



Australian
Competition &
Consumer
Commission

Undertakings in relation to access to digital radio multiplex transmission services

ACCC discussion paper

October 2008



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Executive summary

Digital radio services are due to commence in several state capital cities in the first half of 2009.

The legislative framework introduced by the Australian Government in 2007 provides for the Australian Communications and Media Authority (ACMA) to allocate eight digital radio multiplex licences to joint venture companies representing commercial and community broadcasters. The joint venture companies will be 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 legislative framework includes an access regime to allow broadcasters to receive access to digital radio multiplex transmissions services on reasonable terms and conditions. Each joint venture company representing commercial and community broadcasters is required to provide the ACCC with undertakings specifying the terms and conditions on which it will provide access to broadcasters. It is only after the undertaking has been accepted by the ACCC that ACMA can determine that digital radio services may commence in that area.

The eight joint venture companies representing commercial and community broadcasters submitted their access undertakings to the ACCC on 3 October 2008. All eight undertakings were identical. The undertakings and supporting submission were submitted on behalf of the multiplex licensees by the commercial radio industry body Commercial Radio Australia (CRA). CRA also took the lead role in the development of the undertakings.

Each undertaking states that the multiplex licensee 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 applicable provisions of the Act; and
- provide the multiplex transmission service to access seekers on the terms and conditions specified in the Access Agreement.

The undertakings, including the Access Agreement, set out the specific details regarding these obligations, including the principles for determining the price of the service and the procedures to be followed to resolve any disputes in relation to the service.

The ACCC is seeking submissions from interested stakeholders to assist in its assessment of the undertakings under the decision-making criteria. The criteria are:

- whether the undertaking complies with Division 4B of Part 3.3 of the *Radiocommunications Act 1992*

- whether the undertaking unduly restricts competition
- whether the terms and conditions of access are reasonable
- whether the access prices or pricing methodologies are fair and reasonable
- whether there is an obligation on the licensee to not hinder access
- whether the undertaking provides for a reasonable dispute resolution mechanism
- other matters which the ACCC may consider relevant.

Submissions are due by **Friday 21 November 2008**. These views will be used to inform the ACCC's decision to accept or reject the undertakings.

The ACCC has some options should it determine that the undertakings cannot be accepted in their current form. The ACCC can either:

- give the licensee a written notice advising that it will accept the undertaking if the licensee makes such alterations to the undertaking as are specified in the notice¹, or
- determine that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence.²

¹ Subsection 118NF(4), *Radiocommunications Act 1992*

² Subsection 118NF(5), *Radiocommunications Act 1992*

1. Introduction

Digital radio services are currently due to commence in Adelaide, Brisbane, Hobart, Melbourne, Perth and Sydney by no later than 1 January 2009. However, at the time of publication of this discussion paper, there was legislation before Parliament that would delay the legislative deadline for the introduction of digital radio services until 1 July 2009, and further delay the introduction of services in Hobart by redefining Hobart as a regional licence area.³

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.

The legislative framework was introduced by the Australian Government in 2007 through amendments to the *Radiocommunications Act 1992* (the Act), *Broadcasting Services Act 1992* (the Broadcasting Services Act) and the *Trade Practices Act 1974* (the Trade Practices Act).

The arrangements provide for ACMA to allocate 13 digital radio multiplex transmitter licences. Eight licences will be allocated to joint venture companies representing commercial and community broadcasters, and a further five licences will be allocated to national broadcasters. The joint venture companies will be responsible for multiplexing together the separate streams of content from individual broadcasters and transmitting a combined stream to end users in each licence area.

With only one or two joint venture companies providing access to digital radio services to commercial and community broadcasters in each capital city, the joint venture companies may be in a position of market power. This could potentially allow them to misuse this position by offering access to broadcasters on unreasonable terms and conditions, or by discriminating anti-competitively between broadcasters.

The legislative framework therefore includes an access regime to allow broadcasters to receive access to digital radio multiplex transmission services at reasonable terms and conditions. Each joint venture company representing commercial and community broadcasters is required to provide the ACCC with an undertaking specifying the terms and conditions on which it will provide access to broadcasters. It is only after the undertaking has been accepted by the ACCC that ACMA can determine that digital radio services may commence in that area.

The eight joint venture companies representing commercial and community broadcasters submitted their access undertakings to the ACCC on 3 October 2008. All eight undertakings were identical. The undertakings and supporting submission were submitted on behalf of the multiplex licensees by the commercial radio industry body

³ *Broadcasting Legislation Amendment (Digital Radio) Bill 2008*. The Bill also proposes to provide further opportunity for community radio broadcasters to take up shares in the multiplex licensee companies.

Commercial Radio Australia (CRA). CRA also took the lead role in the development of the undertakings.

This discussion paper represents the beginning of the ACCC's process for assessing whether it should accept or reject each undertaking. It 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.

If the legislation currently before Parliament is passed, and the deadline for the introduction of digital radio services is 1 July 2009 instead of 1 January 2009, the ACCC will release a draft decision on which there will be consultation. If the deadline remains at 1 January 2009, the ACCC is likely to progress straight to a final decision.

2. Timetable and assessment process

2.1 Process

The process the ACCC will adopt for assessing the undertakings must be in accordance with Division 4B of Part 3.3 of the Act and the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008* (the Procedural Rules). The Procedural Rules deal with matters such as the form in which documents must be provided, time limits for the provision of certain information, and confidentiality. More generally, the process will be similar to that used for assessing telecommunications access undertakings under Part XIC of the Trade Practices Act.

The ACCC does not have a statutory timeframe within which it must reach a decision on the undertakings. This is different to the process for undertakings under Part XIC of the Trade Practices Act which must be completed within six months.⁴

Despite this, the ACCC is aware of the urgency for a decision to be reached by a date that is consistent with the statutory deadline for the introduction of digital radio services. ACMA is required by legislation to determine the digital radio start-up day in each licence area prior to the deadline, but it cannot do this until the ACCC has accepted an undertaking for that area. The ACCC's timing will also be mindful of the intentions of the industry for the introduction of digital radio services.

The consultation process the ACCC will use to inform its decision on the undertakings will depend on whether proposed legislation currently before Parliament is passed. The Bill delays the deadline for the introduction of digital radio services from 1 January 2009 to 1 July 2009. The ACCC notes that the CRA has assumed that the legislation will be amended, as it has announced that digital radio services will begin on 1 May 2009.⁵

A deadline of 1 July 2009 would enable the ACCC to provide stakeholders with at least two opportunities to provide their views on whether the ACCC should accept or reject the undertakings. The first opportunity will be in response to this discussion paper. The ACCC will make a draft decision to accept or reject the undertakings after it considers submissions. A second consultation period will then begin to allow stakeholders to provide their views on the ACCC's draft decision. The ACCC will then make its final decision.

⁴ It is noted that in practice the process for assessing telecommunications undertakings under the Trade Practices Act takes longer than six months because of the possibility of extensions of time and the fact that the timeframe excludes the time in which the ACCC is awaiting submissions.

⁵ Commercial Radio Australia, 'Digital radio reveals logo and marketing plans', media release, 11 September 2008.

In the event that the deadline is not extended, there would not be time for a second round of consultation. The ACCC would therefore likely to progress straight from this discussion paper to a final decision.

Unlike when it assesses undertakings under Part XIC, the ACCC has some options should it determine that the undertakings cannot be accepted in their current form. The ACCC can either:

- give the licensee a written notice advising that it will accept the undertaking if the licensee makes such alterations to the undertaking as are specified in the notice⁶, or
- determine that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence.⁷

It is noted that 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. This would have consequences for the timeframe for the introduction of digital radio services.

2.2 Submissions in response to the discussion paper

All submissions in response to this discussion paper should be forwarded by email by **Friday 21 November 2008** to:

Richard Home
General Manager
Strategic Analysis and Development Branch
Australian Competition and Consumer Commission
richard.home@acc.gov.au

Submissions should also be copied to digitalradio@acc.gov.au.

Enquiries may be directed to David Cranston, Assistant Director, Convergence & Coordination Team, on (03) 9290 1971 or david.cranston@acc.gov.au.

Submissions should be in a PDF, Microsoft Word or (if appropriate) Microsoft Excel format that is text-searchable and allows a copy and paste function. To facilitate the efficient assessment of submissions, the ACCC has provided a submission template (Appendix A) to assist parties in making submissions that are directly relevant to the ACCC's decision-making criteria.

⁶ Subsection 118NF(4), *Radiocommunications Act 1992*

⁷ Subsection 118NF(5), *Radiocommunications Act 1992*

2.2.1 Confidentiality claims on submissions

All submissions will be considered as public submissions and will be posted on the ACCC's website.

If parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and a confidential version of their submission. The public version of the submission should clearly identify the confidential material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

It should be noted that the ACCC will ultimately determine whether to accept confidentiality claims with regards to a submission. It will consult with the party providing the submission before making it publicly available. The ACCC is not opposed to requiring parties wishing to gain access to confidential information to execute confidentiality undertakings.

3. Legislative framework

3.1 Digital radio legislative framework

3.1.1 General overview

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 *Trade Practices Act 1974* (the Trade Practices Act).

The arrangements provided for the Australian Communications and Media Authority (ACMA) to allocate 13 digital radio multiplex transmitter licences in the five nominated capital cities. The licences were allocated to the joint venture companies that will operate the digital radio multiplex infrastructure. The joint venture companies will be 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 joint venture companies consist of broadcasters that are expected to use the multiplex transmission service to provide digital radio content services.

The legislative framework provides for three different categories of licences:

- Category 1 licences were allocated to joint venture companies representing commercial and community broadcasters. These licences are subject to the digital radio access regime. The undertakings submitted to the ACCC, which form the focus of this discussion paper, have been submitted by category 1 licensees.
- Category 2 licences could be offered to joint venture companies representing commercial, community and national broadcasters. The licences are also subject to the access regime. The ACCC understands that they have not been issued and are not likely to be issued in the foreseeable future.
- Category 3 licences will be allocated to the national broadcasters, the ABC and SBS. These licences are not subject to the access regime.

For category 1 foundation licences, the joint venture company was intended to include incumbent commercial broadcasters and a community broadcaster representative company. Incumbent commercial broadcasters and the community broadcasting representative company⁸ were able to 'opt in' to the joint venture company; membership was not compulsory. If the invitation to subscribe for shares were to be accepted by each invitee, the community broadcasting representative company would

⁸ The community broadcasting representative company will jointly represent all the relevant community broadcasters.

hold two-ninths of the shares in the joint venture company, while the incumbent commercial broadcasters would hold the remaining seven-ninths.

Each multiplex licensee is therefore intended to be a joint venture company comprising or representing some, if not all, of the constituent broadcasters that will use capacity under the licence. A joint venture company itself is not permitted to provide digital radio content services. In this regard, there is a degree of separation between the control of the licence and the provision of content services in the downstream retail market.

The ACCC notes that at the time of publication of this discussion paper, community broadcasters are not shareholders in the joint venture companies. However, the government was exploring options to enable this to occur, and legislative amendments currently before Parliament would provide community broadcasters with further opportunity to take up shares in the multiplex licensee companies.⁹

Within three months of being awarded the licence, each multiplex licensee is required to submit an access undertaking to the ACCC that specifies the terms and conditions on which it will provide access to the broadcasters. The access regime regarding digital radio services is described in more detail in section 3.1.2 of this discussion paper.

Once access undertakings have been accepted by the ACCC, multiplex licensees are required to allocate standard access entitlements to broadcasters. Under the legislation, existing commercial broadcasters in the licence area are each entitled to one-ninth of the total multiplex capacity¹⁰, while community broadcasters are entitled to share a total of two-ninths of the total multiplex capacity.¹¹

⁹ Broadcasting Legislation Amendment (Digital Radio) Bill 2008

¹⁰ Capacity relates to a particular licence area. For example, one-ninth of the multiplex capacity in Sydney allows a broadcaster to provide services in the Sydney licence area.

¹¹ The relevant community broadcasting representative company must nominate which community broadcasters are entitled to the two-ninths of capacity. No single broadcaster can get more than one-ninth of the capacity. How the capacity is to be shared amongst community broadcasters is not specified in the legislation.

Table 1 Distribution of capacity at each multiplex relating to foundation category 1 licences

Multiplex	Standard access entitlements		Excess-capacity entitlements
	Community b'casters	Commercial b'casters	
Adelaide			
Category 1 multiplex	2	6	1
Brisbane			
Category 1 multiplex	2	4	3
Category 1 multiplex	2	4	3
Melbourne			
Category 1 multiplex	2	6	1
Category 1 multiplex	2	5	2
Perth			
Category 1 multiplex	2	6	1
Sydney			
Category 1 multiplex	2	6	1
Category 1 multiplex	2	5	2

The ACCC understands that there will be excess capacity on each of the eight multiplexes after the allocation of standard access entitlements (see Table 1). In this situation, each multiplex licensee is then required by legislation to assess demand for the excess capacity amongst broadcasters in that licence area. If demand for the excess capacity falls short of that available, then the broadcasters wanting that capacity will receive it. If demand is greater than the excess capacity, then the multiplex licensee will be required to conduct an open and transparent auction process to allocate the excess capacity. The assessment of demand and the establishment of excess-capacity entitlements are provided for on the digital start-up day for the area, or at any time after the 12-month period beginning on the digital start-up day for the area.

The digital radio start-up day refers to the day on which the foundation multiplex transmitter licensees in that licence area are required to commence providing digital radio services.¹² ACMA must only determine a digital radio start-up day for a particular licence area when it is satisfied that, amongst other things, an access undertaking under Division 4B of Part 3.3 of the Act is in force for the licensee/s in that area.¹³ ACMA is required to provide at least 30 days' notice of its intention to declare a digital radio start-up day. It must also ensure that the start-up day is not later than 1 January 2009, although legislation currently before Parliament would change this to 1 July 2009.

3.1.2 The access regime for digital radio

An access regime for digital radio multiplex transmitter licences is contained in Division 4B of Part 3.3 of the Act. The access obligations are to ensure that content service providers can get access to digital radio multiplex capacity on appropriate terms, and therefore to facilitate the provision of digital radio content services to end-users.

¹² Paragraphs 109B(1)(i) & (j), *Radiocommunications Act 1992*.

¹³ Paragraph 8AC(1)(d), *Broadcasting Services Act 1992*.

Under section 109B, the concept of ‘content services’ for category 1 licences relates to one of the following:

- a digital commercial radio broadcasting service, which operates in accord with a commercial radio broadcasting licence authorising the provision of the service in the designated area concerned or
- a digital community radio broadcasting service, which operates in accord with a community radio broadcasting licence authorising the provision of the service in the designated area concerned or
- a restricted datacasting service, which operates in accord with a restricted datacasting licence.

As mentioned above, access will be to multiplex capacity. ‘Multiplex capacity’ is defined in section 118NB to mean:

...so much of the gross transmission capacity of the main [and/or repeater] multiplex transmitter[s] as is available for the transmission of content services.

The primary element of the access regime is the requirement on the multiplex licensees to submit an access undertaking to the ACCC. ACMA cannot determine a digital radio start-up day unless the ACCC has accepted an undertaking for the licensee/s in the area.¹⁴ The access regime is discussed in further detail below.

Requirement to submit an access undertaking

Section 118ND provides that a digital radio multiplex transmitter 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 multiplex licensee (or a person authorised to operate a multiplex transmitter under the licence) will comply with the terms and conditions contained in the undertaking. These terms and conditions relate to the relevant access obligations applicable to the licence. There are both *standard access* obligations and *excess-capacity access* obligations for the initial eight category 1 licences.

Access obligations

Section 118NL sets out the standard access obligations and section 118NM sets out the excess-capacity access obligations. Both sections provide that multiplex 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. Multiplex licensees must also provide access to services that facilitate the use of that fraction of multiplex capacity for the purpose of providing content services.

Multiplex licensees must not discriminate between access seekers on the basis of:

¹⁴ Paragraph 8AC(1)(d), *Broadcasting Services Act 1992*.

- the technical and operational quality of the services supplied to the access seekers and
- the technical and operation quality and timing of the fault detection, handling and rectification supplied to the access seekers.¹⁵

Standard access entitlements and excess-capacity access entitlements

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

Sections 118NQ and 118NR 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.¹⁶ 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. As discussed in 3.1.1, the ACCC understands that there will be excess capacity at each of the eight multiplexes under the initial category 1 licences.

Capacity cap

Section 118NV 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.

Process to be followed for assessing the undertakings

Section 118NF requires the ACCC to make the undertaking available on its website and invite members of the public to make submissions before accepting or rejecting an undertaking. Although this requirement is quite broad, the ACCC will follow a similar process to the one it generally uses for assessing telecommunications access undertakings under Part XIC of the Trade Practices Act. This process includes at least two rounds of consultation and the release of a discussion paper, draft decision, and final decision. This is discussed in more detail in Chapter 2 of this discussion paper.

¹⁵ Section 118NP, *Radiocommunications Act 1992*

¹⁶ Paragraphs 118NQ(2)(e) and 118NR(3)(e)

The ACCC may request a multiplex licensee to provide further information about the access undertaking under section 118NE.

Section 118NJ provides that the ACCC may determine decision-making criteria to be applied in deciding whether to accept access undertakings or variations of access undertakings. The ACCC made such a determination on 21 May 2008.¹⁷ The criteria are discussed further in section 3.2.

Section 118PO 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. The ACCC made these ‘procedural rules’ on 21 May 2008.¹⁸ 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.

ACCC must accept or reject an access undertaking

The ACCC must either accept or reject an access undertaking. If the ACCC rejects an undertaking, it has two further options under section 118NF.

One option is that the ACCC may give the licensee a written notice advising that if the licensee makes such alterations to the undertaking as are specified in the notice, the ACCC will accept the undertaking.

The other option is that the ACCC may give the licensee a written notice that determines that an undertaking in the terms specified in the determination is the access undertaking in relation to the licensee. Before giving this notice, the ACCC must publish a copy of the notice on its website and consider any submissions it receives from the public.

Variation of access undertakings

Section 118NH provides for a multiplex licensee to decide to give the ACCC a variation of an undertaking that is already in force. The process followed is similar to that used when an undertaking is submitted to the ACCC.

The ACCC can require a multiplex licensee to give a variation of an undertaking on or after 1 January 2015. The ACCC can only do this if it is satisfied that the undertaking would be rejected if it were given to the ACCC when the current requirement is imposed.

Enforcement

Section 118NZ provides that where a licensee (or person authorised by a licensee) contravenes the standard access obligations, the excess-capacity access obligations or

¹⁷ *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

¹⁸ *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008*

other obligations set out in section 118NP, the ACCC or any person who is affected by the contravention may apply to the Federal Court for orders to be made.

Section 118P provides that the ACCC or any person whose interests are affected by an access undertaking that is in force may apply to the Federal Court for orders against another person who has breached the undertaking. If the Federal Court is satisfied a breach has occurred, it may make orders such as to direct the person who has breached the undertaking to comply with it or to compensate those who have suffered loss or damage as a result of the breach.

Review of decisions by the Australian Competition Tribunal

Section 118PE provides that a person whose interests are affected by one of the following decisions by the ACCC may apply within 21 days to the Australian Competition Tribunal (ACT) for a review of that decision:

- to accept or reject an access undertaking (subsection 118NF(2))
- to determine unilaterally the terms of an access undertaking after it has been rejected (subsection 118NF(5))
- to accept or reject a variation of an access undertaking (subsection 118NH(3))
- to unilaterally vary an access undertaking after it has been rejected (subsection 118NH(6)) and
- to unilaterally vary an access undertaking after a licensee has not complied with a request to vary (subsection 118NH(11)).

The ACT can affirm, set aside or substitute the decision of the ACCC. The ACT's decision must be made within six months of receiving the application for review. The ACT's decision-making period can be extended by a further three months.

Injunctions

Section 118PI provides that the ACCC may apply to the Federal Court for an injunction to restrain a person from engaging in conduct in contravention of Division 4B of Part 3.3. Interim injunctions are also available under section 118PJ.

Annual reports

Section 118PN provides that multiplex 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 compliance with the relevant access obligations.

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 undertakings. The ACCC made these decision-

making criteria on 21 May 2008 in accordance with section 118NJ of the Act¹⁹. The criteria are described below.

3.2.1 Whether the undertaking complies with Division 4B of Part 3.3

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 access 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).

3.2.2 Whether the undertaking unduly restricts competition

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.

¹⁹ *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*

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

3.2.3 Whether the terms and conditions of access 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 to 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 of the Trade Practices Act.

3.2.4 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 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. For example, any fair and reasonable pricing is in the public interest.

3.2.5 Whether there is an obligation on the 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 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 to 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 of the Trade Practices Act.

3.2.6 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; 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.

3.2.7 Other matters which the ACCC may consider

The criteria 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 undertakings

This section of the discussion paper will provide an overview of the eight identical access undertakings submitted by the digital radio multiplex licensees. The full undertakings are available at www.accc.gov.au.

The multiplex licensees have chosen to submit undertakings that consist of a main body and two attachments called Service Description (Attachment A) and Access Agreement (Attachment B). The attachments are considered to be part of each undertaking. Each part of the undertakings is discussed below.

4.2 Main body of the undertakings

The main body of the undertakings actually form only a small part of the complete document. It is in this part of the document that the multiplex 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 applicable provisions of the Act, including but not limited to the obligation of non-discrimination in section 118NP of the Act in relation to
 - i) the technical and operational quality of the services supplied to the content service providers; and
 - ii) 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 to enable:
 - i) an incumbent commercial broadcaster to obtain the standard access entitlement to which it is entitled;
 - ii) a digital community broadcaster to obtain, through the digital community radio broadcasting representative company, the standard access entitlement nominated for allocation to that broadcaster by the digital community radio broadcasting representative company; and
 - iii) a qualified content service provider to obtain an excess-capacity access entitlement that it may acquire pursuant to the Access Agreement.

4.2.1 Withdrawal, replacement and variation

Clause 4 of the undertakings states that nothing in them limit the multiplex licensee's rights to amend, replace or vary this access undertaking in accordance with the Act or otherwise.

It states that any replacement of or variation to the undertakings will, unless agreed otherwise between the multiplex licensee and an access seeker, automatically form part of an Access Agreement that has been entered into between those parties.

4.3 Service description (Attachment A)

This part of each undertaking provides a description of the multiplex transmission service. This is described as a service provided by the multiplex 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 licensee.

The multiplex transmission service is described as having three bundled components:

- a multiplexing service: multiplexing digital channels from more than one access seeker into a single transport stream;
- a modulation service: modulating that transport stream using orthogonal frequency division multiplex (OFDM) in preparation for radio frequency transmission; and
- a RF service: radio frequency transmission of the OFDM modulated transport stream.

The undertakings provide a technical explanation of each of the three bundled components of the multiplex transmission service.

4.4 Access Agreement (Attachment B)

This part of each undertaking provides the bulk of the details in the document, and provides many of the specifics that underpin the statements in the main body. In many respects the Access Agreement reflects a detailed bilateral contract.

4.4.1 Operational manual

Clause 2.2 of the Access Agreement states that the multiplex licensee agrees to develop an operational manual in consultation with access seekers to deal with technical and operational matters in relation to the multiplex transmission service.

The licensee must:

- establish a process for the development of the operational manual, which includes a process for consultation with access seekers;
- undertake consultation with access seekers in good faith;
- use its reasonable endeavours to accommodate any reasonable requests that may be made by access seekers during the consultation process in respect of the development or contents of the operational manual; and

- ensure that the operational manual is consistent with the Access Agreement.

The undertakings state that any operational manual developed by the multiplex licensee forms part of the Access Agreement and is binding on the parties. The operational manual may also be amended by the multiplex licensee from time to time, subject to Clause 2.2 in the Access Agreement.

4.4.2 Allocation of access entitlements

Clauses 6 and 7 of the Access Agreement set out the manner in which the multiplex licensee is to provide access to both standard access entitlements and excess-capacity access entitlements.

The processes for allocating access entitlements are largely specified in Subdivision C of the Act. The following is a brief summary of the processes as described in the undertakings.

Standard access entitlements for incumbent commercial broadcasters

An incumbent commercial broadcaster must provide the multiplex licensee with notice of its intention to claim access to one-ninth of multiplex capacity made available to incumbent commercial broadcasters. This must occur within 30 days after the issuance of a digital radio multiplex transmitter licence to the multiplex licensee.

The ACCC notes that this deadline has already passed, and all the claims from incumbent commercial broadcasters to multiplex capacity have been accepted by the multiplex licensees.

Standard access entitlements for digital community broadcasters

The multiplex licensee must reserve two-ninths of the multiplex capacity for digital community broadcasters who are nominated and represented by the digital radio community broadcasting representative company. The multiplex licensee must allocate capacity to nominated digital community broadcasters based on the fractions nominated by the representative company, subject to the total allocation not exceeding two-ninths of the total capacity.

Excess-capacity access entitlements

The undertakings state that the multiplex licensee agrees to provide each qualified content service provider with access to the fraction of multiplex capacity to which it may be entitled as an excess-capacity access entitlement, as determined in accordance with clause 7 of the Access Agreement.

The multiplex licensee is considered to have excess capacity if—either on the digital start up day or any time after the end of the 12 month period beginning on the start up day—there is more multiplex capacity than that allocated to incumbent commercial broadcasters and reserved for community broadcasters.

The undertakings state that the multiplex licensee may:

- set out the amount of excess capacity that is available;

- provide at least 30 days notice of its intention to ascertain the level of demand for excess capacity; and
- invite expressions of interest in accessing the excess capacity.

Where demand for the excess capacity falls short of the supply, each interested party will be entitled to its request. Where demand exceeds supply, the multiplex licensee will conduct an auction process in accordance with auction rules to determine the allocation of the excess capacity. Any auction rules that are developed by the multiplex licensee must:

- use an open and transparent auction process;
- allocate the excess capacity using a market based allocation system;
- treat all bids and related information received from an interested party as confidential;
- ensure that the auction is conducted within 60 days of the date of completion of consultation with the industry regarding the excess capacity.

Parties that are successful in the auction must pay the multiplex licensee the applicable auction fee. The fees can only be used to pay for costs in connection with the auction process or to promote digital radio broadcasting in Australia.

Any party that acquires excess capacity is not permitted to have more than two-ninths of the multiplex capacity in a designated licence area.

4.4.2 Supply of the multiplex transmission service

The undertakings state that the multiplex licensee agrees to provide access to, and the access seeker agrees to acquire, the multiplex transmission service in accordance with the prices, terms and conditions set out in the Access Agreement.

The multiplex licensee must not prevent an access seeker from obtaining access to the service in accordance with the applicable terms of the Access Agreement.

The multiplex licensee must not discriminate between access seekers to which it provides the service in relation to:

- the technical and operational quality of the service; and
- the technical and operational quality and timing of the fault detection, handling and rectification supplied to access seekers.

The undertakings state that, for the avoidance of doubt, the multiplex licensee must not discriminate on the basis that the access seeker is or is not a shareholder in the multiplex licensee. The undertakings further state that the requirement for non-discrimination does not limit the ability of an access seeker to request access to the service at a lower bit rate than that provided to other access seekers.

The multiplex licensee agrees to provide access seekers with the standard and excess capacity access entitlements to which they are entitled.

4.4.3 Liability and indemnity

Clause 17 of the Access Agreement deals with liability and indemnity. The undertakings propose that, to the extent permitted by law, the liability of each party is limited and excluded as set out in the Access Agreement.

The undertakings provide for an exclusion of implied warranties, a limit on liability, and a reduction of liability. They also state that each party indemnifies the other party against all damage arising as a result of any claims in respect of various specified matters.

It is also proposed that subject to the approval of the ACCC, the multiplex licensee may propose changes to the liability regime to take account of changes in the licensee's liability to suppliers or vendors under third party supply agreements, or in the manner in which the licensee supplies the multiplex transmission service.

4.4.4 Pricing principles

Schedule 2 of the Access Agreement sets out the pricing principles applicable to the provision of the multiplex transmission service by the multiplex licensee, and the methodology for determining the charges payable by access seekers for the service.

The undertakings state that the pricing principles will be used by the parties when commercially negotiating the prices to be paid by an access seeker to the multiplex licensee for the service.

It is stated that an over-arching principle is that a multiplex licensee may supply the multiplex transmission service at a price that allows it to recover its efficient costs and earn a normal commercial rate of return on its investment.

Pricing principles

The proposed methodology identifies the following cost categories, which are said to be recoverable from access seekers:

- capital expenditure;
- operating expenditure; and
- expenditure on corporate overheads.

The proposed pricing principles provide for the annualisation of the multiplex licensee's costs to derive recurrent charges. Capital expenditure will be recovered by annualising these costs over the economic life of the assets, as determined in accordance with the *Income Tax (Effective Life of Depreciating Assets) Determination 2001*.

It is proposed that the annualised capital expenditure will be determined by aggregating the return on capital of the depreciated value of the assets, and the return of capital. For the purposes of this calculation:

- the return on capital is the weighted average cost of capital of the depreciated value of the assets. The weighted average cost of capital is the nominal post-tax return on capital and is calculated by reference to the cost of equity and the cost of debt to the multiplex licensee. The weighted average cost of capital will be commensurate with that of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business cycle; and
- the return of capital is the depreciation expense incurred in each period calculated by applying a straight-line depreciation schedule to each of the assets.

Principles for determining charges

The undertakings state 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.

The annualised costs derived in accordance with the process described above will be converted into an annual fixed recurring charge according to the following formula:

$$\text{AFRC} = \text{AC} \times \frac{\text{BMC}}{\text{TMC}}$$

where,

AFRC is the annual fixed recurring charge

AC is the annualised costs

BMC is the amount of the multiplex capacity allocated to the relevant access seeker by the multiplex licensee.

TMC is the total amount of multiplex capacity allocated to all access seekers by the multiplex licensee and which shall be no greater (but may be less) than 9/9.

In the event that the amount of capacity allocated to access seekers increases or decreases within a billing period, the charges payable by each access seeker are to be proportionally adjusted upwards or downwards (as the case may be) from the date of the relevant increase or decrease.

Should the multiplex licensee provide the service to access seekers at a lower bit rate than that provided to other access seekers, the access seekers obtaining the lower bit rate agree that the charges will also include specific costs incurred by the multiplex licensee in providing the lower bit rate service. This includes but is not limited to the cost of any additional line cards.

Review of standard charges

The undertakings provide for the multiplex licensee to regularly review the fixed recurring charges payable, depending on a number of factors including but not limited to:

- to reflect actual expenditure incurred by the multiplex licensee when compared with the forecast, estimated costs;
- increases in the cost incurred by the multiplex licensee;
- changes in the consumer price index; and
- technological changes that change the cost of supplying the multiplex transmission service or the number of access seekers that can be accommodated by the multiplex licensee.

4.4.5 Dispute resolution procedures

Schedule 3 of the Access Agreement sets out the procedures to be followed should there be a dispute arising under or in connection with the Access Agreement.

The undertakings set out processes to be followed and timelines for the escalation of disputes. The overall process is set out in Chart 1 below.

If the parties cannot resolve the dispute themselves, either party may refer the dispute to mediation. The parties then either agree on a mediator, or may apply to the Australian Commercial Disputes Centre (ACDC) to appoint a mediator. Any mediation must be conducted in accordance with the ACDC *Commercial Mediation Guidelines*.

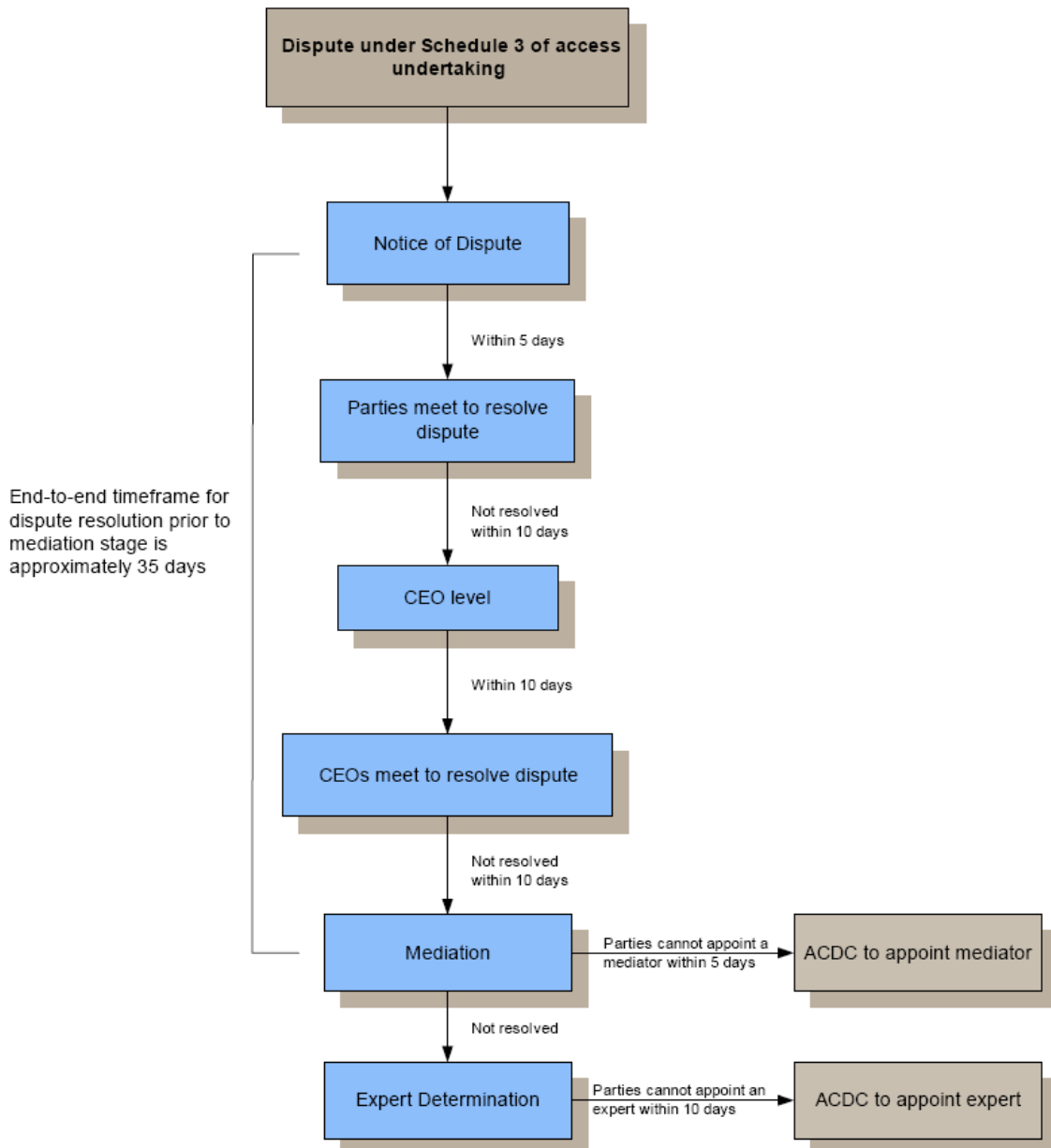
If the parties cannot resolve the dispute through mediation, either party may refer the dispute for binding expert determination. The ACDC can appoint an expert if the parties cannot agree on the selection of an expert. Any binding expert determination must be conducted in accordance with the ACDC *Rules for Expert Determination*.

In making a determination, the expert must have regard to the following:

- the terms of the undertaking and the Access Agreement;
- the applicable terms of the Act;
- the legitimate business interests of the multiplex licensee and its investment in facilities used to supply the multiplex transmission service;
- the interests of access seekers
- the public interest in having competition in markets and efficient investment in facilities used to supply the multiplex transmission service and services that use the multiplex transmission service as an input;
- the operational and technical requirements necessary for the safe and reliable operation of the multiplex transmission service; and

- the economically efficient operation of the facilities used to supply the multiplex transmission service.

Chart 1 Dispute resolution mechanism as proposed in the undertakings²⁰



4.4.6 Conditions precedent

Attachment A of the Access Agreement contains the conditions precedent that an access seeker must satisfy before the multiplex licensee is obliged to supply the service.

The conditions precedent are:

²⁰ Gilbert + Tobin, *Supporting submission in relation to Access Undertaking lodged pursuant to Part 3.3, Division 4B, Subdivision B of the Radiocommunications Act 1992*, p 24.

- the access seeker must be either an incumbent commercial broadcaster, the representative company (acting on behalf of digital community broadcasters) or a restricted datacaster;
- the access seeker must submit an application for entry into an Access Agreement with the multiplex licensee; and
- the access seeker has satisfied certain specified requirements for financial security.

With regards to financial security, the undertakings propose that the multiplex licensee may conduct a review of the creditworthiness of the access seeker. The access seeker must provide financial security if the multiplex licensee does not consider that the access seeker is creditworthy, or the access seeker does not provide information in relation to its creditworthiness.

4.4.7 Other provisions

The Access Agreement also contains many other provisions relating to matters such as:

- representations and warranties;
- access and maintenance;
- invoices and payment;
- suspension and termination of the service;
- intellectual property;
- confidentiality; and
- external audits.

Clause 23.9 states that no variation of the Access Agreement is effective unless made in writing and signed by each party. Pursuant to clause 4.2 in the main body of the undertakings, any replacement or variation of the undertaking will, unless otherwise agreed between the parties, automatically form part of the Access Agreement.

5. Questions about the undertakings

This section sets out the particular issues the ACCC would like interested parties to focus on in providing submissions to this discussion paper.

In assessing the undertakings, the ACCC must have regard to the decision-making criteria as set out in section 3.2 of this discussion paper. The discussion and specific issues outlined in this section are therefore categorised with these assessment criteria in mind. Interested parties may wish to provide submissions on relevant issues not directly raised in this section.

The questions below are designed to stimulate discussion about the undertakings and do not necessarily represent the ACCC's views.

5.1 Whether the undertaking complies with Division 4B of Part 3.3

In assessing considering whether to accept an undertaking, the ACCC must consider whether the terms and conditions of access in the undertaking comply with the access framework set out in Division 4B of Part 3.3 of the Act.

The legislative framework provides for formal procedures that are to be followed if the multiplex licensee, or the ACCC in some circumstances, wants an existing undertaking varied.²¹ The procedures allow for the ACCC to conduct an assessment in a similar manner to that followed when assessing an undertaking in the first instance.

The undertakings that are being considered by the ACCC contain provisions that refer to variation. The main body of the undertaking includes the following: (our emphasis)

4.1 General

Nothing in this access undertaking limits the Multiplex Licensee's rights to amend, replace or vary this access undertaking in accordance with the Radiocommunications Act *or otherwise*.

4.2 Effect of replacement or variation

Any replacement of, or variation to, this access undertaking will, *unless agreed otherwise between the Multiplex Licensee and an Access Seeker*, automatically form part of an Access Agreement that has been entered into between those parties.

Further, clause 23.9 of the Access Agreement states as follows:

²¹ Sections 118NH and 118NI, *Radiocommunications Act 1992*

23.9 Variation

- (a) Subject to clause 23.9(b), *no variation of this Agreement is effective unless made in writing and signed by each Party.*
- (b) Pursuant to clause 4.2 of the Access Undertaking, any replacement or variation of the Access Undertaking will, *unless otherwise agreed between the Parties*, automatically form part of this Agreement.

The ACCC has some concerns that these clauses do not appear to be strictly consistent with Division 4B of Part 3.3 of the Act. First, they appear to contemplate variation to the terms of the Access Agreement without ACCC approval. Further, they appear to sanction a multiplex licensee agreeing with an individual access seeker to opt out of specific provisions in the access undertaking in the event of an ACCC approved variation.

Do the clauses in the undertaking that refer to variation, namely clause 4 of the Access Undertaking and clause 23.9 of the Access Agreement, comply strictly with Division 4B of Part 3.3 of the Act?

An important aspect of this part of the Act is the requirement for the licensee to provide access to the multiplex capacity to content service providers with standard and excess capacity access entitlements.

The undertakings set out the obligations on the multiplex licensee in relation to standard and excess capacity access entitlements in clause 3.2 of the main body of the undertaking together with clauses 6 and 7 of the Access Agreement.

More specifically, section 118NT of the Act requires the multiplex licensee to ascertain the level of demand for access to excess capacity, and sets out mandatory requirements for how this process is to occur. However, the ACCC notes that clause 7.4(a) of the Access Agreement states that the multiplex licensee *may*, by way of notice on its website:

- set out the amount of the excess multiplex capacity that is available;
- provide at least 30 days notice of its intention to ascertain the level of demand for excess multiplex capacity; and
- invite expressions of interest in accessing the excess multiplex capacity.

Do the provisions regarding access entitlements in the undertakings comply with the provisions in Subdivision C of Division 4B of Part 3.3 of the Act?

Subsection 118NQ(2) of the Act states that an eligible incumbent commercial broadcaster is entitled to one-ninth of multiplex capacity through standard access entitlements. By contrast, in the undertakings clause 6.3(b) of the Access Agreement states that an eligible incumbent commercial broadcaster can claim access to one-ninth

of multiplex capacity ‘made available by the Multiplex Licensee to Incumbent Commercial Broadcasters’.

When one considers that each eligible commercial broadcaster can claim one-ninth of total multiplex capacity under standard access entitlements (as opposed to one-ninth of multiplex capacity made available to incumbent commercial broadcasters) does this mean that clause 6.3(b) of the undertakings is inconsistent with the Act?

5.2 Whether the undertaking unduly restricts competition

An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker to provide services, including in competition with any services provided by other parties. Similarly, an undertaking should not favour particular access seekers.

Are there any aspects of the undertakings that unreasonably restrict the ability of digital radio broadcasters from providing digital radio content services?

Clause 9.3 of the Access Agreement states that the multiplex licensee must not discriminate between access seekers to which it provides the multiplex transmission service in relation to:

- the technical and operational quality of the multiplex transmission service supplied to access seekers; and
- the technical and operational quality and timing of the fault detection, handling and rectification supplied to access seekers.

The undertakings also state that, for the avoidance of doubt, the multiplex licensee must not discriminate between access seekers in relation to the two matters above on the basis that the access seeker is not a shareholder of the multiplex licensee.

As noted earlier in this discussion paper, community broadcasters were not shareholders in the joint venture companies at the time of publication of this discussion paper. However, the government was exploring options to enable this to occur, and legislation currently before Parliament will provide community broadcasters with further opportunity to take up shares in the multiplex licensee companies if passed.²²

Are there any mechanisms in the undertakings that would allow the multiplex licensee to unreasonably discriminate in favour of one or more access seekers? Does clause 9.3 provide sufficient protection against this occurring?

Further, the undertakings state that the non-discrimination obligation clause does not prevent an access seeker from requesting access at a lower bit rate than that provided to other access seekers (clause 9.3(c) in the Access Agreement).

²² Broadcasting Legislation Amendment (Digital Radio) Bill 2008

The Gilbert + Tobin submission (on behalf of CRA) in support of the undertakings notes that the Act provides for allocations of multiplex capacity based on divisions of one-ninth. It states that one-ninth of capacity equates to approximately 128 Kbps of capacity on a multiplex transmitter. It states that digital signals can be transmitted at various bit rates to provide acceptable broadcast quality, and it is likely that certain access seekers will choose to acquire a lower bit rate for digital radio services. It also states that it will enable the access seeker to pay a proportionally reduced access charge, although the ACCC notes that clause 4.4 of the pricing principles (Schedule 2) provides that access seekers receiving a lower bit rate service must also pay any direct costs incurred by the licensee in providing the lower bit rate service such as costs for an additional line card.

Do the provisions in the undertakings enabling access seekers to obtain service at lower bit rates provide scope for the licensee to unreasonably discriminate between access seekers?

In section 5.1 of this discussion, the ACCC notes that certain clauses in the main body of the undertaking and the Access Agreement refer to variation of the undertaking.

Do the clauses in the undertaking that refer to variation, namely clause 4 of the main body of the access undertaking and clause 23.9 of the Access Agreement, provide scope for the licensee to unreasonably discriminate between access seekers?

5.3 Whether the terms and conditions of access are reasonable

The terms and conditions of access in the undertakings must be considered to be reasonable. The ACCC considers that attributes characterising 'reasonable' terms and conditions include certainty, fairness and balance, timeliness and the removal of any potential for delaying access.

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

The undertakings currently do not include an operational manual that deals with technical and operational matters that arise in connection with the Access Agreement or the supply of the multiplex transmission service. However, clause 2.2 of the Access Agreement states that the multiplex licensee must develop such an operational manual and use its reasonable endeavours to accommodate any reasonable requests from access seekers during a consultation process. It also states that any operational manual forms part of the Access Agreement, and may be amended by the multiplex licensee from time to time subject to clause 2.2.

In its supporting submission, Gilbert + Tobin (on behalf of CRA) states that the operational manual has not yet been developed because at the date of the supporting submission, the deployment of digital radio infrastructure was still in its planning and design stage. It states that the approach taken is consistent with industry practice in

other networked industries, where operational and technical matters are dealt with in separate documentation between the parties.

Is there sufficient safeguard in the undertakings that the operational manual subsequently developed will be consistent with the criteria in section 5 of *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*?

Clause 17 of the Access Agreement deals with liability and indemnity. There are also provisions that enable the multiplex licensee to propose changes to the liability regime under clause 17, subject to approval by the ACCC. The proposed changes can be to take account of changes in the multiplex licensee's liability to suppliers or vendors under third party agreements, or in the manner in which the licensee supplies the service.

Are the specified terms in the undertakings relating to liability and indemnity reasonable?

5.4 Whether the access prices or pricing methodologies are fair and reasonable

The prices or pricing methodologies in the access undertaking must be fair and reasonable for the ACCC to accept the undertaking.

The explanatory statement to the decision-making criteria states that 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. In its supporting submission, Gilbert + Tobin (on behalf of CRA) states that as the multiplex licensees are still in the process of finalising their downstream supply arrangements, it is not possible at this point in time for the licensees to know their costs or for the undertakings to set out specific prices for the service.

Given the stage of development of the digital radio multiplex infrastructure at the time the undertakings were submitted, is it reasonable for the undertakings to include only pricing principles and not indicative pricing? Do pricing principles alone provide sufficient assurance that the eventual prices will be fair and reasonable? Will access seekers be able to access the necessary information to verify that any prices proposed at a later date by the multiplex licensee do in fact accurately reflect the pricing principles in the undertaking?

Schedule 2 of the Access Agreement sets out the pricing principles applicable to the service, and the methodology for determining the standard charges payable by access seekers for the service.

Do these pricing principles represent a fair and reasonable methodology for the multiplex licensee to set prices so as to recover its efficient costs, including a normal commercial rate of return?

The pricing principles provide that the weighted average cost of capital (WACC) of the multiplex licensee will be commensurate with the WACC of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business cycle.²³

Given the possible difficulty in finding a similar business as specified under clause 3.3(c)(i) of Schedule 2 of the Access Agreement, do the pricing principles represent a fair and reasonable method for determining the weighted average cost of capital?

The pricing principles determine charges on a per-access seeker basis, rather than a per-capacity basis. This means the price paid by an access seeker will be determined in part by the number of access seekers receiving the service provided by that multiplex licensee. Clause 4.3 of Schedule 2 of the Access Agreement provides a mechanism for adjusting the charge when the number of access seekers changes.

Is it reasonable for the undertakings to specify that charges be determined on a per-access seeker basis, rather than a per-capacity basis? Is the mechanism for adjusting prices when the number of access seekers changes fair and reasonable?

Clause 5 of Schedule 2 of the Access Agreement enables the multiplex licensee to regularly review the fixed recurring charges payable by access seekers. The review would depend on a number of factors including but not limited to:

- to reflect actual expenditure incurred by the multiplex licensee when compared with the forecast, estimated costs;
- increases in the cost incurred by the multiplex licensee;
- changes in the consumer price index; and
- technological changes that change the cost of supplying the multiplex transmission service or the number of access seekers that can be accommodated by the multiplex licensee.

Is it reasonable for the undertakings to enable the multiplex licensee to regularly review the fixed recurring charges payable by access seekers? Does this provision mean the pricing principles are too broad to ensure that the prices payable by access seekers will be fair and reasonable?

²³ Clause 3.3(c)(i) of Schedule 2 of the Access Agreement

5.5 Whether there is an obligation on the licensee to not hinder access

The undertaking should include an obligation to not hinder access to services. This would not be applied unreasonably. For example, the multiplex licensee may require access seekers to be creditworthy or technically capable of providing a content stream.

Clause 9.2 of the Access Agreement states that the multiplex 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.

Does clause 9.2 of the Access Agreement, in particular the stipulation ‘in accordance with the applicable terms of this Agreement’, satisfy the requirement for an undertaking to include an obligation on the multiplex licensee to not hinder access?

Clause 14 of the Access Agreement includes provisions for the multiplex licensee to conduct a review of the creditworthiness of an access seeker. The access seeker must provide relevant financial information for this purpose, and provide financial security if it does not meet the security requirements according to the multiplex licensee.

Are the financial security provisions of the undertaking too onerous on access seekers and represent in effect an ability of the multiplex licensee to hinder access?

5.6 Whether the undertaking provides for a reasonable dispute resolution mechanism

The ACCC must assess whether the dispute resolution mechanism included in the undertakings is reasonable. In that regard, the ACCC will consider whether the mechanism facilitates the fair, timely and efficient resolution of disputes, including possibly the appointment of an appropriate arbitrator within a reasonable timeframe.

The dispute resolution procedures are set out in Schedule 3 of the Access Agreement. The procedures provide for the dispute to be resolved through discussion between the parties, before escalating to mediation or an expert determination if required. The mediation and expert determination procedures are governed by guidelines set out by the Australian Commercial Disputes Centre (ACDC).

The ACCC notes that an expert determination process differs slightly from that of an arbitration. The ACDC guidelines for arbitrations provide some discussion of the hearings that are to occur, a matter on which the ACDC guidelines for expert determinations are silent. The ACDC guidelines for arbitrations state that the arbitrator may determine the submission of, or the limitation of:

- pleadings;
- discovery;
- opening address and closing address;

- lodgement of sworn statements or affidavit evidence on which the parties seek to rely;
- rights of reply to documents tendered;
- attendance of deponents for cross-examination;
- expert witnesses;
- expert reports;
- calling, examining, cross-examining or re-directing witnesses and experts; and
- procedural directions.

The ACCC has previously expressed a preference for arbitration (as opposed to expert determination) as a means of resolving disputes. However Gilbert + Tobin (on behalf of CRA) submits that the functions and roles of the expert are virtually identical to that of an arbitrator. It also states that an expert determination has the added benefit of ensuring that the adjudicator is also expert with the relevant expertise in the area of the dispute.²⁴

Does the proposed dispute resolution mechanism specified in the undertakings represent a reasonable dispute resolution mechanism? Does it facilitate the fair, timely and efficient resolution of potential disputes?

5.7 Other matters which the ACCC may consider

The ACCC may also consider other matters it believes is relevant to the assessment of the undertakings. All of the ACCC's questions at this stage relate to some degree to at least one of the decision-making criteria, but submitters may wish to raise other issues in their submissions.

²⁴ Gilbert + Tobin, *Supporting submission in relation to Access Undertaking lodged pursuant to Part 3.3, Division 4B, Subdivision B of the Radiocommunications Act 1992*, p 25.

Appendix A — Submission template

Assessment of access undertakings in relation to digital radio multiplex transmission services

Lodged under Division 4B Part 3.3 of the *Radiocommunications Act 1992* (the Act) on 3 October 2008

SUBMISSION LODGED BY THE *[Insert name of party making the submission]* pursuant to the discussion paper released by the ACCC on 23 October 2008.

Matters to be specifically addressed by party

1. Submission on whether the access undertaking complies with Division 4B of Part 3.3 of the Act

[Insert submission]

2. Submission on whether the access undertaking unduly restricts competition in related markets

[Insert submission]

3. Submission on whether the terms and conditions of access specified in the undertaking are reasonable

[Insert submission]

4. Submission on whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable

[Insert submission]

5. Submission on whether the access undertaking includes an obligation on the licensee to not hinder access to services

[Insert submission]

6. Submission on whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism

[Insert submission]

7. Submission on other matters to which the ACCC may have regard

[Insert submission]