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The Committee Secretary
Senate Standing Committee on Environment,
Communications, Information Technology and the Arts
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Attn Dr Ian Holland

By facsimile and e-mail: 02 6277 5818
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Dear Dr Holland

Inquiry into the provisions of the
***Broadcasting Legislation Amendment (Digital Radio) Bill* 2007**

Commercial Radio Australia is the peak industry body for commercial radio broadcasting stations in Australia. Commercial Radio Australia has 260 members and represents approximately 98% of the commercial radio broadcasting industry in Australia.

Commercial Radio Australia welcomes the opportunity to comment on the *Broadcasting Legislation Amendment (Digital Radio) Bill* 2007 (**Bill**).

As the Committee may be aware, Commercial Radio Australia is an enthusiastic supporter of the introduction of digital radio in Australia and played the leading role with Government in developing the policy framework on which the legislation is based.

As the largest sector of the radio industry commanding 80% of listeners, the industry's support for and involvement in the rollout of digital radio is vital to the success of the technology in this country. We are therefore keen to contribute to the development of a workable regulatory regime which accurately reflects the intent of the Government's policy framework.

The Bill proposes to introduce the new regulatory framework for digital radio through amendments to the *Broadcasting Services Act* 1992 (**BSA**) and the *Radiocommunications Act* 1992 (**Radcoms Act**).

Part A of this submission highlights some important policy issues that Commercial Radio Australia has identified, and suggests how these should be addressed in the Bill.

Part B of this submission outlines additional suggested drafting amendments (in the order in which they appear in the Bill). Finally, some comments about other submissions posted on the Committee's website are set out at Part C.

Commercial Radio Australia's members will be "incumbent digital commercial radio broadcasting licensees" under proposed s9D of the Radcoms Act and in this submission, references to "**commercial radio licensees**" should be understood to have that meaning.

PART A: Issues that need to be addressed

In summary, important issues to be addressed in the Bill include:

- **the requirement for statutory review of the digital radio moratorium period no later than 5 years after the commencement of digital radio broadcasting;**
- **additional restrictions upon ACMA's ability to allocate new analog commercial radio licences;**
- **ensuring that commercial radio broadcasters' entitlements to digital radio spectrum reflect that some licensees hold more than one licence in a licence area;**
- **ensuring that post-moratorium planning for any new entrant digital radio services reflects the planning scheme and priorities under Part 3 of the BSA; and**
- **clarifying that an eligible joint venture company can hold more than one foundation digital radio multiplex transmitter licences in a licence area.**

These issues are discussed in more detail below.

Review of digital radio moratorium

The Bill requires a review of certain aspects of the new digital radio scheme by 1 January 2014 (proposed s313B of the Radcoms Act). Commercial Radio Australia requests that proposed s313B be **expanded to refer to a review of the digital radio moratorium period** (as defined in proposed s35C of the BSA), and that such review be completed no later than 5 years after the commencement of digital radio broadcasting in metropolitan licence areas. A further review should be completed within 5 years after the commencement of digital radio broadcasting in regional areas.

A review of the digital radio moratorium period will provide an opportunity for the take-up of digital radio to be assessed prior to the expiry of the 6 year period specified in proposed s35C of the BSA, and it will provide the Minister with flexibility to extend the moratorium period if this is considered appropriate at the time. **It is requested that the Bill state that in carrying out the review, regard must be had to matters including:**

- **the financial viability of broadcasters in the relevant licence area; and**
- **the costs incurred by broadcasters of rolling out and operating digital broadcast systems in addition to analog systems**.

Related drafting amendments are suggested for proposed s35C of the BSA follow below, together with some additional points about the commencement and duration of the moratorium.

It is possible that an ability to review the digital radio moratorium period may be able to be implied as part of proposed s215A or s215B of the BSA. **However, Commercial Radio Australia's strong preference is that a review of the digital radio moratorium period expressly be required under the new legislative scheme.**

Review of the analog radio moratorium

Upon an initial reading of proposed s36A(2) of the BSA, it is unclear how this provision was intended to interact with the moratorium on the issue of new analog licences (as announced by the former ABA on 25 September 2003). It is assumed this provision has been inserted to address the possibility that the analog moratorium may expire before the digital radio start-up day arrives in all licence areas. This issue is not clarified by the Explanatory Memorandum.

It must be emphasised that it will be extremely difficult for commercial radio broadcasters to focus on digital radio rollout if they are distracted by new analog licence allocations in their licence areas.

For that reason, and having regard to the fact that the commercial radio industry has recently faced significant levels of additional competition (as a result of the LAP process under Part 3 of the BSA), **Commercial Radio Australia requests that additional restrictions be placed upon ACMA's ability to allocate any additional analog commercial radio licences**.

As outlined below, **Commercial Radio Australia is seeking similar of restrictions to those that apply in relation to the allocation of additional commercial television licences (albeit in an analog, rather than a digital environment).**

Specifically, from an appropriate date (eg the date that the Bill is settled and receives Royal Assent), ACMA should be prevented from allocating any new analog commercial radio licences unless the Minister has decided that such licences may be allocated (the Minister's decision being informed by a review). However, following such a decision, ACMA would still be required to follow all the planning processes in Part 3 of the BSA. It is noted that this approach is similar to that which applies to commercial television, under the recent amendments to the BSA by the *Broadcasting Legislation Amendment (Digital Television) Act* 2006.

Also, proposed s41D of the BSA contemplates that additional commercial radio licences may be allocated both before s41D commences operation, and also after the digital radio start-up day in a licence area.

Commercial Radio Australia requests that these provisions be made subject to the analog and digital moratorium provisions.

For clarification, Commercial Radio Australia's understanding is that the moratorium on new analog commercial licences will continue in place and that the above suggestions are in addition to, but not in substitution for, that moratorium.

Capacity entitlements

From the Explanatory Memorandum to the Bill (EM), it is understood that:

- the effect of proposed s118NV of the Radcoms Act is that:
  - where there is only one digital radio multiplex in a licence area, each commercial radio licensee will be entitled to a maximum of 2/9thof that single digital radio multiplex transmitter's capacity; and
  - where there are two or more digital radio multiplex transmitter licences in a licence area, each commercial radio licensee is not entitled to access more than the "designated fraction" of the capacity of the "total multiplex capacities" under those multiplex transmitter licences. The fraction is expressed as "2/(number of transmitter licences x 9)". The EM indicates that the intention of the drafting is that the fraction of the total multiplex capacities is equivalent to 2/9th of the capacity of any one digital radio multiplex in the licence area; and
- the effect of proposed s43D(3) of the BSA is that each commercial radio licensee will not be able to use more than 1/9th of a digital radio multiplex transmitter's capacity to provide a digital service that passes "the shared content test" (in relation to its own analog service or another analog service in the licence area). It is noted that "shared content test" is defined in proposed s43D(6)

Commercial Radio Australia seeks to raise some issues about the drafting of these provisions.

As a first point, it needs to be noted that in some licence areas, a single licensee company will hold two commercial radio broadcasting licences. It cannot be assumed that there is a separate licensee company for each commercial radio broadcasting licence.

For this reason, Commercial Radio Australia requests that it be clarified in the drafting of the Bill that the caps referred to the above provisions apply in relation to each commercial radio licence, rather than each licensee.

Alternatively, an additional definition of "digital commercial radio broadcasting licensee" could be inserted into the Bill and related provisions could clarify that if a single licensee holds more than one commercial radio licence in a licence area, it is entitled, **in relation to each commercial radio licence it holds**, to a minimum 128kbs (1/9) of total digital multiplex capacity in a licence area and up to 256kbs (2/9) of total digital multiplex capacity in a licence area.

This is necessary to establish the rights relevant to each incumbent commercial radio licence, that is, that each commercial radio licensee is entitled to a minimum 128kbs (1/9) of total digital multiplex capacity in a licence area in relation to each of its licences, and up to 256kbs (2/9) of total digital multiplex capacity in a licence area in relation to each commercial radio licence.

The second point is that if there is "excess" digital radio multiplex transmission capacity in a licence area after commercial radio licensees, the digital community radio representative company, and the national broadcasters have each taken up their entitlements, Commercial Radio Australia's view is that it is that "excess" capacity should either lie dormant until the end of the moratorium, or be made available for "restricted datacasting" (which would not include audio services, as discussed in more detail below).

Further drafting comments in relation to s43D are outlined below.

Planning for new digital services

Commercial Radio Australia has noted various amendments to Part 3 of the BSA, which are understood to establish the new digital radio planning process (together with the provisions for the preparation of digital channel plans under the Radcoms Act). However, Commercial Radio Australia questions how these provisions are intended to operate at the end of the digital radio moratorium.

Commercial Radio Australia would not support ACMA having the ability to plan new capacity for "new entrant" digital radio services (under a FAP or a LAP) at the end of the digital radio moratorium without regard to the planning criteria in s23 of the BSA, or without the "wide public consultation" that would otherwise be required under section 27 of the BSA (but for the addition of new s25(4)).

For these reasons, Commercial Radio Australia's view is that at the end of the digital radio moratorium, each step of the planning process for new digital radio services should be subject to the same rules which have applied to the planning of new analog radio services (under Part 3 of the BSA), and which have hitherto governed the introduction of additional competition in the commercial radio sector.

It is not clear from the Bill whether this is intended, so it is requested that this important issue be confirmed by amendments to the Bill.

Foundation multiplex transmitter licences

One eligible joint venture company, multiple licences

Commercial Radio Australia's understanding is that multiple foundation digital radio multiplex transmitter licences (**foundation licences**) should be able to be allocated to a single eligible joint venture company in a licence area.

For instance, in the case of a category 1 digital radio multiplex transmitter licence, if all the commercial radio licensees in Sydney took up an invitation to subscribe for shares in the eligible joint venture company that is formed to apply for that licence, together with the digital community radio broadcasting representative company for the Sydney licence area, there would not be enough capacity in a single multiplex to meet the standard entitlements of all the shareholders.

In such circumstances, Commercial Radio Australia understands that more than one foundation licence would be allocated to that eligible joint venture company (so that it is authorised to operate more than one foundation multiplex).

However, Commercial Radio Australia requests that this be clarified in the Bill or confirmed in the Explanatory Memorandum.

It is very important for Commercial Radio Australia's members to be confident that the Bill (as settled) will clearly and as per the Minister's policy announcement give each commercial radio licensee the right to a basic entitlement of 128kb of spectrum (in relation to each licence it holds), plus the option of an additional 128kb where possible, with the only licensing cost being the administrative fees determined by the ACMA (eg under proposed s102C(2)(b) or 102D(2)(b) of the BSA). **This needs to be made clearer in the Bill and in a revised version of the EM.**

Foundation licences vs non-foundation licences

Commercial Radio Australia has noted the distinction in the Bill between foundation digital radio multiplex transmitter licences (foundation licences) and other types of multiplex transmitter licences that are not foundation licences.

The EM explains that non-foundation 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", and refers to proposed s102F of the Radcoms Act.

Commercial Radio Australia considers that it must be made clear in the Bill that non-foundation licences may be issued **only at the end of the moratorium period** as per the Minister's policy announcement. In the absence of such clarification, the moratorium is compromised.

PART B: Drafting clarifications and amendments

The following outlines requested drafting clarifications and amendments in the order in which they appear in the Bill.

Restricted datacasting services

It is proposed under the Bill that "excess capacity" in digital radio multiplexes may be used by "restricted datacasting licensees". However, the definitions of this term in the Bill (eg in amendments to s6(1) of the BSA) are rather circular.

The Minister may restrict the type of content that can be provided by a "restricted datacasting licensee" (and such restrictions will apply as a special condition of licence under clause 24A of Schedule 6 of the BSA). Commercial Radio Australia understands that this would involve further restrictions upon the "genres" of content that may otherwise be provided under a datacasting content licence under Schedule 6 of the BSA. It is noted that the EM confirms that "restricted datacasting licensees" will be subject to the "television and radio programming restrictions for datacasting licensees", but this new service type is "intended to enable new service providers to make use of the digital radio platform to deliver content other than traditional radio content".

Commercial Radio Australia considers it very important that restricted datacasting licensees not be permitted to provide audio services, and it requests that this be reflected in the definition of "restricted datcasting service" in the Bill.

As a separate point, it is also noted that amendments have been made to how the "program supply exception" in the control rules in Schedule 1 of the BSA applies in respect of restricted datacasting licensees. This means that a commercial radio broadcaster couldn't provide a restricted datacasting licensee with content that was more than "a minority" of its content. It is assumed that this has been inserted to ensure that commercial radio broadcasters are not able to provide content from a digital radio multiplex that exceeds the capacity limits (although the EM does not clarify this issue).

However, it is unclear why this is necessary if a restricted datacasting service is not able to provide audio services. **At a minimum, this should be explained in a revised version of the EM, which should state clearly that restricted datacasting services will not be audio services** (consistent with the clarifications to the Bill requested above).

Digital program enhancement content: s8AB(1)

Digital program enhancement content is permitted under the Bill. If a commercial radio licensee provides a digital commercial radio broadcasting service and "digital program enhancement content" (as defined on page 6) in relation to a radio program delivered by that service, the digital program enhancement content is taken to be a radio program delivered by that service (see proposed s8AB of the BSA, and the proposed definition of "digital program enhancement content").

However, it is noted that the definition of "digital program enhancement content" in s6(1) of the BSA refers to "still visual images". This would prevent commercial radio broadcasters from using moving visual images such as dynamic text, animated gifs, interactive web-site capabilities and short burst video – all of which would complement the digital radio services being provided, and encourage take-up.

Commercial Radio Australia understood from the Minister's policy announcement in October 2005 that there would be **no** restrictions placed on commercial radio broadcasters' use of spectrum and **therefore it requests that paragraph (b) of the definition of "digital program enhancement content" be broadened as suggested above.**

Moratorium on the issue of new licences: s35C

The Bill proposes to specify the "digital radio moratorium" in a proposed s35C of the BSA. It specifies that the "digital radio moratorium period" for a licence area is the "6-year period beginning at the start of the digital radio start-up day for the licence area".

It is understood that the effect of proposed s35C is that during the digital radio moratorium period for a licence area, the ACMA must not allocate new licences to provide digital commercial radio broadcasting services in that licence area.

Commercial Radio Australia supports the inclusion of a moratorium period. However, it requests that:

- **the Minister be provided with the discretion to extend this moratorium period, following the completion of a review (as outlined at Part A of this submission); and**
- **it be clarified that the commencement of the digital radio moratorium period is on the day that the Bill (as enacted) receives Royal Assent;[1] and**
- **the moratorium should then continue for 6 years after the "adequate coverage date" in the relevant licence area. To elaborate, the six year period should not commence until the coverage of digital radio services in a licence area reaches 80% of the relevant licence area population (noting that infill translators will need to be rolled out in most licence areas). This is what we describe as the "adequate coverage date".**

[1] Leaving aside the moratorium issue, the current drafting of the Bill is defective where it refers to allocation of a commercial radio broadcasting licence on or after the digital start-up date because no licences are to be issued on that date.

For these reasons, Commercial Radio Australia suggests that Commercial Radio Australia requests that **s35C(3) provide** as follows:

> *"For the purposes of this Act, the digital radio moratorium period for a licence area is the combination of the periods below:*
> *(a) the period from the date that this Act receives Royal Assent to the digital radio start-up day for the licence area; and*
> *(b) the period from the digital radio start-up day for the licence area to the date that the coverage of at least one digital commercial radio service (provided under a foundation category A or category B digital radio multiplex transmitter licence) is at least 80% of the licence area population (the adequate coverage date); and*
> *(c) the 6-year period beginning at the start of the adequate coverage date for the licence area, or such longer period as is prescribed in relation to that area".*

As a separate point, it is assumed that references throughout the Bill to the allocation of digital commercial radio broadcasting licences are either references to allocations that occur pursuant to s35D(3) (discussed in more detail below) or allocations that occur after the conclusion of the moratorium, but this should be clarified (eg see in s41D(4)).

Use it or lose it: s35D

The Bill establishes a "use it or lose it" regime in relation to digital commercial radio broadcasting licences. It is understood that if at any time during the digital radio moratorium period, an incumbent commercial radio licensee is not providing at least one digital commercial radio broadcasting service in its licence area, ACMA may convert its licence back to an analog only licence and re-allocate the digital licence under the BSA.

This is a significant and **potentially draconian power** which could have permanent adverse consequences for commercial radio broadcasters. It is noted that under the Bill it does not appear possible for a commercial radio licensee to transfer, assign, lease or otherwise grant rights over the digital licence to a third party.

Given the seriousness of these provisions, Commercial Radio Australia considers that the drafting of the proposed s35D of the BSA is too broad, and it is concerned that ACMA will take an unreasonably narrow view of s35D (eg for the purposes of proposed s35D(1)(c) of the BSA).

For that reason, Commercial Radio Australia considers that the powers under s35D should not be able to be exercised by ACMA **for at least two years after the digital start-up date in a licence area.**

It is noted that decisions by ACMA under proposed s35D are to be subject to merits review by the Administrative Appeals Tribunal (AAT) (under proposed amendments to s204 of the BSA), and Commercial Radio Australia considers that this is appropriate.

However Commercial Radio Australia also considers that it would be of assistance if the Bill contained some principles to guide ACMA in its exercise of its discretion under proposed s35(1)(c), and its formulation of a legislative instrument under s35D(4), so that appeals are not necessary. It is also important for some "defences" or "reasonable excuses" to be specified.

In relation to the principles that should guide ACMA when it exercises powers under s35(1)(c) and s35D(4), the Bill should require ACMA to have regard to factors including the steps the relevant commercial radio licensee has taken to commence digital broadcasts, whether there were any technical issues that contributed to the delay (eg interference management issues) and whether delays in the commencement of digital services in a licence area, or interruptions to the provision of digital services in a licence area, were directly or indirectly caused by factors that were outside the reasonable control of the licensee.

It is noted that the EM refers to factors outside the reasonable control of the licensee as matters that could be taken into account by ACMA when exercising its instrument-making powers under s35D(4). **However, Commercial Radio Australia would prefer that the Bill expressly set out the factors listed above within s35D. Failing that, all the above factors should be referred to in the revised version of the EM.**

As a separate matter, it would also be appropriate for s35D to set out non-exclusive examples of defences (or "reasonable excuses") that could be raised by a commercial radio broadcaster that has been identified by ACMA as not providing a digital service in its licence area after the digital start date.

For instance, there should be a defence based on **financial hardship**, particularly given that the scope of Government support for the rollout of digital services in regional areas is not yet clear, and given the very significant additional costs that regional licensees could potentially face under the new "local content" requirements.

Finally, in the event that digital capacity is surrendered, **other existing commercial radio licensees in the licence area should be given the first rights to take up that capacity**. This should be considered as a separate issue from the allocation of "excess capacity" under new Division 4B (Access to digital radio multiplex transmitter licences).

Multiplex issues: s43D(2)

Under the proposed s43D(2) of the BSA, each commercial radio licensee will be subject to a condition that they must not provide a digital service unless:

- that digital service is transmitted using a multiplex transmitter; and
- the operation of the multiplex transmitter is authorised by a digital radio multiplex transmitter licence.

Commercial Radio Australia has considered whether this could mean that a commercial radio broadcaster in one licence area is able to use a multiplex in a neighbouring licence area to provide its service to that area (in addition to its own licence area).

It is noted that the definition of "digital radio multiplex transmitter licence" that is to be inserted into the BSA simply cross-refers to the definition that is to be inserted into the Radcoms Act. In the Radcoms Act, the term is defined to mean a category 1 digital radio multiplex transmitter licence, a category 2 digital radio multiplex transmitter licence or a category 3 digital radio multiplex transmitter licence. Each of these defined terms refer to a multiplex transmitter that is used for transmitting specified services in a "designated BSA radio area". That term is defined to mean "licence area within the meaning of the BSA".

From this, the intention appears to be that a commercial radio broadcaster cannot use a multiplex to serve any other licence areas other than its own. However, as this is not completely clear, it is suggested that the words "to the licence area of the first licence" should be added to the end of s43D(2)(a).

The reason this has been suggested is to ensure protection of the integrity of licence area boundaries, and to ensure that a licensee cannot gain access to a multiplex in a neighbouring licence area for the purpose of providing its services to that licence area.

Capacity and multiple multiplexes: s43D(4) & (5)

Commercial Radio Australia understands that the intention of proposed s43D(4) of the BSA is to limit the amount of capacity that can be used to provide digital services that pass the "shared content test" – in licence areas where there are 2 or more multiplexes.

The EM explains that in such circumstances, the licence (held by the relevant commercial radio licensee) will authorise the use of 1/9th of the capacity of any one digital radio multiplex in the licence area for the purpose of providing services that pass the "shared content test".

However, that does not appear to be the result when the fraction in proposed s43D(5) is applied. For instance, in a licence area that has two digital radio multiplex transmitter licences, the result of the application of the fraction in s43D(5) would appear to be 1/18th, rather than 1/9th.

This seems to suggest that in licence areas where there is one multiplex only, a commercial radio licensee can use 1/9th of that multiplex for providing digital services that pass the "shared content test".

However, in licence areas where there is more than one multiplex, less capacity can be used to do so (eg 1/18th of the total multiplex capacity – in licence areas where there are two multiplexes). **This result does not appear to be what is intended, and Commercial Radio Australia requests that this be clarified.**

It may be that the confusion arises from the use of the term "total multiplex capacities" in proposed s43D(4), and that provision should refer to the "designated fraction of the total multiplex capacities under EACH OF those digital radio multiplex transmitter licences"?

Transmission overspill issues

Commercial Radio Australia has some concerns about whether the Bill places adequate emphasis upon the regulation of unnecessary digital transmission "overspills".

The licensing system under the BSA is based around the concept of a "licence area". A licence area determines the geographical area into which a commercial radio licensee is permitted to broadcast and ultimately determines the size of its potential audience. **It is important that the integrity of licence area boundaries continue to be maintained under the Bill.**

The BSA currently requires licensees to minimise transmission overspill into neighbouring licence areas, while recognising that in certain circumstances overspill cannot be avoided. This is achieved through the licence condition in clause 8(3) of Schedule 2 of the BSA and through the technical specifications that apply to licences.

However, in some parts of Australia, the technical limitations of analog transmission have meant that there is a significant degree of transmission overspill into neighbouring licence areas.

Commercial Radio Australia understands that technical capabilities of digital radio transmission will mean that there is far greater control of the overspill of digital signals (from a technical perspective), when compared with analog transmissions.

Therefore, Commercial Radio Australia request that a revised version of the EM 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.

Allocation of multiplex transmitter licences: ss102C & 102D

Proposed sections 102C and 102D of the Radcoms Act give a consortium in which each commercial licensee and an entity representing community broadcasters (ie the "digital community radio broadcasting representative company" for that area) has been invited to participate, a preferential right to acquire the foundation category 1 and category 2 multiplex transmitter licences.

For the purposes of this discussion, these types of licence are described as "foundation multiplex transmitter licences".

It is understood that foundation multiplex transmitter licences are not required to be auctioned or otherwise allocated through a section 106 price-based allocation system (although they may be if ACMA decides not to issue the licence to any applicants for that licence, as discussed below).

It is assumed that this means that such licences can be allocated "over the counter" following the payment of the fee determined by ACMA (eg see proposed s102C(2)(b) and 102C(8)), although this is not entirely clear from the Bill.

However, if a category 1 or category 2 multiplex licence is not a foundation multiplex licence, it must be allocated through a section 106 price-based allocation system.

In order to apply for a foundation multiplex licence, the applicant must be an "eligible joint venture company". The Bill contemplates that there may be "one or more" consortiums that comprise an "eligible joint venture company".

However, the allocation rules for the foundation multiplex transmitter licences contain no principles by which ACMA may chose to allocate the foundation multiplex licence to one consortium over another, or by which it may choose not to allocate a licence to the sole applicant. For instance, proposed s102C(3)(b)(ii) of the Radcoms Act simply refers to a situation where "one or more applications were received from eligible joint venture companies.... but ACMA refused to issue the licence to any of the applicants".

The foundation multiplexes will represent critical infrastructure for digital radio, therefore the Bill should provide a more certain regulatory framework under which the foundation multiplex transmitter licences will be issued – whether there is only one eligible joint venture company who has applied for the licence, or whether there is more than one applicant.

Commercial Radio Australia considers that it is desirable for the Bill to promote the concept that there should only be one eligible joint venture company for each type of foundation digital radio transmitter licence.

It is hoped that generally, this is a matter that the radio industry in a licence area should be able to resolve itself.

However, where there are "competing" eligible joint venture companies and ACMA is required to determine which should be the eligible joint venture company for a licence area, preference should be given to the company that **represents the most commercial radio licensees** in the relevant licence area.

Commercial Radio Australia also considers that the allocation framework should include a right to seek merits review (ie by the AAT) of any decision by ACMA to allocate the licence to a particular eligible joint venture company over another, or not to allocate the licence at all. This would require an additional amendment to s204 of the BSA.

However, there should be no right of merits review if the reasons for the decision state that the reason that one eligible joint venture company was preferred over another because it represented more commercial radio licensees in the relevant licence area.

Eligible joint venture company: s102C(5) and s102D(5)

Proposed s102C(5) and s102D(5) of the Radcoms Act define the term "eligible joint venture company" by reference to the process by which such company was created. The term "promoter" is used to describe the entities or individuals who were responsible for inviting commercial radio licensees and the "digital community radio broadcasting representative company" to join.

There does not appear to be any requirement that a "promoter" be a commercial radio licensee (or a related body corporate of a licensee).

Commercial Radio Australia considers that it is very important that this be a requirement (unless no commercial radio broadcaster in a licence area is interested in being the promoter) and in fact was one of the important policy points made by the industry in discussions with Government on digital radio policy.

It is critical that the commercial radio licensees are in a position to operate the category 1 and category 2 multiplex transmitter licences. Otherwise, there is a risk that representatives of community radio broadcasters or third party non-broadcaster companies (acting as "promoters") could create an artificial auction situation, or disrupt the orderly rollout of digital radio services which we would assume would be against the intentions of the Minister and Government.

Implementation Plans: s109B

Under proposed s109B of the Radcoms Act (general conditions of digital radio multiplex transmitter licences), it is a condition that the licensee will, if requested by ACMA, submit an implementation plan that complies with any determinations made under s109B(2) – see s109B(1)(q). This must be done "within a specified period of at least 30 days".

It is unclear from the Bill exactly what the implementation plan process will involve, and therefore Commercial Radio Australia is concerned that a minimum period of 30 days may not be reasonable. A longer period is requested, particularly as there appears to be no good reason why such a short period of time has been selected.

"Content service provider": s118NL ff

The term "content service provider" is used in relation to the proposed standard access obligations, excess capacity access obligations and distributed capacity obligations. While the term "content service provider" has a limited meaning under the definition of this term and "content service" in proposed s118NB, this phrase has a much broader meaning under other communications industry legislation (eg under the *Telecommunications Act* 1997).

This is likely to cause confusion (eg to new entrant restricted datacasting licensees, who may be accustomed to operating under such other legislation). **Commercial Radio Australia requests that a different definitional approach be used.**

ACCC criteria: s118NJ

Under proposed s118NJ of the Radcoms Act, the ACCC is required to determine criteria to be applied in deciding whether or not to accept an access undertaking from a digital radio multiplex transmitter licensee.

Commercial Radio Australia questions whether the Bill should specify principles that the ACCC must consider in this context, particularly with regard to whether terms and conditions proposed by the relevant licensee are acceptable.

Specifically, it is important that the legitimate business interests of digital radio multiplex transmitter licensees be taken into account.

While the non-discrimination obligations owed by digital radio multiplex transmitter licensees under proposed s118NP are recognised, a multiplex licensee must be able to assess whether or not an "content service provider" (access seeker) is likely to be able to pay for the transmission services it seeks (and is otherwise a suitable applicant).

Excess capacity access entitlements: s118NT

Commercial Radio Australia has commented above about what it considers should be the approach under the Bill in relation to "excess capacity". Subject to those comments, some additional drafting comments follow.

Under proposed s118NT of the Radcoms Act, the multiplex licensee is required to ascertain the demand for access to "excess multiplex capacity". This has to occur very quickly – ie "within 90 days after the digital radio start-up day for the designated BSA radio area". It is also required to give "at least 30 days notice" of its intention to do so and invite "content service providers" to express their interest.

It must be recognised that during this period, commercial radio licensees will still be trialling their new formats and identifying their spectrum needs. It is very likely that they will not be in a position to assess their interest in the excess capacity so quickly after the launch date.

It is requested that a longer period of time be permitted as again, there appears to be no good reason why such a short period of time has been selected.

Consultation issues

ACCC Code: s@118QH

It is noted that under proposed s118QH of the Radcoms Act, there is provision for the ACCC to make, by legislative instrument, a Code setting out the conditions that are to be complied with in relation to the provision of access under new Division 4C of Part 3.3 of Chapter 3 of the Radcoms Act. Commercial Radio Australia has noted that a very similar provision is contained in clause 48 of Schedule 4 of the BSA (in relation to the transmitter access regime for digital television).

However, under Schedule 4 of the BSA, the ACCC must consult with commercial television broadcasting licensees before it makes such an instrument. Under s118QH, the consultation obligation relates to "digital radio multiplex transmitter licensees".

Commercial Radio Australia suggests that this also refer to "incumbent digital commercial radio broadcasting licensees".

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

A minimum consultation period of 30 days is specified in proposed s44A(5) of the Radcoms Act.

Assuming that ACMA implemented this minimum period, this would not be an adequate period of time for all interested parties to properly consider and provide comments on any draft frequency/channel plan. A minimum period of 60 days is requested.

It is noted that proposed s44A(1)(e) requires the ACMA to "prepare a plan that determines technical specifications of multiplex transmitters". Commercial Radio Australia understands from this and from the EM that ACMA will determine the locations of digital radio multiplex transmitters.

It is essential that ACMA consult with commercial radio licensees about this issue, as site location can have a considerable influence on coverage issues.

Pre-existing use of spectrum identified for digital radio

It is noted that the effect of the transitional provision in clause 186 of the Bill (pre-commencement transmitter licences issued under the Radcoms Act) is that licences that have already use spectrum designated under new s31(1A) of the Radcoms Act remain in force.

Commercial Radio Australia considers that digital radio services must take priority in the spectrum that is to be designated under s31(1A), and requests that this be clarified in the Bill.

Regulations

Commercial Radio Australia questions whether provision should also be made for digital radio regulations to address other miscellaneous matters relevant to digital radio planning of the VHF Band III and L-Band spectrum, and how that spectrum is used.

For instance, this would mean that there would be scope for the Government to determine additional matters that may be more appropriate for it rather than ACMA to decide (eg minimum audio bitrates for the national broadcasting services). It is noted that ACMA may determine technical standards under the Bill, but there should also be scope for technical policy decisions to be implemented through regulations

Channel positioning

The Bill appears to assume that the positioning of digital channels will be agreed within the "eligible joint venture company". We understand that in the digital television context, the positioning of digital channels was a complex issue, and in the digital radio context, there are more channels to be positioned. **The Bill is silent about this issue, and Commercial Radio Australia considers that it needs to be addressed.**

One option would be to ensure that the licensing requirements for digital radio multiplex transmitter licences required licensees to demonstrate that they had established processes to respond to this issue, including dispute resolution processes. **Commercial Radio Australia is concerned that this issue has the potential to delay the commencement of digital radio broadcasts, so it should be addressed.**

Agreements relating to digital radio multiplex transmitter licences

It is possible 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. However, the Bill is silent about this issue.

We request that protections be included in the Bill to address this issue.

PART C: Other submissions

Commercial Radio Australia also seeks to make some brief submissions about community broadcasting.

In earlier consultation about the scope of the Bill, it was unclear whether the "community broadcasting representative company" could potentially hold more shares in the "eligible joint venture company" than commercial broadcasters (particularly in regional areas), and how it would be determined how spectrum rights would be shared among community broadcasters.

Commercial Radio Australia is pleased that these issues have been addressed in the Bill. It has been confirmed that:

- commercial broadcasters will hold the majority of shares in eligible joint venture companies that are entitled to apply for category 1 and 2 foundation digital radio multiplex transmitter licences (eg under s102C(5(a)); and
- the community broadcasting representative company will determine how the spectrum available for community broadcasting is to be distributed between eligible community broadcasters.

Commercial Radio Australia considers that the approach adopted in the Bill to these issues is appropriate.

Commercial Radio Australia has considered the submission by the peak body of the community radio industry, the CBAA. It has requested that additional spectrum be made available for digital community radio, and that community radio licensees should each be able to individually assert an "entitlement" to 1/9th of any multiplex.

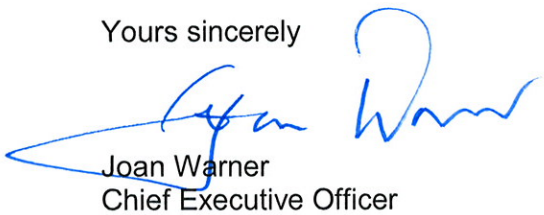
Commercial Radio Australia does not agree with this proposal, as it considers that the existing allocation of multiplex access to community broadcasters on commercial radio broadcaster owned multiplexes under the Bill is already excessive.

Commercial Radio Australia also considers that the proposed "community broadcasting representative company" approach that is contained in the Bill is a far more **workable** approach than that which has been suggested by the CBAA.

If commercial radio licensees are to be required to make capacity available on their digital radio multiplexes to community radio licensees, then the "community broadcasting representative company" appears to be a more pragmatic and sensible way to proceed to ensure that the rollout of digital radio services proceeds smoothly and expeditiously, than if commercial radio licensees had to become involved with any competing claims by individual community licensees for access or in disputes between individual community licensees.

We request that the Committee's report recommend that the issues raised in this submission be addressed and would be happy to discuss any of the issues with the Committee should that be of assistance.

Yours sincerely



Joan Warner
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