



Australian
Competition &
Consumer
Commission

ACCC submission to the Department of Communications' review of digital radio

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Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to contribute to the Department of Communications' (the Department) two statutory reviews of digital radio in accordance with the *Broadcasting Services Act 1992* (BSA) and the *Radiocommunications Act 1992* (Radiocommunications Act). As both reviews are being conducted in a combined process, the reviews will be referred together in this submission as one review (the Review).

This submission provides the ACCC's general comments on competition principles and the digital radio regulatory regime, as well as responding to specific questions raised in the *Digital Radio discussion paper* (Discussion Paper). Given the ACCC's statutory role in relation to the digital radio access regime (discussed below at section 1.1), the ACCC's submission focuses on questions in Part 1 of the Discussion Paper.

The ACCC recognises that digital radio services operate in a dynamic environment, both in relation to technological change and also in terms of supplying consumers with audio content, as identified in Part 3 of the Discussion Paper. The ACCC considers that this review will assist in assessing whether the appropriate frameworks are in place to ensure that market participants and consumers continue to benefit from the development of digital radio and other audio content services.

1.1 The ACCC's role in the digital radio regulatory regime

The ACCC administers the access regime for the digital radio multiplex transmission service (DRMT service) contained in Division 4B Part 3.3 of the Radiocommunications Act. Provisions in the Radiocommunications Act require joint venture companies (JVCs) who hold DRMT licences to submit an access undertaking to the ACCC specifying the terms and conditions on which it will provide access to the multiplex. Only once an undertaking is accepted by the ACCC can the Australian Communications and Media Authority (ACMA) determine that a JVC may provide services to digital radio broadcasters and enable broadcasters to commence transmitting digital radio content services in a particular area.

In October 2008, the five JVCs who hold the eight DRMT licences allocated by the ACMA, submitted identical access undertakings to the ACCC. The ACCC conducted public consultation on the proposed access undertakings and made its assessment of the access undertakings against the decision making criteria set out in the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008* (the Decision-Making Criteria).¹ The Decision-Making Criteria provides a framework for the ACCC to use when considering a new undertaking or a variation to an undertaking. The Decision-Making Criteria were created to ensure that an access undertaking complies with the access framework set out in Division 4B Part 3.3 of the Radiocommunications Act and ensure the terms and conditions of an access undertaking are reasonable and will not unduly restrict competition.² After assessing these initial access undertakings in accordance with provisions in the Radiocommunications Act, the ACCC rejected the access undertakings and proposed modified access undertakings. In May 2009, these modified access undertakings were accepted by the ACCC and came into force as the Access Undertakings.

Since the commencement of digital radio services, the JVCs, in accordance with section 118PN of the Radiocommunications Act, have provided the ACCC with an annual report within 60 days after the

¹ See sections 118H and 118NF, *Radiocommunications Act 1992* (Radiocommunications Act).

² ACCC, *Explanatory Statement – Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008*, 2009.

end of the financial year. These reports detail compliance with the access undertakings and provisions under the Radiocommunications Act.

The ACCC also assesses variations to undertakings made under section 2(a) of the Radiocommunications Act and has limited powers to require a variation under section 2(b) of the Radiocommunications Act. In December 2013, the ACCC accepted a variation request from JVCs under section 2(a) of the Radiocommunications Act.

2. ACCC's general comments in response to the Review

2.1 Regulation and developing markets in media and communications industries

The ACCC considers that regulatory frameworks should maximise the opportunities for businesses to enter media and communications industries and encourage robust competition between different types of services. On this basis, any regulation should meet broader public interest objectives and be proportional to the market or regulatory failure that has been identified.

As such, the ACCC considers that any reform of the legislative or regulatory framework should not have the effect of inhibiting the development of competition in the digital radio market or other media or communications platforms. The ACCC submits that any reform to the relevant frameworks should be based on an identified and persistent issue with its current construction, and consideration should be given to the precise outcomes sought by any modifications to the regime.

2.2 Maximising the public benefit of spectrum use

Given the nature of radiofrequency spectrum as a scarce public resource, the ACCC continues to support a competitive process for allocating spectrum. As previously stated in submissions to government reviews, such as the Convergence Review, a competitive process would maximise the overall public benefit as spectrum would be allocated to the highest value of use.³

The ACCC recommends that this general principle continue to guide relevant agencies in considering future allocations of spectrum in the media and communications market.

3. ACCC response to Discussion Paper questions

The ACCC has responded below to four of the specific questions posed by the Department in Part 1 of the Discussion Paper as the ACCC considers that these questions are particularly relevant to the remit of the ACCC.

3.1 Discussion Paper Question 2

Should the provisions concerning the commencement of digital radio services be modified or removed, allowing broadcasters to commence services whenever they wish (subject to spectrum planning considerations)?

The ACCC notes that one of the legislated preconditions for the commencement of digital radio services is the requirement that ACCC-approved access arrangements are in place for digital radio broadcasters to access the DRMT service. Specifically, for areas where there are no digital radio

³ For example, this general principle was put forward in the ACCC's submissions to the Convergence Review in 2011 and 2012: ACCC, *ACCC submission to the Convergence Review Framing Paper*, ACCC website, June 2011, p.13-14; ACCC, *ACCC submission to the Convergence Review Interim Report*, ACCC website, February 2012, p.6.

services, the BSA provides that an ACCC-approved access undertaking must be in force before the ACMA may permit digital radio broadcasters to commence transmitting digital radio services.⁴

The ACCC supports the continuation of provisions that require an ACCC-approved access undertaking to be in place for the supply of DRMT services in new or existing licence areas. Currently, under the digital radio regulatory regime, the DRMT service is only provided by one or two JVCs who hold a DRMT licence in the states where digital radio is available. The market structure that is created by this regime places the DRMT license holders in a dominant position in relation to the supply of DRMT services, and therefore also has the ability to affect the supply of digital radio services by digital radio broadcasters more generally. The ACCC submits that there is a continued need for an access regime to ensure digital radio broadcasters are able to obtain access to the DRMT service to transmit their content on reasonable terms and conditions and safeguard against any competition concerns that may arise.

3.2 Discussion Paper Question 3

Is the access regime established in Part 3.3 of the Radiocommunications Act operating effectively? Is the system of access undertakings working as it should?

As discussed above, the ACCC administers the access regime contained in Division 4B Part 3.3 of the Radiocommunications Act. Since accepting the Access Undertakings, no concerns have been raised with the ACCC in relation to obtaining access to DRMT services. The ACCC considers that the existing regulatory framework appears to be operating effectively and is not inhibiting the rollout or supply of digital radio services. That said, the ACCC encourages greater consultation between JVCs and broadcasters seeking access to their services. The issue of consultation is further discussed below.

The ACCC notes that one manner in which the ACCC is able to monitor the JVC's compliance with both the Access Undertakings and the Radiocommunications Act is by considering the annual reports submitted by the JVCs.

Under the access regime, the ACCC also has a role in considering any variations to the Access Undertakings. To date, the ACCC has only received one request to vary the Access Undertakings. The variation request was made by the five JVCs who hold the eight DRMT licences under section 118NH(2)(a) of the Radiocommunications Act in 2013. The variation, amongst other things, sought changes to the service description to reflect new and forthcoming investments in on-channel repeaters.

In December 2013, the ACCC approved the request to vary the Access Undertakings. After considering the variation request against the relevant framework, the ACCC considered that the proposed amendments to the Access Undertakings satisfied the relevant Decision-Making Criteria.

In making its assessment of the variation request, the ACCC received submissions from the JVCs and the Community Broadcasting Association of Australia (CBAA). The CBAA is the peak body for community broadcasters in Australia, representing over 350 licenced community broadcasters. The CBAA was broadly supportive of the proposed amendments, however raised the need for greater consultation, particularly in relation to new investments in the DRMT service.

Consultation between JVCs and broadcasters

Under the digital radio regime, JVCs provide DRMT services to both community and commercial broadcasters. As both groups of broadcasters have different needs, ongoing consultation between JVCs and all broadcasters seeking access to the DRMT service is encouraged as an effective industry

⁴ Section 8AC, *Broadcasting Services Act 1992*.

mechanism for JVCs to understand and potentially address any concerns in the provision of their service.

As noted by the ACCC in its recent decision to vary the Access Undertakings, the Access Undertakings contains pricing principles that support efficient investments by JVCs, as well as providing a mechanism for broadcasters to seek price reviews or dispute resolution where they have specific concerns.⁵ In addition, the ACCC retains powers to require a variation to the Access Undertakings should existing provisions fail to operate as intended.⁶

Conclusion

As discussed above in section 3.1, the system of access undertakings is necessary to safeguard against anti-competitive behaviour. The ACCC notes that the access regime appears to be working effectively and efficiently in facilitating access to the DRMT service. Further, the ACCC considers that the current access regime should form the foundation for any expansion of digital radio services.

3.3 Discussion Paper Question 4

Should any of the provisions relating to the access regime be amended or replaced?

The ACCC has not identified any substantive deficiencies that would warrant amendments to the current provisions relating to the existing access regime. The ACCC notes the current access framework appears to be operating effectively and is a necessary component in the ongoing development of digital radio services in Australia.

The ACCC notes that the Radiocommunications Act provides for variations to be made to the access regime established through the Access Undertakings. As noted above, section 118NH (2)(a) of the Radiocommunications Act allows the JVCs to make requests to the ACCC to vary the Access Undertakings. Further, section 118NH (2)(b) gives the ACCC the ability to review and instigate variations to the Access Undertakings, subject to certain conditions (e.g. limitations regarding frequency of reviews) and following public consultation. These provisions give the ACCC and industry sufficient flexibility to revise access arrangements should the need arise.

3.4 Discussion Paper Question 5

Are the reasons for moratorium on new licence area planned commercial digital radio licences still valid? Should the moratorium, which is due to expire on 30 June 2015, be extended or discontinued?

The ACCC would not support the extension of the moratorium beyond 30 June 2015. The ACCC considers digital radio services are now established and, as contemplated in the legislation, the rationale for a moratorium i.e. 'to provide incumbent commercial broadcasters with a level of stability and certainty during the digital radio investment phase,' has now lessened.⁷ The potential emergence of new competitors may further stimulate the market by driving innovation and investment. For example, as digital radio services are not intended to replace existing analogue services, a broader range of services available on digital radio platforms may enhance consumer awareness and drive take-up rates through further differentiation from existing analogue services.

⁵ ACCC, *ACCC final decision on the request for a variation of the digital radio access undertakings*, December 2013, <http://acc.gov.au/system/files/Digital%20Radio%20Access%20Undertakings%20-%20Variation%20request%20-%20Final%20Decision%20-%20December%202013%20%282%29.pdf>.

⁶ Section 118NH(2)(b), Radiocommunications Act.

⁷ Explanatory Memorandum, Broadcasting Legislation Amendment (Digital Radio) Bill 2007, Radio License Fees Amendment Bill 2007, p. 40.