

Review of Digital Radio Instruments

Submission by Commercial Radio Australia

Rod Middleton
Director (A/g)
Wireline Section, IWW Markets Branch
ACCC
By email: Rod.Middleton@acc.gov.au

Ifa Rushdi
Senior Project Officer (A/g)
Wireline Section, IWW Markets Branch
ACCC
By email: Ifa.Rushdi@acc.gov.au

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Introduction

Commercial Radio Australia (**CRA**), on behalf of the commercial radio sector, welcomes the opportunity to comment on the review by the Australian Competition and Consumer Commission (the **ACCC**) of the following instruments:

- Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008 (**Decision-Making Criteria**); and
- Digital Radio Multiplex Transmitter Licences Procedural Rules 2008 (**Procedural Rules**),

(the **Digital Radio Instrument Review**).

The Digital Radio Instrument Review comes at a critical time for the commercial radio sector as the industry seeks to expand digital radio services beyond the five largest capital city markets into several regional markets, including Canberra, Darwin and Hobart.

Executive Summary

- CRA supports the ACCC re-issuing the Digital Radio Instruments in substantially the same form as the instruments which exist today.
- CRA considers that the Digital Radio Instruments have brought transparency and regulatory certainty to DRMT licensees¹ in respect of the development and assessment of digital radio access undertakings (and subsequent variations).
- In relation to the Procedural Rules:
 - As many DRMT licensees will be established in the coming years to support the expansion of digital radio services into regional and rural areas and each DRMT licensee will need to submit its own digital radio access undertaking under the access regime under the Radiocommunications Act (**Access Regime**), there is scope for the ACCC to incorporate further refinements into new Procedural Rules to promote a more streamlined and expeditious assessment process for these access undertakings.
 - As all future access undertakings for regional and rural markets are expected to be the same or substantively similar to those that the ACCC has already accepted for capital city markets, there is scope for the ACCC to subject such undertakings to a more truncated consultation and decision-making process in new Procedural Rules.
- CRA also supports the ACCC making a new Decision-Making Criteria instrument which contains the same criteria as the current instrument.

¹ The JVC entities which hold DRMT Licences pursuant to section 102C of the *Radiocommunications Act 1992* (Commonwealth) (the **Radiocommunications Act**).

1. Assessment of the Digital Radio Instruments

The Digital Radio Instruments have worked effectively in practice, providing regulatory certainty and transparency to DRMT Licensees in relation to how the ACCC will exercise its powers and undertake its functions under the Access Regime. This includes:

- certainty as to the procedure governing the lodgement of digital radio access undertakings;
- transparency around the ACCC's decision-making criteria in relation to the assessment of digital radio access undertakings; and
- clarity on the reporting obligations of DRMT licensees (e.g. annual reports).

We consider there is an ongoing need for the Digital Radio Instruments beyond their sunset date of 1 October 2018 and, subject to our comments in this submission, we support the ACCC making new Digital Radio Instruments based on the existing instruments.

1.1 Ensuring the Digital Radio Instruments remain fit for purpose

The ACCC originally consulted on the Digital Radio Instruments in 2008.

Since that time, digital radio services have been launched in capital city markets and the industry is now preparing to expand digital radio services into regional and rural areas, with the Canberra, Darwin and Hobart markets being the first-movers.

There are potentially dozens of licence areas where a DRMT licensee may be established to provide digital radio multiplex services in the coming year. This expansion will entail a corresponding number of new digital radio access undertakings to be submitted to the ACCC for each market.

In these circumstances, CRA considers that it would be appropriate for the ACCC to refine the Procedural Rules to allow for a more streamlined process for the consideration of digital radio access undertakings that are the same or substantially similar to an access undertaking that has been previously accepted by the ACCC.

The practical effect of such changes would be threefold:

- minimise the time it takes for the ACCC to assess and approve each new digital radio access undertaking;
- minimise the regulatory burden on each DRMT licensee in preparing and securing the approval of a digital radio access undertaking; and
- minimise the ACCC's own resourcing requirements when it comes to the assessment of digital radio access undertakings, allowing it to focus its resources on other areas that present a higher regulatory priority.

Moving to a more streamlined process for the assessment and approval of digital radio access undertakings would also be consistent with broader reforms that have recently

been made to the legislative framework for digital radio services under the Radiocommunications Act.

In February 2018, the Australian Parliament passed amendments to the Radiocommunications Act,² which simplified the DRMT licensing process and rationalised a range of timeframes prescribed within the Act. The objectives of the amendments included:³

- creating a more simple, flexible process for the planning and licensing of digital radio in regional Australia;
- simplifying and improving the operation of the digital radio framework;
- removing unnecessary or redundant steps in the legislative framework; and
- shortening legislatively prescribed timeframes.

Similarly, CRA considers the ACCC should commit to a more streamlined decision-making process in the Procedural Rules in respect of the ACCC's assessment of digital radio access undertakings that are the same or substantially similar to an undertaking that has been previously accepted by the ACCC.

2. Proposed changes to Digital Radio Instruments

2.1 Changes to Procedural Rules

It is likely that the DRMT licensees that will shortly launch digital radio services in new markets will use the digital radio access undertakings previously accepted by the ACCC as the basis for the undertakings they will submit in relation to those new markets.

Where a proposed digital radio access undertaking is the same or substantially similar to a digital radio access undertaking which has been accepted by the ACCC, the Procedural Rules should explicitly provide for a streamlined decision-making process to be followed by the ACCC which avoids unnecessary consultation and process steps prior to a final decision to accept.

CRA acknowledges that there are some constraints on the ACCC in its decision-making process under the Access Regime, including:

- in respect of new access undertakings (and subsequent variations), the requirements in sections 118NF and 118NH (respectively) of the Radiocommunications Act to publish the access undertaking, undertake

² The *Broadcasting Legislation Amendment (Digital Radio) Act 2018* (Commonwealth) amends the Radiocommunications Act 1992 by reducing the statutorily prescribed timings relating to:

³ Explanatory Memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2017* (Commonwealth), page 2.

consultation and consider any public submissions before making a decision to accept or reject an undertaking;⁴ and

- procedural fairness and other administrative law requirements that seek to guarantee the proper exercise of the ACCC's power and functions under the Radiocommunications Act.

Even with these constraints, we consider that there is broad scope for the ACCC to streamline its decision-making process where a DRMT licensee submits an undertaking that is the same or substantially similar to a previous undertaking that has been accepted by the ACCC.

Additionally, while the ACCC has some discretion to determine an appropriate consultation period under section 8 of the Procedural Rules, there is scope to be more explicit about how consultation and decision-making can be streamlined in a number of common scenarios.

We consider that a streamlined regime could include:

- a truncated consultation and public submission process prior to the making of a final decision to accept or reject an access undertaking that is the same or substantially similar to a previous undertaking accepted by the ACCC in respect of another DRMT licensee. This truncated process could replace the more typical process used by the ACCC for access undertakings which typically comprise a discussion paper, draft decision and final decision (with associated consultation at each stage). This streamlined procedure would not be available if a substantively different access undertaking was submitted by a DRMT licensee; and
- a provision explicitly dealing with minor modifications to an accepted digital radio access undertaking, which exposes such changes to a more truncated consultation requirement and which permits the ACCC to immediately proceed with a final decision. This provision could be modelled on section 152CBC of Part XIC of the *Competition and Consumer Act* and the draft procedural rules that were historically proposed for special access undertakings in the telecoms sector (but which were not ultimately enacted).⁵

In addition, we consider that there is also scope for the ACCC to update the Procedural Rules to remove CD/DVD delivery of documents and non-electronic documents, etc.

⁴ Sections 118NF of the Radiocommunications Act sets out the procedure which must be followed by the ACCC when making a decision to accept or reject a proposed digital radio access undertaking submitted to it pursuant to section 118ND. Section 118NH sets out the procedure which must be followed by the ACCC when making a decision to accept or reject a varied digital radio access undertaking submitted to it pursuant to section 118NH(2).

⁵

<http://web.archive.org/web/20131003100118/http://transition.accc.gov.au/content/index.phtml/itemId/723256>

2.2 Re-issue of Decision-Making Criteria

The Decision-Making Criteria sets out the specific criteria which must be considered when deciding whether to accept or reject a digital radio access undertaking. The Radiocommunications Act does not establish any criteria which must be considered by the ACCC when deciding to accept a digital radio access undertaking apart from noting that the ACCC may take into account any matter it considers relevant.⁶

Without Decision Making Criteria being published by the ACCC, there is likely to be a lack of transparency in how the ACCC may approach its assessment of digital radio access undertakings.

CRA supports the ACCC making a new Decision-Making Criteria instrument which contains the same criteria as the current instrument.

⁶ Section 118NJ of the Radiocommunications Act.