

## **Appendix 2**

### **Correspondence from the Department of Communications, Information Technology and the Arts**





**Australian Government**  
**Department of Communications,  
Information Technology and the Arts**

our reference

Secretary

**Helen Williams AO**

Senator Alan Eggleston  
Chair  
Standing Committee on the Environment, Communications,  
Information Technology and the Arts  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Senator Eggleston

**Digital radio legislation**

I refer to your letter of 24 April 2007 in which you requested a response from the Department to issues raised by submissions to the current Senate Committee on the Environment, Communications, Information Technology and the Arts inquiry into the Broadcasting Legislation Amendment (Digital Radio) Bill 2007 and the Radio Licence Fees Amendment Bill 2007 (the digital radio bills).

The Department's response to the issues raised in the Commercial Radio Australia (CRA) submission in relation to the digital radio bills is provided at [Attachment A](#).

The Department's comments on the summary briefing prepared within the committee on the multiplex governance framework for community radio and, in particular, the Community Broadcasting Association of Australia's proposed alternative model for managing community radio access to multiplexes, and on concerns about how conflict between stakeholders would be resolved is at [Attachment B](#).

Your letter also sought advice regarding the consultation process to date with community radio stakeholders. The community sector has been widely consulted in the development of the Government's digital radio policy framework and the subsequent digital radio bills.

In December 2004, the Minister released the report of the Digital Radio Study Group, together with an issues paper, to elicit the views of all interested stakeholders on the implementation of digital radio in Australia. Submissions were received from a range of radio broadcasters, representative groups and individuals, including the Community Broadcasting Association of Australia (CBAA), RPH Australia Cooperative Limited and Melbourne community station 3MBS-FM. The Department also met with major radio

sector stakeholders, including representatives of the CBAA and individual community broadcasters.

In September 2006, the Department co-funded a Digital Radio Symposium – convened by the CBAA – to enhance the understanding among wide-coverage community radio broadcasters of the introductory model for digital radio, and related matters. The Department provided an opening address to the Symposium setting out the key elements of the Government's introductory framework for digital radio relevant to the community sector. A range of other issues of relevance to the sector were also discussed, including industry delivery models for digital radio, the definition of wide-coverage community radio broadcasting licensees for the purposes of digital radio, management of digital radio capacity, and infrastructure and capital costs.

Finally, an exposure draft of the digital radio legislation was released to major radio stakeholders, including the CBAA, in February 2007. The CBAA provided a response to this process and the Department also responded to telephone queries from CBAA representatives regarding the provisions of the exposure draft prior to the introduction of the bills into Parliament.

I trust this information will assist the committee in the conduct of its inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen Williams', written in a cursive style.

Helen Williams  
20 April 2007

**RESPONSE TO MATTERS RAISED IN COMMERCIAL RADIO AUSTRALIA (CRA)  
SUBMISSION**

**Note:** References to the BSA mean *Broadcasting Services Act 1992*. References to the Radcomms Act mean the *Radiocommunications Act 1992*.

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**Part A – Issues that need to be addressed**

**Review of Digital Radio Moratorium**

CRA argues that the Bill should include the requirement for statutory review of the digital radio moratorium period no later than 5 years after the commencement of digital radio broadcasting, and requests that the review be required to have regard to matters including financial viability of broadcasters in the licence area and costs incurred by broadcasters in rolling out and operating digital broadcasting systems in addition to analogue systems.

*Response*

**Items 70 and 177** provide for reviews (under new BSA section 215B and new RCA section 313B) into the licensing, regulation and development of digital radio to be conducted before 1 January 2014 (i.e. one year before the first moratorium in the state capital cities will end, or five years after the commencement of digital radio broadcasting).

These reviews will enable consideration to be given to issues arising in relation to the moratorium.

**Review of Analogue Moratorium**

**CRA** argues that the Bill should include additional restrictions upon ACMA's ability to allocate new analogue commercial radio licences. It suggests that the Bill should prevent ACMA from allocating further analogue commercial radio licences unless the Minister has decided that these licences should be allocated (with the Minister's decision being informed by a review).

*Response*

**Item 37** of the Bill provides for a six year moratorium on the allocation of digital commercial radio broadcasting licences.

Any extension of the moratorium to apply to allocation of analogue radio licences would be a matter for the Government.

However, it is noted that there is already an administrative halt on the issue of new commercial radio broadcasting licences. In September 2003, the then Australian Broadcasting Authority announced an effective five year moratorium on the issue of new commercial radio licences following the allocation of the last commercial radio licence in each market. In Sydney and Brisbane, for example, consideration of possible new services would not occur until after April 2009.

After the end of the five year period, the regulator is expecting to respond to requests for further commercial services on a market-by-market basis, but is not intending to commence widespread replanning of broadcasting services throughout Australia.

## Capacity Entitlements

**CRA** argues that the Bill should ensure that commercial radio broadcasters' entitlements to digital radio spectrum reflect the fact that some commercial radio broadcasters hold more than one licence in a licence area.

**CRA** also argues that once all incumbent broadcasters' entitlements are fulfilled, any 'excess capacity' should be made available for 'restricted datacasting' or lie dormant.

### *Response*

**Item 172** of the Bill establishes a cap on the capacity that may be accessed by any one commercial radio licensee (new section 118NV). As noted in the Explanatory Memorandum, the cap provides that any one digital commercial radio broadcasting licensee is not entitled to access more than a total of two-ninths of multiplex capacity in any licence area, regardless of how many digital radio multiplex transmitter licences are issued for the area.

The cap on total multiplex capacity that may be accessed by a digital commercial radio broadcasting licensee is applied on a per-licence basis.

That is, commercial radio broadcasting operators who own two commercial radio broadcasting licences in an area will – subject to the availability of capacity – be able to access up to four-ninths of the capacity of a multiplex in a licence area in total by virtue of the fact that they hold two commercial radio broadcasting licences.

This is explained in the Explanatory Memorandum (page 77).

Under section 118NT, if capacity available under the digital radio multiplex transmitter licence on the digital start-up day for the area exceeds the aggregate of the standard access entitlements or capacity reserved for community broadcasting, the foundation digital radio multiplex transmitter licensee must ascertain the level of demand for access to the excess multiplex capacity from content service providers who are entitled to provide one or more digital content services in the BSA radio area, within ninety days of the digital radio start-up day for the designated BSA area. This means that once standard access entitlements are fulfilled, excess capacity (excluding the capacity reserved for community broadcasting) is to be offered to digital commercial and digital community radio broadcasters who are licensed to provide digital radio service in that licence area and to restricted datacasters, and national broadcasters in relation to a category 2 multiplex transmitter licence.

During the moratorium period, the excess capacity can only be offered to incumbent broadcasters (who, in relation to commercial licensees, will be the only ones licensed to provide digital radio services during the moratorium) and restricted datacasters. The only exceptions to this arise if ACMA has issued a new digital commercial radio broadcasting licence in accordance with section 35D (where an incumbent licensee has failed to provide a digital service) or where a new digital community radio broadcasting licence has been issued for that licence area.

## Planning for new Digital Services

**CRA** argues that the Bill should ensure that post-moratorium planning for any 'new entrant' digital radio services reflect the planning scheme and priorities under Part 3 of the BSA.

### *Response*

The Bill makes a number of changes to streamline the planning process for digital radio.

**Item 32** inserts new subsection 25(4) which provides that ACMA is not required to have regard to sections 23, 24 or 27 in developing or varying a Frequency Allocation Plan (FAP) for digital radio services or restricted datacasting services for the spectrum designated under subsection 31(1) or subsection 31(1A). It is unnecessary for ACMA to re-examine all the issues examined in developing the FAP, because digital radio services will be introduced on the basis of existing licence areas with services provided, for the most part, by existing licensees or after preparation of Licence Area Plans (which have regard for sections 23, 24 and 27) and preparation Digital Radio Channel Plans (see Item 75 of Schedule 1) which involves public consultation processes.

**New subsections 26C(1) and (3)** provide that Licence Area Plans (LAPs) are not required to deal with commercial or community digital radio broadcasting services provided under licences in force immediately before the digital radio start-up day for the licence area which authorise digital transmission. Requiring ACMA to replan the digital radio services of incumbent licensees would add unnecessary costs and delays in the rollout of digital radio as the licences providing these services are already planned through existing LAPs.

**New subsection 26C(2)** provides that LAPs are not required to deal with digital services provided under a digital commercial radio broadcasting licence allocated in accordance with new subsection 35D(3). Existing LAPs will not need to be varied because the new licensee will be allocated a license under new subsection 35D (3) and will replace the existing BSA licensee, in relation to the delivery of digital radio services in the licence area.

**New section 26D** provides that LAPs dealing with digital commercial, digital community or digital national radio broadcasting services are not required to identify each individual digital radio service, but can deal collectively with the digital radio services that, from time to time, are, or are to be, transmitted under the digital radio multiplex transmitter licence by licence type, for the licence area. This provision will enable LAPs to deal collectively with the services to be provided on the multiplex transmitter licences in a market, rather than each individual digital broadcasting service.

This provision will apply after the moratorium. In this situation, in developing LAPs (and planning for services collectively) considerations will involve having regard to the socio economic criteria for planning purposes (contained in section 23 of the BSA) and will be subject to the normal public consultation requirements of a LAP (under section 27 of the BSA).

### **Multiplex licences**

**CRA** argues that the Bill should clarify that an eligible joint venture company can hold more than one foundation multiplex transmitter licence in a licence area, and suggests that the Bill or EM needs to make clear that the only cost to be incurred by broadcasters in the allocation of foundation licences will be an administrative fee determined by the ACMA.

CRA also argues that non-foundation multiplex licences should not be able to be allocated until after the end of the moratorium.

### *Response*

**Item 161** of the Bill sets out the terms on which ACMA may allocate foundation and non-foundation multiplex transmitter licences, including the requirements for the formation by broadcasters of eligible joint venture companies that may apply for foundation licences.

It is recognised that for administrative and operational reasons incumbent broadcasters may choose to form a single joint venture company to run all foundation multiplexes in a licence area.

The Bill does not prevent this.

However, the company must satisfy the requirements of the allocation process that include that all qualifying incumbent broadcasters in the licence area were invited to become shareholders.

In this case, legislation specifies that the fee charged for such foundation licences must not amount to taxation. The Explanatory Memorandum (page 64) makes clear that this means the fee would be ‘administrative only’.

Item 155 of the Bill inserts new section 98C into the Radcomms Act, which enables ACMA to declare that a specified category 1 digital radio multiplex transmitter licence is a foundation category 1 digital radio multiplex transmitter licence (see Item 136 of Schedule 1).

Item 155 also inserts new section 98D into the Radcomms Act, which enables ACMA to declare that a specified category 2 digital radio multiplex transmitter licence is a foundation category 2 digital radio multiplex transmitter licence (see Item 137 of Schedule 1).

These provisions enable an important and necessary distinction to be drawn between *foundation* digital radio multiplex transmitter licences and *non-foundation* digital radio multiplex transmitter licences:

- *Foundation* digital radio multiplex transmitter licences are category 1 and category 2 licences that provide standard access entitlements for digital commercial, digital community and digital national radio broadcasting operators in an area (see Item 172, new sections 118NQ, 118NR, 118NS). Essentially, they are licences designed to accommodate incumbent operators.
- *Non-foundation* digital radio multiplex transmitter licences are any additional category 1 or category 2 multiplex transmitter licences issued in an area which do not provide for standard access entitlements (see Item 172, new section 118NU). These licences are intended to accommodate any future digital radio broadcasters, and may be issued in a particular area once sufficient foundation licences are in force (see Item 161 of Schedule 1).

As noted above, the Bill provides that non-foundation multiplex transmitter licences may be allocated only when sufficient foundation multiplex licences have been allocated in a market to accommodate the standard access entitlements of the commercial broadcasters in the market.

It would be open to ACMA to issue a non-foundation multiplex transmitter licence in an area, subject to the requirement to have issued sufficient foundation licences and (presumably) subject to spectrum availability.

However, the moratorium on the issue of new commercial radio licence would operate irrespective of the issue of a non-foundation multiplex licence (i.e. any non-foundation licensee would have no new digital commercial radio content service providers until after the moratorium period).



## Part B – Drafting Clarifications and Amendments

### **Restricted datacasting services**

**CRA** argues that restricted datacasting licensees should not be permitted to provide audio services, and it requests that the definition be changed.

#### *Response*

**Item 24** of the Bill inserts into section 6 of the BSA a definition of ‘restricted datacasting licence’. This new sub-category of datacasting licence is defined as a licence that is issued in response to an application for a ‘restricted datacasting licence’. An application for a ‘restricted datacasting licence’ can be made under new subclause 7(3) of Schedule 6 of the BSA (see Item 105 of Schedule 1).

**Item 110** inserts new section 24A into the BSA, which imposes licence conditions relating to transmission mode and program content for ‘restricted datacasting licences’ (see Items 24 and 25 of Schedule 1).

In the absence of any legislative instrument specifying content that may not be provided, restricted datacasting licence holders can provide the same types of services as datacasting licence holders, including the following types of services:

- information-only programs (including those which enable transactions);
- educational programs;
- interactive computer game;
- text or still visual images;
- Parliamentary broadcasts;
- email;
- internet content;
- 10 minute extracts of a television program in the following genres (known as category 1 programs). These extracts are not able to be combined with other extracts to form a whole program which would fall into one of these genres: Drama, Sport, Music, Infotainment/lifestyle, Documentary, Reality TV, Children’s entertainment, Light entertainment/variety, Compilation programming, Quiz/games, Comedy, a combination of the above; and
- 10 minute news, current affairs, financial/market/business information or weather bulletins (or bulletins which combine these elements). These may be repeated at 30 minute intervals but may not be run consecutively. Bulletins may be presenter-based.

There are also restrictions on ‘datacasting’ (and therefore on ‘restricted datacasting’) relating to audio content (Division 2 of Schedule 6 to the BSA).

- Subclause 21(1) prohibits a datacasting licensee from using the datacasting service to transmit matter that, if it were broadcast on a commercial radio broadcasting service, would be a designated radio program.

As with genres restrictions relating to television programs, there are also some exceptions relating to audio content:

- Subclause 21(2) has the effect of excluding ‘information-only programs’, ‘educational programs’ and ‘foreign-language news bulletins’ from the audio content condition.
- Subclauses 21(3) to (8) enable ACMA to make written determinations providing that specified radio programs or specified matter is taken to be, or is taken not to be, a designated radio program.

- Subclause 21(9) provides that subclause 21(1) does not apply to the transmission of so much of a datacasting service as consists of an 'Internet carriage service'.
- Clause 22 permits carriage of Parliamentary proceedings and certain court and other proceedings.

### **Digital Program Enhancement Content: s8AB(1)**

**CRA** argues that the policy intent was that there was no restriction on what broadcasters could use digital radio spectrum for, and therefore the definition of enhancements should be broadened to include dynamic text, animated gifs, interactive web-site capabilities and short burst video.

#### *Response*

**Items 15 and 26** of the Bill allow commercial, community and national radio broadcasters to provide text and still visual images as part of their digital services. This additional content is known as 'digital program enhancement content'.

The Bill does not allow animation or moving visual images.

However, in order to provide some flexibility for adjustment to the definition of permitted program content, the Bill provides the Minister with a power to determine additional types of digital program enhancement content. This might include animation or moving image material.

### **Moratorium on the issue of new licences: s35C**

**CRA** in its submission supports the inclusion of a moratorium period but requests additional features in the Bill to:

1. enable the Minister to extend the moratorium following completion of a review (discussed in Part A);
2. clarify that the digital moratorium commences when the Bill receives Royal Assent; and
3. extend the moratorium such that it continues for 6 years after an 'adequate coverage date' - a date by which there is rollout of infrastructure to provide services to 80 % of the licence area population.

#### *Response*

**Item 37** inserts a new section 35C into the BSA. New section 35C provides for a six year moratorium on the issue of new digital commercial radio licences in the broadcasting services bands in a licence area, beginning at the start of the digital radio start-up day for the licence area.

The commencement of the moratorium on the issue of new digital commercial radio licences from Royal Assent would not achieve a greater level of commercial protection than is already provided for under existing licensing arrangements. The Bill does not allow commercial broadcasters to provide digital services until digital start-up day, which is when the moratorium is due to start.

**Item 39 inserts new section 41D** which prescribes the services (by reference to transmission mode) authorised, at various points in time, by commercial radio broadcasting licences by reference to the time of allocation of the licence. Section 41D authorises incumbent licensees to deliver digital services after digital radio start-up day and/or to continue to provide their analogue services using their existing BSA licences.

**New subsection 41D(2)** provides that a commercial radio broadcasting licence allocated on or after the commencement of the section but before the digital radio start-up day for the licence area, that was allocated as a licence to provide an analogue service, is taken to authorise the licensee to provide an analogue service during the period beginning on the commencement of the section and ending immediately before the digital radio start-up day for the licence area. That is, any licence issued after Royal Assent can only provide analogue services until digital radio start-up day.

**New subsection 41D(3)** gives effect to the Government's intention to allow incumbent licensees to deliver digital radio services using their existing BSA licences, after the digital radio start-up day.

Any extension of the moratorium beyond the six year period would be a policy matter for the Government.

However, **Items 70 and 177** provide for reviews (under new BSA section 215B and new RCA section 313B) into the licensing, regulation and development of digital radio to be conducted before 1 January 2014 (i.e. one year before the first moratorium in the state capital cities will end, or five years from the commencement of digital radio services). This review could examine whether the moratorium could be extended and under what conditions.

### **Use it or lose it: s35D**

**CRA** argues that this provision gives ACMA significant and potentially draconian power and considers that this power should not be able to be exercised for at least two years after the start-up date in a licence area.

CRA also prefers that the Bill expressly set out the factors listed in its submission within s35D.

### *Response*

**Item 37** inserts new section 35D which provides that the continuity of the moratorium in any licence area is contingent upon the provision of at least one digital commercial radio broadcasting service by each commercial radio broadcasting licensee.

The section requires ACMA to allocate a new digital commercial radio broadcasting licence for the licence area if a commercial radio broadcasting licensee who is licensed to provide one or more digital services on the digital radio start-up day does not provide at least one digital commercial radio broadcasting service during the digital radio moratorium period for the licence area (i.e. after the digital radio start-up day for the area).

In these circumstances, under proposed subsection 35D(2), ACMA is also required to determine, by written notice to the licensee, that the digital commercial radio broadcasting licence ceases to authorise the licensee to provide one or more digital commercial radio broadcasting services in the licence area, and that the incumbent's licence only authorises transmission in analogue mode.

- A delay in the application of the ACMA power under this section for at least two years would reduce the incentive for broadcasters to commence services for that period. Services would not, in effect, be required to commence until the beginning of 2011.

A determination made by ACMA under section 35D will be reviewable by the Administrative Appeals Tribunal (see Item 65 of Schedule 1).

New subsection 35D(4) enables ACMA to specify, by legislative instrument, circumstances in which a commercial radio broadcasting licensee is taken to be providing a digital commercial radio broadcasting service. It is feasible that there may be circumstances where a licensee is legitimately unable to meet a continuity of service provision, for example, where interruptions to the provision of digital radio service in a licence area were directly or indirectly caused by factors outside the reasonable control of the licensee such as weather damage to transmission or distribution equipment.

Proposed subsection 35D(4) would provide flexibility to deal with such circumstances by enabling ACMA to specify the circumstances in which a licensee is taken to be providing a service and enabling ACMA to take into account circumstances which emerge closer to the time of digital start-up.

### **Multiplex issues: s43D(2)**

**CRA** suggests drafting changes to ensure that it is clear that radio broadcasters are only entitled to provide services on multiplexes in their licence area.

#### *Response*

A number of provisions mean that radio broadcasters are only permitted to provide digital radio services on multiplexes in their licence area.

**Item 40** inserts new section 43D into the BSA, which provides special licence conditions relating to digital radio commercial broadcasting services.

These conditions include that the service or services must be transmitted using a multiplex transmitter operated under a category 1 or category 2 digital radio multiplex transmitter licence allocated under the Radcomms Act. This provision ensures that digital radio services are provided only via licensed DAB multiplex transmitters.

**Item 39** inserts new section 41D into the BSA, which authorises incumbent licensees to deliver digital services and/or to continue to provide their analogue services using their existing BSA licences in the licence area.

In addition, licence conditions imposed on the multiplex operators under s109B of the Radcomms Act (by Item 166) make it clear that in relation to commercial and community digital radio services, category 1 and 2 multiplex transmitter licences may only be used to provide services where there is in force a licence which authorises the provision of those service *in that licence area*.

### **Multiplex issues: s43D(4) and (5)**

**CRA** considers that the wording of the provision should be revised to make sure that the meaning of the section is clear.

#### *Response*

**Item 40** inserts new section 43D into the BSA, which provides special licence conditions relating to digital radio commercial broadcasting services.

The section provides a cap on the amount of multiplex capacity that can be used by a commercial radio broadcasting licensee to simulcast in digital an analogue commercial radio broadcasting

service. This is intended to ensure the development of new and innovative digital-only programming, while not unreasonably constraining a broadcaster's legitimate right to replicate a reasonable amount of their analogue service in digital.

As noted in the Explanatory Memorandum (page 48), **new subsections 43D(4) and 43D(5)** of the Bill provide that, where there are two or more digital radio multiplex transmitter licences (category 1 or 2) for the licence area, commercial digital radio broadcasters will be subject to the condition that they can use not more than the designated fraction of the total multiplex capacities under those digital radio multiplex transmitter licences (i.e. one-eighteenth of the capacity of two multiplexes is equivalent to one-ninth of the capacity of any one digital radio multiplex in the licence area) to provide a service that *passes the shared content test* in relation to an analogue commercial radio broadcasting service provided under the first licence, or under a commercial radio broadcasting licence that has the same licence area as the first licence.

The effect of subsections 43D(4) and 43D(5) (where there are two or more digital radio multiplex transmitter licences) is the same in terms of the capacity to which the shared content test will apply as that of subsection 43D(3) (where there is only one multiplex transmitter licence).

- In the case where there is only one multiplex transmitter licence for the licence area, the capacity threshold that is applied in relation to the shared content test is 1/9<sup>th</sup> of multiplex capacity (refer subsection 43D(3)).
- In the case where there are two or more multiplex transmitter licences for the licence area, the relevant capacity threshold is the 'designated fraction' of total multiplex capacities for these licences, which is always equivalent to 1/9<sup>th</sup> of the multiplex capacity of a single licence (subsections 43D(4) and 43D(5)).
- For example, if there were two multiplex transmitter licences for the licence area, the designated fraction would be 1/18<sup>th</sup> of the total multiplex capacities of the two licences: 1/(9 multiplied by two).
- 1/18<sup>th</sup> of the total multiplex capacities of two multiplex transmitter licences is equivalent to 1/9<sup>th</sup> of the capacity of one multiplex transmitter licence.

As such, in all circumstances, it would be open to a digital commercial radio broadcasting licensee to use 1/9<sup>th</sup> of multiplex capacity to provide a simulcast service, or a service that includes more than 50% of the content from the broadcaster's analogue service or another analogue service in the licence area, should they wish to do so.

However, where a digital commercial broadcasting licensee acquires more than 1/9<sup>th</sup> of multiplex capacity in the licence area, the commercial broadcasting licensee will be prevented from simulcasting more than 50% of its analogue service or another analogue service in the licence area on that additional capacity. This additional capacity above the 1/9<sup>th</sup> is to be used only for new services.

### **Transmission Overspills**

**CRA** requests that the Explanatory Memorandum should make it clear that the introduction of the regulatory framework for digital radio is an opportunity to preserve and respect licence area boundaries by more closely matching digital signals to those boundaries.

*Response*

This appears to be a similar point to those made in relation to new subsection 43D(2) above. The bill does not provide scope for a multiplex licensee to provide the broadcasting services of an adjacent market or otherwise operate in an adjacent market.

Moreover, there is no intention to permit a greater level of overspill into adjacent markets in digital than there currently is in analogue and, as a general comment, the Bill does not alter or amend the current overspill protections that exist for licensed radio broadcasting services.

The technical specifications of multiplex transmitters that will be used to provide digital radio services will be determined in digital radio channel plans prepared by the regulator (Item 154 of the Bill refers). These digital radio channel plans must be consistent with all relevant planning instruments, including licence area plans.

### **Allocation of multiplex transmitter licences: ss 102C & 102D**

**CRA** expresses concern that there are no criteria for ACMA to choose which joint venture company should get a multiplex licence – it suggests that this criteria should be the company that represents the most commercial radio licensees in the relevant licence area and that one company per licence area should be encouraged.

#### *Response*

**Item 161** inserts new section 102C, which prescribes the circumstances in which ACMA can issue a category 1 digital radio multiplex transmitter licence.

Item 161 also inserts new section 102D, which prescribes the circumstances in which ACMA can issue a category 2 digital radio multiplex transmitter licence.

The new section provides for a two stage allocation process for category 1 digital radio multiplex transmitter licences for the commercial and community broadcasters:

- Stage one: under new subsection 102C(2), incumbent commercial and community broadcasters must be provided with an opportunity to elect to jointly hold (via a joint venture company formed by these broadcasters in accordance with section 102C(5)) a foundation category 1 digital radio multiplex transmitter licence, allocated for a fee (new subsection 102C(2)) that must not amount to taxation (i.e. is administrative only) (new subsection 102C(8)); and
- Stage two: under new subsection 102C(3), ACMA will be able to allocate a foundation category 1 digital radio multiplex transmitter licence under section 106 of the Radcomms Act if either no applications were made by ‘eligible joint venture companies’ (formed by incumbent broadcasters in accordance with section 102C(5)) or applications were rejected (under section 100). The allocation process under section 106 will be a price-based allocation system (new subsection 102C(3)). Any rejection of application can be subject to internal review by ACMA under section 285 of the Radcomms Act and is reviewable by the AAT under section 292.

A similar process is involved for Category 2 multiplexes.

The Bill provides that ACMA may reject applications from eligible joint venture companies. However, the grounds on which it can reject the application are the grounds on which it can reject applications for apparatus licences under section 100 of the Radcomms Act. Such decisions are appealable to the Administrative Appeals Tribunal.

It will be a matter for commercial broadcasters in a licence area to manage the application process in relation to joint venture companies. The provisions ensure that every incumbent broadcaster in the licence area has the opportunity to join such joint ventures.

**Eligible joint venture company: 102C(5) and s102D(5)**

**CRA** argues that there should be a requirement that the ‘promoter’ of a joint venture company should be a commercial radio broadcasting licensee.

*Response*

**News 102C and 102D** provide for the allocation of multiplex transmitter licences to eligible joint venture companies.

An eligible joint venture company will be required to be formed to apply for and hold a foundation category 1 digital radio multiplex transmitter licence (subsection 102C(2)). New subsection 102C(5) provides that a company is an ‘eligible joint venture company’ for the purposes of section 102C if:

- before registration, the promoters of the company initially invited each incumbent commercial broadcaster, and the community broadcasting representative company (if formed) (see Items 146 and 172 of Schedule 1) to subscribe for shares in the company;
- assuming the initial invitation were to be accepted by each invitee, the incumbent commercial radio broadcasting licensees who accepted the invitation would be issued with an equal number of shares which, in aggregate, could total seven-ninths of the shares, and the community digital radio broadcasting representative company would, if it accepted the invitation, hold two-ninths of the shares in the joint venture company (new subparagraphs 102C(5)(a)(iii), (v) and (vi)); and
- the only persons entitled to subscribe for shares in the eligible joint venture company would be the incumbent digital commercial radio broadcasting licensees and the digital community radio broadcasting representative company (new subparagraph 102C(5)(a)(iv)).

Similar provisions exist in new section 102D in relation to a Category 2 multiplex transmitter licence.

As the rules for the joint-venture companies specify the terms on which each type of broadcaster may participate, the identity of the promoter is largely irrelevant. The shareholders can only be incumbent broadcasters and, from the time of formation, the shareholders will control the operations of a company. The promoter has no rights or further role.

**Implementation Plans: s109B**

**CRA** expresses concern that the period for submitting an implementation plan (the scope of which is unknown) should be longer than 30 days.

*Response*

**Item 166** inserts new section 109B which sets in place general licence conditions which are to apply to category 1, 2 and 3 digital radio multiplex transmitter licences. A number of these

conditions are in line with existing conditions applicable to other apparatus licences. There are also a number of general licence conditions which are specific to digital radio.

Section 109B multiplex transmitter licence conditions require:

- submission, if required, of an implementation plan to ACMA. ACMA is able to determine, by legislative instrument, the requirements to be complied with by implementation plans, within a specified period of **at least 30 days**.

This is a minimum period and, if ACMA judges that a longer period is necessary, it is free to provide for it.

### **Content service provider**

**CRA** expresses concern that, although the term is defined, it could be confused with the generally accepted term in the telecommunications legislation.

*Response*

**Item 172** inserts new Division 4B into the BSA.

Division 4B sets out an access regime for digital radio multiplex transmitter licences, requires compliance with access obligations in relation to multiplex capacity under the licence, and provides that terms and conditions on which the multiplex transmitter licensees are required to comply with access obligations will be set out in access undertakings.

New section 118NA provides that this Division will deal with access to foundation category 1 and foundation category 2 digital radio multiplex transmitter licences and non-foundation category 1 and non-foundation category 2 digital radio multiplex transmitter licences.

A ‘content service provider’ is defined as a company who provides, or proposes to provide, a ‘content service’. In turn, a ‘content service’ is defined for a category 1 digital radio multiplex transmitter licence as a licensed digital commercial radio broadcasting service, a licensed digital community radio broadcasting service, or a licensed restricted datacasting service (Item 172 of the Bill, new section 118NB, and item 166, new section 109B). For a category 2 digital radio multiplex transmitter licence, a ‘content service’ is defined as a licensed digital commercial radio broadcasting service, a licensed digital community radio broadcasting service, a licensed restricted data casting service or a national radio broadcasting service.

The term content service provider is clearly defined.

The term has already been used (and defined separately) in relation to the access regime in the Radcomms Act, Division 4A, which relates to access to Channel B datacasting transmitter licences.

### **ACCC criteria: s118NJ**

**CRA** questions whether the Bill should specify principles that the ACCC must consider in deciding whether or not to accept an access undertaking from a digital radio multiplex transmitter licensee.

*Response*

**Item 172** inserts new Division 4B into the BSA.



New section 118NJ provides that the ACCC may, by legislative instrument, determine criteria to be applied by the ACCC in deciding whether to accept undertakings or variations to undertakings.

The provisions in the Bill which allow the ACCC to develop the decision-making criteria that it will use in assessing undertakings are consistent with the arrangements for other access regimes, such as that for Channel B datacasting transmitter licences.

The decision-making criteria are legislative instruments and as such are subject to a requirement for the ACCC to consult affected parties in their development.

### **Excess capacity entitlement**

**CRA** requests that a longer period be permitted for multiplex owners to assess demand after the digital radio start-up day.

#### *Response*

**Item 172** inserts new Division 4B into the BSA.

New section 118NT provides that within 90 days of the digital radio start-up day the multiplex operator is to ascertain the level of demand for capacity not occupied by standard access entitlements or capacity reserved for community broadcasting. The ninety day timeframe includes a thirty day period in which the digital radio multiplex transmitter licences must give notice of intent to assess demand and invite content service providers to express interest in having access to that excess multiplex capacity.

A three month period should allow sufficient time for the joint venture company to establish the excess demand on a multiplex.

Prolonged delays would inhibit the ability of broadcasters to take up the opportunity to provide additional services and postpone the entry of potential new restricted datacasting licensees.

### **ACCC Code: new s@118QH**

**CRA** has expressed concern that the consultation requirements in relation to this Code do not include consultation with broadcasters.

#### *Response*

**Item 172** inserts new Division 4B into the BSA.

The ACCC may, by legislative instrument, make a binding code setting out conditions relating to the provision of access to infrastructure. This must be done in consultation with digital radio multiplex transmitter licensees, owners and operators of broadcasting towers and owners and operators of designated associated facilities.

The code only relates to access by multiplex transmitter licensees to infrastructure such as broadcasting towers, sites and associated facilities.

The Bill requires the ACCC to consult with digital radio multiplex transmitter licensees as well as owners and operators of transmission towers and associated facilities.

Other than through their control of joint venture companies holding multiplex licences, commercial radio broadcasters do not have a significant stake in the access code for broadcasting infrastructure.

### **Digital Radio Channel Plans: s44A(5) and s44A(1)(e)**

**CRA** has expressed concern that the consultation period is insufficient and that commercial radio broadcasters must be consulted.

#### *Response*

**Item 154** inserts new section 44A, which provides for the preparation of digital radio channel plans. Under this section, digital radio will be planned and licensed on the basis of BSA licence areas. A copy of a digital radio channel plan is to be made available on ACMA's Internet site (subsection 44A(4)).

ACMA may, by legislative instrument, vary a digital radio channel plan. Before doing so, ACMA must publish a draft of the variation on its site, invite public submissions within a period of at least 30 days and consider any submissions provided (subsections 44A(6) and (7)).

The Bill requires that ACMA conduct public consultation in developing Digital Radio Channel Plans – this would ensure that commercial radio broadcasters are consulted.

The 30 day period provided is a minimum period. It would be expected that ACMA, which is experienced in public consultation in relation to planning for spectrum and broadcasting licensing, would provide an appropriate consultation period for the complexity of the Plan being considered.

### **Pre-existing use of Spectrum identified for digital radio**

**CRA** considers that digital radio should take priority in the spectrum that may be designated under subsection 31(1A), and request that this be clarified in the Bill.

#### *Response*

**Item 149** inserts new subsection 31(1A), which enables the Minister, in consultation with ACMA, to designate parts of the spectrum as being partly for the purpose of digital radio broadcasting services and restricted datacasting services, and to refer the spectrum to ACMA for planning under Part 3 of the BSA. This designated spectrum forms part of the broadcasting services bands, under section 6 of the BSA (see Item 3).

Spectrum constraints for digital radio mean that services are likely to need to be transmitted using BSB spectrum as well as spectrum currently outside the BSB including, for example, 'L-Band' (1.5 GHz). This spectrum will be partly for the purposes of digital radio broadcasting and restricted datacasting services.

The Minister may, by written instrument, determine that a designation under subsection 31(1A) ceases to be in force at a specified time (subsection (1C)) or only has effect in relation to one or more specified areas of Australia (subsection (1D)).

These subsections enable the Minister to set a time limit on a designation under section 31(1A), which may allow for the temporary use of spectrum, for example, pending decisions about spectrum use after switchover from analogue television. Similarly, the capacity for the Minister to limit the effect of a designation to one or more specified areas may have particular application in relation L-Band, where some channels are currently utilised more heavily in some areas than others.

The Bill safeguards the operation of existing licences authorised to use spectrum that may be designated under new subsection 31(1A) as part of the BSBs for the purposes of digital radio and restricted datacasting (see Item 92 of Schedule 1). This will ensure that existing users of non-BSB spectrum are not unduly impacted by a designation for digital radio. Spectrum designated under new subsection 31(1A) will also not be able to be used for a broadcasting service other than digital radio (i.e. can not used for commercial television, analogue commercial radio, analogue community radio, subscription television, datacasting, or class-licensed services.)

It would be a significant departure from the policy framework for digital radio providers to be given rights which override those of existing spectrum users. This would create significant uncertainty for existing users of this spectrum. It is also likely that sufficient unused spectrum will be able to be found for digital radio services while still maintaining the framework in the Bill for sharing this spectrum with existing users.

## **Regulations**

**CRA** questions whether provision should also be made for digital radio regulations to address other “miscellaneous matters” relevant to spectrum planning and spectrum use. **CRA** provides the example of minimum bit-rates for national broadcasting services and argues that this is more appropriately a matter determined by the Government than by **ACMA**.

### *Response*

**Item 166** inserts new section 109B which sets in place general licence conditions which are to apply to category 1, 2 and 3 digital radio multiplex transmitter licences. A number of these conditions are in line with existing conditions applicable to other apparatus licences. There are also a number of general licence conditions which are specific to digital radio.

**ACMA** is also able to impose additional conditions and vary or revoke these under paragraphs 111(1)(a), (b) and (c) of the **Radcomms Act**. The Bill gives the Minister the power to direct **ACMA** in relation to these powers (new subsections 11(6) and (7) of the **Radcomms Act**) (see Items 168 and 169 of the Bill). In relation to spectrum used for digital radio, the Bill provides the Minister with a power to designate certain spectrum to be party for use for digital radio (see Item 149 of the Bill).

More specific spectrum planning and usage issues are appropriately matters for the regulator, and will be determined through the digital radio channel planning processes under new s44A of the **Radcomms Act**.

There are a number of mechanisms by which technical issues, such as minimum bit rate settings for individual broadcasting services, can be regulated if necessary.

**Item 56** inserts new provisions in the **BSA** relating to the making of standards. **New section 130AA** provides for technical standards for digital radio transmission. **ACMA** will have power to determine, through legislative instrument, technical standards relating to the transmission of digital radio services. Under new subsection 130AA(3), national broadcasters will be required to comply with these technical standards. For other categories of broadcasters, compliance with standards will be enforced through licence conditions.

**New section 130AB** allows ACMA to determine, through legislative instrument, technical standards relating to the operation of multiplex transmitters. These standards will be enforced through licence conditions (see new section 109B(1)(o)).

**Item 57** inserts new section 130BA, which allows ACMA to determine, by legislative instrument, standards relating to domestic digital reception equipment for radio services. These standards will be enforced through licence conditions. These technical standards setting powers could be used, for example, to require the use of particular digital radio standards such as the recently revised Digital Audio Broadcasting standard known as DAB+ .

**Items 58, 61 to 63** amend subsection 130F(1) of the BSA to broaden the scope of Industry activities for the purposes of Part 9B of the BSA to cover the activities of providers of radio services (new subparagraph 130F(1)(ea)-(ef)), providers of reception equipment capable of receiving radio services (new subparagraph 130F(1)(g)(va)-(vf)) and the operation of multiplex transmitters (new subsection 130F(1)(i)). Part 9B provides for the making of industry codes and industry standards in relation to Industry activities.

If the licence is a category 3 licence (to be operated by national broadcasters) conditions can be specified in the regulations (paragraph 109B(1)(s)). This would allow rules to be made, for example, relating to the sharing of capacity on a category 3 multiplex transmitter (given that there are no access obligations imposed on such licences which determine capacity sharing arrangements).

### **Channel positioning**

**CRA** expresses concern that there is no provision in the Bill for channel positioning within a multiplex.

#### *Response*

Channel positioning is a matter that could – in the first instance – be dealt with by the joint venture company. However, the new code- and standard-making provisions in the Bill provide ACMA with the power to require the development of codes of practice relating to issues such as these if it considers it necessary (for example, if industry cannot reach agreement). Items 54 to 63 refer.

**Items 58, 61 to 63** amend subsection 130F(1) of the BSA to broaden the scope of Industry activities for the purposes of Part 9B of the BSA to cover the activities of providers of radio services (new subparagraph 130F(1)(ea)-(ef)), providers of reception equipment capable of receiving radio services (new subparagraph 130F(1)(g)(va)-(vf)) and the operation of multiplex transmitters (new subsection 130F(1)(i)). Part 9B provides for the making of industry codes and industry standards in relation to Industry activities.

These mechanisms have been provided in relation to digital television, where one of the matters which may be dealt with by industry codes is channel numbering. The Bill will apply these mechanisms to digital radio.

### **Agreements relating to digital radio transmitter licences**

**CRA** is concerned that “in the absence of statutory protections, agreements between commercial radio licensees with each other or with other shareholders in the relevant eligible joint venture company may raise issues about compliance with the *Trade Practices Act 1974*.”

*Response*

It is not clear what kind of agreement between licensees is envisaged that would require protection from action under the *Trade Practices Act 1974* (TPA). The purpose and functions of the joint-venture company are prescribed in the Bill. For example, the allocation processes for standard access entitlements are set out in proposed s 118NQ, and an access regime is required under Division 4B.



**MULTIPLEX GOVERNANCE FRAMEWORK FOR COMMUNITY RADIO**  
***DCITA COMMENT***

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**Issue:**

**The administrative and managerial burden of the representative company**

“... the requirement to form a company would constitute an unnecessary administrative and managerial burden on the broadcaster.” (Briefing paper: 1.5)

**DCITA comment:**

The Government’s announced policy framework for the introduction of digital radio – released by the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, on 14 October 2005 – provided for the community radio sector to participate collectively in digital radio<sup>1</sup>. Specifically, the framework included the following:

- wide-coverage community broadcasters will be provided with the opportunity to participate with the commercial broadcasters in the joint-venture companies holding the multiplex licences for their services; and
- wide-coverage community broadcasters will have an entitlement to the equivalent of two-ninths of capacity on these multiplexes, on the basis that they collectively determine how this is to be shared.

It is therefore necessary to establish an entity to enable the relevant community broadcasters in a licence area to manage their collective involvement in digital radio on an equitable and transparent basis. To this end, the Bill provides for the designated community radio broadcasters in each market to establish a digital community radio broadcasting representative company (Item 146 of the Bill).

Shares in each representative company can only be made available to the digital community radio broadcasting licensees for the area on an equal basis. There are a range of other provisions to ensure fairness and non-discrimination in the operations of each company (refer Item 146 of the Bill).

- Where formed, a representative company will have the option to participate in the joint-venture company applying for a foundation category 1 or foundation category 2 multiplex transmitter licence in a market, and hold up to two-ninths of the shares in that joint venture company (Item 161 of the Bill).
- The representative company may also nominate the digital community radio broadcasting licensees to access capacity forming part of the capacity reserved for

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<sup>1</sup> Media Release, Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, 14 October 2005, <http://www.minister.dcita.gov.au>

the sector on each foundation category 1 or foundation category 2 multiplex transmitter licence (Item 172 of the Bill). The company will also nominate each licensee's share of that capacity

The company approach has been adopted in the Bill as it was considered to be the simplest, most well-understood and equitable means of facilitating the collective involvement of the digital community radio broadcasting licensees in digital radio. Shares in a representative company may only be held by the digital community radio broadcasting licensees for the licence area concerned. This provides a direct line of control for these broadcasters to manage their participation in digital radio.

- It will be these community broadcasters alone who make decisions concerning their involvement – together with the commercial broadcasters – in the joint-venture companies that will own and operate foundation multiplex transmitter licences.
- It will be these broadcasters alone who making decisions regarding how much capacity they are nominated to access – as individual licensees – as standard access entitlements.

The proposed representative company has no greater role in digital radio than in nominating the fractions of multiplex to be claimed by its shareholders – which are the community broadcasters themselves – and being involved in the operation of multiplex transmitter licences, again, on behalf of its shareholders.

The administrative requirements for the representative companies will be limited to these two functions. It is not intended that the representative company would have any involvement in the day to day operation of individual community broadcasting stations in terms of the digital radio services they provide, the development or sourcing program content, the sharing of resources, or any other matter related to the operation of a digital community radio broadcasting service.

In this sense, the Bill provides for a 'direct licensing model' similar to that which applies for commercial broadcasting, as sought by the Community Broadcasting Association of Australia.<sup>2</sup> The Bill provides for the individual licensing and authorisation of community broadcasting stations in digital (Items 26, 50 and 51 of the Bill), akin the arrangements for commercial broadcasters (Items 38 and 39 of the Bill).

The Bill also establishes standard access entitlements that may be held and used by individual digital community radio broadcasting licensees (Item 172 of the Bill), parallel to the arrangements for incumbent digital commercial radio broadcasting licensees (see also Item 172 of the Bill).

A point of difference between the community and commercial sectors is in terms of capacity allocation, where the commercial broadcasters will be able to claim one-ninth of the capacity of a foundation multiplex licence, whereas the digital community

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<sup>2</sup> Community Broadcasting Association of Australia, *Submission to the Inquiry into the provisions of the Broadcasting Legislation Amendment (Digital Radio) Bill 2007 and the Radio Licence Fees Amendment Bill 2007*, page 5.



radio broadcasting licensees will be required to collectively use their reservation of two-ninths of capacity per foundation multiplex.

This is consistent with the Government's policy framework for the introduction of digital radio.<sup>3</sup>

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<sup>3</sup> Media Release, Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, 14 October 2005, <http://www.minister.dcita.gov.au>

**Issue:**

**Concerns about how conflict between stakeholders would be resolved**

“... under the proposed model, any conflict between community broadcasters over which amongst them gets to use the limited bandwidth available will have to be resolved within the community radio broadcasting representative company. It is not clear how such resolution would work in practice.” (Briefing paper: 1.12)

**DCITA comment:**

The Bill provides for the digital community representative broadcasting company in each licence area to nominate the fraction of reserved capacity to be claimed by each digital community radio broadcasting licensee in the market as their standard access entitlement (Item 172 of the Bill).

Establishing an entity to collectively nominate the capacity to be used by individual broadcasters is necessary as the Bill – and the Government’s announced policy framework – provides that wide-coverage community broadcasters must collectively determine how to distribute capacity that is reserved for their services.

The nomination process in the Bill enables each representative company to either specify the proportion of multiplex capacity that is to be made available to each broadcaster, or alternatively, stipulate that the reserved capacity is to be divided equally among the nominated broadcasters.

This process is intended to provide the digital community radio broadcasting licensees in a market with significant flexibility and autonomy in the distribution of reserved capacity, and affords a fall-back of equal distribution if the relevant shareholders can not come to an agreement on any alternative approach.

However, it would be open to the shareholders of a representative company to establish appropriate dispute resolution mechanisms in relation to the capacity nomination through the constitution of the representative company, should they consider this to be necessary.

Moreover, it should be noted that that shares in each representative company can only be made available to, and be held by, the digital community radio broadcasting licensees for the area concerned on an equal and non-discriminatory basis. It will be these broadcasters alone who make decisions regarding how much capacity they are nominated to access – as individual licensees – as standard access entitlements. There will be no external party making decisions for the broadcasters which they may not consider to be in their interest.

It should also be noted that, in relation to standard access entitlements, the role of the representative company is limited simply to the nomination process itself. The company will have no involvement the actual operation of individual digital community broadcasting stations, the development or sourcing of program content, the sharing of resources or any other matter related to the operation of a digital community radio broadcasting service. Neither does it have a role in relation to licensing community broadcasters, this remains a function of ACMA.

## **Issue:**

### **CBAAs' proposed alternative model for managing community radio access to multiplexes**

“The CBAAs were suggesting that ACMA deal with licensing, and that issues be resolved by a community radio industry body (which could, but did not need to, be CBAAs) under guidelines registered with ACMA.” (Briefing paper: 1.9)

## **DCITA comment:**

Consistent with the Government's announced policy framework<sup>4</sup>, the Bill provides for the wide-coverage community radio broadcasting licensees in the state capital city markets to participate collectively in the first phase introduction of digital radio, and in particular to:

- jointly hold the multiplex transmitter licences for their services, together with the digital commercial radio broadcasting licensees in the area; and
- access an amount of the reserved capacity – two-ninths of a multiplex – on each foundation multiplex transmitter licence in the area.

It is therefore necessary to establish an entity that enables the digital community radio broadcasting licensees in a licence area to manage their involvement in digital radio on an equitable and transparent basis.

To this end, the Bill provides for the incumbent digital community radio broadcasters in each market to establish a digital community radio broadcasting representative company (Item 146 of the Bill). This company approach was considered to be the most simple and efficient means of facilitating the relevant licensee's collective participation in digital radio.

Shares in each representative company can only be made available to the digital community radio broadcasting licensees for the area on an equal basis. There are a range of other provisions to ensure fairness and non-discrimination in the operations of each company (Item 146 of the Bill).

- Where formed, a digital community radio broadcasting representative company will have the option to participate in the joint-venture company applying for a foundation category 1 or foundation category 2 multiplex transmitter licence in a licence area, and hold up to two-ninths of the shares in that joint venture company (Item 161 of the Bill).
- The digital community radio broadcasting representative company may also nominate the digital community radio broadcasting licensees to access capacity forming part of the capacity reserved for the sector on each foundation category 1 or foundation category 2 multiplex transmitter licence. The company will also nominate each licensee's share of that capacity (Item 172 of the Bill).

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<sup>4</sup> Media Release, Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, 14 October 2005, <http://www.minister.dcita.gov.au>

The representative company is anticipated to be the most efficient and flexible means of enabling the digital community radio broadcasters in a licence area to fulfil the administrative functions of nominating the fractions of multiplex to be claimed by its shareholders (themselves), or being involved in the operation of multiplex transmitter licences.

However, it is possible that other arrangements could be considered as a means of fulfilling these administrative functions. The Community Broadcasting Association of Australia's submission to the ECITA inquiry proposes an approach where by an industry body representing the community radio broadcasters takes on these functions.<sup>5</sup>

- In relation to the involvement of community broadcasting in joint venture companies applying for and holding foundation multiplex transmitter licences:

“Nominee/s as appointed by a process determined by the industry body and registered with ACMA.” (page 6)

- In relation to the distribution of multiplex capacity:

“Where there are more eligible licensees seeking 1/9th capacity than there is capacity available then decisions on allocation of 1/9th capacity or fractions thereof will be determined by processes developed by the industry body and documented in Guidelines and registered with the ACMA.” (page 6)

There are, however, some possible concerns and risks that could arise in relation to the proposed involvement of an industry body in digital radio on behalf of particular community broadcasting licensees.

#### *Joint-venture company participation*

The nomination by the industry body of particular persons/licensees to hold shares in a joint venture company on behalf of a broader group of individual digital community radio broadcasting licensees would appear likely to increase the risk of disputes between community broadcasters. This could be the case, for example, where a nominated digital community radio broadcasting licensee was not considered by other licensees in the area to necessarily represent their interests.

For this reason, the proposed representative company structure in the Bill allows only the digital community radio broadcasting licensees for the area concerned to be shareholders in the representative company. In this way, it is only those digital community radio broadcasting licensees who will make decisions – through the operations of the multiplex – that will impact on their digital radio services.

An alternative approach to the nomination process would be simply to provide that relevant digital community radio broadcasting licensees may hold shares directly in the joint venture company. However, this approach would seem unlikely to yield any significant gains.

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<sup>5</sup> Community Broadcasting Association of Australia, *Submission to the Inquiry into the provisions of the Broadcasting Legislation Amendment (Digital Radio) Bill 2007 and the Radio Licence Fees Amendment Bill 2007*.

Firstly, it would be likely to increase the administrative and operational burden on the joint venture company, with many voices rather than a single entity representing the community broadcasters in the area.

Secondly, the nomination of persons/licensees by an industry group would require the establishment of complex rules to ensure that the collective shareholding of the individual community broadcasters in the joint venture company were distributed equitably between the broadcasters concerned, and did not result in the community broadcasting sector holding the bulk of the shares in the joint venture company and being required to meet significant financial and management costs associated with the operation of a multiplex.

### *Capacity distribution*

The proposal for an industry body to make decisions on the distribution of the reserved capacity would not appear likely to minimise the potential for disputes between individual digital community radio broadcasting licensees. Presumably, the industry body would not simply represent the interests of the broadcasters in the particular market, but rather those of the sector more widely.

At a minimum, the industry body would need to develop detailed rules on such matters as the making and revoking decisions on access to capacity, entry of new community licensees, and resolving disputes. It is likely that these rules would be necessarily complex as they would need to accommodate the circumstances that might arise in any licence area, rather than dealing with a specific licence area alone.

To the degree that any such decision-making processes is proved to be inadequate or fail, the regulator, and the commercial shareholders in the joint-venture company, would be impacted. This concern appears to have been reflected in the submission to the inquiry by Commercial Radio Australia.<sup>6</sup>

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<sup>6</sup>Commercial Radio Australia, *Submission to the Inquiry into the provisions of the Broadcasting Legislation Amendment (Digital Radio) Bill 2007 and the Radio Licence Fees Amendment Bill 2007*, page 14.

**Issue:**

**Guaranteed capacity for community radio broadcasting**

“...proposed arrangements regarding multiplex allocation categories [are] unsatisfactory, and at odds with the Minister's initial announcement in October 2005 that all available multiplexes would provide guaranteed capacity for community radio broadcasting.” (Briefing paper: 1.1)

**DCITA comment:**

The Government’s policy framework for the introduction of digital radio – released by the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, on 14 October 2005 – included the following:

*“Jointly, wide-coverage community broadcasters in any market will have access rights to 128 kbps per analogue service (up to a maximum of 256 kbps per available multiplex) on the basis that they collectively determine how this is to be shared.”<sup>7</sup>*

The Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (the Bill) reflects this and other elements of the Government announced policy framework as outlined below.

Item 172 of the Bill establishes standard access entitlements for digital radio broadcasters – including digital community radio broadcasting licensees. These standard access entitlements confer a right for broadcasters to access an amount of multiplex capacity in an area to provide their digital radio services.

Different standard access entitlements apply to different broadcaster types, in accordance with the policy framework announced by the Minister in October 2005. However, all standard access entitlements are defined in terms of a fraction of multiplex capacity<sup>8</sup>.

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<sup>7</sup> Media Release, Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, 14 October 2005.

<sup>8</sup> The fractional representation of multiplex capacity has been incorporated in the Bill to accommodate recent changes in the Digital Audio Broadcasting or DAB standard that is likely to be used for digital radio in Australia. When the Government announced its policy framework for the introduction of digital radio in October 2005, access rights for broadcasters were defined in terms of 128 kilobits per second (kbit/s). This was equivalent to one-ninth of the net transmission capacity of a multiplex using the DAB standard in existence at the time.

However, with the strong support of the Australian Government and with contributions from the Australian radio industry, the international DAB standard has been revised to incorporate a more efficient audio compression scheme alongside the existing scheme. If the more efficient standard, known as DAB+ is used in Australia, one-ninth of available multiplex capacity will equate to around 116 kbit/s, although this will enable broadcasters to provide significantly more content as result of the use of the more efficient compression scheme.

It can not be ruled out that the compression scheme used in DAB might again change as digital broadcasting technologies evolve. Defining the standard access entitlements in terms of the fraction of transmission capacity will provide greater certainty, while implementing the Government’s intention to provide broadcasters with minimum rights to one ninth of multiplex capacity.

The Bill provides that two-ninths of the multiplex capacity of every foundation category 1 or foundation category 2 multiplex transmitter licence in a licence area will be reserved for digital community radio broadcasting services. Foundation multiplex transmitter licences are those that provide standard access entitlements for digital commercial, digital community and digital national radio broadcasting operators in an area.

The capacity reserved on every foundation multiplex transmitter licence for community broadcasting can be accessed by individual digital community radio broadcasting licensees where they are nominated by the digital community radio broadcasting representative company for the licence area in question (which is formed and owned by these broadcasters – refer Item 146 of the Bill).

Under the nomination process, the representative company can either specify the proportion of multiplex capacity that is to be made available to each nominated broadcaster, or alternatively stipulate that the reserved capacity is to be divided evenly among the nominated broadcasters. The fraction of reserved capacity obtained by each community broadcaster via the nomination process constitutes their standard access entitlement.

The nomination process to determine the amount of multiplex capacity for each standard access entitlement is necessary as the Bill provides for a reservation of capacity that the relevant community broadcasters must jointly share. This collective use of the capacity to be made available for the digital community radio services was flagged in the Government's announced policy framework.

## **Issue:**

### **Adequacy of capacity allocation for community broadcasters**

“... there will be more community radio broadcasters wanting access in some capital city markets than there will be space on the available multiplexes. In these circumstances, they [CBAA] see the arrangements as giving commercial broadcasters better access to spectrum than community broadcasters. (Briefing paper: 1.2)

## **DCITA comment:**

The Government’s policy framework for the introduction of digital radio – released by the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, on 14 October 2005<sup>9</sup> – provided wide-coverage community radio broadcasting licensees in the state capital city markets with an opportunity to commence digital radio services alongside the commercial and national broadcasters.

Specifically, the policy framework provided wide-coverage community radio broadcasting licensees with the right to access the equivalent of two-ninths of the capacity on multiplex transmitter licences that will provide incumbent digital commercial radio broadcasting services, on the basis that they collectively determine how that capacity is to be shared.

The framework did not provide wide-coverage community radio broadcasters with equivalence in terms of capacity allocation with the commercial radio broadcasters or the national radio broadcasters. Rather, the capacity entitlements and spectrum reservations in the framework were established to provide each of the respective sector’s with an appropriate opportunity to participate in the first phase introduction of digital radio, taking into account their roles in the analogue radio environment and the severe limitations on the amount of suitable spectrum available for digital radio services.

The Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (the Bill) gives effect to the capacity entitlements and spectrum reservations set out in the framework as outlined below.

In relation to the community sector, Item 172 of the Bill establishes a right for digital community radio broadcasting licensees in an area to access an amount of multiplex capacity reserved for the sector on every foundation category 1 or foundation category 2 multiplex transmitter licence. These rights are known as standard access entitlements and the capacity reserved for these entitlements is two-ninths of the capacity of a multiplex.

It should also be noted that standard access entitlements are not the only means by which digital community radio broadcasting licensees may be able to access multiplex capacity.

Digital community radio broadcasting licensees may also seek access to multiplex

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<sup>9</sup> Media Release, Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, 14 October 2005, <http://www.minister.dcita.gov.au>



capacity on a foundation multiplex licence via excess-capacity access entitlements. Excess capacity access entitlements refer to capacity which is surplus to that required to fulfil the standard access entitlements of existing broadcasters on a multiplex.

Item 172 of the Bill also sets out a process to distribute any excess capacity in an equitable manner to content service providers entitled to provide digital radio services in the relevant area. This includes the digital community radio broadcasting licensees for the area. Depending on the level of demand for any such excess capacity, it will be either allocated to the interested parties directly, or via an open and transparent auction process.

In addition, the Bill also includes provision for community broadcasters to access capacity on non-foundation category 1 and non-foundation category 2 multiplex transmitter licences via distributed-capacity access entitlements. Non-foundation multiplex transmitter licences are any additional category 1 or category 2 multiplex transmitter licences that may, following the allocation of foundation licences, be issued in an area to accommodate future digital radio services. That is, they don't provide for standard access entitlements for existing broadcasters.

Item 172 of the Bill also provides for an open allocation process for distributed capacity access entitlements parallel to that for excess-capacity access entitlements on foundation licences.

