

EXPLANATORY STATEMENT

Issued by the Australian Competition and Consumer Commission

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

Radiocommunications Act 1992

Legislative provisions

Section 118NJ of the *Radiocommunications Act 1992* provides that the Australian Competition and Consumer Commission (the ACCC) may determine, by legislative instrument, decision-making criteria to be applied in deciding whether to accept an access undertaking and may also determine criteria to be applied in deciding whether to accept a variation of an access undertaking that is in force.

The Determination sets out the criteria which the ACCC must have regard to in deciding whether to accept an access undertaking or a variation of an access undertaking given to the ACCC in relation to a digital radio multiplex transmitter licence.

A Determination made under section 118NJ of the Act is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Purpose

The purpose of the Determination is to promote transparency in decision-making by setting out the criteria that the ACCC must apply in deciding whether to accept an access undertaking or a variation of an access undertaking given to the ACCC in relation to a digital radio multiplex transmitter licence. The ACCC has made this Determination in order to provide regulatory certainty and assistance to digital radio multiplex transmitter licensees.

Background

In October 2005, the government announced its policy framework for the introduction of digital radio services in Australia. The framework was implemented by the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007*, passed in May 2007, which amended the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* (the Act) and the *Trade Practices Act 1974*.

Division 4B of Part 3.3 of the Act establishes an access regime for digital radio multiplex transmitter licences. Under this access regime initial allocation of multiplex capacity will occur among incumbent commercial and community broadcasters in accordance with specified access entitlements. Subsequent licence allocations are undertaken via a price-based method. Licence allocations are conducted by the Australian Communications and Media Authority.

The ACCC is responsible for implementing and enforcing the access regime for digital radio multiplex transmitter licences.

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

The access undertaking is an undertaking that a licensee or a person authorised to operate a multiplex transmitter under a licence will comply with the access obligations provided for in an undertaking in relation to standard access obligations, excess-capacity access obligations and distributed-capacity access obligations (subsection 118ND(1)). Where an access undertaking is in force in relation to a licence, the licensee or the person so authorised must comply with any access obligations that are applicable to the licence on such terms and conditions as are ascertained in accordance with the undertaking (section 118NO).

For the purposes of the access regime, a person authorised by a licensee to operate a multiplex transmitter is not an employee of the licensee.

The initial allocation of digital radio multiplex transmitter licences consists of nine foundation digital radio multiplex transmitter licences. Foundation digital radio multiplex transmitter licences are category 1 and 2 digital radio multiplex transmitter licences that provide standard access entitlements and are designed to accommodate incumbent commercial and community broadcasters. The access obligations relevant to foundation digital radio multiplex transmitter licences are standard access obligations under section 118NL and excess-capacity access obligations under section 118NM of the Act.

The access regime also applies to non-foundation digital radio multiplex transmitter licences. These licences are intended to accommodate any future digital radio broadcasters, and may be issued in a particular area once sufficient foundation licences are in force. This Determination relates only to foundation category 1 and category 2 digital radio multiplex transmitter licences. If non-foundation digital radio multiplex transmitter licences are issued in the future, the ACCC will make the necessary amendments to the Determination.

Under section 118NH a licensee may give to the ACCC a variation of an access undertaking. Section 118NH also provides that the ACCC can require a variation to be made to an access undertaking, however, the ACCC may not require a licensee to provide a variation before 1 January 2015.

The access regime is modelled on key elements of existing access regimes, in particular Part IIIA and Part XIC of the *Trade Practices Act 1974* with appropriate amendment due to particular features of the access regime for digital radio.

A statutory review of matters relating to the digital radio framework including the operation of the access regime under Division 4B of the Act and whether this division should be repealed is to be conducted before 1 January 2014 (section 313B).

Regulation Impact Statement

The ACCC has obtained the advice of the Office of Best Practice Regulation (OBPR) that a Regulation Impact Statement is not required for the Determination as the Determination does not have a significant impact on business or the economy (OBPR Ref No. 9612).

Consultation

On 11 April 2008, the ACCC published an exposure draft of the Determination for public comment. The draft Determination was published on the ACCC's website www.accc.gov.au and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by 28 April 2008. The ACCC further extended the time for making submissions to 9 May 2008.

The ACCC received one submission and has taken this submission into account in making the Determination.

Notes on sections of the Determination

Section 1 – Name of Determination

Section 1 provides that the name of the Determination is the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*.

Section 2 – Commencement

Section 2 provides that the Determination commences the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Object of Determination

Section 3 provides that the object of the Determination is to promote transparency in decision-making by setting out the criteria that the ACCC must apply in deciding whether to accept an access undertaking or a variation of an access undertaking given to the ACCC in relation to a digital radio multiplex transmitter licence.

Section 4 – Definitions

Section 4 provides the definitions relevant to the Determination.

Section 5 – Acceptance of access undertakings

Subsection 5(1) sets out the decision-making criteria that the ACCC must have regard to in deciding whether to accept an access undertaking. An explanation of each criterion is given below.

- (a) *whether the access undertaking complies with Division 4B of Part 3.3 of the Act*

Under section 118ND, a licensee must provide an access undertaking to the ACCC within three months 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 licensee will be under an obligation to comply with those access obligations that are applicable to the licence on such terms and conditions as are ascertained in accordance with the accepted access undertaking (section 118NO).

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

(b) *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 licensee should not be charged unreasonably high prices or provided with unreasonably low quality services or be unreasonably disadvantaged in any other way relative to access seekers that are constituent members of a licensee.

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

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

This criterion complements existing criteria in Part IIIA and Part XIC of the *Trade Practices Act 1974*. For example, any unreasonable restriction on competition would not be in the public interest or would not promote competition.

(c) *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 licensee and its investment in facilities used to supply the service;
- the interests of persons who have rights to use the service;
- the public interest in having competition in markets and efficient investment in facilities and services;
- the operational and technical requirements necessary for the safe and reliable operation of the service; and

- the economically efficient operation of the network.

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

- evidence that an access seeker is not creditworthy;
- repeated failures by an access seeker to comply with the terms and conditions on which the same or similar access has been provided;
- requiring access seekers demonstrate that they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

This criterion is consistent with the requirements of both Part XIC and Part IIIA.

(d) *whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which 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 anti-competitive.

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

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

This criterion complements existing criteria in Part IIIA and Part XIC of the *Trade Practices Act 1974*. For example, any fair and reasonable pricing is in the public interest.

(e) *whether the access undertaking includes an obligation on the licensee to not hinder access to services*

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

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

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

This criterion is consistent with the requirements of both Part XIC and Part IIIA.

(f) whether the terms and conditions of access specified in the access undertaking provide 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 time frame.

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; and
- defines the enforceability of any dispute resolution mechanism on the parties, including the enforceability of an arbitrated settlement.

This criterion ensures that the objectives of the other decision-making criteria may actually be enforced.

Subsection 5(2) provides that subsection 5(1) of the Determination does not, by implication, limit the matters that the ACCC must have regard to in deciding whether to accept an access undertaking.

Section 6 – Acceptance of variations of access undertakings

Subsection 6(1) provides that in deciding whether to accept a variation of an access undertaking the ACCC must have regard to the matters in section 5 of the Determination.

Subsection 6(2) provides that subsection 6(1) of the Determination does not, by implication, limit the matters that the ACCC must have regard to in deciding whether to accept a variation of an access undertaking.