

December 2018

Assessment of Access Undertaking for Digital Radio Multiplex Transmission Services in Canberra, Darwin and Hobart

Submission by the Community Broadcasting Association of Australia to the Australian Competition and Consumer Commission

1. Introduction

- 1.1 The Community Broadcasting Association of Australia (**CBAA**) welcomes the opportunity to submit comments in relation to the ACCC's consultation and position paper regarding three new access undertakings received in relation to the commencement of digital radio services in Canberra, Darwin and Hobart.
- 1.2 The three undertakings were lodged by the Digital Radio Multiplex Transmitter (**DRMT**) licensees of Canberra, Darwin and Hobart and are identical.

2. Background

- 2.1 The CBAA is the peak body for community broadcasting in Australia, representing over 350+ licensed community broadcasters. It acts under agency arrangements as a single point of coordination for community broadcasting licensees designated to be digital radio access seekers under the Radiocommunications Act 1992 (**Act**).
- 2.2 There are currently 36 community broadcasting licensees eligible to be access seekers and providing 40+ on-air digital radio services in Brisbane, Sydney, Melbourne, Adelaide and Perth, alongside commercial and national digital radio services.
- 2.3 A further 12+ eligible community broadcasting licensees are expected to commence operating digital radio services in Darwin, Canberra and Hobart in 2019, and other regional locations are under planning consideration.
- 2.4 The provision of community broadcasting services on digital radio is an important aspect of, and contribution to, locally produced content and free-to-air media diversity.
- 2.5 The legislative framework in the Act reserves two-ninths of the total capacity of each Foundation Category 1 digital radio multiplex for eligible licensed community broadcasting services. An increase in the amount of multiplex capacity reserved for community broadcasting services and multiplex capacity caps for commercial broadcasting licensees in regional locations is under policy consideration.
- 2.6 The Act gives each Digital Community Radio Broadcasting Representative Company (**DRC**) the right to take up a shareholding in the DRMT licensee joint venture companies, which were established in accordance with the Act.
- 2.7 No DRC has elected to take up a shareholding in the relevant DRMT licensee joint venture companies in the locations where digital radio services have been operating to date, ie, Sydney, Melbourne, Brisbane, Adelaide and Perth.
- 2.8 Irrespective of shareholding status, the intention of the access undertakings and the access regime is to allow eligible broadcasters to obtain access to digital radio transmission services on terms and conditions that are reasonable, and not to discriminate between access seekers in terms of the technical and operational quality of the multiplex transmission service.

3. Shareholding

- 3.1 At the time of writing, no formal business plan has been provided to each DRC for shareholding in the Canberra, Darwin or Hobart DRMT Licensees and so no decision has yet been made by each DRC as to take up of DRMT licensee shareholding.
- 3.2 As has been noted¹, the CBAA negotiated a pre-payment of funds in respect of each DRMT licensee. These funds are held in trust and provide a level of security to each DRMT licensee that there is financial capacity and preparedness to access multiplex capacity by the community broadcasters, and so provides some reassurance to each DRMT licensee in making decisions in regard to investment in adequate infrastructure and implementation.
- 3.3 The degree to which there is engagement in the DRMT licensee infrastructure build by the CBAA on behalf of the community broadcasters is limited. The DRMT licensee understandably seeks self-determination in this matter.
- 3.4 To an extent this is reasonable, however the use of public spectrum and the resulting market opportunity also generates responsibilities to use the spectrum to the most efficient extent, consistent with ACMA planning, and in a manner that facilitates planning by access seekers and timely introduction of services, commercial and community.

4. Changes to the Act

- 4.1 A number of changes have been made to the legislative framework in the Act² subsequent to the undertakings put in place, and as updated, for the digital radio services operating to date.
- 4.2 The changes have been developed through the Digital Radio Planning Committee, chaired by the ACMA and with membership including the national, commercial and community broadcasters, represented by the CBAA, and extending also to the ACCC.
- 4.3 Changes to the legislation to date² have included measures to shorten legislatively prescribed timeframes and remove steps in the process for digital radio rollout. Changes have also clarified the manner in which excess capacity allocations are determined.
- 4.4 During 2017 a number of proposals were circulated within the Digital Radio Planning Committee by the Department of Communications and the Arts (**DOCA**) relating to the allocation of capacity on Foundation Category 1 digital radio multiplex transmitters. This included proposals to increase caps on multiplex capacity for commercial broadcasters in licence areas where there is a small number of commercial licensees and also to increase capacity reserved for community broadcasters in relevant licence areas.
- 4.5 DOCA also consulted with members of the Digital Radio Planning Committee on the possible removal of the non-discrimination clause in sub-section 44A(11) of the Act.
- 4.6 At the time of writing, there is no agreed position within the Committee on how to proceed in relation to either of these matters.
- 4.7 DOCA is to continue to explore options to remove inefficiencies in the digital radio framework, taking account of the interests of relevant stakeholders.

5. Regional and metropolitan implementations differ

- 5.1 At several points, the ACCC discussion paper makes reference to the proposed undertakings as being similar to those developed or accepted previously by the ACCC for digital radio implementation in Sydney, Melbourne, Brisbane, Adelaide and Perth.
- 5.2 However, as is outlined further, below, the competition and implementation issues in Canberra, Darwin and Hobart are substantially and materially different than those at play in Sydney, Melbourne, Brisbane, Adelaide and Perth and so, while relevant, broader consideration is required as a test for adequacy of the proposed undertakings.

¹ Supporting submission in relation to the Access Undertaking, Webb Henderson Page xxx

² Broadcasting Legislation Amendment (Digital Radio) Act 2018

- 5.3 The expansion of digital radio to regional areas generates consideration of some factors less in focus at the time of the initial implementation of digital radio services in the five capital cities.
- 5.4 An obvious difference is that in many regional areas, there are only a small number of commercial licensees to take up Standard Access entitlements. For example, in Darwin there are two existing analogue commercial licensees. In Hobart there are three. Canberra four.
- 5.5 It is acknowledged that the ACCC has a limited remit in this consultation and review. It is limited to seeking 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.
- 5.6 Within those narrow constraints, the CBAA's legitimate concerns may usefully be addressed in part via consideration of revisions to the Access Undertakings and Agreements and/or by the ACCC making observations on how the legislation or co-regulation with the ACMA may be revised.
- 5.7 CBAA's main concern is that the Access Undertaking and Access Agreement may hinder performance of the standard access obligations in section 118NL of the Act and the excess-capacity access obligations under section 118NM of the Act insofar as decisions made by the access provider in relation to infrastructure architecture and operation of the infrastructure within certain proposed operational parameters in fact may not 'give the content service provider: ...(d) access to services that facilitate the use of that fraction of multiplex capacity for that purpose'³. Where those decisions by the access provider result in the choice of equipment that is incompatible with equipment used by access seekers or where operation of the infrastructure occurs in a way that access seekers are unable to fully utilise their capacity entitlements for content.
- 5.8 In addition, these same decisions regarding equipment choice and operating parameters have the potential to cut across the other obligations in section 118NP where the access provider must not discriminate 'as between content service providers who have access to multiplex capacity in relation to:
- (a) the technical and operational quality of the services supplied to the content service providers; and
 - (b) the technical and operational quality and timing of the fault detection, handling and rectification supplied to the content service providers;
- for the purposes of facilitating the use of that multiplex capacity.'
- 5.9 To address these concerns, the structure of CBAA comments is as follows:
- Summary comments on proposed changes to the Access Undertakings and Access Agreements are tabulated as Attachment A.
 - Several key matters are dealt with in more detail in the text below:
 - Efficient use of spectrum by operation of RF Service as near as practical to the maximum specified in the relevant ACMA licence.
 - Interoperability, and an inclusive methodology for operational and developmental matters.
 - A trigger included in the Access Undertaking that commits the DRMT licensee to undertake a process that leads to allocation of excess capacity by grant or auction.
 - Summary comments in relation to the ACCC discussion paper questions are at Attachment B.

6. Appropriate standard of transmission facility or service

- 6.1 The CBAA considers that the Access Undertaking does not sufficiently address or ensure the access provider is offering an appropriate standard of transmission facilities or service.
- 6.2 An access provider could under-invest so that the multiplex transmission infrastructure available to access seekers may not be reasonably adequate, in terms of quality of service or service coverage, for their purposes.

³ See sections 118NL(2)(d) and 118NM(2)(d).

- 6.3 Historically, the ACCC has relied on patterns of commercial competition as being sufficient to ensure efficient pricing outcomes and the provision of adequate multiplex transmission facilities. While this may reasonably be assumed in the capital cities, with a high number of broadcast service licensees, there are different planning considerations for regional areas with a lower number of broadcast service licensees and varying patterns in geographical licence areas.
- 6.4 In regional areas there may be the situation where only one or a small number of licensees may consider operating multiplex transmission facilities with significantly lower power than is called for by the published ACMA Digital Radio Channel Plan (**DRCP**).
- 6.5 Those DRMT licensees may decide to operate with lower transmission power and the commercial radio broadcasters who are shareholders in the DRMT licensees may partially compensate for that lower power, for their own services, by using more of transmission capacity for overheads to protect and mitigate against the effects of weaker coverage.
- 6.6 Operating with lower than the nominal maximum envelope of transmission power as specified in the published DRCP would be to the detriment of others making use of the transmission multiplex as access seekers.
- 6.7 Other access seekers would either have to accept sub-optimal coverage to the intended population of the Licence Area or otherwise use more than the usual and nominal transmission capacity for protection overheads. This would have a particularly adverse and discriminatory effect on access seekers who have lesser amount of multiplex capacity entitlement. With there being an overall constraint on capacity (eg a total of two-ninths for community broadcasters), this would result overall in a lower number of services able to be accommodated. Such a circumstance may raise competition issues.
- 6.8 Accordingly, a simple addition is suggested to the Access Undertaking noting that the built facility make efficient use of radiocommunications spectrum allocated for the purposes of the DRMT service, and be in compliance with the nominal pattern and transmission power to the maximum extent possible and practical.
- 6.9 To be specific, the following text is suggested as amended text for the Description of the RF Service at Attachment A, clause 1.4 of the Undertaking:
- The Multiplex Licensee modulates one or more transmitters using the OFDM symbols produced using the Modulation Service to form the RF Service.*
- The Multiplex Licensee may additionally transmit the RF service using repeater multiplex transmitters connected by means of an off-air reception, microwave link or fibre connection.*
- The transmitter's characteristics conform to the radiocommunications apparatus licence held by the Multiplex Licensee and result in an Effective Radiated Power consistent with or near as practical to the maximum specified in that licence.*
- 6.10 As a parallel to this amendment to the Access Undertaking, the CBAA has recommended to the ACMA that future DRMT licences prepared by the ACMA include a condition that requires the minimum peak ERP align as closely as is practical to the specification for maximum peak ERP as published in the relevant DRCP Channel Plan.
- 6.11 As an example, the ACMA recently sought comment on Canberra and the CBAA has suggested the Licence Condition note tolerance limits for ERP, and as follows:
- maximum peak power of 20 kW +0 dB.
minimum peak power of 20 kW -2 dB.
- 6.12 The CBAA noted to the ACMA that, as best practice, the tolerance limit at the minimum should be specified as a Licence Condition so as to require operation at or near the maximum peak ERP specification.
- 6.13 The CBAA further noted that this would obviate on-going use of the radio-frequency channel with significant reduction from the maximum planned ERP, a situation which represents inefficient use of spectrum.
- 6.14 The CBAA noted this is especially important for digital radio transmission where reductions in main site ERP has coverage impact on multiple services and for which the DRMT licensee is providing an over-arching shared platform.
- 6.15 Accordingly, as an on-going pattern, the CBAA submitted that specifying the nominal ERP with a maximum peak limit and a tight minimum peak limit become standard best practice as a Licence Condition associated with all DRMT licences.

7. Interoperability and inclusive methodology for operation and development

- 7.1 The implementation and operation of the DRMT infrastructure should encourage compatibility, interoperability and open standards to the extent reasonably possible, in order to promote competition and efficiency.
- 7.2 While the Transmission / RF Service aspects are covered above, there are compatibility and interoperability issues that directly impact access seekers in terms of compatibility with the Multiplex Service.
- 7.3 The standards referenced in the Service Description, while relevant and necessary, are not sufficient to ensure compatibility as there are operational aspects of key multiplexing equipment that differ from vendor to vendor.
- 7.4 Operational choices made by the DRMT licensee in regard to equipment vendor and version upgrade cycles can have a material impact on all Access Seekers.
- 7.5 While it may be reasonable for an access provider to require that access seekers demonstrate they have the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting, this should not amount to a barrier to access and should not result in discrimination as between access seekers in relation to the technical and operational quality of services provided to access seekers as required by section 118NP of the Act.
- 7.6 The infrastructure build outcomes and compatibilities appear to be resolving in a positive manner for Canberra, Darwin and Hobart. This relates to pre-payments that have been negotiated and to detailed engagement with industry stakeholders and vendors, rather than as a result of a structured or transparent approach to infrastructure development.
- 7.7 The metropolitan implementation and operation benefits greatly from a collegiate broadcast industry approach that is under-pinned by regular meetings and reporting of operational matters.
- 7.8 Access principles and efficient operation would be enhanced if the Undertaking provided high level guidance and an open and transparent consultation process around operational and infrastructure development matters for shared multiplex facilities, along the lines of:

The DRMT licensee to conduct meetings with Access Seekers at least twice per year to discuss and report on operational, performance and development issues, and, irrespective of such meetings, there be an obligation to consult with existing Access Seekers in a timely and transparent manner if upgrades, updates or any material change to the architecture or infrastructure used to provide the Service are under consideration.

If this principle is adopted in the Undertaking it should be reflected in a suitably detailed provision in the Access Agreement.

8. Standard Access Entitlements and Excess capacity

- 8.1 In regional licence areas the number of commercial licensees is typically much lower than metropolitan licence areas. This gives rise to Excess Capacity issues that are of a different nature and scale to that of metropolitan licence areas.
- 8.2 In most if not all regional licence areas Section 118NT(2) of the Act will apply. That is, there will be Excess Capacity above the combined total of commercial radio standard access entitlements and the capacity reserved for community broadcasters.
- 8.3 Therefore, the DRMT licensee must within 90 days of digital radio start up day ascertain the level of demand for access to that Excess Capacity from eligible content service providers.
- 8.4 The legislation sets a cap of two-ninths of multiplex capacity for each eligible commercial broadcaster. One-ninth as the Standard Access entitlement and up to a further one-ninth of Excess Capacity being available after allocation by auction, in the case where demand exceeds supply, or grant, in the case where supply exceeds demand.
- 8.5 The legislation reserves two-ninths capacity for eligible community broadcasters on a shared use basis.
- 8.6 Existing commercial and community broadcasters and/or the licensee of any new licenses issued after digital radio start-up day would be eligible content service providers.

- 8.7 Section 118NT(2) mandates that where Excess Capacity exists, the initial level of demand for that Excess Capacity must be ascertained.
- 8.8 If, after 12 months from start-up day there remains unallocated Excess Capacity, under Section 118NT(3) the DRMT licensee may ascertain what is then the level of demand for access to that Excess Capacity.
- 8.9 Section 118NT(3) appears to provide that there is no mandatory requirement in the Act for the DRMT licensee to ascertain the level of demand for Excess Capacity after the initial 12 months. Furthermore, the section does not appear to prevent the DRMT licensee potentially granting an excess-capacity entitlement to a party seeking access – there is no prohibition on such a grant of access. In the CBAA’s view, neither circumstance is desirable without a structured and transparent process.
- 8.10 This situation has significant potential to lessen competition and hinder access to digital radio multiplex capacity.
- 8.11 This could be remedied by an update to the Access Undertaking that makes clear the circumstance under which the DRMT licensee would ascertain the level of demand for unused Excess Capacity, along the lines of:
- If, at any time after the 12-month period beginning on the digital start-up day for the area:*
- (1) *there is unallocated Excess Capacity on the digital radio multiplex; and*
 - (2) *an eligible content service provider expresses interest in use of Excess Capacity; then*
- (a) *the digital radio multiplex transmitter licensee will ascertain the level of demand for access to that excess multiplex capacity from content service providers who are entitled to provide one or more content services in the designated BSA radio area; and*
 - (b) *if the licensee proposes to ascertain the level of demand as mentioned in paragraph (a)—the digital radio multiplex transmitter licensee must, by notice published on the licensee’s website:*
 - (i) *give at least 30 days notice of the licensee’s intention to ascertain the level of demand as mentioned in paragraph (a); and*
 - (ii) *invite content service providers to express an interest in having access to that excess multiplex capacity.*
- 8.12 A provision of this kind in the Undertaking and a suitably detailed provision in the Access Agreement would in CBAA’s view address the shortcomings noted above as it would provide a process by which an access seeker could seek access to excess-capacity and then trigger the process to ascertain demand for that capacity and, if there is sufficient demand, to trigger an auction process.

Attachment A: Comments on amendments

The Community Broadcasting Association of Australia (CBAA) makes the following comments in relation to specific changes noted for the previous Access Undertaking and Access Agreement and the proposed Access Undertaking and Access Agreement. Some minor tidy ups have been ignored.

Access Undertaking

Clause Reference	Changes	Comment
Definitions	The Digital Community Radio Broadcasting Representative Company has been removed as a potential access seeker under the undertaking and references to obligations of the licensee to enter into an access agreement with the representative company have been removed.	Agreed.
Definitions	The definitions of Restricted Datacaster and Restricted Datacaster Licence have been removed and Restricted Datacasters have been deleted from the definition of access seeker.	Agreed. This reflects the deletion of Restricted Datacaster Licences from the Broadcasting Services Act.
Definitions	The definition of a Qualified Content Service Provider has been deleted and references to Qualified Content Service Providers obtaining any excess capacity access entitlements have been removed.	Agreed.
3.2	This has been amended to require the licensee to provide excess capacity access entitlements to the incumbent commercials and digital community broadcasters that they may acquire pursuant to the access agreements.	Agreed.
	Reference to a Qualified Content Service Provider and the Digital Community Radio Representative Company has been deleted.	Agreed.
Attachment A clause 1.4	The sentence "The Multiplex Licensee may additionally transmit the RF Service using repeater multiplex transmitters which form a Single Frequency Network (SFN)" has been amended to "The Multiplex Licensee may additionally transmit the RF Service using repeater multiplex transmitters connected by means of an off-air reception, microwave link or fibre connection."	Agreed, subject to addition of extra amending text seeking to ensure spectrum efficiency and compliance with maximum ERP. See CBAA submission, Section 6.

Attachment A: Comments on amendments, continued

The Community Broadcasting Association of Australia (CBAA) makes the following comments in relation to specific changes noted for the previous Access Undertaking and Access Agreement and the proposed Access Undertaking and Access Agreement. Some minor tidy ups have been ignored.

Access Agreement

Clause Reference	Changes	Comment
Background, clause B	Clause B of the Background has been amended to provide for broadcasters obtaining excess capacity access entitlements.	Agreed.
N/A	The conditions precedent that are required to be satisfied by an access seeker prior to the Multiplex Licensee supplying the transmission service have been removed.	Agreed.
4.3(b)	An additional paragraph (b) "The Multiplex Licensee will allocate Standard Access Entitlement to each Incumbent Commercial Broadcaster in accordance with section 118NO of the Radiocommunications Act." has been inserted.	Agreed.
4.4(b)	An additional paragraph (b) "The Multiplex Licensee will allocate Standard Access Entitlement to each Digital Community Broadcaster in accordance with Section 118NR of the Radiocommunications Act." has been inserted.	Agreed. This will avoid the need for subsequent revision should Standard Entitlements be changed in the Act.
N/A	The following clause has been deleted: The Multiplex Licensee must allocate Multiplex Capacity (and revoke the allocation of Multiplex Capacity) to Digital Community Broadcasters nominated by the Representative Company based on the fractions that are notified to the Multiplex Licensee by the Representative Company to be made available to each Digital Community Broadcaster, subject to the total allocation not exceeding two-ninths of the total Multiplex Capacity for a Digital Radio Multiplex Transmitter Licence.	This is now covered under clause 4.4(b) pursuant to s 118NR of the act. Agreed. As above.
4.4(e)	The right of the Representative Company to grant a third party the right to provide outsourced transmission and manage the digital spectrum on behalf of a community broadcaster has been removed.	Not agreed. Original wording of 4.4(e) to be retained.
5.2	Clause 5.2 has been amended to provide for Digital Broadcasters rather than Qualified Content Service Providers. This appears to reflect the removal of a Restricted Datacaster Licence from the Broadcasting Services Act.	Agreed.

Attachment A: Comments on amendments, continued

Access Agreement

Clause Reference	Changes	Comment
5.3 and 5.4	Clause 5.3 has been amended substantially to provide that "The Multiplex Licensee will allocate excess capacity access entitlements to each digital broadcaster that in accordance with section 118NT of the Radiocommunications Act." There is also some additional diction changes to reflect some changes in defined terms.	<p>Agreed, subject to:</p> <ul style="list-style-type: none"> In Clauses 5.3 (i) and (ii), replace the words 'Incumbent Commercial Broadcaster' with 'Digital Broadcaster'. Deletion of Clause 5.4, Regarding capacity cap. <p>This will avoid the need for subsequent revision should Standard Entitlements and caps be changed in the Act.</p> <p>See also Section 8.</p>
6(e) and 6(f)	An additional representation and warranty has been added in relation to compliance with obligations under the Radiocommunications Act and holding and maintaining all relevant licences and approvals that are required to exercise the rights and perform the obligations under the Agreement. Clause 6(f) is simplified.	Agreed.
N/A	The representation and warranty regarding that no intellectual property rights have been infringed, no obscene, indecent, defamatory broadcast or broadcast in contempt of court or violating any law or industry code has been made, has been deleted.	Agreed
7.4(b)	The reference to "Representative Company" should be changed to "Digital Community Radio Broadcasting Representative Company".	<p>Not Agreed.</p> <p>Instead add a new Definition to define 'Representative Company' as meaning Digital Community Radio Broadcasting Representative Company.</p>
7.5	Clause 7.5 has been amended to remove the reference to Qualified Content Service Provider.	Agreed.
10	The application clause has been deleted.	Agreed.
10.4	The time period for access seekers to notify the Multiplex Licensee of an overpayment made by an access seeker has been increased from 30 days to 180 days.	Agreed.

Attachment A: Comments on amendments, continued

Access Agreement

Clause Reference	Changes	Comment
12.1(a)(i)	The time limit of 6 months following the Effective Date of the agreement for when the licensee may conduct a review of the credit worthiness of an access seeker has been removed.	Agreed.
13.1(a)(iv)	Clause 13.1(a)(iv) has been amended to add the words "subject to any applicable legal restrictions on suspension".	Agreed.
13.1(b)	Clause 13.1(b) has been amended in relation to suspension of supply or powering down to add in the words "and will select the option (powering down or suspension) that represents the most proportionate response in the applicable circumstances." to the end of the clause.	Agreed.
13.2	Clause 13.2 has been amended to "power down or suspend" in addition to the licensee right to suspend the agreement or the transmission service.	Agreed.
13.4	Clause 13.4 has been amended to provide that the licensee must power up / lift the suspension of the Agreement as soon as the reason for the powering down is overcome, in addition to the reason for the suspension.	Agreed.
14.2(a)	This clause has been amended to provide that termination is subject to any applicable legal restriction on termination for insolvency events.	Agreed.
14.2(b)(iii) / (iv)	Additional wording has been included in these clauses to add further detail around the Licensee terminating the agreement due to the termination of key agreements or supplier arrangements of the Licensee.	Agreed.
14.4(d)	A new clause 14.4(d) has been inserted stating that on termination all sums invoiced by the licensee but not yet payable become due and payable 30 days from the invoice date.	Agreed.
15.5	The limitation of liability in clause 15.5 has been reduced in respect of negligent, wilful, reckless or unlawful acts or omissions and has been expanded to cover payment of standard charges and reimbursements for costs and disbursements.	Agreed.

Attachment A: Comments on amendments, continued

Access Agreement

Clause Reference	Changes	Comment
15.7(d)	The indemnity from an access seeker to the Licensee regarding claims made by third parties in respect of the Agreement of the supply of the Multiplex Transmission Services has been removed.	Agreed.
17.3	The restrictions around the disclosure of confidential information have been modified	Agreed.
N/A	The exclusion of the applicability of confidentiality provisions and the requirement to provide prior notice to a party prior to disclosing that party's confidential information have been removed.	Agreed.
21.1	The notice provisions have been amended to provide for the use of email rather than fax.	Agreed.
Definitions	A Restricted Datacaster and the representative company have been removed from the definition of an access seeker	Agreed.
Definitions	Digital Community Broadcaster Allocations should be a reference to clause 4.4(g) not clause 5.2	
Definitions	The definition of interested party has been deleted. This relates to the changes made in clause 5.3	Agreed.
Definitions	A definition of Loss has been added and reflected in parts of the agreement.	Agreed.
Definitions	The definition of Qualified Content Service Provider has been deleted.	Agreed.
Definitions	The definitions of Restricted Datacaster, Restricted Datacasting Licence and Restricted Datacasting Service have been deleted	Agreed.
Schedule 2 Clause 3.2(a)	Efficient costs of the licensee that may be incurred and recovered have been expanded to include "on-channel repeater equipment".	Agreed.
Schedule 2 Clause 3.2(b)	Operational costs have been expanded to include tower access costs in addition to site access costs.	Agreed.

Attachment A: Comments on amendments, continued

Access Agreement

Clause Reference	Changes	Comment
Schedule 2 Clause 3.4	The method of determining the recovery of capital expenditure in relation to assets has been amended.	Agreed.
	Alignment and reliance on standard taxation methods for depreciation	Agreed.
	The weighted average cost of capital is to be reviewed annually and have regard to telecommunications, electricity or gas industries.	Query whether an annual review of the WACC is actually necessary. Agreed, subject to further text to indicate that the review parameters include that the WACC adopted remain at the low end of any referenced determination.
Schedule 2 clause 5.1-5.3	The wording around Multiplex Licensee Initiated Reviews have been amended in respect of disputes.	Agreed.
	The wording around information to be supplied for verification that recurring charges are consistent with Pricing Principles has been amended.	Agreed.
	The need for consultation on reviews has been modified where the only Access Seeker are shareholders.	Agreed.
Schedule 2 clause 5.4	A new paragraph 5.4 has been added in respect of “other reviews”.	Agreed.
Conditions Precedent	Deleted	Agreed.

Attachment B: Questions

Question 1

Do the undertakings comply with the Division 4B of Part 3.3 of the Act?

The ACCC's initial assessment is that the undertakings comply with Division 4B of Part 3.3 of the Act.

Question 2

Are there any aspects of the undertakings that unreasonably restrict competition for digital radio service or related markets.

The undertakings can be improved with the addition of a commitment to:

- Efficient use of spectrum by operation of RF Service as near as practical to the maximum specified in the relevant ACMA licence.
See Section 6.
- A trigger included in the Access Undertaking that commits the DRMT licensee to undertake a process that leads to allocation of excess capacity by grant or auction.
See Section 8.

Question 3

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

The undertakings can be improved with the addition of a commitment to:

- Interoperability, and an inclusive methodology for operational and developmental matters.
See Section 7.

Question 4

(a) Are the access prices or pricing methodologies in the undertaking fair and reasonable

(b) Does the addition of clause 5.2(j) in Schedule 2 raise any concern?

There are no prices provided.

The Pricing Principles and methodology are suitable, provided the rate for the weighted average cost of capital on the low end of any referenced determination. The metropolitan rate is currently 5.29%.

Question 5

Do the undertakings include an obligation on the DRMT Licensees to not hinder access?

The undertakings can be improved with the addition of a commitment to:

- Efficient use of spectrum by operation of RF Service as near as practical to the maximum specified in the relevant ACMA licence.
See Section 6.
- Interoperability, and an inclusive methodology for operational and developmental matters.
See Section 7.
- A trigger included in the Access Undertaking that commits the DRMT licensee to undertake a process that leads to allocation of excess capacity by grant or auction.
See Section 8.

Question 6

Do the terms and conditions of access specified in the access undertakings provide for a reasonable dispute resolution mechanism?

The terms and conditions provide for a reasonable dispute resolution mechanism.

Question 7

Are there any other matters which the ACCC may consider?

Suggestions are intended to improve the potential for service diversity and promote access.

They need not and are not intended to cause undue delay in ACCC consideration of the Access Undertakings.

Subject to the improvements outlined in this submission, the CBAA supports the proposed Access Undertakings.

In particular please note comments tabulated in CBAA submission, Attachment A.