwin and Hobart are similar to those accepted by the ACCC in 2009 for which no major issues have arisen. As a result, we intend to conduct an expedited assessment of these new undertakings.⁵

To that end, the ACCC's position is that the undertakings should be accepted in their current form, subject to the outcomes of consultation.

The ACCC will hold a four week consultation period for submissions between 19 November 2018 and 17 December 2018. In the absence of any significant new issues arising, the ACCC will progress straight from this consultation and position paper to a final decision.

2.2. Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the issues set out in this consultation and position paper.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission

⁵ This approach is consistent with the ACCC assessment process outlined in the Explanatory Statement to the Procedural Rules 2018, which states, "it may be appropriate to have an expedited process if an access undertaking or a variation of an access undertaking is substantially similar to a previous access undertaking or a variation of an access undertaking accepted by the ACCC".

should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'. 'Blacked out' text is not preferred.

The ACCC expects that claims for commercial in confidence status of information by parties will be limited in nature in order to allow widest possible participation in the public inquiry.

"The ACCC-AER Information Policy" sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website:

<https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched. Please email digitalradio@acc.gov.au regarding any questions you have concerning this consultation.

Submissions are due by **17 December 2018**.

Please email submissions to:

digitalradio@acc.gov.au

In addition, to assist reduce the costs and complexity of engagement, the ACCC has provided a web form to allow a short submission to be made in response to the consultation questions without the need to construct a full written submission. This form is available on the consultation hub here: <https://consultation.accc.gov.au/regulated-infrastructure/2018-digital-radio-consultation>

3. Legislative framework

3.1. Digital radio legislative framework

The legislative framework for the provision of digital radio services was introduced by the Australian Government in 2007 through the *Broadcasting Legislation Amendment (Digital Radio) Act 2007*. This Act amended the *Radiocommunications Act 1992* (the Act), *Broadcasting Services Act 1992* (the Broadcasting Services Act) and the *Competition and Consumer Act 2010* (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. This is a different approach from that taken for digital television. 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. 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.⁶ In May 2018, the ACCC published the Decision-Making Criteria and the Procedural Rules.⁷ The Decision-Making Criteria sets out the criteria that the ACCC is to apply in determining whether to accept an undertaking. The Procedural Rules deal with matters such as the form in which the documents must be provided, time limits for the provision of certain information and confidentiality.

Division 4B of Part 3.3 of the Act sets out an access regime for the multiplex transmitter licenses. 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 for the duration of the license, and remains in force if the undertaking is varied or a license is renewed (section 118NG).
- The ACCC must maintain a register of the undertakings (section 118NK).

⁶ Section 118NJ of the Radiocommunications Act.

⁷ ACCC website, Decision-Making Criteria, <https://www.accc.gov.au/system/files/F2018L00643.pdf>; Procedural Rules, <https://www.accc.gov.au/system/files/F2018L00642.PDF>.

- 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 (ACT) 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 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 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, 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 of the Act.

Decision-making criteria

Section 118 NJ of the Act provides that the ACCC may by legislative instrument, determine criteria to be applied by the ACCC in deciding whether to accept access undertakings. The ACCC made 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 Part 3.2 below.

ACCC to accept or reject access undertakings

Section 118NF of the Act provides that the ACCC must accept or reject an access undertaking once a DRMT Licensee gives an access undertaking to the ACCC. Before accepting the access undertaking, 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 about the access undertaking within a specified period. The ACCC must consider any submissions received within this period.

If the ACCC rejects the access undertaking, the ACCC may give the DRMT Licensee a written notice advising that if certain alterations are made to the undertaking and submitted within a specified period of time allowed in the Procedural Rules, the ACCC will accept the altered access undertaking.

Otherwise, the ACCC may make a determination specifying certain terms and conditions of access and give a written notice to the DRMT Licensee that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence. However, before giving this notice, the ACCC must publish a copy of the notice on the ACCC's website and invite members of the public to make submissions to the ACCC about the notice within a specified period and consider any submissions it receives.

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 *Broadcasting Services Act 1992* provides that the ACCC must accept the access undertaking before ACMA can declare a digital radio start-up day for the licence area.

If the ACCC rejects the access undertaking, it must give the DRMT Licensee a written notice setting out the reasons for the rejection.

Access obligations

Section 118NL of the Act sets out the standard access obligations and section 118NM sets out the excess-capacity access obligations. Both sections provide that DRMT 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. 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.⁸

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 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 via the community broadcasting representative company.

Standard access entitlements for both commercial broadcasters and community broadcasters cannot be transferred to other broadcasters.⁹ 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 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.

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 an access undertaking. The ACCC made these decision-making criteria on 23 May 2018 in accordance with section 118NJ of the Act.¹⁰ The criteria are described below.

⁸ Section 118NP, *Radiocommunications Act 1992*

⁹ Sections 118NQ(2)(e) and 118NR(3)(e), *Radiocommunications Act 1992*

¹⁰ Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018

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 digital radio multiplex transmitter licence. 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).

Further obligations that a DRMT Licensee must comply with in accordance with the 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).

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 DRMT 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 DRMT Licensee.

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 those it offers to other access seekers, where this is not reasonable. 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 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. Fair access prices 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 concluded.

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

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 an 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.

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 that they have 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.

4. Summary of the undertaking

This section of the consultation and position paper provides an overview of the three identical access undertakings for Canberra, Darwin and Hobart submitted by the DRMT Licensees.

Each of the access undertakings consists of the main body, the access undertaking, and two attachments called the Service Description (Attachment A) and Access Agreement (Attachment B). Each part of the undertaking is discussed below and the full undertakings are available on the [consultation page](#).

4.1. Access undertaking

The access undertaking only forms a small part of the complete document. It is in this part of the document that the DRMT Licensee states that it undertakes to:

- be bound by the obligations set out in Part 3.3, Division 4B of the Act
- supply the multiplex transmission service in accordance with the Act, including but not limited to the obligation of non-discrimination between content service providers in section 118NP of the Act in relation to:
 - the technical and operational quality of the services supplied to the content service providers
 - the technical and operational quality and timing of the fault detection, handling and rectification supplied to the content service providers
- provide the multiplex transmission service to access seekers on the terms and conditions specified in the access agreement, which forms part of the access undertaking, to enable broadcasters to obtain the capacity to which they are entitled
- if needed, amend, replace or vary the access undertaking in accordance with the Act and that this process is not limited by the undertakings made. It also states that any replacement or variation of the undertakings will automatically form part of an Access Agreement that has been entered into between those parties.

4.2. 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 DRMT Licensee to access seekers who have access to multiplex capacity, for the transmission over that multiplex capacity of digital channels supplied by access seekers to the multiplex licence. It includes a technical explanation of each of the components of the multiplex transmission service. The service description is very close to the service description in the 2013 varied undertaking with some redundant words removed.

4.3. Access agreement (Attachment B)

The Access Agreement provides the bulk of the details of the undertaking, including many of the specifics that underpin the statements in access undertaking. The matters covered by the Access Agreement include:

- a statement that the DRMT Licensee will develop a binding operational manual, in consultation with the access seekers, to deal with technical and operational matters in relation to the multiplex transmission service

- provisions setting out the manner in which the DRMT Licensee will allocate both standard access entitlements and excess-capacity entitlements, as prescribed in Part 3.3, Division 4B, Subdivision C of the Act
- provisions regarding the supply of the multiplex transmission service, such as the DRMT Licensee not being able to prevent an access seeker from obtaining access to the service in accordance with the access agreement or the obligation on the DRMT Licensee to not discriminate between access seekers
- a methodology for determining the charges payable by the access seekers for using the service to allow the DRMT Licensee to recover its efficient costs and to earn a normal commercial rate of return on its investment
- dispute resolution procedures arising under or in connection with the Access Agreement
- other provisions relating to representation and warranties, access and maintenance, invoices and payment (including reviews into the creditworthiness of the access seeker and financial security), suspension and termination of the service, liability and indemnity, intellectual property, confidentiality and external audits
- provisions in relation to varying the access agreement, where variations are to be made in writing, signed by each party and approved by the ACCC. Pursuant to clause 4.2 in the main body of the access undertaking, any replacement or variation of the undertaking will, unless otherwise agreed between the parties, automatically form part of the access agreement.

5. The ACCC's initial assessment of the undertaking

This section outlines the ACCC's initial assessment and position in relation to the undertakings by examining whether or not the proposed undertakings meet all six criteria in the Decision-making Criteria legislative instrument¹¹.

Section 6 of the Decision-Making Criteria states that in deciding whether to accept an access undertaking, the ACCC must have regard to six matters. Below is our initial assessment of whether the proposed undertakings meets these matters.

Whether the access undertakings comply with Division 4B of Part 3.3 of the Radiocommunications Act

Our initial assessment is that the proposed undertakings comply with Division 4B of Part 3.3 of the Act.

The three DRMT Licensees have provided the access undertakings to the ACCC within 50 days after the issue of their DRMT Licences in compliance with section 118ND of the Act.

Clause 5.2 of the proposed access agreements comply with section 118NO of the Act by stating that the DRMT Licensee must provide each Digital Broadcaster with access of Multiplex Capacity to which it is entitled as a Standard Access Entitlement. While clause 6.2 also comply with section 118NO of the Act by stating that the DRMT Licensees must provide each incumbent commercial broadcaster and digital community broadcaster with access to the fraction of multiplex capacity to which it may be entitled as an Excess-Capacity Access Entitlement.

Clause 8.3 of the proposed access agreements comply 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 condition in the proposed undertakings in relation to complying with Division 4B of Part 3.3 of the Act are similar to those accepted by the ACCC in the 2013 varied access undertaking.

The CBAA submitted previously that the Instruments are fit for purpose and that, as the ACCC suggested in its submission of 5 February 2014 to the Department of Communications' review of digital radio, the access regime appears to be working effectively and efficiently in facilitating access to the DRMT service.¹²

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

¹² [CBAA, "Review of digital radio Instruments: Submission by the Community Broadcasting Association of Australia to the Australian Competition and Consumer Commission", April 2018](#)

The Procedural Rules also set out a requirement on the JVCs to provide to the ACCC an annual report, which is published on the ACCC's website.¹³ The measure promotes transparency surrounding the operation of the regime and facilitates the disclosure of key information about the access arrangements, including non-compliance. The same obligation applies to the existing undertakings and has shown to be an effective compliance measure.¹⁴

As such, our position is to accept the proposed undertakings, subject to submissions we receive during the consultation.

Question 1

Do you consider the access undertakings comply with Division 4B of Part 3.3 of the *Radiocommunications Act*?

Whether the access undertaking unduly restricts competition in related markets

Our preliminary assessment is that the proposed undertakings do not unduly restrict competition in related markets.

The proposed undertakings do not appear to unreasonably restrict the ability of an access seeker to provide service or favour particular access seekers. This is supported by section 8.2 of the proposed undertaking, 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.

Also, section 8.3(b) of the proposed access agreement provides 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 condition in the proposed undertakings in relation to restricting competition in related markets are similar to those accepted by the ACCC in the 2013 varied access undertaking. Accordingly, our position is to accept the proposed undertakings, subject to the submissions we receive during consultation.

Question 2

Are there any aspects of the undertakings that unreasonably restrict competition for digital radio services or related markets?

¹³ Section 118PN(2)(a) of the Act requires the DRMT Licensees to give ACCC an annual report within 60 days after the end of the financial year containing matters that are specified in the Procedural Rules, See: <https://www.legislation.gov.au/Details/F2018L00642>

¹⁴ *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>

Whether the terms and conditions of access specified in the access undertaking are reasonable

Our preliminary assessment is that the terms and conditions of access specified in the proposed access undertakings are reasonable.

Section 2.2 of the proposed access agreement states that the DRMT Licensee will develop an operational manual in consultation with all access seekers to deal with technical and operational matters that arise under or in connection with the proposed access agreement, or the supply of the multiplex transmission service.

Section 8.6 of the proposed 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; or damage, threaten, interfere with, degrade or result in the deterioration of the operation or performance of the systems, equipment or facilities.

Section 15 provides that a party may terminate the access 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 proposed undertakings in relation to access are similar to those accepted by the ACCC in the 2013 varied access undertakings. Again, our position is to accept the proposed undertakings subject to the submissions we receive during consultation.

Question 3

Are the terms and conditions of access specified in the access undertakings reasonable?

Whether the access prices or pricing methodologies are fair and reasonable

Our preliminary assessment is that the pricing methodology in the proposed access undertaking is fair and reasonable.

Schedule 2 of the proposed access agreement 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 over-arching 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.

According to section 4 of this Schedule, 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 the Schedule provides that as at the effective date¹⁵, 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.

Following pre-consultation discussion with the ACCC in relation to regular updating of the weighted average cost of capital (WACC), the JVCs have agreed to conduct an annual review of the WACC in a simple and cost effective way. They have indicated that the rate of WACC will be determined by reference to the most recent final regulatory determination issued by the ACCC-AER in the context of the telecoms, electricity or gas sector at the time of the review.

The terms and condition in the proposed undertakings in relation to access prices and pricing methodologies are similar to those accepted by the ACCC in the 2013 varied access undertaking. However, a new clause was added in Schedule 2 which [section 5.2(j)] states that consultation obligations in relation to review of fixed recurring charges "... do not apply where the only Access Seekers are shareholders of the Multiplex Licensee". As with the other criteria above, these will be considered in light of consultation outcomes.

Question 4

- (a) Are the access prices or pricing methodologies in the undertakings fair and reasonable?
- (b) Does the addition of clause 5.2(j) in Schedule 2 raise any concern?

Whether there is an obligation on the DRMT Licensee to not hinder access

Our preliminary assessment is that the proposed undertakings meet the criteria to fulfil an obligation to not hinder access.

Section 8.2 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.

The terms and condition in the proposed undertakings in relation to obligation on the DRMT Licensee to not hinder access are similar to those accepted by the ACCC in the 2013 varied access undertakings. As such, our position is to accept the proposed undertakings, subject to submissions we receive during the consultation.

Question 5

Do the undertakings include an obligation on the DRMT Licensees to not hinder access?

Whether the undertaking provides for a reasonable dispute resolution mechanism

Our preliminary assessment is that the proposed undertakings include a dispute resolution mechanism (DRM).

¹⁵ Effective date is defined in the proposed access agreement as the date that the access agreement is executed by both parties.

Section 21 of the proposed access agreement provides that all disputes arising in relation to the access agreement are to be resolved in accordance with the DRM except billing disputes which are to be resolved in accordance with section 12 of the access agreement.

According to section 12 of the access agreement, 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 DRM.

The DRM is provided in Schedule 3 of the access agreement. The DRM 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 Commercial Disputes Centre (ACDC) requesting the appointment of an independent mediator. The settlement reached through mediation is final and binding on the parties.

The terms and condition in the proposed undertakings in relation to provision of reasonable dispute resolution mechanism are similar to those accepted by the ACCC in the 2013 varied access undertakings. Accordingly, our position is to accept the proposed undertakings, subject to the submissions we receive during consultation.

Question 6

Do the terms and conditions of access specified in the access undertakings provide for a reasonable dispute resolution mechanism?

Whether there are any other matters which the ACCC may consider

In addition to the six matters listed above, are there any other matters which the ACCC may consider in relation to the assessment of these undertakings? The terms and conditions in the proposed undertakings are generally similar to those accepted by the ACCC in the 2013 varied access undertakings. As such, our position is to accept the proposed undertakings, subject to submissions the ACCC receives during the consultation.

Question 7

Are there any other matters which the ACCC may consider?

Attachment A – Consolidated list of questions

Question 1

Do the undertakings comply with Division 4B of Part 3.3 of the Act?

Question 2

Are there any aspects of the undertakings that unreasonably restrict competition for digital radio services or related markets?

Question 3

Are the terms and conditions of access specified in the access undertakings reasonable?

Question 4

- (a) Are the access prices or pricing methodologies in the undertakings fair and reasonable?
- (b) Does the addition of clause 5.2(j) in Schedule 2 raise any concern?

Question 5

Do the undertakings include an obligation on the DRMT Licensees to not hinder access?

Question 6

Do the terms and conditions of access specified in the access undertakings provide for a reasonable dispute resolution mechanism?

Question 7

Are there any other matters which the ACCC may consider?