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# Digital radio access undertaking Submission in response to the ACCC's discussion paper dated 23 October 2008

**Commercial Radio Australia**

**21 November 2008**

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## 1 Introduction

Commercial Radio Australia Limited (**CRA**) is the peak industry body representing commercial radio broadcasting stations in Australia. CRA has 260 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

CRA has been heavily involved in the development of the access regime for digital radio services in Australia.

In particular, CRA has played an active role in:

- the establishment of the Eligible Joint Venture Companies (**EJVCs**) that will provide digital radio multiplex services to access seekers;
- the development of the access undertaking lodged by the EJVCs with the Australian Competition and Consumer Commission (**ACCC**); and
- discussions with the ACCC, on behalf of the industry, about the access undertaking.

CRA strongly supports the proposed access undertaking that has been lodged by EJVCs and considers that it should be approved by the ACCC in its current form.

CRA appreciates the opportunity to comment on the ACCC's discussion paper dated 23 October 2008. (**Discussion Paper**).

This submission sets out CRA's response to the issues raised by the ACCC in its Discussion Paper and seeks to do so in accordance with the submission template set out in Appendix A of the Discussion Paper (see sections 3 to 8).

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## 2 Executive Summary

### 2.1 Access undertaking needs to be considered as part of the broader industry structure for digital radio multiplex services

Digital radio multiplex transmission services are the key input into the supply of digital radio services and provide the basis for competition in downstream radio broadcasting markets.

Given the essential nature of digital radio multiplex services to the future of the radio broadcasting industry, it is important that the proposed access undertaking provides for EJVCs to sustainably provide digital radio multiplex services in a manner that meets the needs of the broadcasting industry.

The proposed access undertaking has been prepared with these objectives in mind.

A key aspect of providing digital radio multiplex services on a sustainable basis is the need to ensure that EJVCs are permitted to recover their efficient costs and to earn a normal commercial rate of return.

It is unlikely that EJVCs will be sustainable if the proposed access undertaking does not make sufficient provision in this regard. This is because the *Radiocommunications Act* 1992 (Cth) (**Radiocommunications Act**) establishes EJVCs as a wholesale only business, with the sole function of providing digital radio multiplex transmission services to certain access seekers.

As a wholesale only business, each EJVC will have a single stream of revenue in the form of access charges payable by access seekers for the supply of multiplex capacity.

To ensure its viability and the supply of digital radio multiplex services on a sustainable basis, CRA wishes to emphasise the fundamental need for EJVCs to be able to:

- fully recover their costs in providing multiplex capacity to access seekers from access charges; and
- earn a normal commercial rate of return.

CRA submits that the pricing methodology set out in the proposed access undertaking provides an appropriate basis for the long term viability of EJVCs and should be approved by the ACCC in its current form.

## **2.2 The access undertaking is consistent with the Radiocommunications Act and the ACCC's decision making criteria**

CRA considers that the proposed access undertaking is consistent with:

- applicable terms of the Radiocommunications Act; and
- the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008 (Decision Making Criteria)*.

The Radiocommunications Act establishes a prescriptive regime for allocation of standard access entitlements and excess-capacity access entitlements. The proposed access undertaking provides the basis for eligible access seekers to claim these entitlements and does so in a manner that is consistent with the Radiocommunications Act.

In particular, the access undertaking provides the basis for:

- incumbent commercial broadcasters to claim a total of seven-ninths of multiplex capacity on a multiplexer, with individual incumbent commercial broadcasters claiming one-ninth of this multiplex capacity;
- digital community broadcasters to access the remaining two-ninths of multiplex capacity through, and based on the allocations specified by, the Digital Community Radio Broadcasting Representative Company (**Representative Company**); and
- the allocation of excess-capacity access entitlements to incumbent commercial broadcasters, digital community broadcasters (through the Representative Company) and restricted datacasters.

## **2.3 No reasonable prospect of discrimination**

CRA does not consider that there is any reasonable prospect of discrimination in the manner alleged by the ACCC for the following reasons:

- access agreements entered into between the EJVC and an access seeker (and any variations to an agreement) must be consistent with the access undertaking and Radiocommunications Act, including the prohibition against discrimination contained therein;
- the ACCC has extensive powers under the Radiocommunications Act to monitor and audit compliance with the access undertaking, and to take enforcement action for a breach of the prohibition against discrimination;

- it is intended that all access seekers will be subject to the same terms and conditions of access, as the allocation of standard access entitlements and excess-capacity access entitlements (and the manner in which access charges are to be calculated) is contingent on all access seekers being subject to the same access agreement terms;
- the decision to acquire a lower bit rate service is a decision for the access seeker alone (not the EJVC);
- in supplying digital radio multiplex transmission service, the EJVC will simply accept and convert the access seeker's data stream into a digital service based on the instructions of individual access seekers – the EJVC effectively serves as a conduit for the purpose of providing digital radio services;
- the access regime already provides for the supply of multiplex capacity on a non-discriminatory basis with respect to:
  - the technical and operational quality; and
  - price, such that all access seekers will pay the same for an equivalent amount of multiplex capacity.

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### 3 Access undertaking complies with Division 4B of Part 3.3 of the Radiocommunications Act

#### 3.1 Variation to access agreement

The ACCC has requested submissions about whether the variation provisions in the access undertaking and access agreement are consistent with section 118NH of the Radiocommunications Act, which sets out the process for variations to access undertakings.<sup>1</sup>

In particular, the ACCC has claimed that the access agreement:<sup>2</sup>

- appears to permit the EJVC to vary the terms of the access agreement without the ACCC's approval
- allows EJVC to agree with individual access seekers terms that are inconsistent with the access undertaking in the event of an ACCC approved variation.

CRA considers that there is nothing in the access undertaking that is inconsistent with section 118NH of the Radiocommunications Act, or which should be a cause of concern for the ACCC.

In its Discussion Paper, the ACCC has identified clause 23.9(a) of the access agreement as a cause of concern:

*"...no variation of this Agreement is effective unless made in writing and signed by each Party".*

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<sup>1</sup> Australian Competition and Consumer Commission, *undertakings in relation to access to digital radio multiplex transmission services – discussion paper, 23 October 2008*, page 32.

<sup>2</sup> *Ibid*, page 32.

CRA is surprised by the ACCC's concern.

Clause 3.2 of the proposed access undertaking provides that the access agreement forms part of the access undertaking. The purpose of this clause is to make it clear that the access agreement provides the mechanism by which the EJVC will implement the commitments it has given to the ACCC pursuant to the access undertaking.

However, for the purposes of implementation, the access agreement is a contractual arrangement between two parties and it is this contractual arrangement that establishes the obligations of the EJVC to each access seeker. The commencement of legal obligations pursuant to an access agreement take effect on execution by the parties. It is the same for variations.

In the event that a variation to the access undertaking required a change to an access agreement, it would be necessary for the parties to implement that change through a formal variation. Clause 23.9(a) of the access agreement reflects this requirement.

Any variation to an access agreement between access seekers would remain subject to the commitments given by the EJVC in the access undertaking, including the overarching obligation of non-discrimination in the access undertaking and the Radiocommunications Act. When coupled with the ACCC's power to audit and take enforcement action against a breach of an access undertaking, there are sufficient safeguards in place to ensure that access agreements between EJVCs and access seekers remain non-discriminatory and in compliance with the terms of the access undertaking and Radiocommunications Act.

The ACCC also appears to have a concern with the use of the words "*unless agreed otherwise*" in clause 23.9(b) of the access agreement:

*"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".*

Once again, it is not intended that this phrase will result in the establishment of discriminatory terms and conditions for different access seekers (or classes of access seekers). Such a phrase was included in the access agreement to ensure flexibility in how changes to the access undertaking are implemented, but ultimately remains subject to the terms of the access undertaking, including the EJVCs obligation of non-discrimination under the access undertaking and the Radiocommunications Act.

It may be the case that the changes to the access undertaking require technological changes, or changes in how the EJVC calculates and invoices for access charges. As it may not be possible to implement these changes immediately when the changes immediately (e.g. technological changes may have certain lead times associated with procurement, systems testing and implementation), clause 23.9(b) of the access agreement provides the contracting parties with some flexibility as to how these matters may be handled from a practical perspective. For example, it may be the case that the parties agree to continue with the existing arrangement until the EJVC procures a new billing platform, from which date the access charges will be backdated to take account of changes to the access undertaking. Any such variations that are agreed by the parties pursuant to clause 23.9(b) of the main body would remain subject to the applicable terms of the access undertaking and the Radiocommunications Act.

In any case, it is intended that all access seekers will be subject to the same terms and conditions of access. In fact, there are various aspects of the proposed access agreement that would not be capable of proper implementation unless each and every access seeker is subject to the same terms and conditions of access. For example, it would not be possible to accurately calculate access charges unless all access seekers

were subject to the same terms, given that access charges are determined by dividing the amount of multiplex capacity allocated to each access seeker by the total amount of multiplex capacity allocated to all access seekers.

In light of the above, CRA considers that the variation provisions in the proposed access undertaking do not raise any issues and should be accepted by the ACCC in its current form. In particular:

- the variation provision are not inconsistent with the terms of the Radiocommunications Act, including the ACCC's powers pursuant to section 118NH; and
- the variation provisions do not create a possibility of discrimination between access seekers by EJVCs, as all access agreements between EJVCs and access seekers (and any variations) remain subject to the commitments given by the EJVC in the access undertaking and the terms of the Radiocommunications Act; and
- the ACCC has extensive powers to audit and take enforcement action against a breach of an access undertaking,

However, in the event that the ACCC considers that any perceived issue continues to exist, CRA would be happy to discuss these issues with the ACCC in greater detail.

### **3.2 Access undertaking is consistent with the Radiocommunications Act**

The ACCC has requested submissions on whether the process for the allocation of standard access entitlements and excess-capacity access entitlements in the proposed access undertaking is consistent with the terms of the Radiocommunications Act.<sup>3</sup>

CRA considers that the access undertaking is consistent with the provisions in Subdivision C of Division 4B of Part 3.3 of the Radiocommunications Act. The access undertakings have been prepared based on, and to ensure consistency with, the terms of the Radiocommunications Act.

In particular, clause 6 of the access agreement sets out the process for the allocation of standard access entitlements. These terms are modelled on the provisions of the Radiocommunications Act, which provide for:

- incumbent commercial broadcasters to claim a total of seven-ninths of multiplex capacity on a multiplexer, with individual incumbent commercial broadcasters claiming one-ninth of the allocated multiplex capacity as a standard access entitlement; and
- digital community broadcasters to access the remaining two-ninths of multiplex capacity through, and based on the allocations specified by, the Representative Company.

Clause 7 of the access agreement provides for the allocation of excess capacity access entitlements to incumbent digital broadcasters, digital community broadcasters (through the Representative Company) and restricted datacasters. These terms are also modelled

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<sup>3</sup> Ibid, pages 32 and 33.

on, and consistent with, the provisions of the Radiocommunications Act, subject to a minor correction.<sup>4</sup>

CRA considers that the access undertaking and the access agreement provide for the implementation of standard access entitlements and the allocation of excess capacity access entitlements in a manner that is consistent with the letter and spirit of the Radiocommunications Act.

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## 4 Proposed access undertaking is pro-competitive

### 4.1 Ability of digital radio broadcasters to provide digital radio content services

The ACCC has requested submissions on whether:

- there are any aspects of the access undertaking that unreasonably restrict the ability of an access seeker from providing digital radio content services;<sup>5</sup> and
- there are mechanisms in the proposed access undertaking that allow an EJVC to unreasonably discriminate in favour of one or more access seekers.<sup>6</sup>

The access undertaking does not restrict the ability of eligible access seekers from providing digital radio content services, nor does it discriminate against access seekers (or a particular class of access seekers).

In fact, the proposed access undertaking facilitates the provision of digital radio services in downstream markets and is therefore pro-competitive.

The proposed access undertaking contains a straightforward and transparent mechanism to enable access seekers to acquire standard access entitlements and excess capacity access entitlements to which they are entitled from EJVCs. This allows access seekers to provide digital radio content services and provides the basis for competition in downstream markets.

This mechanism is consistent with the Radiocommunications Act and reflects the various eligibility requirements that are contained in that Act, including with respect to:

- the types of broadcasters that are eligible to claim standard access entitlements and excess-capacity access entitlements; and
- the amount of multiplex capacity that may be claimed by incumbent commercial broadcasters and digital community broadcasters (through the Representative Company).
- the methodology for the allocation of excess-capacity access entitlements.

In accordance with the eligibility requirements for entry into an access agreement (which reflect the eligibility requirements under the Radiocommunications Act), the proposed

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<sup>4</sup> Please note that the reference to "may" in clause 7.4(a) of the access agreement is a typographical error and should be replaced with "must".

<sup>5</sup> Australian Competition and Consumer Commission, *undertakings in relation to access to digital radio multiplex transmission services – discussion paper, 23 October 2008*, page 33.

<sup>6</sup> *Ibid*, page 33.



access regime provides for the equal treatment of all access seekers and ensures that no access seeker (or class of access seekers) is discriminated against.

In particular:

- the access agreement explicitly prohibits discrimination against access seekers that do not hold a shareholding interest in the Multiplex Licensee;<sup>7</sup>
- the access undertaking prohibits discrimination in respect of the operational and technical quality of services, and in respect of fault detection, handling and rectification;
- the pricing principles provide for the equal treatment of all access seekers in the same situation, with each access seeker paying an identical access charge to another access seeker that acquires the same amount of multiplex capacity; and
- the access undertaking provides access seekers with the option of acquiring a lower bit rate service, in which case the access seeker will receive a proportionate reduction in the level of access charges that are payable.

In light of the above, CRA considers that it is clear that the proposed access undertaking does not “*unduly restrict competition in related markets*” and is consistent with the ACCC’s Decision Making Criteria.

#### **4.2 Availability of lower bit rate services**

The ACCC requested submission on whether the availability of lower bit rate services creates scope for the EJVCs to unreasonably discriminate between access seekers.<sup>8</sup>

It is incorrect for the ACCC to equate the availability of lower bit rate services with the possibility of discrimination between access seekers.

As previously mentioned, digital radio signals can be transmitted at various bit rates to provide acceptable broadcast quality. The bit rate that is chosen by an access seeker will be determined by a variety of factors, such as its business and service model and the nature of the content services that are to be supplied.

It is up to the individual access seeker (not the EJVC) to specify the bit rate of the digital radio services that it wishes to supply. The EJVC will simply accept and convert the access seeker’s signal based on the instructions of the access seeker.

For example, CRA has conducted tests that demonstrate acceptable broadcast quality can be obtained using a bit rate of 24 Kbps upwards. It may be the case that certain broadcasters wish to acquire such a lower bit rate service in accordance with their respective business models. Such a decision, however, is made by the access seeker, independently of the EJVC.

In the event that an access seeker selects a lower bit rate, the access seeker will receive a proportionate reduction in the level of access charges (subject to the payment of any additional costs for a line/codec card required for the supply of a lower bit rate service).

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<sup>7</sup> Access agreement, clause 9.3(b) of main body.

<sup>8</sup> Australian Competition and Consumer Commission, *undertakings in relation to access to digital radio multiplex transmission services – discussion paper, 23 October 2008*, page 34.

CRA submits that the availability of lower bit rate services is pro-competitive. In particular, the availability of lower bit rates services:

- ensures that access seekers have flexibility in the supply of digital radio services;
- ensures that access seekers do not need to acquire and pay for multiplex capacity that they do not need when seeking to acquire excess-capacity access entitlements, which in turn ensures that more capacity is potentially available to other access seekers relative to that which would otherwise exist if lower bit rates were not available; and
- is likely to encourage and permit greater service differentiation in downstream markets by broadcasters.

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## 5 Terms and conditions of access are reasonable

### 5.1 Reasonable terms and conditions

The supporting submission that accompanied the proposed access undertaking has provided extensive information about the reasonableness of the proposed access undertaking.

CRA considers that the proposed access undertaking is reasonable, as required by the Decision Making Criteria.

### 5.2 Operational manual

The ACCC has requested submissions on whether there are sufficient safeguards in the proposed access undertaking to ensure that any operational manual that is developed is consistent with section 5 of the Decision Making Criteria.<sup>9</sup>

CRA considers that the safeguards contained in clause 2.2 of the access agreement provide sufficient safeguards.

In particular:

- the access agreement requires the supply of the Multiplex Transmission Service to occur on a non-discriminatory basis in respect of operational and technical quality – any operational manual that is developed will need to comply with this requirement;
- the access agreement also requires the Multiplex Licensee to:
  - establish a process for the development of the operational manual, which includes a process for consultation with access seekers;
  - undertake such 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

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<sup>9</sup> Ibid, page 35.

- ensure that the operational manual is consistent with the access agreement, including the Multiplex Licensee’s non-discrimination obligations;
- EJVCs are owned and controlled by access seekers, which have a significant incentive to develop operational and technical procedures that are reasonable, fair and balanced; and
- the operational and technical aspects of the Multiplex Transmission Service are relatively straightforward compared to other industries and therefore are unlikely to be contentious as between the Multiplex Licensee and access seekers.

It is also open to the ACCC to review any operational manual developed by EJVCs, including to determine the extent to which there has been compliance with the prohibition against discrimination in respect of the technical and operational quality of services.

Accordingly, the access agreement establishes strong safeguards to protect the interests of access seekers in any operational or technical procedures that are developed outside of the access undertaking process.

In light of the above, CRA considers that there are sufficient safeguards in the proposed access undertaking to ensure that the operational manual, when developed, will be consistent with section 5 of the Decision Making Criteria.

### **5.3 Liability and indemnity**

CRA submits that the terms governing liability and indemnity are reasonable in their current form and seek to allocate risk and liability on a fair and equitable basis between the EJVC and access seekers.

To the extent that an EJVC needs to change the liability and indemnity provisions as a result of changes to downstream supply arrangements (some of which are still subject to negotiation), these changes will be subject to ACCC approval pursuant to clause 17.9 of the access agreement, thereby providing access seekers with an additional level of protection.

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## **6 Pricing methodology is fair and reasonable**

### **6.1 Proposed pricing methodology is fair and reasonable**

The ACCC has requested submissions on whether the pricing principles alone provide sufficient assurance that the eventual prices will be fair and reasonable, and whether access seekers will have access to necessary information to allow for the verification of access charges.<sup>10</sup>

As the ACCC is aware, digital radio services are not intended to commence until 1 May 2009 and the EJVCs (through CRA) are still in the process of finalising their downstream supply arrangements. It is not possible at this point in time for EJVCs to fully know their costs or set indicative prices in the access undertaking.

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<sup>10</sup> Ibid, page 35.

To the extent that various outstanding downstream supply arrangements are finalised and it is possible to accurately calculate the access charges for each EJVC, it is intended that indicative prices would be made available to the ACCC and the access seekers.

However, the absence of indicative prices should not prevent the ACCC from approving the proposed pricing principles, provided that those principles are fair and reasonable, as required pursuant to the Decision Making Criteria.

This has been acknowledged by the ACCC in the explanatory memorandum accompanying the Decision Making Criteria:

*“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”.*

The issue of whether the pricing principles are fair and reasonable does not necessarily depend on the ACCC assessing the quantum of access charges, but rather whether the methodology that will be applied by EJVCs in calculating those charges is fair and reasonable.

To the extent that the pricing principles provide for an EJVC to recover its efficient costs and achieve a normal commercial rate of return, then this should be sufficient to satisfy the ACCC that the proposed pricing principles are fair and reasonable in accordance with the Decision Making Criteria.

## **6.2 Efficient costs and a commercial rate of return**

The ACCC has requested submissions on whether the pricing principles provide for the recovery of the efficient costs of EJVCs and provide for a normal commercial rate of return.<sup>11</sup> It has also requested submissions on the proposed methodology for determining the weighted average cost of capital of EJVCs.

The pricing methodology set out in Schedule 2 of the access agreement is consistent with the ACCC’s requirement that any proposed pricing methodology be *“fair and reasonable”*. It allows the Multiplex Licensee to set prices at a level that would recover its efficient costs and earn a normal rate of return on its investment.

The pricing principles identify a breakdown of the following cost categories incurred in the supply of the Multiplex Transmission Service, which are recoverable by the EJVC from access seekers:

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

In light of the ‘lumpy’ nature of the capital expenditure on multiplex transmission equipment and the limited revenues that are likely to be derived through digital radio services during the start-up phase of digital radio, it is expected that EJVCs will seek to

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<sup>11</sup> Ibid, pages 35 and 36.

recover their capital expenditure costs over the economic life of the relevant assets. CRA considers that this is fair and reasonable.

The pricing principles in the access agreement provide that the annualised capital expenditure will be determined by aggregating the return on capital of the depreciated value of the assets and the return on capital, whereby the return on capital is the WACC of the depreciated value of the assets and the return on capital is calculated using a straight-line depreciation schedule. The pricing principles provide that the WACC of the Multiplex Licensee:<sup>12</sup>

- is the nominal post-tax return on capital;
- is calculated by reference to the cost of equity and cost of capital to the Multiplex Licensee; and
- 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.

Given the nascent status of the digital broadcasting industry in Australia and worldwide and the postponement of the launch of such services until 1 May 2009, CRA maintains its position that it is premature to specify a particular percentage or an overly complex formulaic process for determining a particular rate of return.

CRA submits that it would be appropriate for the industry to conduct a benchmarking exercise at a later date to determine an appropriate WACC for EJVCs, based on the criteria set out in clause 3.3(c) of Schedule 2 of the access agreement. It is assumed that with the passage of time, more data will become available to allow EJVCs to determine an appropriate rate of return.

It is envisaged that the rate of return that is eventually adopted for the digital broadcasting industry will be of a magnitude that is broadly consistent with the rates applied to other regulated industries, such as telecommunications and electricity. These rates would likely constitute an important part of the benchmarking exercise to be conducted.

The approach set out in the access agreement for determining the costs that can be recovered by the Multiplex Licensee and the methodology used to annualise capital expenditure for the purpose of determining prices are fair and reasonable because:

- the agreement allows only for the recovery of efficiently incurred costs and, insofar as is possible at this stage, clearly defines the costs that are likely to be incurred in providing the Multiplex Transmission Service; and
- allows for a normal rate of return to the EJVC. The precise level of the WACC is subject to a benchmarking exercise but it is anticipated that it will be consistent with the rates of return allowed to regulated businesses in Australia.

### **6.3 Pricing based on a per-access seeker basis**

The ACCC has requested submissions as to whether price adjustment on a per-access seeker basis, rather than a per-capacity basis, provides for a fair and reasonable price

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<sup>12</sup> Access agreement, clause 3.3(c) of Schedule 2 (Pricing Principles).

adjustment mechanism.<sup>13</sup> It has also requested submissions on whether the methodology for adjusting access charges when the number of access seeker changes is reasonable.

CRA submits that it is not entirely correct for the ACCC to say that prices are to be calculated on a per-access seeker basis. This oversimplifies the calculation methodology somewhat.

Clause 4 of Schedule 2 of the access agreement provides for the conversion of the annualised costs derived under clause 3 of the pricing principles into an annual fixed recurring charge according to the following formula:<sup>14</sup>

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

where,

**AFRC** is the annual fixed recurring charge.

**AC** is the annualised costs derived under section 3 of the pricing principles.

**BMC** is the amount of multiplex capacity allocated to the relevant access seeker by the Multiplex Licensee allocated for access by the access seeker.

**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.

As the definition of BMC and TMC make clear, the access charges that are payable by each access seeker is a product of the amount of multiplex capacity allocated to that access seeker relative to the total amount of multiplex capacity allocated to all access seekers.

Accordingly, while access charges may be ultimately derived on a per-access seeker basis, the calculation of those charges is contingent on consideration of the amount of multiplex capacity being acquired by that individual access seeker versus total acquired capacity.

Such a methodology is fair and reasonable. It ensures that access seekers that acquire the same amount of multiplex capacity pay the same level of access charges as other access seekers that acquire an equivalent quantity. It also ensures that higher levels of utilisation of multiplex capacity result in an overall proportionate reduction in the level of access charges payable by all access seekers.

Further, in the event that an access seeker wishes to acquire a lower bit rate service from the Multiplex Licensee, the pricing principles provide that the access charge payable by that access seeker will be proportionally reduced relative to the access charge that would otherwise be payable by that access seeker if it acquired a 128 kbps service (subject to the recovery of the costs of the additional line/codec card that is required to provide a lower bit rate service). This is consistent with the principle of cost causality and represents an efficient approach to pricing.

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<sup>13</sup> Australian Competition and Consumer Commission, *undertakings in relation to access to digital radio multiplex transmission services – discussion paper, 23 October 2008*, section 5.4, question 4.

<sup>14</sup> Access agreement, clause 4.2 of Schedule 2 (Pricing Principles).

Given the above, CRA submits that it is not entirely accurate to say that access charges are calculated on a per-access seeker basis, rather than a per-capacity basis, as the access charges that are ultimately payable are determined by reference to both.

CRA also considers that the process for adjusting access charges based on changes in the number of access seekers is fair and reasonable.

Clause 4.4 of the pricing principles provides that any change in the amount of utilised multiplex capacity results in a proportionate and timely adjustment to the level of access charges payable by all access seekers.<sup>15</sup>

This adjustment takes effect on the date of the relevant increase or decrease in the amount of utilised multiplex capacity, thereby ensuring that all access seekers are treated fairly and reasonably.

#### **6.4 Price reviews to reflect change in underlying costs**

The ACCC has requested submission as to whether it is reasonable to allow the EJVCs to regularly review the fixed recurring charges.<sup>16</sup>

CRA submits that it is reasonable for the EJVCs to regularly review the fixed recurring charges payable by access seekers. The undertakings provide that the trigger for a price review is a change in the underlying costs of supplying multiplex capacity.

The EJVCs will operate as a wholesale only business by providing access seekers with access to digital radio multiplex transmission services. The sole revenue stream for EJVCs will be the access charges payable for the provision of digital radio multiplex transmission services.

Given the single revenue stream available to EJVCs and the fact that the costs of providing digital radio multiplex transmission services will vary somewhat over time, it is reasonable and appropriate for the EJVCs to pass on any change in the underlying costs to access seekers in the pricing of access charges. In the absence of such a mechanism, there is likely to be a higher risk of insolvency for EJVCs relative to other comparable businesses, given the wholesale only nature of the EJVC business and its reliance on access charges to cover its costs.

The ACCC has previously recognised the impact that fluctuating costs have on the prices payable for wholesale services and that it is appropriate for these costs changes to be reflected in the form of higher or lower access charges:

*“There are many legitimate commercial reasons why prices vary over time. Changes in the costs of producing the service will most often result in changes in prices, as will fluctuations in demand.”<sup>17</sup>*

Contrary to the ACCC’s suggestion, the pricing principles are not too broad and provide for fair and reasonable price reviews. The timeframe for price reviews is not specified as cost variations are fluid and access charges would need to be adjusted from time to time to take account of such variations.

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<sup>15</sup> Access agreement, clause 4.3 of Schedule 2 (Pricing Principles).

<sup>16</sup> Ibid, page 36. Section 5.4, question 5.

<sup>17</sup> Australian Competition and Consumer Commission, *Access Pricing Principles – Telecommunications – a guide*, July 1997, page 22.

It is also important to recognise that EJVCs will face a natural constraint against excessive pricing (or the inflation of costs), notably the fact that EJVCs are owned by entities that are also access seekers and will have an incentive to minimise, rather than maximise, their costs in supplying digital radio multiplex services.

Accordingly, CRA submits that the proposed pricing review mechanism is fair and reasonable. It does not need to contain a fixed period price review mechanism at this point.

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## 7 Obligation not to hinder access

### 7.1 Obligation not to hinder access “in accordance with the applicable terms of this Agreement”

The ACCC has requested submissions as to whether the obligation under clause 9.2 of the access agreement for the EJVC to not hinder access satisfies the requirement in the Decision Making Criteria that the access undertaking is to include an obligation by the EJVC not to hinder access.<sup>18</sup>

Clause 9.2 of the access agreement, which forms part of the access undertaking, includes an express obligation on the EJVCs to not hinder access to digital radio multiplex transmission services “*in accordance with the applicable terms of this Agreement.*”

The Radiocommunications Act provides the legislative framework for allocation of standard access entitlements and excess-capacity access entitlements in respect of digital radio multiplex transmission services. However, these standard access entitlements and excess-capacity entitlements require implementation through the access agreement, which provides for the allocation of standard access entitlements and excess capacity access entitlements based on the framework under the Radiocommunications Act.

Accordingly, it is appropriate that the obligation to not hinder access is referenced to the applicable terms of the access agreement, as these serve as the basis for the implementation of each EJVC’s access obligations.

### 7.2 Financial security provisions

The ACCC has requested submissions as to whether the requirement for the access seekers to provide financial security is too onerous and hinders access.<sup>19</sup>

The financial security provisions of the undertaking are reasonable.

Financial security is necessary to enable the EJVCs to minimise the effects of non-payment or insolvency by the access seeker. To achieve this, the access agreement requires the EJVCs to carry out an objective assessment of the financial position of individual access seekers, subject to appropriate confidentiality restrictions.

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<sup>18</sup> Australian Competition and Consumer Commission, *undertakings in relation to access to digital radio multiplex transmission services – discussion paper, 23 October 2008*, page 37.

<sup>19</sup> *Ibid*, page 37.



To ensure that each EJVC's investment in infrastructure and supply of digital radio multiplex transmission services is protected, a robust financial structure is necessary to ensure that the EJVCs can recover their costs efficiently and remain afloat.

Given the wholesale only nature of EJVCs and the fact that access charges represent the single source of revenue for EJVCs, there is a high risk that the failure by an access seeker to pay its access charges (or an insolvency event) will have a corresponding impact on the EJVC (including possibly insolvency in certain circumstances).

Accordingly, CRA considers that it is important for the financial security provisions to remain and provide EJVCs with adequate protection against the risk of non-payment and the flow on effects that may be associated with such non-payment.

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## 8 Dispute resolution

The ACCC requested submissions on the dispute resolution mechanism and whether dispute resolution by expert determination, rather than arbitration, facilitates fair, timely and efficient resolution of disputes.<sup>20</sup>

The proposed dispute resolution mechanism specified in the undertaking is reasonable. In the event that a dispute cannot be settled between the parties, the dispute resolution procedures allow for mediation, followed by expert determination if the dispute is not settled at mediation.

The functions and roles of the expert are identical to that of an arbitrator. CRA has adopted an expert determination process to ensure:

- that the adjudicator is appropriately qualified and capable of readily understanding the issues that would arise in the broadcasting industry;
- that the adjudicator is an expert with relevant expertise in the area of the dispute arising from the model access undertaking; and
- certainty for the parties as it is a legally binding determination.

A binding expert determination is to be conducted in accordance with the ACDC's Expert Determination Rules<sup>21</sup>.

The access undertaking states that the expert may have regard to a number of factors in hearing a dispute, including:

- the terms of the access undertaking;
- the applicable terms of the Radiocommunications Act;
- the legitimate business interests of the EJVCs;
- the interest of access seekers;
- the public interest in having a competitive market and efficient investment in facilities;

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<sup>20</sup> Ibid, page 38.

<sup>21</sup> Australian Commercial Disputes Centre – Expert Determination Rules.

- the operation and technical requirement necessary for the safe and reliable operation of digital radio multiplex transmission services; and
- the economically efficient operation of the facilities used to supply digital radio multiplex transmission services.

The consideration of these factors will ensure the reasonableness of the decision making and ensure that the expert has appropriate guidance as to the issues that are to be taken into account in resolving a dispute.

The dispute resolution mechanism has been drafted to ensure consistency with the ACCC's Decision Making Criteria and to facilitate the "*fair, timely and efficient*"<sup>22</sup> resolution of disputes.

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## 9 Conclusion

CRA considers that the proposed access undertaking is consistent with the Radiocommunications Act and the ACCC's Decision Making Criteria, and should be approved by the ACCC in its current form.

CRA thanks the ACCC for the opportunity to make this submission.

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<sup>22</sup> Australian Competition and Consumer Commission (ACCC), *Explanatory Statement* – issued by the ACCC relating to the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*, page 7.