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**BROADCASTING LEGISLATION AMENDMENT (DIGITAL RADIO) BILL
2007**

RADIO LICENCE FEES AMENDMENT BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Helen Coonan,
Minister for Communications, Information Technology and the Arts)

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2007**

RADIO LICENCE FEES AMENDMENT

BILL 2007

OUTLINE

The Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (Digital Radio Bill) implements the Government's policy framework for the introduction of digital radio services in Australia.

The framework, announced in October 2005, was the culmination of an extensive process of research, policy development and industry consultation. This included the release of the report of the Digital Radio Study Group together with an issues paper inviting submissions from interested parties on key issues relevant to the introduction of digital radio. In initiating the policy development process, the Government reiterated its principle election commitments in relation to digital radio, which included a moratorium on the issue of new licence area planned commercial digital radio licences, the inclusion of the community broadcasting sector in the digital environment and the conduct of a transparent and accountable process for developing the policy and regulatory settings for digital radio.

The Digital Radio Bill is intended to implement the framework for digital radio broadcasting and transmission provided for through the announced policy framework. The Digital Radio Bill will amend the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* (Radcomms Act) and the *Trade Practices Act 1974* (TPA) to:

- enable the provision of digital radio services by commercial and wide-coverage community radio broadcasting licensees, and the national broadcasters, using the Digital Audio Broadcasting (DAB) technology;
- establish a new category of service, restricted datacasting, to enable the provision of innovative data services on the digital radio platform;
- establish a new multiplex transmitter licence category to accommodate the shared transmission platforms ('multiplexes') of the DAB system;
- provide the Australian Communications and Media Authority (ACMA) with powers to undertake planning and licence allocation activities for digital radio services;
- require incumbent commercial radio broadcasters and multiplex licensees to commence, and to continue to provide, digital radio services – in the case of the state capital city markets on or before 1 January 2009;

- provide the opportunity for existing commercial and wide-coverage community broadcasters to control the multiplex licences for their initial services, with subsequent licence allocations to be undertaken via a priced-based method;
- introduce a six year moratorium on the issue of new licence area planned commercial digital radio licences from the commencement of services in the respective market;
- establish minimum access rights to multiplex transmission capacity for the commercial, wide-coverage community and national broadcasters on relevant multiplex licences;
- establish a multiplex access regime to ensure operators of commercial multiplexes provide access to transmission capacity on terms that are open, efficient and generally non-discriminatory;
- provide the Australian Competition and Consumer Commission (ACCC) with appropriate powers to enforce the access regime;
- provide ACMA with the power to determine technical standards relating to digital radio and restricted datacasting services, the operation of digital radio multiplex transmitters, and domestic digital reception equipment for radio services; and
- provide ACMA with the power to require industry to develop and register voluntary codes of practice dealing with a range of digital radio and restricted datacasting issues, and with a power to determine standards where such codes are not developed or do not operate effectively.

Consequential amendments to the *Radio Licence Fees Act 1964* will also ensure the consistent application of licence fees to the revenue of commercial radio broadcasting licensees derived from analogue and digital radio services. These amendments are made in the Radio Licence Fees Amendment Bill 2007 (the Licence Fees Bill) which is part of this package.

The Digital Radio Bill allows incumbent commercial radio broadcasters to provide their analogue radio services, and one or more digital radio services, using their existing licence. Any new digital commercial radio licensees in the future will also be able to provide multiple digital services.

Commercial radio licensees are required to pay licence fees under the *Radio Licence Fees Act 1964*. The fees payable are calculated on the basis of the 'gross earnings' of the licensee. The Licence Fees Bill amends the definition of 'gross earnings' to reflect the fact that commercial radio licensees will be able to earn revenue from the provision of multiple services. The effect of the Licence Fees Bill is that all revenue derived by a commercial radio broadcasting licensee from the airing of advertisements or other matter on all services provided by the licensee will be included for the purposes of calculating the licence fee.

FINANCIAL IMPACT STATEMENT

The Digital Radio Bill is expected to have no significant impact on Commonwealth expenditure. The potential future price-based allocation of digital radio multiplex transmitter licences is likely to result in receipt of revenue. This revenue may be reduced depending on the number of multiplex licences operating in each market when the allocation occurs and on market assessments of the impact of the access regime for digital radio multiplex transmitter licences. However, at this stage it is not possible to predict with any accuracy the quantum of revenue likely to be received, nor the likely impact of factors such as market structure and the access regime, as the business model for digital radio multiplex transmitter licences has not been tested. The ability to provide a greater number of services, and thus air a greater number of advertisements, on the digital radio platform may increase the gross earnings of commercial radio licensees. This would result in the Australian Communications and Media Authority collecting more revenue from licence fees. However, there are a number of factors which may mitigate this:

- While broadcasters will have a strong incentive to provide digital services (if they do not provide services they will lose their authorisation to do so), they will not be forced to do so.
- Broadcasters will not be prevented from providing at least some digital services which are simulcasts of their analogue services. In this case it is unlikely that there would be a change in licence fee revenue as a result of the Licence Fees Bill.
- It is unclear whether the introduction of new digital radio services will affect the revenue raised by existing analogue commercial radio services. However, the greater the benefit that commercial broadcasters see in the digital radio platform, the more likely they are to provide multiple additional services.

Given these factors, any financial impact of the Licence Fees Bill is likely to be net positive in terms of revenue but it is not possible to quantify this in advance of the introduction of digital radio services.

REGULATION IMPACT STATEMENT

BACKGROUND

Broadcasting services

The *Broadcasting Services Act 1992* (BSA) sets in place a regulatory framework for Australia's broadcasting industry that serves the public interest in all its dimensions – social, cultural and economic. It also seeks to meet the changing needs of industry with a regulatory framework that supports the development of new technologies, such as digital video, audio and data services and new delivery mechanisms such as satellite and cable.

The objects of the BSA (outlined in Section 3 to the Act) include, among other things, encouraging diversity in the provision of radio and television services, promoting the availability of a wide range of services and the provision of a regulatory environment that encourages efficiency, competition and responsiveness to audience needs.

The BSA defines a number of categories of television and radio broadcasting services. These are national broadcasting services – services provided by the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), commercial broadcasting services which are operated for profit and intended to appeal to the general public, community broadcasting services provided for community purposes, subscription broadcasting services that are intended to appeal to the general public, but only on payment of subscription fees; and narrowcasting services which are targeted to a special interest group, provided in a limited time period or location, or provide a service of limited appeal.

Broadcasting spectrum

The *Radiocommunications Act 1992* (Radcomms Act) provides for the management of radiofrequency spectrum¹, including providing a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international markets.

Spectrum is non-homogenous. The varying properties of different frequencies make some frequency ranges more suitable for particular uses than others. The planning of spectrum attempts to take these issues into account when allocating various frequency ranges to the various uses of spectrum including fixed links, mobile phones, aeronautical and radionavigation, satellite, radioastronomy and broadcasting.

The Australian Communications and Media Authority (ACMA) has responsibility for managing the Australian radiofrequency spectrum, including the Broadcasting Services Bands (BSB), to minimise interference between various uses, provide for the efficient allocation of spectrum and to manage equity issues associated with access to

¹ Radiofrequency spectrum refers to that part of the electromagnetic spectrum in which electromagnetic waves can be generated by alternating current fed to an antenna.

this scarce public resource. Free to air broadcasting of television and radio services primarily uses those parts of the spectrum designated as the BSB.

Digital radio

Digital radio offers a range of potential improvements over existing analogue radio. Like digital television, digital radio technology allows for the delivery of a greater quantity of information via the same amount of spectrum, providing for the more efficient use of spectrum channels. It also potentially allows for a much greater variety of forms of content to be delivered to the consumer's radio receiver.

Other potential strengths of digital radio over analogue include better sound quality, reduced interference, the ability to pause or rewind, greater ease of tuning (with channels identified by name rather than frequency), the provision of still images such as maps or graphics (eg an album cover from which a song was played or a station logo or advertising), program associated text (e.g. what song is playing, where it can be purchased, the name of the artist, etc) and data services such as news, traffic and weather updates.

A range of platform standards have been developed for digital radio internationally. These include: Digital Audio Broadcasting (DAB, also known as Eureka 147); High Definition (HD) Radio (previously known as In-Band On-Channel or IBOC); Satellite Digital Audio Radio Services (SDARS); Digital Radio Mondiale (DRM), and Terrestrial Integrated Services Digital Broadcasting (ISDB-T).

The UK, Germany and Canada have progressed significantly with the terrestrial implementation of the DAB system. A number of other countries have also commenced DAB services including France, Sweden, Portugal, Italy, Spain, Belgium and Singapore. A variant of the DAB system, which incorporates the broadcast of video services, Terrestrial Digital Media Broadcast (T-DMB) is also in various stages of implementation in a handful of countries, including South Korea and Taiwan.

In the US, the Federal Communications Commission (FCC) has approved the proprietary HD Radio system as the national standard for the introduction of terrestrial digital radio broadcasts on a voluntary basis. HD Radio delivers a narrow-band digital simulcast signal, plus a limited data capacity, alongside the transmission of an existing analogue AM or FM radio service. Recent reports indicate that the HD system is gaining increasing support from US broadcasters, although some technical concerns remain. Direct to consumer satellite digital radio services have also been available in the US on a subscription basis since 2001 using the SDARS system.

ISDB-T is a wideband system similar to the DVB-T system used in Australia for digital television. The ISDB-T system is understood to have been deployed in Japan.

DRM is a non-proprietary system specifically designed to deliver very wide area coverage services in the high and medium frequency (HF and MF) bands. DRM is a narrowband service that allows the provision of a single digital service, which is suggested to be of around monophonic FM radio quality, and limited ancillary data services. Implementation of DRM internationally to date has typically been limited to

trials and periodic broadcasts, with only recent indications that equipment manufacturers will be providing a range of DRM-capable portable and in-car sets.

Despite its promise, the overall experience with these digital radio technologies has been disappointing. Take-up of digital radio has generally been slow in most markets, resulting - in the case of Sweden and Finland - in the cutting back of the commitment to the new platform. In other cases, such as with HD Radio in the US, there have been ongoing concerns about the technical appropriateness and characteristics of the technology.

More recently, however, there are some clear instances of successful implementation. The two SDARS operators in the US have attracted approximately 13.6 million subscribers in around 6 years of operation² while in the UK, the number of DAB digital radio receivers in the population has grown from just over half million in March 2004 to an estimated 3 million in March 2006³. These and other experiences suggest that the successful introduction of digital radio is dependent on the adopted system receiving wide support from broadcasters and the public, and demonstrating a capacity to provide services that go beyond those available in analogue, such as new, digital-only content or enhanced audio quality.

ISSUE

In Australia, and in most countries, radio is the most ubiquitous of all media. It can be found in every home, car and workplace in the country. As with other media and communications sectors, digitisation poses significant opportunities for expansion, improvement and innovation in the radio services currently provided to audiences.

The digitisation of radio in Australia offers the potential for a range of benefits, many of which were noted in general terms in the discussion above. For listeners, digital radio holds the promise of improved reception and better audio quality, and digital transmission systems have the potential to provide a more diverse range of enhanced radio services than is possible in analogue. Digital radio also promises benefits for the commercial radio industry including better advertising and sponsorship opportunities through program associated text and images, additional data services, and the offer of subscription services.

Other public benefits of digital radio include the potential of the technology to deliver on a number of the Government's broadcasting policy objectives. The technology has the potential to promote diversity, enhance broadcasting industry competitiveness, and encourage the provision of innovative content that is responsive to audience

² XM Satellite Radio, 5 January 2007, News Release: *XM Adds Nearly 1.7 Million New Subscribers in 2006 for Total of More Than 7.6 Million Subscribers ...* refer - <http://www.xmradio.com>.

Sirius Satellite Radio, 2 January 2007, News Release: *SIRIUS Exceeds 6 Million Subscribers and Achieves First Cash Flow Positive Quarter*, refer - <http://www.sirius.com>

³ Dab-digital-radio.com, 5 May 2004, *Half a Million DAB Radios*, refer - <http://www.dab-digital-radio.com>.

Ofcom, 10 August 2006, *The Communications Market 2006*, refer - <http://www.ofcom.org.uk>.

needs. It may also provide in the longer term for more efficient and cost effective provision of ABC and SBS services as well as an opportunity to serve a wider range of audiences. A number of digital radio technologies also potentially offer greater efficiency in the use of the radiocommunications spectrum.

The introduction of digital radio will, however, require consideration of a number of constraints and limitations, many of which are specific to the Australian landscape. The introduction of digital radio also raises an array of complex technical and policy issues. Some of these key constraints and issues are discussed below.

As noted above, the implementation of digital radio overseas has, until recently, met with limited success. It is clear from this experience that digital radio is unlikely to be a replacement technology for analogue services and that analogue radio services will operate alongside digital for a considerable period.

The likely role of digital radio as a supplementary technology to analogue has implications for the way in which digital radio is introduced and, in particular, the degree to which the introductory framework is able, or indeed should, pursue the objective of replicating analogue radio services.

Spectrum issues are also a relevant factor in the development of a framework for digital radio. In Australia, much of the spectrum suitable for the implementation of digital radio services is currently employed for a range of uses including the transmission of analogue and digital television and Defence communications. As a result, unoccupied spectrum appropriate for digital radio is limited, particularly in the major metropolitan markets such as Sydney and Melbourne.

These spectrum limitations will influence or otherwise constrain the possible parameters of an implementation approach for digital radio, including: the timing for the introduction of the new technology; the types of services that might be made available (in particular services which go beyond what are currently available in analogue, such as data services, text, graphics and services with enhanced audio quality); and the scope to provide pathways for competitive entry to the radio market.

The current structure of the Australian radio market will also influence the development of key settings for the introduction of digital radio. The quality and diversity of Australian radio is based on the individual contributions made by the commercial, national and community sectors. The successful introduction of digital radio in Australia will hinge on the presence of each of these sectors, commensurate to their current role and capacities, on the new platform.

Finally, Australia's geography and population distribution presents some unique challenges for the introduction of digital radio which were not experienced in many overseas markets to have introduced digital radio. On the basis of available information, it appears that the most mature digital radio technologies may not practically provide the same level of coverage as analogue AM and FM services, particularly in regional areas. There are also uncertainties associated with the cost associated with establishing digital radio infrastructure in regional and remote areas of Australia.

OBJECTIVE

In the context of the 2004 election, the Government made explicit its commitment to ensuring a transparent and accountable process for the development a policy framework for the introduction of digital radio that meets both industry and community needs and expectations. Specifically, the Government committed to:

... continuing to work in partnership with industry and stakeholders to develop an appropriate framework for the introduction of digital radio technology so that all Australians have access to the best radio services possible, regardless of where they live.⁴

OPTIONS

There are three broad options or approaches identified for the achievement of the stated objective of articulating the key elements of an introductory framework for digital radio:

- Option A: digital radio is an unknown technology, whose introduction should be deferred (a 'defer decision' model).
- Option B: digital radio is a replacement technology, with services to be introduced via the conversion of existing analogue radio services to digital (a 'conversion' model).
- Option C: digital radio is a supplementary technology, with services to be introduced via a progressive or staged approach (a 'managed introduction' model).

Option A – Defer Decision

Option A would seek to defer the decision on key elements of an introductory framework until there is further clarity on the role that digital radio services will play in the wider radio market in the long term.

The benefits of Option A include the potential for greater spectrum efficiency provided through the adoption of emerging advanced audio compression techniques (more radio services per unit of spectrum and lower associated capital and ongoing costs for digital radio infrastructure). Deferring the decision on elements of a digital radio framework would allow digital radio to more clearly establish its viability as a mainstream technology capable of matching the success of analogue radio broadcasting.

However, the central disadvantage of Option A would be that it would delay access to the public benefits arising from consumer demand for digital radio and potentially affect the commercial viability of the operations of existing broadcasters with a negative impact on the quality and diversity of existing analogue radio services. Consumers in a number of countries around the world are already benefiting from the

⁴ The Howard Government, Election 2004 Policy: *21st Century Broadcasting*, refer - <http://www.liberal.org.au>.

availability of digital radio services, albeit some years following their initial introduction. In addition, the radio industry, and the commercial sector in particular, have argued strongly that analogue radio is facing significant competition from the internet, broadcast and other digital devices. The articulation of key elements of a policy framework for digital radio would begin the process by which the radio industry secured a 'digital footing' with which to compete with these emerging digital products.

In recognition of the potential for digital technology to enhance the radio services available to Australians, the Government has, as noted above, explicitly indicated its intention to undertake a transparent and accountable process for developing a policy framework and an implementation strategy for digital radio.

As part of the policy development process, the Government released the report of the Digital Radio Study Group and an associated issues paper to elicit the views of all interested stakeholders (discussed in further detail in the 'Consultation' section below). This process was supported by a program of work conducted by the then Australian Communications Authority and the Australian Broadcasting Authority aimed at providing further clarity in relation to the technological and spectrum issues discussed above. This process involved the investigation of a range of issues, including the availability and performance of appropriate spectrum in markets.

In relation to participation in the digital commercial radio sector, the Government made a commitment in its 2004 election campaign to introduce a moratorium on the issue of new licence area planned commercial digital radio licences for an initial period of five years. This will have the effect of restricting participation in the commercial digital radio sector to the incumbent analogue broadcasters during the moratorium period. The Government has also indicated that it will continue to work with the community radio sector in the development of digital radio and is committed to the inclusion of community broadcasters in the digital environment.

The Government has made clear via these commitments and processes that digital radio is to be introduced once a policy and regulatory framework can be finalised. Option A, to defer a decision on an implementation framework for digital radio, is not realistic in these circumstances. Accordingly, the impact analysis of possible options for achieving the stated objective is confined to Options B and C, and does not include Option A.

For comparative purposes, the parameters proposed under each option are discussed in terms of the implementation model, moratorium, regional assistance, simulcast and content and multiplex arrangements

Option B – 'Conversion' Model

Option B would seek to introduce digital radio under a full conversion model similar to that adopted for digital television that would seek to replace existing analogue services. The key assumption unpinning this model is that digital radio is a replacement technology for analogue. Commercial Radio Australia (CRA), the peak industry body representing commercial radio broadcasters, has expressed strong support for a conversion-based approach to digital radio and argued that radio be treated in an equivalent manner to television in the move to digital.

The key parameters of a possible framework for the introduction of digital radio under Option B are outlined in the following table.

Issue	Option B – ‘Conversion’
Implementation model	Full conversion of existing analogue services. Commercial and national broadcasters moving first, possibly followed by community broadcasters and narrowcasters.
Moratorium	Extended moratorium (possibly in the order of 10 to 15 years) with limitations on new or additional services.
Regional assistance	Likely need for financial assistance to support regional infrastructure rollout.
Simulcast and content	Extensive simulcast period (possibly 20 years plus). Restrictions on multi-channelling. Limitations on new digital-only audio services.
Multiplex arrangements⁵	Allocation of adequate digital capacity for each commercial and national radio broadcaster. Limited capacity allocation for community and narrowcasters. Commercial broadcaster ownership of transmitter licences and no third party licensing.

Option C – ‘Managed Introduction’ Model

Option C has been developed as an alternative position to a full conversion model. This model incorporates the Government’s stated commitments to industry and attempts to work within the constraints posed by the spectrum and technical limitations noted above. The key assumption upon which this model is based, drawn from overseas experience, is that digital radio is not a replacement technology for analogue within a reasonable policy horizon, and that analogue radio will continue to provide a valuable and unique role for some time. The key parameters of a framework

ASSESSMENT OF IMPACTS

The main elements of options B and C will, when considered together as part of a framework for the introduction of digital radio, have a range of impacts on key stakeholder groups; including commercial radio broadcasters, national broadcasters (ABC and SBS), community radio broadcasters and consumers. The benefits and costs of each option in terms of these stakeholder groups are presented below in qualitative terms.

It should be noted that any significant quantitative analysis is not feasible given the relatively high level nature of two options being considered. Use of the Government’s Business Cost Calculator (BCC) is reserved for analysis of specific regulatory issues associated with the DAB multiplex (below). However, where possible, the following discussion of digital radio approaches to the introduction of digital radio includes comment on the likely incidence and significance of costs and benefits.

Option B

^{5, 6} Reference to multiplex arrangements assumes the adoption of the DAB technology in Australia. The report of the Digital Radio Study Group found that if a decision were taken to move now on terrestrial digital radio, the only realistic option for Australia would be DAB, which is mature and has significant numbers and types of consumer receivers available. Unless otherwise stated, the analysis of Option B and C is based on the introduction of digital radio in Australia using the DAB platform.

Option B – ‘Conversion’ Impacts on stakeholders		
Stakeholder	Benefit	Cost
Commercial broadcasters	Secure existing industry profitability and limit the potential for competition, particularly under extended moratorium arrangements. Capital cost of providing digital services borne among the maximum number of players. All commercial broadcasters to receive access to digital spectrum from commencement.	Capital costs involved with digital transmission infrastructure.
National broadcasters	SBS and ABC will have the opportunity to provide radio services in digital.	Little capacity to provide innovative digital content that builds on existing programming. Likely requirement to build/operate own transmission infrastructure or pay for access to multiplexes owned by other parties.
Community broadcasters	Community broadcasters provided with a place in digital, albeit subject to the requirements of commercial and national broadcasters being met first.	No rights to digital capacity for community broadcasters effectively relegated to a ‘second tier’ of broadcasting (particularly if services are provided on alternative spectrum). Would impose transmission costs for which the sector is unlikely to be able to meet without significant Government assistance.
Consumers	Consumers would have access to digital radio services at least comparable to those available in analogue.	Provision of minimal new content and / or services of reduced audio quality, with little or no incentive to take-up digital radio.

Under Option B, all existing analogue services would be replaced by digital services (a ‘full conversion model’), similar to the approach adopted for the introduction of digital television. There are a number of arguments to suggest, however, that the replacement of analogue radio is an unfeasible policy objective for the introduction of digital radio and a sub-optimal outcome in public interest and resource efficiency terms.

In most major markets, there is currently insufficient spectrum to enable all existing analogue radio services to move to digital broadcasting.⁶ Nor is there a technical solution to offer digital conversion (were it financially feasible) to the large number of localised services provided by community broadcasters and low powered open narrowcasters (such as tourist radio).

Critically, the most mature digital radio technology, DAB, cannot provide the same level of coverage as an analogue AM and FM services in regional areas. This would mean that meeting the high rollout requirements that were part of the digital TV model (same level of coverage as analogue) may be unrealistic.

Even in the absence of spectrum limitations or technical constraints, international experience suggests that the replacement of analogue radio by digital is a long term prospect at best. As noted previously, in the UK, considered to be at the forefront of digital radio, the number of digital radio sets sold in the UK, although growing, still

⁶Prior to analogue television closure, the only VHF Band III spectrum likely to be available in the capital city markets is the 6 MHz Channel 9A, which can accommodate a maximum of three DAB multiplex ensembles. VHF Band II (FM) and Medium Frequency (AM) spectrum is also heavily utilised in most major population areas.

constitutes around three per cent of the total estimated number of radio sets⁷, and analogue radios accounted for 84 per cent of the total number of radios sold in the six months to March 2006⁸. The UK is also continuing a program of allocating new analogue radio licences. This replacement issue is exacerbated in Australia given that there are substantially larger numbers of analogue radio sets in Australia (40 million⁹) than analogue television receivers (15 million¹⁰).

The net effect of an implementation model seeking to replace analogue with digital would be the dual operation of the two platforms (possibly in excess of 20 years) prior to the take-up of receivers reaching a level that would permit analogue closure. This would have substantial cost implications for the broadcasters (including the national and community broadcasters) and the Government. Finally, there is no clear alternative use for analogue radio spectrum, suggesting there is no strong policy rationale for a Government-driven analogue closure policy.

In terms of market structure, Option B may involve a moratorium of extended duration, possibly in the order of 10 to 15 years. If a complete moratorium was adopted, this might include any potential commercial digital service, such as data-only services or digital commercial services delivered outside broadcasting spectrum.

As digital radio faces many of the same implementation challenges and potential market uncertainties as digital television, there are grounds for providing a similar period of protection from new commercial entrants in radio as was provided for television. The moratorium for digital television provided an effective six year moratorium from the commencement of the first digital television broadcasts on 1 January 2001.

However, the costs associated with an extended moratorium – both in terms of duration and breadth - are expected to be significant. The successful implementation of digital radio is likely to be driven by new and innovative digital content. An extended moratorium would provide little incentive for the investment in new services expected to be critical in stimulating consumer interest in the new platform. Moreover, the preclusion of entry to digital of those services that pose no direct competitive threat to incumbent commercial broadcasters, such as community and narrowcast broadcasters would appear to stifle an additional source of service diversity in digital with little potential benefit.

The parameters of Option B propose that, as with digital television, assistance may possibly be provided to regional broadcasters for infrastructure rollout. The television model under which regional commercial broadcasters receive assistance (primarily by

⁷ Ofcom, 10 August 2006, *The Communications Market 2006*, refer - <http://www.ofcom.org.uk>.

The Guardian, 13 July 2004, *Ofcom backs digital radio switch*, refer - <http://www.guardian.co.uk>.

⁸ Ofcom, 10 August 2006, *The Communications Market 2006*, refer - <http://www.ofcom.org.uk>.

⁹ Paul Budde Communications, 2006, *Australia – Radio – Overview and Statistics*, refer - <http://www.budde.com.au>.

¹⁰ Digital Broadcasting Australia, May 2005, Submission to House of Representatives Standing Committee on Communications, Information Technology and the Arts inquiry into the uptake of digital television in Australia, refer - <http://www.aph.gov.au/house/committee>.

way of licence fee rebates) is designed to cover around 50 per cent of their costs (capital and operating) for a specified period.

The likely costs of digital rollout are yet to be determined and will be a function of key spectrum, rollout and technology decisions. Preliminary information from industry suggests that regional rollout costs are likely to constitute the bulk of the capital costs for commercial digital radio.

A mandatory simulcast period (possibly in the order 20 years or more), coupled with tight restrictions on the capacity of incumbent broadcasters to provide new audio or data content, are also elements of the proposed model. The purpose of a simulcast period is to ensure that people depending on analogue receivers are not left behind and disadvantaged in the conversion process.

However, and unlike digital television, digital radio is not a replacement technology for analogue in the foreseeable future. Radio consumers will have a much longer period to adjust to the new services and will make decisions about buying digital radios primarily on whether the service provides a value supplementation of analogue services. An extended simulcast period of 20 years or more would 'soak up' most available spectrum for digital radio and provide little reason for consumers to consider buying digital radio. This would prevent consumers from accessing new digital services that they may value.

In terms of transmission arrangements, Option B proposes that only incumbent in-band commercial radio broadcasters be conferred the right to control multiplexes - the transmission infrastructure used for digital radio which operates to broadcast together the signals of a number of broadcasters - and that third parties (non-broadcasters or non broadcasting spectrum broadcasters) be prohibited from owning or controlling a licence to operate a multiplex. The model also envisages each commercial and national broadcaster be provided with adequate multiplex capacity to provide their services.

Competition issues arise with the introduction of the DAB multiplex into the radio value chain regardless of who controls the multiplex licence, as the operator is likely to possess a degree of market power (with a potential 'gate-keeper' function with respect to access to multiplex capacity). Most countries that have adopted the DAB technology have instituted a two-tier licensing regime, which separately licences content providers from multiplex operators. Depending on processes for accessing multiplex capacity, the separate licensing of the multiplex operator from the content providers is seen to be one means of achieving the efficient allocation and use of spectrum, allowing the multiplex operators to manage bit rate capacity between services in response to demand and possibly permit the entry of new content providers in digital.

Nevertheless, there is no inherent argument against broadcaster control of multiplex operations. In the UK, a number of regional commercial multiplexes are controlled by broadcasters and consortiums of broadcasters and third parties. It is not the case that separate licensing of carriage and content is a necessary pre-requisite for efficient spectrum use and the provision of new and innovative digital content. The key issues under any model, regardless of who controls the transmission infrastructure, will be the introduction of measures to ensure adequate arrangements for access to multiplex capacity are established and that the multiplex is operated on a fair, equitable and transparent basis.

With respect to the allocation of multiplex capacity, it is clear that spectrum limitations, and the desirability of offering national and community broadcasters broadly equitable spectrum access, places some restrictions on the amount of capacity that may be used by existing analogue commercial broadcasters.

Option C

Option C – managed introduction		
Impacts on stakeholders		
Stakeholder	Benefit	Cost
Commercial broadcasters	Incumbent broadcasters provided with initial access to the digital platform, including ownership / operation of transmission infrastructure. Stable environment and protection during moratorium period. If Government funding for roll-out costs was agreed, this would be a tangible benefit for broadcasters in regional areas.	Lower bit rate per service than desired. Obligation to commence services within a specified period and achieve specified coverage requirements.
National Broadcasters	Specific spectrum rights to jointly manage transmission facilities in all markets, separate from other broadcasters. Capacity to provide additional digital content that builds on existing programming. Potential to provide full range of services throughout metropolitan and regional areas.	Lower bit per service than desired. Additional capital and operational expenditure, some of which may need to be absorbed by the broadcasters.
Community broadcasters	Community broadcasters provided with specific rights in digital, including option to jointly participate in transmission management and minimum access rights per licence area. Potential for targeted financial assistance to support the sector's participation in digital.	Lower bit rate per service than desired. Slightly lower rights than those accorded to national and commercial broadcasters (reflecting spectrum limitations and lesser capacity to substantially expand current operations). Additional capital and operational expenditure, some of which may need to be absorbed by the broadcasters.
Consumers	Diversity of current radio services maintained and enhanced in digital, with the availability of national broadcasting and the obligation for commercial licensees to rollout services, in conjunction with community broadcasters, within specified timeframes. Consumers potentially provided with a broad range of innovative digital services from the early stages of digital introduction, including enhanced audio and data content. Provision of new services from non-broadcasting spectrum commercial providers, data service providers and (following the moratorium period) new commercial entrants.	Limitation on new commercial services during the moratorium.

The implementation model proposed under Option C is based on the assumption that digital radio will operate alongside analogue radio for the foreseeable future and is not capable of replacing analogue services due to spectrum and other limitations. Accordingly, the parameters of this option seek to introduce measures that provide the flexibility for, and encourage, innovative, new digital services and to provide pathways for new competitive entry. The aim of this approach would be to maximise the consumer benefits of digital radio.

This model does not, however, seek to preclude aspects of a conversion model where these either constitute articulated elements of the Government's preferred approach to the introduction of digital radio, or are likely to contribute to the exploitation the consumer benefits of digital radio in a manner consistent with established public policy objectives for broadcasting. In this context, there are similarities between Option C and a conversion approach (as in Option B) with respect to:

- the provision of initial access in digital for incumbent broadcasting spectrum commercial, national and wide-coverage community services;
- the moratorium on new commercial entrants in the early stages of digital implementation;
- possible financial support for regional commercial broadcasters; and
- the capacity for incumbent broadcasters to own and manage transmission facilities.

However, the policy parameters of Option C diverge from the conversion model in a number of key areas:

- the length and scope of the moratorium period;
- the form and extent of potential regional assistance for the commercial and community broadcasting sectors;
- the requirement for simulcast of analogue services and restrictions of data and audio services that may be provided in digital;
- transmission licensing and access to multiplex capacity; and
- the rights and roles of the respective broadcasting sectors in the initial stages of digital introduction.

In terms of market structure, Option C proposes a 6 year moratorium on the issue of new commercial digital radio licences using broadcasting spectrum. This period is consistent with that provided for the commercial television sector that, as noted above, faced similar implementation challenges and potential markets uncertainties to those currently facing radio.

This six year moratorium period is also broadly aligned with the Government's announcement in its 2004 election campaign to introduce a moratorium on the issue of new licence area planned commercial digital radio licences for an initial period of five years, as well as the regulator's general policy that it does not propose to allocate any further analogue commercial radio licences within five years of the last allocation.

However, in contrast with Option B, the proposed moratorium under Option C is balanced with appropriate pathways for new entry. There will be no restrictions on digital radio services delivered outside the broadcasting spectrum (i.e. over the Internet and via cable and satellite subscription TV services) and scope will be retained for satellite digital radio services should a commercial proposition emerge.

In contrast with Option B, these measures attempt to balance the Government's commitment to providing incumbent broadcasters with a stable environment during their digital radio investment phase – achieved through the time limited moratorium – with the need to ensure sufficient participants in digital to drive the digital radio platform.

With respect to assistance for regional broadcasting, the parameters of the Option C provide for the possible provision of targeted financial assistance for infrastructure rollout by commercial broadcasters in regional markets. In this context, it is acknowledged that the costs of rollout in regional markets are likely to constitute the bulk of the capital costs for commercial digital radio. However, the decision as to whether and in what form any such assistance may be provided would be a matter for the Government.

With regard to content regulation, the international experience of digital radio suggests consumers place a high value on a differentiation of services on the digital platform, particularly where customer equipment enables listeners to access the analogue services over the same device. It will therefore be critical that the policy settings for the introduction of digital radio provide sufficient flexibility and incentives for broadcasters to offer new and innovative content in digital in order to stimulate consumer interest and up-take of the new platform.

In the absence of regulatory obligation, it is likely that commercial factors will ensure that the bulk of content on digital radio will be a simulcast of analogue services. However, a mandatory simulcast obligation (as proposed under Option B) for a platform where replacement of analogue services is a long term prospect would represent a significant spectrum drain, with no clear consumer benefit, and would have also major cost implications for Government (in relation to the running costs of non-commercial broadcasters).

While Australia's digital television system was implemented under an approach which included a mandatory simulcast requirement, this was intended to protect consumers in the transition from analogue to digital by ensuring less expensive analogue receivers provide a comprehensive service until switch off. The same policy drivers are not apparent with respect to digital radio.

Option C does not propose a mandatory simulcast of existing analogue services, or limitations on the types of additional radio or data services that can be broadcast. This will avoid the disincentives for consumers in terms of buying digital radio, and for broadcasters in terms of investment in the development of new and innovative content, inherent in mandatory simulcast obligations or excessive content restrictions.

In terms of transmission arrangements, it was noted previously that while competition issues arise regardless of who controls the multiplexes, there is no inherent argument against broadcaster control of multiplex operations provided regulations are in place to ensure multiplexes are not operated in an anti-competitive way and that access seekers (community broadcasters, data providers and potential new commercial broadcasters post-moratorium) are not frustrated by the multiplex operator.

Accordingly, Option C proposes the following multiplex management and access arrangements:

- Commercial broadcasters, and wide-coverage community broadcasters if they wish, will be provided with an opportunity to elect to jointly operate multiplexes for their services in a licence area. Any such election would be subject to committing to a series of minimum requirements to ensure the joint venture operates fairly and transparently.
- If a valid election is made, the relevant multiplex transmitter licence would be licensed to the joint venture by the regulator for an administrative charge only. If the incumbents do not elect to manage the multiplex, the Government would by default reserve the right to allocate the relevant spectrum to others.
- Under either scenario, legislated access provisions would guarantee commercial broadcasters access to a minimum transmission capacity and the ability to flexibly acquire additional capacity to offer a wider range of services. They would also provide access rights for wide-coverage community broadcasters and any data providers. Access rules would require fair and reasonable terms, including non-discriminatory pricing and provision for the regulator to intervene if necessary.

With respect to the allocation of multiplex capacity, there are a number of factors which support a two-tiered approach. Spectrum limitations in major metropolitan markets mean that it is not possible to allocate sufficient multiplex capacity to provide for all commercial, national and community services. Further, the allocation of fixed percentages of multiplex capacity without the capacity to trade such allocations will reduce the potential for efficiencies in the use of capacity and possibly inhibit the incentives to provide new digital-only services.

In order to encourage new content and an element of competition within multiplexes, incumbent commercial broadcasters will have an entitlement to a capped amount of capacity, with the ability to acquire additional capacity on the condition that this is used to deliver new content. Reflecting spectrum pressures and their limited capacity to fund their involvement in digital, wide-coverage community broadcasters in any market would have a joint access right to sectoral allocation of capacity on the basis that they collectively determine how this is to be shared.

With respect to the national broadcasters, Option C proposes that these broadcasters be allocated provided with the opportunity to jointly manage a multiplex in all markets separate from other broadcasters. This will enable them to continue to acquire those services through open tender and will enable them to provide a common range of digital services throughout Australia.

CONSULTATION

In the mid 1990s the then Government formed a Digital Radio Advisory Committee to commence formal studies exploring options for the introduction of digital radio in Australia. The committee released its report in 1997 and in 1998 the Digital Radio Planning and Steering Committee was tasked with building on this work and progressing implementation plans. Uncertainties about technology preferences, commercial viability and a lack of commitment from some stakeholders prompted digital radio trials and delayed a decision on introduction of the new platform.

In 2003 a Digital Radio Study Group was tasked with reporting to Government on the implementation of major digital radio technologies internationally, their relative merits

in the Australian context, and the implications of the alternative technologies with respect to technical standards or regulatory considerations.

In December 2004, the Minister for Communications, Information Technology and the Arts released the Study Group report together with an issues paper to elicit the views of all interested stakeholders. This release formed part of the Government's 2004 election commitment to undertake a transparent and accountable process to develop a policy framework and implementation strategy for digital radio (this commitment constitutes the objective of this Impact Statement). The election commitment also included a moratorium on the issue of new licence area planned commercial digital radio licences for an initial period of five years, and to the inclusion of community radio broadcasters in the digital environment.

Formal submissions to the review process closed for this process on 20 April 2005. Submissions were received from radio broadcasters and representative groups and some other interested individuals. Submissions were invited to address issues raised in the Issues Paper including the options discussed in this Impact Statement. The Department of Communications, Information Technology and the Arts also met with major radio sector stakeholders including industry bodies and the national and major commercial radio broadcasters.

The views regarding an appropriate implementation model for digital radio in Australia were mixed and broadly divided between support for either full conversion or some form of introduction more consistent with the managed introduction of Option C (i.e. a phased introduction recognising current spectrum availability limitations and the need to encourage those sections of the industry with an interest in driving consumer take-up to take the lead in introducing digital radio services). CRA and Broadcast Australia (BA) were strongly of the view that digital radio is a replacement technology and that Australia should adopt a full conversion approach to implementation.

In relation to spectrum availability, the view expressed by BA, the Community Broadcasting Association of Australia (CBAA) and a range of other submittants was that spectrum constraints would necessarily require some decisions to be made concerning – in relation to the DAB system – the allocation of capacity for services and the number of services per multiplex. Most interested parties acknowledged that a managed introduction would help resolve these issues in the short term, however CRA expressed the view that spectrum constraints are not significant enough to prevent the conversion to digital of all incumbent commercial radio broadcasters.

A range of other issues were raised including multiplex operation – CRA have outlined their position that only broadcasters should own and operate multiplexes, while BA has indicated its willingness to provide third-party multiplex services. On the issue of content, BA and the national broadcasters consider that new audio and data content would be significant contributors to consumer take-up. CRA also acknowledged the role that data services could play but expressed the view that only services provided by broadcasters and associated with the main audio stream should be allowed.

CONCLUSION AND RECOMMENDATION

Option C is the preferred option as it strikes a balance which recognises the role and legitimate interests of incumbent broadcasters, while seeking to promote the consumer benefits of digital radio by encouraging new services and providing pathways for new competitive entry.

Both Options B and C would provide for a significant role for Government in relation to managing and, potentially, funding the rollout of digital radio services. Among a range of concerns, the lack of appropriate digital radio spectrum makes the feasibility of a conversion model (Option B) doubtful, at least in the short to medium term.

IMPLEMENTATION & REVIEW

The adoption of an approach of managed introduction for digital radio was endorsed by Government in October 2005 with the release of a high level policy framework to guide the introduction of digital radio in Australia. This release culminated the extensive process of policy development, research and consultations initiated in 2003.

The elements of the announced policy framework can be categorised in terms of the key constraints and issues relevant to the consideration of digital radio in Australia.

Issue	Policy Parameter
Role of the technology	<ul style="list-style-type: none">• Digital radio will supplement existing analogue radio services for a considerable period and may never be a complete replacement.
Spectrum availability	<ul style="list-style-type: none">• Subject to further technical advice, it is expected that where possible VHF Band III spectrum will be used for primary digital radio transmitters of commercial, wide-coverage community and national broadcasting services. L Band is expected to be used for infill, localised services and where VHF Band III spectrum is unavailable, or insufficient.• L-Band spectrum planning will include reservation of capacity for potential satellite digital radio services.• Significant spectrum limitations currently exist for the introduction of digital radio in key markets (including major metropolitan and adjacent areas). The Government will consider releasing additional spectrum for new digital radio services in relevant markets following the closure of analogue television services, subject to demand and other competing uses for the spectrum.• The Government will ask the Australian Communications and Media Authority (ACMA) to give priority to reserving adequate VHF Band III spectrum for digital radio purposes when planning new digital television services, unless there are clear technical or consumer interests in the use of that spectrum for television.

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- Technology choice**
- Digital Audio Broadcasting (DAB, also known as Eureka 147) will be the primary technology platform for BSB digital radio. However, it is a mature technology and international standards bodies are now considering newer versions, with more advanced compression standards, that will enable more efficient spectrum use. The Government will give further consideration to the feasibility of adopting these later standards.
 - DAB is unlikely to be a suitable platform to address the extended coverage requirements of some regional and remote services. The Government will continue to monitor developments with digital radio technologies, including Digital Radio Mondiale (DRM), to determine what supplementary platforms might be appropriate to address regional and remote coverage issues.
 - The Government considers that technical trials of digital radio technologies, including DRM, need to be undertaken to determine which technologies or combination of technologies will best serve people living in regional and remote Australia.

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- Timing for introduction**
- Planning for the introduction of terrestrial digital radio will initially focus on providing the spectrum to enable existing licence area planned state capital commercial, national and wide-coverage community broadcasters to commence digital radio services.
 - Planning for the introduction of digital radio for existing licence area planned commercial broadcasters in other areas will be considered subsequently and on the basis of broadcaster interest in delivering digital services in the relevant licence area.
 - Planning for the introduction of digital radio for existing licence area planned wide-coverage community and national broadcaster services in other areas will be considered at a later stage.
 - Those categories of Broadcasting Services Bands (BSB) broadcasters not party to the initial planning process, including narrowcasters and localised community broadcasters, will be considered at a later stage.
 - The provision of non-BSB digital radio services by operators of non-BSB delivered services, including section 40 licensees, will continue to be a commercial decision for relevant operators. The Government will continue to consider options for these broadcasters to deliver digital radio services outside the BSB.
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**Transition
arrangements**

- Incumbent commercial and, if they choose, wide-coverage community broadcasters, in a licence area will have first right of refusal to elect to jointly (by way of a separate joint venture company) manage the operations of the multiplex ensembles and hold the associated spectrum licences, to be used for their services in that market, subject to meeting specific regulatory requirements regarding the transparency and openness of the joint venture operation. If they so elect, spectrum licences will be allocated for an administrative charge only.
 - Where a valid election is not made in a licence area, the Government, by default, may allocate transmission licences to operate digital radio multiplex ensembles.
 - Access rules will be established to assure commercial radio broadcasters and the wide-coverage community radio sector of access to minimum levels of capacity on multiplex ensembles, on published and non-discriminatory terms.
 - Commercial broadcasters will have minimum rights to acquire 128 kbps of multiplex capacity with the ability to acquire additional capacity (capped at 256 kbps and subject to bit rate availability limits in each market) on the condition that this is used to deliver new services.
 - 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.
 - Persons licensed to offer non-radio services will also have the right to acquire unreserved capacity on a multiplex to a maximum of 128 kbps, on published and non-discriminatory terms.
 - Provision will be made for regulatory intervention by the ACCC to manage multiplex access, including to address access disputes and anti-competitive conduct.
 - Spectrum allocation and licensing arrangements will continue to be managed by ACMA.
 - Spectrum will be reserved for the national broadcasters equivalent to one multiplex ensemble with appropriate transmission licences to enable them to jointly manage single multiplex ensembles in each state capital and subsequently other markets. The role and timing of national broadcaster involvement in digital radio will be considered further in the context of normal budget processes.

 - A moratorium will be introduced on the issue of new BSB commercial digital radio licences for a period of six years following the commencement of digital radio services in state capital markets. This moratorium will be subject to:
 - the conditions set out in Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No.1 of 2003. This Direction is designed to allow for the issuing of a new licence by ACMA in circumstances where a change of ownership results in a reduction in the number of radio services of general appeal in the market; and
 - the commercial broadcasters in the licence area complying with the digital implementation framework, including the rollout and coverage requirements.

 - Depending on the success of rollout in state capital areas, the Government will consider providing some capped financial assistance for the capital costs associated with rollout of digital transmission facilities by commercial broadcasters in regional areas.
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Types of services

- Digital radio services will be subject to existing content regulation arrangements administered by the Australian Communications and Media Authority (ACMA) applying to analogue radio services (including codes of practice, standards and licence conditions).
 - There will be no requirement on broadcasters to simulcast their analogue service in digital.
 - Subject to content regulation arrangements, there will be no limitations on types of additional radio or data services that can be broadcast.
 - A new licence category will be established to enable non-radio broadcasters to make use of the digital radio platform to deliver non-radio services.
 - In the case of state capitals, existing licence area planned commercial digital radio licensees will be required to commence permanent broadcasts within a specified, legislated period and provide equivalent digital coverage to their existing analogue services by the end of the six year moratorium period.
 - In other areas, where existing licence area planned commercial digital radio licensees are given access to additional broadcasting spectrum for digital radio services, they will be required to commence permanent broadcasts within a specified period and meet coverage and rollout commitments appropriate to such markets.
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On 4 April 2006, the Minister announced the Government's agreement to the drafting of legislation to implement this framework, providing for the introduction of digital radio services in the state capital markets by 1 January 2009. Implementation of the framework will require amendment to the *Broadcasting Services Act 1992*, *Radiocommunications Act 1992*, *Radio Licence Fees Act 1964* and *Trade Practices Act 1974*, as these Acts don't currently provide for the licensing or regulation of digital radio services.

These amendments are introduced by the *Broadcasting Legislation Amendment (Digital Radio) Bill 2006* and the *Radio Licence Fees Amendment Bill 2006*.

However, one area where specific regulatory impacts are likely to arise is in relation to the transmission of DAB digital services. Existing transmission arrangements for radio are based on separate transmission equipment for each service; that is, one spectrum channel corresponds to one broadcast service. In contrast, the DAB platform provides for the delivery of multiplex services on one wideband channel. This situation gives rise to a range of access and competition issues not present in analogue broadcasting, as outlined in the 'Issue' section below.

ISSUE – MULTIPLEX ACCESS

Current limits on available spectrum for digital radio severely restrict the number of multiplexes that can be made available in the major state capital cities. Prior to analogue television closure, the only VHF Band III spectrum likely to be available in the capital city markets is the 6 MHz Channel 9A, which can accommodate a maximum of three DAB multiplex ensembles (assuming these services are transmitted from the same sites within the respective licence areas).¹¹ With spectrum equivalent to

¹¹ VHF Channel 12 (223-230 MHz) is available in Hobart.

one multiplex ensemble reserved for the national broadcasters (as announced in the Government's policy framework), a maximum of two multiplexes may be established in each of the state capital markets to accommodate commercial and wide-coverage community broadcasting stations (as per the announced framework).

By virtue of these restrictions, the licensee of the multiplex for commercial and community services – herein referred to as the multiplex licensee – has the ability to exercise market power in the market for multiplexed DAB digital radio services. Access seekers (commercial or wide-coverage community broadcasters, or data service licensees¹²) need to use the monopoly facility to provide a digital radio service. This creates a potential bottleneck for multiplex services and may allow the multiplex licensee to act as gatekeeper in providing access to the multiplex.

If unregulated, a multiplex licensee could exploit their market power by charging above market prices to businesses using their facilities or otherwise imposing unreasonable restrictions on the use and distribution of multiplex capacity, with adverse effects on access seekers and the radio listening public at large. This issue is further complicated where the multiplex licensee is vertically integrated in a commercial sense with downstream services. Where the entity controlling the multiplex licence is vertically integrated into the potentially competitive downstream market, the broadcaster members of the consortium controlling the multiplex licence have an incentive to restrict a non-consortium member's access to the service, or to offer terms and conditions of access which are discriminatory.

Similar incentives are present in a range of non-broadcasting infrastructure facilities, including gas transmission and distribution pipelines, electricity transmission and distribution, railway track networks, airport systems, water pipelines, certain sea ports and telecommunication networks. A number of these facilities are subject to access regimes which generally seek to establish the rights of third parties to gain access to bottleneck services on terms and conditions that promote competition in the provision of services to end-users.

In digital radio, the position of the multiplex licensee provides a clear rationale for the development of an appropriate access regime for digital radio multiplex services, giving parties the opportunity to access multiplex facilities on reasonable terms and conditions (subject to the availability of capacity), without compromising incentives to develop and maintain such facilities.

This rationale was reflected in the Government's announced framework for the development of digital radio, which stated that access rules will be established to assure commercial radio broadcasters and the wide-coverage community radio sector of access to minimum levels of capacity on multiplex ensembles, on published and non-discriminatory terms. In addition, the management of multiplex access will be undertaken by the Australian Competition and Consumer Commission (ACCC), with provision made for appropriate regulatory intervention including to address access disputes and investigate anti-competitive conduct.

¹² Data services refer to services other than a traditional, audio-based radio. The *Broadcasting Legislation Amendment (Digital Radio) Bill 2006* provides for the delivery of services of this type under a restricted datacasting licence.

OBJECTIVE

To ensure multiplex services (including bit rate) are provided to commercial, wide-coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.

OPTIONS – MULTIPLEX ACCESS REGIME

Within the general parameters for an access regime set out in the Government announced framework for digital radio there are options for the scope of such regulation:

- Option A – conditions of access established and published by the multiplex licensee – no ex ante regulatory oversight.
- Option B – conditions of access established and published by the multiplex licensee and subject to approval by the ACCC.
- Option C – conditions of access determined by the ACCC.

Option A – ‘Licensee-Determined Conditions’

This option would involve a limited regulatory approach whereby the multiplex licensee would establish and publish the terms and conditions of access to multiplex capacity in accordance with the objective that the access regime be efficient, open and transparent, and generally non-discriminatory.

While the ACCC would have no formal role in the assessment and/or approval of published terms and conditions of access, the Commission would be responsible for investigating anti-competitive conduct (as appropriate) in a manner consistent with their established role under the *Trade Practices Act 1974* (TPA).

Option B – ‘ACCC Approved Conditions’

This option provides for a moderate level of regulatory intervention modelled on key elements of existing access regimes, in particular Part IIIA of the TPA (National Access Regime).

Multiplex licensees would be required to develop comprehensive access undertakings, setting out all relevant terms and conditions of access to multiplex capacity, and to submit these undertakings to the ACCC for approval.

The ACCC would assess the undertakings submitted having regard to criteria determined by the ACCC. The ACCC would retain the capacity to approve undertakings where it is satisfied that the relevant criteria are met.

Option C – ‘ACCC Determined Conditions’

This option would involve a high level of initial regulatory intervention, with the ACCC determining ex ante the terms of conditions of access to multiplexed transmission services. While it is expected the ACCC would be required to take into consideration the views of the multiplex licensee and access seekers, the terms and conditions of the access would ultimately remain a matter for the ACCC. The ACCC may have a role in arbitrating disputes between the multiplex consortium and access seekers under this option.

ASSESSMENT OF IMPACTS

Options A, B and C will impact upon the multiplex licensees, access seekers and the ACCC. These impacts are discussed and assessed below, predominantly in qualitative terms. These three options are also examined using the Government’s Business Cost Calculator (BCC). While the BCC estimates may be useful in the assessment of the relative impacts of each option, they should be treated with caution. Accurate information on the likely input costs for complying with each of the regulatory options is not available. The BCC estimates are therefore, at best, indicative of the possible regulatory costs of each option. Limited weight should be given to these estimates for the purposes of assessing each option.

Option A

Option A would favour the multiplex licensee by limiting the administrative burden associated with complying with a more comprehensive access regime and limiting the capacity of access seekers to obtain assistance in negotiating access to the multiplex.

It would result in access to the multiplex being on terms and conditions specified by the multiplex licensee without specific regulatory oversight of those conditions prior to the notification of an access dispute.

The ex post role for the ACCC under this option would limit the initial safeguards available to access seekers and is likely to poorly address the incentives for the multiplex licensee to leverage their market position by refusing access, or providing access on terms and conditions that are unreasonable.

Option A also provides an incentive for open-ended and potentially excessive access disputes as the terms and conditions of access are not subject to any regulatory approval against a set of established criteria prior to dispute. As such, arbitration and transaction costs may be higher under this option.

Option B

Option B is similar to the existing provisions of Part IIIA of the TPA, providing industry with the flexibility to manage the multiplexes while retaining a level of regulatory safeguard through the ACCC’s role in assessing and approving access undertakings.

Subject to acceptance of undertakings by the ACCC, the multiplex licensee is afforded the flexibility to manage the operations of the multiplex as appropriate, and to control the use and distribution of capacity in an efficient and equitable manner.

The process of having the undertaking accepted by the ACCC could be expected to limit the likelihood of disputes and lower the associated arbitration costs as the undertakings would set out the terms and conditions of access, rather than relying on commercial negotiation and/or arbitration.

The ex ante role for the ACCC under this option is likely to provide greater certainty for radio and data service providers seeking access to multiplex capacity and may act to mitigate the incentive for the multiplex licensee to leverage their market position by refusing access, or providing access on terms and conditions that are unreasonable.

Option C

Option C entails a more prescriptive approach by providing for the ACCC to determine the terms and conditions of the access arrangements at the outset, removing this level of control from the multiplex licensee.

By removing the multiplex licensee from the establishment of the terms and conditions upon which it will ultimately provide digital radio multiplex services, Option C introduces a level of regulatory uncertainty to the business decisions of the multiplex licensee prior to the determination of terms and conditions by the regulator.

Compliance costs

Analysis is based on the six state capital markets where it is assumed that incumbent commercial broadcasters will elect to manage the multiplexes and control the associated licences. As such, the proposals would impact on a total of 12 commercial broadcasters who collectively control 45 licences across the six markets (a market-by-market breakdown of controllers and services is provided at Appendix A).

It is further assumed that, at a general level, the costs of establishing processes to comply with the requirements of an access regime may be moderate in so far as a single ‘template model’ may be able to be developed and used as the basis for each of the commercial multiplex licensees. Any development costs are assumed to be shared across the participating commercial broadcasters, relative to their existing licence holdings. However, these costs are not apportioned to the community sector on the basis that community licensees in some or all of the six state capital markets may or may not wish to jointly manage with the commercial licensees the operations of the multiplexes and to control the associated licences.

The ongoing compliance costs would vary according to the requirements of the regime and whether or not it gives rise to a greater or lesser number of access disputes. This remains unknown and estimates are not provided. Estimates of the regulatory costs of establishing an access regime, and the share of these costs to be met by commercial broadcasters, are as follows:

Option B – ACCC Approved Conditions	\$51,220	\$520 - \$10,350
Option C – ACCC Name Determined Conditions	\$25,730	Establishment Cost per Business (range) \$260 - \$5,200
Option A – Licensee Determined Conditions	\$49,730	\$500 - \$10,050

These establishment costs have been developed taking into account the tasks that could be expected to be undertaken in complying with each option. For Options A and B, these tasks include staffing costs associated with the development of an access regime or undertakings (respectively), consultation within the industry, amendments to the regime or undertakings following consultation, and regulatory approvals. For Option C, these tasks relate to industry staffing costs associated with regime development and industry consultation, reflecting the fact that a proportion of the development costs associated with this option will be initially incurred by the ACCC, rather than multiplex licensees.

For each option, the cost estimates do not include those incurred by the ACCC. Any such costs would be a matter for the ACCC to determine at a later time and in accordance with their own budgeting processes. Similarly, the issue of whether the Commission meets those costs within budget, seeks supplementary funding, or cost-recovers from industry, would be a matter for the ACCC to determine.

CONSULTATION

The following have provided input to the development of the access regime:

ACCC

The ACCC expressed a preference for the application of the general access provisions of Part IIIA of the TPA to third party access issues, to the extent possible. The ACCC has generally indicated support for Option B and the proposed role it would play in assessing access undertakings. The ACCC has not provided specific comment on the regulatory costs associated with the proposed access regime.

Industry

The radio industry representative body, CRA, has been consulted on the issue of multiplex access. While providing general comment on the timing and development of the legislative framework for digital radio the industry has not provided specific comment on compliance costs associated with the proposed access regime.

CONCLUSION AND RECOMMENDATION

In the absence of ex ante regulatory oversight, it is highly likely that the terms and conditions of access determined solely by the multiplex licensee (Option A) would be inequitable and may distort the downstream market for digital radio services as the multiplex licensee has a strong incentive to take advantage of their market position by refusing access, or providing access on terms and conditions that are unreasonable.

Requiring the ACCC to arbitrarily determine the terms and conditions of access (Option C) is seen as being overly prescriptive as it removes the flexibility of the multiplex consortium to manage the operations of the multiplex and introduces a level of uncertainty for the multiplex licensee. However, it may be useful to retain a reserve power for the ACCC to determine the conditions of access if undertakings are unacceptable.

Option B is considered to be the more balanced approach, mitigating the potential misuse of market power by the multiplex licensee through the access undertakings process, while also providing certainty for efficient investment in both multiplex facilities and digital radio content services.

This approach has been developed in consultation with the ACCC and is generally consistent with existing access regimes for bottleneck and natural monopoly infrastructure facilities, such as gas and electricity transmission and distribution, railway track networks and airport systems.

Estimated regulatory costs of Option B are in the order of \$51,220, which is comparable with Option A, but higher than those for Option C. As noted above, these estimates should be treated with caution as they are not supported by reliable input cost data.

Option B is the recommended option (with a reserve power for the ACCC to determine arrangements as necessary) as it is considered to most fully meet the objective ensuring the efficient management of the multiplex and access to multiplex facilities by commercial, wide-coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.

IMPLEMENTATION AND REVIEW

The access regime would be administered by the ACCC. No changes would be required to the TPA. The BSA will require amendment to introduce the regime and establish the obligation for multiplex licensees. These amendments will form part of the *Broadcasting Legislation Amendment (Digital Radio) Bill 2006*.

The Digital Radio Bill includes a requirement that the Minister cause to be conducted, before 31 December 2014 (the nominal end of the moratorium period in the state capital city markets) a review of the operation of the multiplex access regime with regard to whether the regime should be amended or repealed.

ISSUE – CAPACITY DISTRIBUTION

The announced framework for the introduction of digital radio sets out minimum bit rate entitlements for incumbent commercial and wide-coverage community broadcasters¹³:

- Commercial broadcasters to have minimum rights to acquire 128 kbps of multiplex capacity with the ability to acquire additional capacity (capped at 256 kbps and subject to bit rate availability limits in each market) on the condition that this is used to deliver new services.

¹³ The minimum bit rate entitlements are defined in the *Broadcasting Legislation Amendment (Digital Radio) Bill 2006* as standard capacity entitlements.

- 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 for the sector per available multiplex) on the basis that they collectively determine how this is to be shared.¹⁴

Decisions regarding the distribution and use of multiplex capacity will generally be best made by the multiplex licensees who would operate as a ‘clearing house’ for capacity use (subject to meeting the relevant conditions of the access undertakings including standard access entitlements).

However, in all markets there will be a certain quantum of multiplex capacity that is not being used by incumbent commercial or wide-coverage community broadcasters (referred here on as excess capacity). This excess capacity would include bit rate that is surplus to that necessary for the standard access entitlements. Using likely multiplex operating parameters, this capacity is likely to be in the order of 384 kbps in Sydney and Melbourne, 768 kbps in Brisbane, 1024 kbps in Perth and Adelaide and 512 kbps in Hobart (assuming the allocation of only one multiplex).

OBJECTIVE

To ensure multiplex services (including bit rate) are provided to commercial, wide-coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.

OPTIONS

There are a number of options for utilising excess capacity:

- Option A – excess capacity distributed by the multiplex licensee (no specific regulatory oversight – ‘Autonomous Licensee Distribution’).
- Option B – excess capacity distributed by the multiplex licensee through the access regime (‘Regulated Licensee Distribution’).
- Option C – excess capacity distributed by ACMA (‘ACMA Distribution’).

Option A – ‘Autonomous Licensee Distribution’

¹⁴ Following the announcement on the framework there have been moves to incorporate more advanced compression schemes within the DAB digital radio standard. The effect of this incorporation will be to enhance the efficiency of the current standard. However, the adoption of a new compression scheme is expected to reduce the total amount of transmission capacity available on a multiplex. In light of this, the *Broadcasting Legislation Amendment (Digital Radio) Bill 2006* provides for a technology-neutral approach to the definition of minimum entitlements. This has been achieved by defining entitlements in terms of one ninth of multiplex capacity rather than 128 kbps. Using the existing DAB standard, 1 ninth of multiplex capacity will be equivalent to 128 kbps of net transmission capacity. The bit rate available using a more advanced compression scheme is likely to be lower than 128 kbps (perhaps in the order of a 10 per cent reduction). However, the number and quality of services that may be provided using this bit rate is expected to exceed that of the older standard.

Option A would allow decisions regarding the use and distribution of capacity to be made by multiplex licensees without any specific regulatory oversight. That is, it would be open to the licensees to determine to whom additional available excess capacity might be allocated and by what method (subject to the general terms and conditions of the access undertakings being met). In particular, these would include ensuring each of the commercial and wide-coverage community broadcasters operating on each multiplex has the opportunity to access their respective standard access entitlements, as prescribed by the Government's announced framework.

Option B – 'Regulated Licensee Distribution'

Option B would retain the multiplex licensee's autonomy to manage and distribute excess capacity (Option A), but would bring this rationing or allocation process more specifically within the access undertakings outlined in multiplex access regime Option B.

The multiplex licensee would be required to allocate excess capacity in a manner consistent with a set of general principles as set out in the access regime. These could include:

- The multiplex licensee to be required to ascertain the level of demand for access to excess capacity on a multiplex¹⁵ from eligible service providers: commercial, wide-coverage community and data service licensees.
- Where the excess capacity sought by interested parties was equal to or less than the available capacity (i.e. supply > demand), the multiplex licensee would distribute capacity under a set of conditions (contractual or otherwise) that were in line with the terms and conditions of the undertakings, including price – assuming the adoption of recommended Option B above.
- Where the excess capacity sought by interested parties was found to be greater than the available capacity (i.e. demand > supply - anticipated to be the case in most markets), the multiplex licensee would distribute capacity via an open and transparent auction process.

Option C – 'ACMA Distribution'

Option C would involve ACMA allocating available capacity to entitled participants, presumably via an open tender or auction process. To be effective, ACMA would need to be able to monitor and identify in a timely manner excess capacity to be made available.

¹⁵ A process for ascertaining excess demand could include, for example, an online trading system comparable with those used for trade in financial assets such as shares.

ASSESSMENT OF IMPACTS

Option A would provide the multiplex licensee with significant flexibility in the management of excess capacity and service delivery. However, this would appear to offer little transparency to access seekers in relation to the process and method for capacity allocation.

Further, where there is vertical integration between the access provider (multiplex licensee) and access seekers (broadcasters) – expected to be the case in all markets where the incumbent commercial and wide-coverage community broadcasters validly elect to manage multiplexes – there is a strong incentive for the incumbent broadcasters to restrict a non-member’s access to the service, or to offer terms and conditions of access which are discriminatory.

Option B would retain the multiplex licensee’s autonomy to manage and distribute excess capacity, but would require – through undertakings – that this be conducted in a manner consistent with the general principles established through the legislation.

The non-discriminatory process for the identification and distribution of capacity would encourage the equitable management and rationing of available excess capacity while also mitigating the potential for a vertically integrated multiplex supplier to discriminate against access seekers not party to the multiplex management operations.

Option C would provide for the greatest level of regulatory intervention in the distribution of excess capacity. However, it is unlikely that the regulator could be expected to be in a position to identify and allocate available capacity in a timely manner, particularly where this may become available in a dynamic context (e.g. hourly). This is likely to impose substantial costs for the regulator and may distort incentives for the multiplex licensee to manage the capacity of the multiplex in an efficient manner.

Compliance costs

Analysis is based on the assumption that a system for monitoring and managing multiplex capacity use on a day to day basis is a core business cost for the multiplex operator, not a compliance cost. As such, under Option A there are not expected to be any regulatory costs to business.

Option Name	Establishment Cost	Establishment Cost per Business (range)	Ongoing Cost (p.a)	Ongoing Cost per Business (range)
Option A – ‘Autonomous Licensee Distribution’	N/A	N/A	N/A	N/A
Option B – ‘Regulated Licensee Distribution’	\$12,000	\$120 - \$2,430	\$4,770	\$50 - \$970

Option C – ‘ACMA Distribution’	\$12,000	\$120 - \$2,430	-	-
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Under Option B, the multiplex licensee would bear the costs of establishing procedures for notifying the market of excess capacity, and of distributing that excess capacity through the access regime. It is assumed that these costs will be shared across the joint venture participants. The costs to each commercial broadcaster would be a function of the number of licences they hold and channels they operate in the six state capital markets.

Under Option C, the cost of a system for managing capacity is again assumed to be a core business cost (as per Option A), however it is assumed the multiplex licensee would be required to notify ACMA of excess capacity and would therefore need to establish procedures as in Option B. Under this option, any allocation of excess capacity would be conducted by ACMA with associated ongoing costs assumed to be at least equivalent to, or possibly higher, than those incurred by the multiplex joint venture for the same task under Option B.

It would be a matter for ACMA as to whether these costs were cost recovered from participants. The cost to each commercial broadcaster from Option C would be a function of the number of licences they hold and channels they operate across the six markets. Estimated regulatory costs under this option are therefore directly comparable to Option B.

These business compliance cost estimates for Options A, B and C do not include those incurred by ACMA. Any such costs would be a matter for ACMA to determine at a later time and in accordance with their own budgeting processes. Similarly, the issue of whether ACMA meets those costs within budget, seeks supplementary funding, or cost-recovers from industry, would be a matter for the ACMA to determine.

CONSULTATION

The ACCC and ACMA were consulted on the regulation of excess capacity and distribution. Neither the Commission nor the Authority indicated specific concerns with the recommended approach (see ‘Conclusions and Recommendation’ below).

The radio industry representative body, CRA, has been consulted on these issues. While providing general comment on the timing and development of the legislative framework for digital radio, the industry has not provided any specific comment on the regulatory options for rationing excess capacity or the associated regulatory costs.

CONCLUSION AND RECOMMENDATION

Decisions regarding the distribution and use of excess capacity will generally be best made by the multiplex licensee, as the party with the expertise and incentives to fully utilise available capacity in an efficient and effective manner. However, the multiplex licensee has a strong incentive to limit or otherwise discriminate against access seekers not party to the multiplex management operations, particularly where the licensee is vertically integrated with downstream services.

Option B would allow the multiplex licensee to operate as a 'clearing house' for capacity use while mitigating the potential incentives for misuse of the licensee's market position in distribution decisions.

Estimated regulatory costs of Option B are in the order of \$12,000 in establishment costs and around \$5,000 p.a. ongoing, which is comparable with Option C, but higher than those for Option C. As noted above, these estimates should be treated with caution as they are not supported by reliable input cost data.

Option B is the recommended option.

IMPLEMENTATION AND REVIEW

The regulation of excess capacity distribution would form part of the access regime to be introduced through the *Broadcasting Legislation Amendment (Digital Radio) Bill 2006*. The access regime is to be administered by the ACCC. No changes would be required to the TPA.

The Digital Radio Bill includes a requirement that the Minister cause to be conducted, before 31 December 2014 (the nominal end of the moratorium period in the state capital city markets) a review of the operation of the multiplex access regime with regard to whether the regime should be amended or repealed. This would include the arrangements for the distribution and use of excess capacity.

**APPENDIX A
COMMERCIAL RADIO LICENCES IN THE
SIX STATE CAPITAL MARKETS**

	Sydney	Melbourne	Brisbane	Adelaide	Perth	Hobart	Total
Austereo Group Ltd	2	2	2	2	2		10
DMG Radio Australia	2	2	1.5	2	0.5		8
Australian Radio Network	2	2	1.5	2	0.5		8
Southern Cross Broadcasting Ltd	1	2	2		2		7
Macquarie Regional RadioWorks (MRR)						2	2
Macquarie Radio Network	2						2
Grant Broadcasters					1	1	2
Pacific Star Network		2					2
Broadcast Operations	1						1
TAB Limited	1						1
Unitab Limited			1				1
3UZ Pty Ltd (Vic Racing)		1					1
Sub Total	11	11	8	6	6	3	45

NOTES ON CLAUSES

BROADCASTING LEGISLATION AMENDMENT (DIGITAL RADIO) BILL 2007

Clause 1 - Short title

Clause 1 provides for the citation of the *Broadcasting Legislation Amendment (Digital Radio) Act 2007*.

Clause 2 - Commencement

Clause 2 provides for clauses 1 to 3 of the *Broadcasting Legislation Amendment (Digital Radio) Bill* (the Bill) to commence on the day on which the Act receives Royal Assent.

Clause 2 provides that amendments to the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* (Radcomms Act) and the *Trade Practices Act 1974* (TPA) made by Schedule 1 of the Bill commence on the day after the day on which the Act receives Royal Assent.

Clause 2 provides that amendments to the Radcomms Act and the TPA made by Schedule 2 of the Bill commence the later of:

- (a) immediately after the commencement of Schedule 1 to this Act; and
- (b) immediately after the commencement of section 155AAA of the TPA.

However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.

The *Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007* includes proposed new s 155AAA of the TPA 1974, which would provide information-sharing arrangements between Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC) including in relation to digital radio multiplex transmitter licence access undertakings. If the *Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007* is passed, the information sharing provisions in it would replace the provisions in the Bill which provide similar information sharing arrangements (see Items 1, 2 and 3 of Schedule 2).

Clause 3 – Schedule(s)

By virtue of this clause, provisions of the BSA, the Radcomms Act and the TPA are amended as set out in the Schedules to the Bill.

SCHEDULE 1 – AMENDMENTS COMMENCING ON THE DAY AFTER ROYAL ASSENT

Items 1 and 2 – Subsection 6(1)

Items 1 and 2 insert new definitions into subsection 6(1) of the BSA of ‘analog commercial radio broadcasting service’ and ‘analog community radio broadcasting service’.

Items 11, 12 and 13 insert new definitions into subsection 6(1) of the BSA for ‘digital commercial radio broadcasting service’, ‘digital community radio broadcasting service’, and ‘digital national radio broadcasting service’.

Digital radio transmission will be a supplementary technology rather than a replacement technology. In certain contexts and for certain purposes, the legislation will differentiate between radio services according to transmission mode. Some aspects of the regulatory framework will relate only to services provided in digital mode while other aspects will relate only to analog services. Therefore, definitions of radio services by reference to transmission mode are necessary.

Item 3 – Subsection 6(1) (definition of ‘broadcasting services bands’)

Item 3 inserts into section 6 of the BSA a new definition of ‘broadcasting services bands’. New subparagraph 6(1)(b) will work in conjunction with new section 31(1A) of the Radcomms Act (see Item 149 of Schedule 1) to provide for an extension of the broadcasting services bands (BSB) to enable the transmission of digital radio broadcasting services and restricted datacasting services. 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; the latter including, for example, ‘L-Band’ (1.5 GHz). This spectrum will be partly for the purposes of digital radio broadcasting and restricted datacasting services. It is intended that other non-broadcasting services currently utilising this spectrum will not be affected by any new designation referred under new sub-paragraph 6(1)(b), see Item 92.

Item 4 – Subsection 6(1) (definition of ‘commercial radio broadcasting licence’)

Item 4 inserts a new definition of ‘commercial radio broadcasting licence’, which will operate in conjunction with new section 41D (see Item 26 of Schedule 1). The definition describes the type of service or services authorised by a commercial radio broadcasting licence by reference to the allocation date of the licence and/or the section of the BSA under which it was issued. The new definition of commercial radio broadcasting licence recognises that when operating in digital mode, licensees, other than those licensed under section 40, will be able to provide more than one service under the same licence.

Items 5,6,7

Items 5, 6 and 7 add or replace definitions in subsection 6(1) of the BSA. The new definitions in items 5 and 7 are to apply for the purposes of the new regulatory framework for digital radio. Item 6 is a minor technical change.

Item 8 – Subsection 6(1) ‘community radio broadcasting licence’

Item 8 inserts a new definition of ‘community radio broadcasting licence’ into the BSA, which includes the new sub-category of community radio broadcasting licence created for the purposes of digital radio, called a ‘designated community radio broadcasting licence’. The new definition of community radio broadcasting licence recognises that certain categories of licence, when operating in digital mode, will be able to provide more than one service under the same licence. A definition of this new sub-category is provided in new section 8AA (see Item 26 of Schedule 1).

Items 9 and 10

These Items add or replace existing definitions in subsection 6(1) of the BSA. The new definitions are to be used in the new regulatory framework for digital radio.

Item 11 – Subsection 6(1) definition of ‘designated community radio broadcasting licence’

Item 11 inserts a definition of ‘designated community radio broadcasting licence’, by cross-reference to new section 8AA (see Item 26 of Schedule 1). New section 8AA defines a ‘designated community radio broadcasting licence’ as a community broadcasting licence operating in the broadcasting services bands of spectrum which has a licence area the same as the licence area of a commercial radio broadcasting licence (or is taken to have a licence area the same as the licence area of a commercial radio broadcasting licence under new section 8AD).

Items 12, 13 and 14

See Items 1 and 2 above.

Item 15 - Subsection 6(1) definition of ‘digital program enhancement content’

Item 15 inserts a definition of ‘digital program enhancement content’ into section 6 of the BSA. ‘Digital program enhancement content’ in relation to a radio program is defined as content in the form of text, or still visual images, or in a form specified in a legislative instrument made by the Minister, or a combination of any of these forms.

The inclusion of this content as part of a digital radio program gives effect to the Government’s intention that broadcasters and consumers should benefit from the advantages afforded by digital technology which include the provision of content other than traditional audio-based programming.

The power given to the Minister under paragraph 6(1)(c) to broaden, by specification in a legislative instrument, the forms of content that could be provided as ‘digital program enhancement content’ allows for additional types of content to be brought within the meaning of ‘digital program enhancement content’. This may allow, for

example, consideration to be given to specifying services such as animation to be provided as ‘digital program enhancement content’.

Under proposed paragraphs (f) and (g) in the definition of digital programme enhancement content inserted into subsection 6(1), to fall within the meaning of ‘digital program enhancement content’, content must be able to be received (where the reception equipment is capable of receiving both the radio program and the program enhancement content) by tuning the reception equipment to receive the radio program in relation to which the digital program enhancement content is provided. That is, the radio service delivering the radio program must also deliver the ‘digital program enhancement content’.

The provisions in the Bill do not require the subject matter of ‘digital program enhancement content’ to be linked to the subject matter of the radio program.

Item 16

Item 16 inserts a definition of ‘digital radio moratorium period’ into section 6 of the BSA. ‘Digital radio moratorium period’ is defined (by reference to new subsection 35C(3) (see Item 37 of Schedule 1)) as, for a licence area, the 6-year period beginning at the start of the ‘digital radio start-up’ day for the licence area. ‘digital radio start-up day’ is defined in new section 8AC (see Item 26 of Schedule 1).

This moratorium gives effect to the Government’s commitments announced in the context of the 2004 election and provides incumbent commercial broadcasters a level of stability and certainty during the digital radio investment phase. The six year duration is consistent with the period of regulatory protection provided for digital television.

Items 17, 19 and 21

Items 17, 19 and 21 incorporate definitions relating to digital radio multiplex transmitters licences and multiplex capacity from the Radcomms Act into section 6 of the BSA. By way of background, the Bill provides for the implementation of digital radio based on European Digital Audio Broadcasting (DAB) standard. The DAB platform requires a number of digital radio services to be jointly broadcast on the one wideband channel using a shared transmission infrastructure known as a ‘multiplex’. The Bill amends the Radcomms Act to provide for a new category of transmitter licence called a ‘digital radio multiplex transmitter licence’.

Item 18

Item 18 inserts a definition of ‘digital radio start-up day’ into section 6 of the BSA by reference to new section 8AC. (See Item 27 of Schedule 1))

Item 20

Item 20 inserts a note at the end of the definition of licence area relating to section 8AD.

Item 22

Item 22 inserts a definition of ‘national radio broadcasting service’ into section 6 of the BSA.

Item 23 definition of ‘radio program’

Item 23 inserts a definition of ‘radio program’ which is affected by proposed section 8AB (see Item 26 of Schedule 1). Section 8AB provides that ‘digital program enhancement content’ is taken to be a radio program. By categorising ‘digital program enhancement content’ as ‘a radio program’ this provision means that commercial and community radio broadcasting licensees can provide such content under their licences.

Item 24 definition of ‘restricted datacasting licence’

Item 24 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).

A ‘restricted datacasting licence’ can be used to provide a ‘restricted datacasting service’ (see Items 25 and 110 of Schedule 1).

Item 25 definition of ‘restricted datacasting service’

Item 25 inserts into section 6 of the BSA a definition of ‘restricted datacasting service’. A ‘restricted datacasting service’ is defined as a service provided under a ‘restricted datacasting licence’. A ‘restricted datacasting licence’ is subject to special conditions (see Item 110 of Schedule 1).

Item 26 ‘designated community radio broadcasting licence’

Item 26 inserts new section 8AA, which will establish a new sub-category of ‘community radio broadcasting licence’ called a ‘designated community radio broadcasting licence’.

New section 8AA defines a ‘designated community radio broadcasting licence’ as a Part 6 (community broadcasting) licence (other than a licence allocated under subsection 82(1) (which is to operate outside the BSB) which:

- has a licence area the same as the licence area of a commercial radio broadcasting licence (or is deemed to have a licence area the same as the licence area of a commercial radio broadcasting licence under new section 8AD), and
- satisfies conditions (if any) as set out in a legislative instrument made by ACMA. Proposed new subsection 8AA(2) will enable the Minister to direct ACMA about the exercise of its power to make conditions.

This provision will give effect to the Government’s commitment to allow only wide-coverage community radio broadcasters to broadcast in digital mode, in the initial phase of digital radio introduction (see also Item 26 (new section 8AD) and Items 8 and 11 of Schedule 1).

Item 26 ‘digital program enhancement content’ taken to be a radio program.

Item 26 also inserts new section 8AB which relates to ‘digital program enhancement content’. A definition of ‘digital program enhancement content’ is inserted into section 6 of the BSA (see Item 15 of Schedule 1). Section 8AB provides that ‘digital program enhancement content’ is taken to be a radio program when delivered by a commercial, community or national radio broadcaster providing a digital radio service. New section 8AB provides for broadcasters and consumers to benefit from the advantages afforded by digital technology, which include the provision of content other than traditional audio-based programming, by defining this content as radio programming.

Item 26 ‘digital start-up day’

Item 26 also inserts new section 8AC which provides for ACMA to declare a specified day to be the ‘digital start-up day’ for a licence area.

Subsection 8AC(1) requires ACMA, before making such a declaration, to be satisfied that it has taken sufficient action in relation to planning requirements, that one or more foundation digital radio multiplex transmitter licences have been issued for the licence area, that the multiplex capacity is sufficient to fulfil the standard access entitlements of commercial broadcasters and that an access undertaking is in force for the multiplex licence or licences. This does not require ACMA to have completed planning for the licence area in question as further planning may be required, for example, in relation to further transmitters to enhance signal coverage in the future. The provision allows ACMA to declare a different start-up day for each licence area.

However, this is subject to the requirement that for metropolitan licence areas (defined in subsection 8AC(8)), ACMA must not declare a ‘digital radio start-up day’ that is later than 1 January 2009 (paragraph 8AC(3)(a)).

ACMA must ensure that the ‘digital radio start-up day’ for a regional licence area is the day specified for the regional licence area in a legislative instrument made by the Minister (paragraph 8AC(3)(b)). The power given to the Minister to declare the digital start-up day in regional areas is consistent with the Government’s intention to allow planning for regional services to be initiated in accordance with broadcaster interest in providing digital radio services in those areas.

Under new subsections 36A, 41D, 84A and 85A of the BSA (see Items 30, 39, 50 and 51 of Schedule 1), the delivery of digital services is not authorised before the ‘digital radio start-up day’ for a licence area and after digital start-up day licences can only be allocated as either digital or analog.

Under new subsection 35C(3) (see Item 37 of Schedule 1) the commencement of the moratorium period for a licence area will be the ‘digital radio start-up day’ for the licence area, and therefore will not be later than 1 January 2009 for metropolitan licence areas.

ACMA’s declaration (which is not a legislative instrument) must be made available on its Internet site and cannot be issued before the day declared to be the start-up day.

ACMA must notify its intention to declare the date at least 30 days in advance (see subsections 8AC(2) (4) (5) and (7)).

In section 8AC licence area is defined as the licence area of a commercial radio broadcasting licensee (or a community radio broadcasting licensee which is the same as a commercial radio broadcasting licensee). Metropolitan licence areas are defined in as areas in which the GPO of the capital city of each state is located. The licence area known as Western Suburbs Sydney RA1 is deemed to be the same licence area as the Sydney licence area for the purposes of digital radio (see Item 26 of Schedule 1). Regional licence areas are defined as those areas not included in the definition of metropolitan licence areas.

Item 26 – ‘Deemed radio broadcasting licence areas’

New subsection 8AD(1) provides that, for the purposes of digital radio, commercial radio broadcasting licensees which operate in the licence area known as Western Suburbs Sydney RA1, will be deemed to operate in the Sydney RA1 licence area.

The commercial radio licence areas of Sydney and Western Suburbs Sydney have a large population overlap. The technical arrangements for digital radio multiplex transmitter licences mean that it is not possible for both licence areas to operate for the purposes of digital radio. This amendment will ensure that commercial radio licensees will be able to operate digital services in Sydney, where the majority of their listeners are located. Listeners in the section of the Western Suburbs licence area which falls outside the Sydney licence area will not be served by digital commercial radio services. This amendment will have no effect on analog services.

New subsection 8AD(2) provides that, for the purposes of section 8AA and 8AC and other aspects of the regulatory framework relating to digital community radio broadcasting services, the licence areas known as Hobart RA2 and Hobart RA4 are taken to be the same as the commercial radio broadcasting licence area in which is situated the General Post Office of Hobart. This provision addressed a situation arising in relation to Hobart where two community radio broadcasting services (7RPH and 7THE) provide services to a significant proportion of the population of the commercial licence area (Hobart RA1), although they technically operate in different licence areas (Hobart RA2 and Hobart RA4 respectively). These services should be regarded as wide-coverage community broadcasting services and therefore enabled to provide digital services.

Subsection 8AD(3) enables ACMA to determine by legislative instrument, for the purposes of new sections 8AA and 8AC, that a specified licence area of a community radio broadcasting licence is taken to be the same as a specified licence area of a commercial radio broadcasting licence. The Minister may direct ACMA in relation to the exercise of this power (section 8AD(4)). This provision has been included to remedy a situation parallel to that of Hobart where the licence area of a wide coverage community broadcasting station does not exactly match that of the relevant commercial licence area, should this arise in another area. As community and commercial radio broadcasters will be delivering their services from a common multiplex with the same transmission characteristics it is appropriate to provide that wide-coverage community radio licence areas are the same as commercial radio licence areas in these circumstances.

Item 27

Item 27 inserts new subsections into section 18, which prevent digital commercial, digital community or digital national radio broadcasting services from being categorised as open narrowcasting services for the purposes of the BSA. This provision ensures that new digital radio services, provided by digital radio broadcasters are categorised as broadcasting services and cannot be categorised as an open narrowcasting service.

Items 28, 29 and 30 – Subsection 25(1)

Items 28, 29 and 30 make consequential amendments to subsection 25(1) of the BSA.

Item 31 – ‘Frequency Allotment Plans’

Item 31 inserts new subsection 25(1A) which operates in conjunction with new subsection 31(1A) of the Radcomms Act (see Item 149 of Schedule 1). Subsection 25(1A) requires ACMA to prepare frequency allotment plans (FAPs) for those parts of the spectrum that are designated as being partly for digital radio broadcasting purposes under subsection 31(1A) of the Radcomms Act. ACMA must prepare a FAP that determines the number of channels that are to be available in particular areas of Australia (using the section 31(1A) spectrum) for digital commercial, digital community, digital national and restricted datacasting services. ACMA may vary such FAPs.

Item 32 ‘Frequency Allotment Plans’

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 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 154 of Schedule 1) which involves public consultation processes.

Items 33 and 35 make technical amendments to clarify that Licence Area Plans are legislative instruments.

Item 34 ‘Licence Area Plans’

Item 34 inserts new subsection 26(1A), which provides that, to the extent to which a licence area plan deals with digital commercial, digital community or digital national radio services, the licence area plan (LAP) is not required to determine the technical specifications of those services. Digital radio services are to be provided on multiplex transmitters and technical specifications will relate to these transmitters and will therefore be developed in the Digital Radio Channel Plan (see Item 154 of Schedule 1) supplemented by Technical Planning Guidelines issued by ACMA under section 33 of the BSA.

Item 36 ‘Licence Area Plans’

Item 36 inserts new section 26C.

New subsections 26C(1) and (3) provide that 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.

Item 36 also inserts new section 26D.

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 (see also Item 34 of Schedule 1).

Item 37 'Moratorium'

Item 37 inserts 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.

Item 37 also inserts new section 35D.

New section 35D 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 whose licence to provide one or more digital services was in force immediately before the 'digital radio start-up day' for the licence area 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 s35D(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 analog mode, despite subsection 36A(5) (see Item 38 of Schedule 1). 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.

Item 38 'Commercial radio broadcasting licences to provide analog or digital commercial radio broadcasting services'

Existing section 36 provides for the allocation of commercial radio broadcasting licences without reference to transmission mode. New section 36A categorises commercial radio broadcasting licences that have been, or are to be, allocated under section 36 as licences to provide analog and/or digital commercial radio broadcasting services.

New subsection 36A(1) provides that commercial radio broadcasting licences in force immediately before the commencement of the section are taken to have been allocated as licences to provide an analog commercial radio broadcasting service.

New subsection 36A(2) provides that a licence allocated after the commencement of the section but before the 'digital radio start-up day' must be allocated as a licence to provide an analog commercial radio broadcasting service.

New subsection 36A(3) provides that commercial radio broadcasting licences allocated on or after the 'digital radio start-up day' must be allocated as either a licence to provide an analog commercial radio broadcasting service or as a licence to provide a digital commercial radio broadcasting service or services.

New subsection 36A(4) provides that a licence allocated as a licence to provide an analog service is subject to a licence condition that the licensee may only provide an analog service. This subsection applies to licences in force before the commencement of this section as well as licences allocated after the commencement of the section but before the 'digital radio start-up day'. It also applies to licences issued after the 'digital radio start-up day' to provide analog services.

New subsection 36A(5) provides that, at the start of the 'digital radio start-up day' for the licence area, the licence condition in 36A(4) ceases to apply to analog licences in force immediately before the 'digital radio start-up day' for a licence area. This provision allows incumbent licensees to provide services in digital mode from the 'digital radio start-up day' for the licence area, using their existing BSA licences, i.e. they will not need to obtain a separate digital licence.

Authorisation for the delivery by these licensees of digital services under existing BSA licences is provided in new paragraph 41D(3)(d)(see Item 39 of Schedule 1)). Authorisation for the continued delivery of analog services is provided under new paragraph 41D(3)(c)(see Item 39 of Schedule 1)). These provisions reflect the Government's intention that digital radio will be a supplementary rather than a replacement technology.

New subsection 36A(6) provides that a commercial radio broadcasting licence allocated as a licence to provide digital commercial radio broadcasting services is subject to a licence condition that the licensee may only provide digital radio broadcasting services under the licence.

New subsection 41D(5) provides that such a licence is taken to authorise the provision of one or more digital commercial radio broadcasting services in the licence area (see Item 39 of Schedule 1).

The provisions in section 36A are subject to section 35D and do not apply to commercial radio broadcasting licences allocated under section 40(1) of the BSA.

Item 39 'Services authorised by commercial radio broadcasting licences'

Item 39 inserts new section 41D into the BSA.

New section 41D 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 and/or to continue to provide their analog services using their existing BSA licences.

New subsection 41D(1) provides that a commercial radio broadcasting licence in force immediately before the commencement of the section, that was allocated as a licence to provide an analog service (see new subsections 36A(1) or (2), Item 38 of Schedule 1), is taken to authorise the licensee to provide an analog 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.

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 analog service, is taken to authorise the licensee to provide an analog 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.

New subsection 41D(3) authorises the delivery, under a licence described in subsection (1) or (2), of one or more digital services on or after the 'digital radio start-up day' for the licence area. This section 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'.

Authorisation for the delivery of digital services is aligned with the 'digital radio start-up day' for the licence area, to ensure that digital services do not commence

before the necessary planning and multiplex transmitter licence arrangements are in place.

Proposed subsection 41D(3) also authorises the continued delivery by the licensees described in subsections (1) and (2) of analog services, reflecting the Government's intention that digital radio will be a supplementary technology rather than a replacement technology.

New subsection 41D(4) provides that a commercial broadcasting licence allocated after the 'digital radio start-up day' for the area is taken to authorise the delivery of an analog service if it is allocated as a licence to provide an analog service under new paragraph 36A(3)(a). Such a licence cannot be used to provide a digital service.

New subsection 41D(5) provides that a commercial broadcasting licence allocated after the 'digital radio start-up day' for the area is taken to authorise the delivery of a digital service if it is allocated as a licence to provide a digital service under new paragraph 36A(3)(b). Such a licence cannot be used to provide an analog service.

The provisions in section 41D will be subject to sections 35D and will not apply to commercial radio broadcasting licences allocated under section 40(1) of the BSA.

Item 40 'Special licence conditions relating to digital radio commercial broadcasting services'

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 analog 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 analog service in digital.

The Bill provides for the implementation of digital radio based on European Digital Audio Broadcasting standards. The Digital Audio Broadcasting (DAB) platform requires a number of digital radio services to be jointly broadcast on the one wide-channel through a shared transmission infrastructure (a 'multiplex'). To enable multiplexed radio broadcasting the Bill amends the Radcomms Act to provide for a new category of transmitter licence called the 'digital radio multiplex transmitter licence'.

New subsections 43D(1) and (2) of the BSA require BSB commercial radio broadcasting licences that authorise the delivery of one or more digital radio services to be subject to the condition 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.

New subsection 43D(3) provides that, where there is only one category 1 or only one category 2 digital radio multiplex transmitter licence for the licence area, a

commercial digital radio broadcaster will be subject to the condition that it can use no more than one-ninth of the multiplex capacity under the digital radio multiplex transmitter licence (i.e. the 'standard access entitlement' as defined in section 118NQ(2) of the Radcomms Act) to provide content that *passes the shared content test* in relation to an analog commercial radio broadcasting service provided under its commercial radio broadcasting licence or another commercial radio broadcasting licence that has the same licence area as the first licence.

New subsections 43D(4) and 43D(5) 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 licence (i.e. this fraction is equivalent to one-ninth of the capacity of any one digital radio multiplex in the licence area) to provide content that *passes the shared content test* in relation to an analog 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.

New subsection 43D(6) provides that content would pass the *shared content test* if at least 50% of the content shown on the digital service was the same as at least 50% of the content shown on an analog service with the same licence area. For the purposes of this test, content would not include specified types of material including advertising. That is, the advertising and other material can be replication on both a digital and analog service without being considered as shared content.

Under the proposed new sections, there would be no requirement on a commercial radio broadcaster to simulcast its analog service in digital, but it would be allowed to use its standard access entitlements to provide a simulcast service, or a service that includes more than 50% of the content from the broadcaster's analog service or another analog service in the licence area.

However, where a commercial broadcasting licensee acquires more than one-ninth of the multiplex capacity in any licence area, the commercial broadcasting licensee will be prevented from simulcasting more than 50% of its analog service or another analog service in the licence area on that additional capacity. This additional capacity above the one-ninth standard access entitlement is to be used only for new services. The conditions in subsections 43D(3) and 43D(4) of the BSA are intended to stimulate the development of new and innovative programming.

Item 41 'Commercial radio broadcasting licences and restricted datacasting licences'

Item 41 inserts new section 54B into the BSA which provides that, for the period of the moratorium for a licence area, a person must not be in a position to control both a commercial radio broadcasting licence and a restricted datacasting licence.

New section 54B will thereby provide for new entrants to make use of the digital radio platform for new types of non-radio services called 'restricted datacasting services' (see Items 24, 25 and 110 of Schedule 1).

Item 42 inserts new subsections 62(2A) and 62(2B), which impose a requirement on restricted datacasting licensees to provide ACMA with details of the persons who were in a position to exercise control of the restricted datacasting licence during the previous financial year and the name of each person who was a director of the restricted datacasting licensee in that year.

Item 43 makes a consequential amendment to paragraph 62(5)(a).

Item 44 inserts new subsection 63(2) which imposes a requirement on restricted datacasting licensees to notify ACMA of any changes in the control of the licence, within 5 days of becoming aware of the changes (see also Items 41 and 106 of Schedule 1).

Item 45 makes a consequential amendment to paragraph 63(5)(a).

Item 46 inserts new subsection 64(2), requires the controller of a restricted datacasting licence to notify ACMA within 5 days of becoming a controller of a restricted datacasting licence (see also Items 28 and 50 B of Schedule 1).

Item 47 makes a consequential amendment to paragraph 64(5)(a).

Item 48 adds a provision to section 82 which clarifies that non-BSB community broadcasting licences can only be allocated on the basis of one licence per service.

Item 49 makes a consequential amendment to section 84 of the BSA.

Item 50 ‘Designated community radio broadcasting licences to provide analog or digital services’

Item 50 inserts new section 84A which relates to those community radio broadcasting licences that are ‘designated community radio broadcasting licences’ under new section 8AA.

Existing section 84 provides for the allocation of community radio broadcasting licences without reference to transmission mode. New section 84A relates to those community radio broadcasting licences that are ‘designated community radio broadcasting licences’ under new section 8AA, and sets out the services authorised by such licences, by reference to allocation date.

New subsection 84A(1) provides that ‘designated community radio broadcasting licences’ in force immediately before the commencement of the section are taken to have been allocated as licences to provide an analog community radio broadcasting service.

New subsection 84A(2) provides that a ‘designated community radio broadcasting licences’ allocated after the commencement of the section but before the ‘digital radio start-up day’ must be allocated as a licence to provide an analog community radio broadcasting service.

New subsection 84A(3) provides that designated community radio broadcasting licence allocated on or after the ‘digital radio start-up day’ must be allocated as either

a licence to provide an analog commercial radio broadcasting service or a licence to provide a digital community radio broadcasting service.

New subsection 84A(4) provides that a licence allocated as a licence to provide an analog service is subject to a licence condition that the licensee may only provide an analog service. This subsection applies to licences in force before the commencement of this section as well as licences allocated after the commencement of the section but before the ‘digital radio start-up day’. It also applies to licences issued after the ‘digital radio start-up day’ to provide analog services.

New subsection 84A(5) provides that, at the start of the ‘digital radio start-up day’ for the licence area, the licence condition in 84A(4) ceases to apply to analog licences in force immediately before the ‘digital radio start-up day’ for a licence area.

New subsection 84A(6) provides that a designated community radio broadcasting licence allocated as a licence to provide digital commercial radio broadcasting services is subject to a licence condition that the licensee may only provide digital radio broadcasting services under the licence.

Item 51 ‘Services authorised by designated community radio broadcasting licences’

Item 51 inserts new section 85A into the BSA, which prescribes the services (by reference to transmission mode) authorised, at various points in time, by designated community radio broadcasting licences, by reference to the time of allocation of the licence. Section 8AA provides a definition of ‘designated community radio broadcasting licence’.

These provisions authorise certain incumbent community broadcasters to deliver digital services using their existing BSA licences, if they elect to do so.

New subsection 85A(1) provides that a ‘designated community radio broadcasting licence’ in force immediately before the commencement of the section, that was allocated as a licence to provide an analog service (see new subsections 84A(1) and (2), Item 50 of Schedule 1), is taken to authorise the licensee to provide an analog 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.

New subsection 85A(2) provides that a licence allocated on or after the commencement of the section but before the ‘digital radio start-up day’, as a licence to provide an analog commercial radio broadcasting service, is taken to authorise the licensee to provide an analog service.

New subsection 85A(3) provides that a ‘designated community radio broadcasting licence’ in force immediately before the ‘digital radio start-up day’ for the licence area is taken to authorise the delivery of both analog and/or digital services, after the ‘digital radio start-up day’ for the licence area.

Authorisation for the delivery of digital services is aligned with the ‘digital radio start-up day’ for the licence area, to ensure that the delivery of digital services does

not commence before the necessary planning and multiplex transmitter licence arrangements are in place.

New subsection 85A(4) provides that a designated community broadcasting licence allocated on or after the ‘digital radio start-up day’ for the licence area, allocated as a licence to provide an analog service, is taken to authorise the licensee to provide that services.

New subsection 85A(5) provides that a designated community broadcasting licence allocated on or after the ‘digital radio start-up day’ for the licence area, allocated as a licence to provide a digital service, is taken to authorised the licensee to provide one or more digital community radio broadcasting service in the licence area.

Item 52 ‘Special licence conditions relating to digital community radio broadcasting services’

Item 52 inserts new section 87B into the BSA.

New subsections 87B(1) and (2) provide that digital community radio broadcasting licences that authorise the delivery of one or more digital radio services are subject to the condition that the service or services must be transmitted using a multiplex transmitter operated under a digital radio multiplex transmitter licence allocated under the Radcomms Act.

Item 53 Application of Codes of Practice

Item 53 inserts new subsections 123(6) and 123(7) into the BSA.

New subsections 123(6) and 123(7) extend the application of codes of practice, made under section 123 of the BSA, to each digital commercial radio broadcasting service provided by a commercial radio broadcasting licensee and to each digital community radio broadcasting service provided by a community radio broadcasting licensee.

This will ensure that the existing regulatory regime for program content – codes of practice and program standards – is also applied to digital radio.

Items 54 and 55 make consequential amendments to subsection 130A(1).

Item 56 inserts the following new sections into the BSA, which relate to codes and 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 (see Items 81, 89, 100, 101, and 110 of Schedule 1).

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 166 of Schedule 1).

Item 57 inserts new section 130BA, which allows ACMA to determine, by legislative instrument, standards relating to domestic digital reception equipment for radio services (see also Item 15 of Schedule 1). These standards will be enforced through licence conditions (see Items 81, 89, 100, 101, and 110 of Schedule 1).

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.

Items 59 and 60 make consequential amendments to paragraph 130F(1)(f), which are necessary to incorporate the new 'restricted datacasting licence' category.

Item 64 ' national broadcaster codes'

Section 130L of the BSA provides that matters dealt with in industry codes and standards made under Part 9B of the BSA have no effect if they are dealt with in a range of other codes. This provision is to make clear that the industry codes under Part 9B are not intended to deal with what are largely programming matters dealt with under these other codes. Item 64 adds to the list of codes in section 130L, codes of practice notified to ACMA and made under section 8(1) of the *Australian Broadcasting Corporations Act 1983* or section 10(1) of the *Special Broadcasting Services Act 1991*.

Item 65 provides that a determination made by ACMA under new section 35D is reviewable by the Administrative Appeals Tribunal (see Item 37 of Schedule 1).

Items 66 to 67 make consequential amendments to section 212 of the BSA.

Items 68 and 69

Items 68 and 69 amend subsection 212(3) to provide that a re-transmission by a 'designated community radio broadcasting licensee' of the programs transmitted by any of the licensee's community radio broadcasting services is not a re-transmission for the purposes of the section 212 exemption.

Item 70

Item 70 inserts a new section 215A which requires that the Minister cause a review to be conducted by 1 January 2011 into the relative merits of various terrestrial and satellite technologies capable of transmitting digital radio and restricted datacasting services in regional licence areas. The review is also to examine the developments in

these technologies and the price and availability of transmission and reception equipment associated with these technologies. This review will also consider whether any changes should be made to legislation to facilitate the transmission of digital radio broadcasting services and restricted datacasting service in regional licence areas using those technologies.

The Minister will be required to table the reports of the review in the Parliament.

This review will inform Government decisions about the path for introduction of digital radio services in regional Australia.

Item 70 also inserts a new section 215B which requires that the Minister cause a review to be conducted by 1 January 2014 of the development of technologies capable of transmitting digital radio and restricted datacasting, and the operation of the Act in so far as it deals with the licensing and regulation of digital radio and restricted datacasting services. This review is timed to coincide with a review of the provisions of the Radcomms Act that relate to digital radio and datacasting. These reviews will provide for an evaluation of a range of aspects of the policy framework for digital radio as digital radio technologies develop and the platform becomes established. This is appropriate given that digital radio is relatively untested in the Australian market. The reviews will also enable an examination of appropriateness of the current regulatory framework for the period after the moratorium ends.

The Minister will be required to table the report of the reviews in the Parliament.

Items 71 to 77 make consequential amendments to Schedule 1 of the BSA, which add 'restricted datacasting licences' to the licences which come with the purview of the Schedule. The Schedule is intended to provide a means of finding out who is in a position to exercise control the types of licences to which the Schedule applies.

Items 78 and 79 make consequential amendments to paragraph 2 of Schedule 2.

Item 80 'conditions for commercial television broadcasting licences'

Item 80 adds a new condition to the conditions for commercial television broadcasting licences provided in clause 7 of Schedule 2. The new condition provides that a commercial television broadcasting licence cannot be used to provide a commercial television service in the part of the spectrum designated as being partly for the purpose of digital radio broadcasting services and restricted datacasting services under new section 31(1A). The use of this spectrum is considered necessary for digital radio and restricted datacasting services but it will not be made available for the broader suite of broadcasting or narrowcasting services.

Item 81 adds a new condition to the conditions for commercial television broadcasting licences provided in clause 8 of Schedule 2. A licensee that provides a digital commercial radio broadcasting service will be required to comply with any applicable standards made under Part 9A and Part 9B of the BSA.

Item 82 amends paragraph 8(1)(f) of Schedule 2 of the BSA to provide that a licensee holding a broadcasting services bands commercial radio broadcasting licences that

authorises the delivery of an analog service will be required to keep a transmitter licence under the Radcomms Act that authorises the provision of the analog service.

A licensee holding a broadcasting services bands commercial radio broadcasting licences that authorises the delivery of a digital service will not be required to hold a transmitter licence under the Radcomms Act because digital radio services will be transmitted using multiplex transmitters.

Items 83 and 84 make consequential amendments to paragraphs 8(1)(g) and (h).

Item 85 adds a new condition to the conditions for commercial radio broadcasting licences provided in clause 8 of Schedule 2. The new condition provides that a commercial radio broadcasting licence cannot be used to provide a commercial radio service in the part of the spectrum designated as being partly for the purpose of digital radio broadcasting services and restricted datacasting services under new section 31(1A) unless the service is a digital commercial radio broadcasting service. The use of spectrum designated under section 31(1A) is considered necessary for digital radio and restricted datacasting services, but it will not be made available for analog commercial radio broadcasting services.

Items 86, 87, 88 and 90, 91 make consequential amendments to paragraphs 8 and 9 of Schedule 2.

Item 89 adds a new condition to the conditions for community radio broadcasting licences provided in clause 9 of Schedule 2. A licensee that provides a digital community radio broadcasting service will be required to comply with any applicable standards made under Part 9A of the BSA

Item 92 adds a new condition to the conditions for community radio broadcasting licences provided in clause 9 of Schedule 2. The new condition provides that a community radio broadcasting licence cannot be used to provide a community radio service in the part of the spectrum designated as being partly for the purpose of digital radio broadcasting services and restricted datacasting services under new section 31(1A) unless the service is a digital community radio broadcasting service. The use of spectrum designated under section 31(1A) is considered necessary for digital radio and restricted datacasting services, but it will not be made available for analog community radio broadcasting services.

Items 93, 94, 96, 97 and 98 make consequential amendments to clause 9 of Schedule 2.

Item 95 inserts new subclause 9(2AA) into Schedule 2 of the BSA. The licence condition under BSA Schedule 2, Paragraph (2)(e) – which requires that the licensee will not operate the service for a profit or as part of a profit-making enterprise – does not prevent a designated community radio broadcasting license from holding shares in a digital community radio broadcasting representative company (community broadcasting representative company).

This provision is necessary because it is intended that designated community radio broadcasting licensees, through digital community radio broadcasting representative companies, will be able to join the joint venture companies holding category 1 or

category 2 multiplex transmitter licences. Although vetted by the ACCC through the undertakings process, it is expected that multiplex transmitter licensees will have the ability to generate a return commensurate with the investment and commercial risks of their investment.

Item 99 adds a new condition to the conditions for subscription television broadcasting licences provided in clause 10 of Schedule 2. The new condition provides that a subscription television broadcasting licence cannot be used to provide a subscription television service in the part of the spectrum designated as being partly for the purpose of digital radio broadcasting services and restricted datacasting services under new section 31(1A). The use of spectrum designated under section 31(1A) is considered necessary for digital radio and restricted datacasting services, but it will not be made available for the broader suit of broadcasting, narrowcasting and datacasting services.

Items 100 and 101 add new conditions to the conditions for services provided under class licences provided in clause 11 of Schedule 2. A licensee that provides a digital subscription radio broadcasting service, a digital subscription radio narrowcasting service or an open narrowcasting radio service will be required to comply with any applicable standards made under Part 9A and Part 9B of the BSA

Item 102 adds a new condition to the conditions for services provided under class licences provided in clause 11 of Schedule 2. The new condition provides that spectrum designated under new section 31(1A) cannot be used to provide broadcasting services under class licences. The use of spectrum designated under section 31(1A) is considered necessary for digital radio and restricted datacasting services, but it will not be made available for the broader suit of broadcasting, narrowcasting and datacasting services.

Items 103 and 104 amend Schedule 6 of the BSA, to provide for the regulation of 'restricted datacasting licences', and services provided using these licence.

Item 105 provides for the allocation of restricted datacasting licences.

The new licence category and service type are intended to enable new operators to make use of the digital radio platform to deliver non-radio digital services. (see Items 24, 25, 110 of Schedule 1).

Items 106 makes an amendment consequential upon the creation of the category of restricted datacasting.

Item 107 requires ACMA to keep a register of restricted datacasting licences, which will assist ACMA with the enforcement of the provisions relating to control of restricted datacasting licences.

Item 109 provides that a datacasting licence that is not a 'restricted datacasting licence' cannot be used to provide a service in the part of the spectrum designated under section 31(1A). The use of spectrum designated under section 31(1A) is considered necessary for digital radio and restricted datacasting services, but it will not be made available for the broader suit of broadcasting, narrowcasting and datacasting services.

Item 110

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).

Restricted datacasting licences will be required to operate in digital mode, will be subject to the television and radio programming restrictions for datacasting licences, and will be required to comply with any standards under s 130AA which deals with technical standards for digital transmission. The Minister will also have capacity to specify, by legislative instrument, any content that may not be provided by a restricted datacasting licensee.

The new licence category and service type are intended to enable new service providers to make use of the digital radio platform to deliver content other than traditional radio content.

The word 'form' is used in paragraph 24A(b) in the same sense in which it is used in the definition of 'datacasting service' in section 6 of the BSA.

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.
- 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.
- Radio programs that are foreign language news or current affairs programs.

Items 111 to 118

Item 111 to 118 inserts new offence provisions for breaches of the special conditions imposed under clause 24A and related consequential amendments.

Items 119 to 171 amend the *Radiocommunications Act 1992*

Item 119 inserts a definition into section 5 of the Radcomms Act of ‘BSA licence area’, which is used for the purposes of the multiplex transmitter licensing regime (see Item 75 of Schedule 1).

Items 120, 121 and 122 insert definitions into section 5 of the Radcomms Act of ‘category 1 digital radio multiplex transmitter licence’, ‘category 2 digital radio multiplex transmitter licence’ and ‘category 3 digital radio multiplex transmitter licence’, respectively. These definitions establish three categories of digital radio multiplex transmitter licences which will apply for the purposes of the multiplex transmitter licensing regime (see Item 161 of Schedule 1).

Item 123 amends the definition of ‘datacasting transmitter licence’ in section 5 of the Radcomms Act, to exclude a ‘digital radio multiplex transmitter licence’ from the meaning of ‘datacasting transmitter licence’. ‘Digital radio multiplex transmitters’ will be able to be used for transmitting ‘restricted datacasting services’ and a range of digital radio broadcasting services. Without the exception they could fall within the meaning of ‘datacasting transmitter licence’. The exception is necessary because ‘digital radio multiplex transmitters’ will be allocated and regulated separately from ‘datacasting transmitter licences’.

Item 124 inserts a definition of ‘designated BSA radio area’ into section 5 of the Radcomms Act, which is used for the purposes of the digital radio multiplex transmitter licensing regime. ‘Designated BSA radio area’ defines licence areas for digital radio as being the licence area of a commercial radio broadcasting licence or the licence area of a community radio broadcasting licence where the area is the same as that for the commercial licence or is deemed to be the same as that for the commercial licence under new section 8AD of the BSA (see Item 22 of Schedule 1).

Items 125 to 135 insert a series of definitions into section 5 of the Radcomms Act, which are to apply for the purposes of the multiplex transmitter licensing regime.

Items 136 to 138 and 143 insert definitions of *foundation* digital radio multiplex transmitter licences and *non-foundation* digital radio multiplex transmitter licences. This is an important distinction for the purposes of the regulatory framework introduced in this Bill. *Foundation* digital radio multiplex transmitter licences are category 1 and 2 digital radio multiplex transmitter licences (see Item 155 of Schedule 1) that provide standard access entitlements for digital commercial, digital community and digital national radio broadcasters (defined sections 118NQ, 188NR, 118NS) in an area, among other matters. Essentially, they are licences designed to accommodate incumbent commercial and community broadcasters and, in some cases, the national broadcasters.

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. 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).

Items 139 and 140 ‘Incumbent digital commercial and incumbent digital community radio broadcasting licensees’

Items 139 and 140 insert into section 5 of the Radcomms Act definitions for incumbent digital commercial radio broadcasting licensee and incumbent digital community radio broadcasting licensee by cross-reference to subsections 9(D)(1) and 9D(2) respectively.

It is necessary to provide a definition of incumbent commercial and incumbent community radio broadcasting licensees, to create a distinction between these broadcasters and other commercial and community radio broadcasting licensees, because several of the statutory arrangements for digital radio differentiate between licensees according to whether or not the licensee is an incumbent licensee.

For example, incumbent commercial and incumbent community radio broadcasting licensees will be permitted to participate in the regulatory arrangements prior to the commencement of digital radio services (for example, the opportunity to form a joint venture company to apply for multiplex transmitter licences).

Incumbent licensees will also be entitled to receive multiplex capacity entitlements in accordance with the Government’s announced policy framework for digital radio, under foundation category 1 digital radio multiplex transmitter licences and foundation category 2 digital radio multiplex transmitter licences (see sections 118NQ to 118NU).

Items 141, 143 to 145 insert a series of definitions into section 5 of the Radcomms Act, which are to apply for the purposes of the multiplex transmitter licensing regime.

Item 142 excludes from the definition of NBS transmitter licence, a digital radio multiplex transmitter licence. The distinction between a transmitter licence which is used to transmit traditional broadcasting services and a multiplex transmitter used to transmit digital radio will ensure the relevant regulatory provisions are correctly applied.

Item 146 ‘Digital community radio broadcasting representative company’

Item 146 inserts new section 9C, which defines, and provides for the formation of, a digital community radio broadcasting representative company.

The community broadcasters in a licence area will be required to establish a representative company to enable their participation with the commercial radio broadcasters in the joint venture company controlling the multiplex transmitter licence (see Item 161 of Schedule 1).

A collective arrangement through the representative company is intended to provide for the efficient administration of the licensing and access provisions of the Bill.

Under new section 9C, a representative company will be subject to the following requirements:

- the representative company must be a qualified company (paragraph 9C(1)(a)), with the promoters of the company required to invite each incumbent digital community radio broadcasting licensee in the licence area to subscribe for shares in the company (which must be issued equally) (paragraph 9C(1)(c)). The Bill amends the licence conditions of community broadcasters to allow them to hold shares in the community broadcasting representative company and thus benefit from participation in the joint venture company (see Item 95 of Schedule 1).
- invitations to subscribe for shares in the company must be published on ACMA's website and the invitations must remain open for at least 90 days from the commencement of Schedule 1 to the Bill (paragraph 9C(1)(d) and subsections 9C(5) and (6)).
- there must be no discrimination between subscribers for shares in the company in relation to the consideration payable, which in aggregate must not substantially exceed the total that, as at the time the invitation to subscribe for shares was published, would be required for the viable operation of the company (paragraphs 9C(1)(e), (f)). It is intended that the consideration payable for a share will comprise the proportionate amount of the capital reasonably known at the time of inviting applications for shares for the commercially viable operation of the company. This should in no way constrain or otherwise affect the autonomy of the company to make decisions regarding the means by which the company meets any future obligations or raises additional capital. Further, the consideration payable for shares at issue is separate from any fees charged by a joint venture company to content service providers for access to multiplex capacity. No invitees are to be subject to duress (paragraph 9C(1)(g)).
- the company must have a constitution which must provide that only digital community radio broadcasting licensees for the relevant licence area hold shares in the company. If a new digital community radio broadcasting licence is issued after the commencement of Schedule 1 to the Bill, the company constitution must provide that within 30 days of the allocation of that new broadcasting licence, the company will offer to issue equivalent shares to the new licensee (and keep that offer open for 90 days) with the amount payable not substantially in excess of the amount payable by incumbent licensees (paragraphs 9C(1)(h), (i), (j)).
- the company's constitution must provide that the purposes of the company are to: hold shares in one or more joint venture companies that hold, have applied for or propose to apply for category 1 or 2 multiplex transmitter licences; exercise powers conferred by the Bill on the representative company; and any activities incidental to those purposes (paragraph 9C 1(k)).
- the company constitution must also provide that the company must comply with any conditions laid down in regulations (paragraph 9C(1)(l); and

- the digital community broadcasting licensees for the area must give ACMA written notice that they elect that this company be the nominated representative company (paragraph 9C(1)(b). Subsection 9C(3)) provides that this nomination is the only one made for the BSA radio area (This election is irrevocable (subsection 9C(4)).

Item 146 ‘Incumbent digital radio broadcasting licensees’

Item 146 also inserts new section 9D which adds a definition of ‘incumbent digital radio broadcasting licensee’ into the Radcomms Act, which is to apply for the purposes of the multiplex transmitter licensing regime. Licensees holding a BSB digital commercial or a designated community radio broadcasting license at the commencement of the Act are incumbent licensees for the purposes of the Radcomms Act (see Items 130 and 140).

Item 147 makes a consequential amendment to section 29.

Item 148 makes a consequential amendment to section 31(1)(a).

Item 149 ‘Spectrum designation’

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 of Schedule 1).

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 particularly 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.)

Items 150 – 153 clarifies that instruments made under subsections 31(1), (1A), (1C), (1D), (5) or (6), and a determination subsection 31(2), are not legislative instruments.

Item 154 ‘Digital radio channel plans’

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)).

Before issuing the first digital radio multiplex transmitter licence for a designated BSA radio area, ACMA must, by legislative instrument, prepare a digital radio channel plan that:

- allots frequency channels in relation to the area for use by digital radio multiplex transmitter licensees, where each channel has at least 1.536 MHz bandwidth (paragraph 44A(1)(a));
- reserves a frequency channel of at least 1.536 MHz bandwidth for a category 3 multiplex transmitter licence for the area (paragraph 44A(1)(b)) (This provision ensures spectrum is reserved for the national broadcasters in every area of Australia, that is subject to digital radio planning.);
- determines the type, combination and number of category 1 and category 2 multiplex transmitter licences that are to be issued for the area (paragraph 44A(1)(c)) (This provides ACMA with the discretion to determine the multiplex transmitter licences that will be issued in an area.);
- determines the technical specifications for each multiplex transmitter in the licence area (paragraph 44A(1)(e)). (It is intended that ACMA have the flexibility to determine whether these technical specifications are general technical parameters and constraints on the use of a frequency channel, or more specific technical characteristics of individual transmitters).

New subsection 44A(2) requires a plan made under 44A(1) to be consistent with:

- the spectrum plan (paragraph 44A(2)(a));
- any relevant frequency band plans (paragraph 44A(2)(b));
- any relevant frequency allotment plans (paragraph 44A(2)(c));
- any relevant licence area plans (paragraph 44A(2)(d));
- any relevant digital channel plans made under the commercial television conversion scheme (paragraph 44A(2)(e)); and

- any relevant digital channel plans made under the national television conversion scheme (paragraph 44A(2)(f)).

Before preparing a digital radio channel plan, ACMA must publish a draft of the plan on its site, invite public submissions within a period of at least 30 days and consider any submissions provided (subsection 44A(5)). A copy of the final plan must also 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)).

In preparing or varying a digital radio channel plan, ACMA must have regard to, among other matters, the digital radio broadcasting services that are authorised, or will be authorised by commercial or community radio broadcasting licences for the designated BSA radio area and digital radio broadcasting services that are, or will be, provided by national broadcasters in that area (subsection 44A(8) and (9)).

ACMA must ensure, as far as practicable, that all the frequency channels allotted or reserved by a digital radio channel plan for a particular designated BSA radio area are in the same frequency band (subsection 44A(10)). ACMA must also ensure, as far as practicable, that a digital radio channel plan for a particular designated BSA radio area does not discriminate between digital radio multiplex transmitter licensees in relation to the technical specifications of multiplex transmitters. These provisions are intended to ensure that, as far as possible, each multiplex operating in a particular area can deliver similar service characteristics and performance.

Item 155 'Declarations regarding digital radio multiplex transmitter licence types'

Item 155 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 68A 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 138 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).

Item 155 ‘Limit on declaration of foundation digital radio multiplex transmitter licences’

Item 155 also inserts new section 98E, which provides that ACMA must not declare a multiplex transmitter licence to be a foundation digital radio multiplex transmitter licence if doing so would result in the total multiplex capacities under foundation digital radio multiplex transmitter licences for the designated BSA radio area being more than sufficient to fulfil the number of standard access entitlements that have come into existence, or are likely to come into existence in that licence area.

This establishes a cap on the number of multiplex transmitter licences that provide standard access entitlements for digital commercial, digital community and digital national radio broadcasting operators in an area. Foundation digital radio multiplex transmitter licences are subject to special provisions only appropriate for those multiplexes accommodating standard access entitlements (such as allocation for administrative fees and right of renewal). It is therefore appropriate that the number of such licences should be limited.

The cap on the number of foundation digital radio multiplex transmitter licences is such that, for example, if there were 7 standard access entitlements under subsection 118NQ(2) for commercial radio broadcasters in the area, one foundation multiplex licence could be declared; if there were between 8 and 14 standard access entitlements for commercial radio broadcasters, two foundation digital radio multiplex transmitter licences could be declared (subsection 98E(2)).

ACMA may ignore the limitation imposed by subsection (1) in declaring a multiplex transmitter licence to be a foundation digital radio multiplex transmitter licence where ACMA proposes to cancel a foundation digital radio multiplex transmitter licence that has been previously issued for that area (subsections 98E(3) and 98E(4)). This ensures that there will be scope for the allocation of an additional foundation digital radio multiplex transmitter licence – accommodating the standard access entitlements of broadcasters – even where a multiplex licence is subject to cancellation.

Items 156 to 158 ‘Issuing apparatus licences in the BSBs’

Item 156 to 158 amend section 100 of the Radcomms Act. Subsection 100(2), which limits the ability for ACMA to issue an apparatus licence authorising operation of a transmitter within the BSBs, is amended to provide for the issue of digital radio multiplex transmitter licences within the BSBs.

Item 159 makes a consequential amendment to subsection 102(1).

Item 160 ‘Apparatus licence allocation process for digital commercial radio licensees’

Item 160 inserts new subsections 102(2AA) to (2AD) into section 102 of the Radcomms Act. Section 102 of the Radcomms Act requires ACMA to issue a transmitter licence to a person holding a commercial or community broadcasting licence. The new subsections create exceptions such that the section will not operate to require the automatic issuing of a transmitter licence to holders of commercial radio broadcasting licences, or community radio broadcasting licences, authorised to provide digital radio services.

These licensees will be required to transmit digital services using a digital radio multiplex transmitter licence. The digital radio multiplex transmitter licensing regime is set in place through new provisions (see Item 161). These provisions do not alter the operation of licensing arrangements for analog radio services.

Item 161 ‘Category 1 digital radio multiplex transmitter licences’

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

ACMA must not issue a category 1 multiplex transmitter licence to a person unless that person is a qualified company (new subsection 102C(1)).

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 reviewable by the AAT under section 292.

Before issuing a licence under subsection 102C(3) (stage 2), ACMA must first, by notice published on its Internet site at least 150 days before the issue of such a licence, invite applications from eligible joint venture companies new paragraph 102C(3)(a).

This provision is intended to provide incumbent commercial and community broadcasters with an adequate period in which to form an eligible joint venture company to apply for the foundation digital radio multiplex transmitter licence. It aligns with the 120 day period for which a promoter of an eligible company formed to apply for a category 1 digital radio multiplex transmitter licence is required to hold open invitations to hold shares in that company.

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 Item 73A 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 and which could in aggregate total seven-ninths of the shares; and that 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). 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));
- where an initial share offering is not fully subscribed, provide that those persons who had subscribed for shares in response to the initial offer may subscribe for the remaining shares (new paragraph 102C(5)(b));
- the invitations to subscribe were published on ACMA's Internet site (at the request of promoters of the company (new subsection 102C(6)) and were open for at least 120 days from the commencement of Schedule 1 to the Bill (new paragraph 102C(5)(c)), with no recipients subject to duress as to whether to accept the invitation (new paragraph 102C(5)(f)).
- there was no discrimination between subscribers for shares in relation to the consideration payable (new paragraph 102C(5)(d)) and, in aggregate, this consideration is not substantially in excess of the amount, as at the time of invitations, would be required for the commercially viable operation of the company (new paragraph 102C(5)(e)). It is intended that the consideration payable for a share will comprise the proportionate amount of the capital reasonably known at the time of inviting applications for shares for the commercially viable operation of the company. This should in no way constrain or otherwise affect the autonomy of the company to make decisions regarding the means by which the company meets any future obligations or raises additional capital. Further, the consideration payable for shares at issue is separate from any fees charged by a joint venture company to content service providers for access to multiplex capacity.

- The Bill amends the licence conditions of community broadcasters to allow them to hold shares in the community broadcasting representative company and thus benefit from participation in the joint venture company (see item 95 of Schedule 1).

A category 1 digital radio multiplex transmitter licence that is not a foundation category 1 digital radio multiplex transmitter licence cannot be issued otherwise than in accordance with a price-based allocation system determined under section 106 (subsection 102C(4)).

Item 161 ‘Category 2 digital radio multiplex transmitter licences’

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

ACMA must not issue a category 2 multiplex transmitter licence to a person unless that person is a qualified company (new subsection 102D(1)).

The new section provides for a two stage allocation process for category 2 digital radio multiplex transmitter licences:

- Stage one: under new subsection 102D(2), incumbent broadcasters will be provided with an opportunity to elect to jointly hold (via a joint venture company formed by incumbent commercial, community and national broadcasters in accordance with section 102D(5)) a foundation category 2 digital radio multiplex transmitter licence, allocated for a fee (new subsection 102D(2)) that must not amount to taxation (i.e. is administrative only) (new subsection 102D(9)); and
- Stage two: under new subsection 102D(3), ACMA will be able to allocate a foundation category 2 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 broadcasters in accordance with section 102D(5)) or applications were made but rejected under section 100. The allocation process under section 106 will be a price-based allocation system (new subsection 102D(3)). Any rejection of application can be subject to internal review by ACMA under section 285 of the Radcomms Act and reviewable by the AAT under section 292.

With respect to licences issued under stage 2, ACMA must first, by notice published on its Internet site at least 150 days before the issue of such a licence, invite applications from eligible joint venture companies new paragraph 102D(3)(a).

This provision is intended to provide incumbent commercial and community and national broadcasters with an adequate period in which to form an eligible joint venture company and apply for the foundation digital radio multiplex transmitter licence. It aligns with the 120 day period for which a promoter of an eligible company formed to apply for a category 2 digital radio multiplex transmitter licence is required to hold open invitations to hold shares in that company.

Under new subsection 102D(2), an eligible joint venture company will be required to be formed to apply for and hold a foundation category 2 digital radio multiplex transmitter licence. New subsection 102D(5) provides that a company is an 'eligible joint venture company' for the purposes of section 102D if:

- before registration, the promoters of the company initially invited each incumbent commercial broadcaster and the community broadcasting representative company (if formed) (see Item 73A of Schedule 1) and each national broadcaster to subscribe for shares in the company (new paragraph 102D(5)(a));
- the invitations to subscribe were published on ACMA's Internet site (at the request of promoters of the company (new subsection 102D(6)) and were open for at least 120 days from the commencement of Schedule 1 to the Bill (new paragraph 102D(5)(b)), with no recipients subject to duress as to whether to accept the invitation (new paragraph 102D(5)(e)).
- assuming the initial invitation were to be accepted by each invitee, the shares in the company were offered on the basis that incumbent commercial radio broadcasting licensees who accepted the invitation would be issued with an equal number of shares which could in aggregate total five-ninths of the shares; and that the community digital radio broadcasting representative company would, if it accepted the invitation, hold two-ninths of the shares in the joint venture company; and that each national broadcaster would be able to hold one-ninth of the shares issued (new subparagraphs 102D(5)(a)(iv), (vi), (vii) and (viii)). The only persons entitled to subscribe for shares in the eligible joint-venture company were the incumbent digital commercial radio broadcasting licensees, the digital community radio broadcasting representative company and the national broadcasters (new subparagraph 102D(5)(a)(v)).
- where an initial share offering is not fully subscribed, provide that those persons who had subscribed for shares in response to the initial offer may subscribe for the remaining shares (new paragraph 102D(5)(b));
- there was no discrimination between subscribers for shares in relation to the consideration payable (new paragraph 102D(5)(d)) and, in aggregate, this consideration is not substantially in excess of the amount, as at the time of invitations, would be required for the commercially viable operation of the company (new paragraph 102D(5)(e)). It is intended that the consideration payable for a share will comprise the proportionate amount of the capital reasonably known at the time of inviting applications for shares for the commercially viable operation of the company. This should in no way constrain or otherwise affect the autonomy of the company to make decisions regarding the means by which the company meets any future obligations or raises additional capital. Further, the consideration payable for shares at issue is separate from any fees charged by a joint venture company to content service providers for access to multiplex capacity.

The Bill amends the licence conditions of community broadcasters to allow them to hold shares in the community broadcasting representative company and thus benefit from participation in the joint venture company (see item 95 of Schedule 1). The Bill provides that a national broadcaster may hold shares in a company that is the holder of a category 2 licence, is an applicant for a licence, or proposes to apply for a licence (new subsection 102D(8)).

A category 2 digital radio multiplex transmitter licence that is not a foundation category 2 digital radio multiplex transmitter licence cannot be issued otherwise than in accordance with a price-based allocation system determined under section 106 (subsection 102D(4)).

Item 161 ‘Category 3 digital radio multiplex transmitter licences’

Item 79 also inserts new section 102E, which prescribes the circumstances in which ACMA can issue a category 3 digital radio multiplex transmitter licence. ACMA must not issue a category 3 multiplex transmitter licence to a person unless that person is a qualified company (new subsection 102E(1)) and either each national broadcaster beneficially owns shares in the company (new paragraph 102E(1)(a)) or a single national broadcaster beneficially owns shares in the company and the other national broadcaster has consented to that ownership (new paragraph 102E(1)(b)).

Under new subsection 102E(2), unless there is already a category 3 digital radio multiplex transmitter licence for the designated BSA radio area, ACMA is required to issue a category 3 digital radio multiplex transmitter licence, provided that:

- a digital radio channel plan is in force in the designated BSA radio area; and
- a qualified company applies under section 99; and
- the requirements in paragraphs 102E(1)(a) or (b) are met.

The Bill provides that a national broadcaster may hold shares in a company that is the holder of a category 3 licence, is an applicant for a licence, or proposes to apply for a licence (new subsection 102E(3)).

Item 161 ‘Limit on issue of non-foundation digital radio multiplex transmitter licences’

Item 161 also inserts new section 102F, which requires that before ACMA issues any non-foundation digital radio multiplex transmitter licences it must first issue sufficient foundation digital radio multiplex transmitter licences (i.e. one or more) to provide sufficient multiplex transmitter capacity to meet the standards access entitlements of incumbent commercial radio broadcasters under subsection section 118NQ(2).

Items 162 and 163 make consequential amendments to section 103 of the Radcomms Act, which extend the operation of the section to digital radio multiplex transmitter licences. New subsection 103(6) provides that a digital radio multiplex transmitter licence remains in force for 15 years.

Items 164 and 165 make consequential amendments to subsections 107(3) and 108(5) respectively.

Item 166 ‘General licence conditions for digital radio multiplex transmitter licences’

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:

- compliance by the licensee (and persons authorised by the licensee to operate the multiplex) with the Radcomms Act (and licence conditions) (paragraphs 109B(1)(a) and (c));
- payment of charges and fees (paragraph 109B(1)(b));
- where a licence is for more than one multiplex transmitter, one must be used as the main transmitter and the other(s) as repeater transmitters (paragraph 109B(1)(d)). This provision is necessary for the definition of multiplex transmitter capacity in the access provisions;
- operation of the transmitter in accordance with the digital radio channel plan (paragraph 109B(1)(e));
- for category 1 licences, the provision of only licensed digital commercial or digital community radio broadcasting services for the BSA licence area concerned or licensed restricted datacasting services (paragraph 109B(1)(f));
- for category 2 licences, the provision of only licensed digital commercial or digital community radio broadcasting services for the BSA licence area concerned, digital national radio broadcasting services, or licensed restricted datacasting services (paragraph 109B(1)(g));
- for category 3 licences, the provision of digital national radio broadcasting services or restricted datacasting services provided by national broadcasters only (paragraph 109B(1)(h));
- for foundation category 1 and 2 digital radio multiplex transmitter licences, the commencement of digital commercial, digital community or digital national radio broadcasting services on the designated ‘digital radio start-up day’ and transmission of the services thereafter (paragraphs 109B(1)(i) and (j)). ACMA is given a power to specify, by legislative instrument, circumstances in which a digital radio multiplex transmitter licensee is taken to be transmitting a service (subsections 109B(6) and (7)). It is feasible that there may be circumstances where a licensee is legitimately unable to transmit a service, 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 or where the content provider has not provided the necessary content to fulfil the obligations. Proposed subsections 109B(6) and (7) would provide flexibility to deal with such circumstances by enabling ACMA to specify the circumstances in which a licensee is taken to be transmitting the appropriate service.

- transmission only using a digital modulation technique (paragraph 109B(1)(k));
- restriction of business activities to the operation of a multiplex transmitter and related activities (paragraph 109B(1)(l));
- compliance with technical specifications as specified in the digital radio channel plan (paragraph 109B(1)(m));
- compliance with technical planning guidelines developed by ACMA (paragraph 109B(1)(n));
- compliance with section 130AB technical standards and subsection 130V(1) industry standards (paragraphs 109B(o) and (p));
- 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, and there is a Ministerial power to direct ACMA in relation to implementation plan requirements (paragraphs 109B(1)(q) and (r) and subsections 109B(2), (3) and (4));
- if the licence is a category 3 licence, such other conditions as are 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).
- other conditions specified in the licence (paragraph 109B(1)(t)]. There is a Ministerial power to direct ACMA in this regard (subsections 109B(9) and (10)).

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 Schedule 1).

The powers under new paragraph 109B(1)(t) and new subsections 109B(9) and (10) and existing paragraph 111(1)(a) and new subsections 111(6) and (7) could be used in the future to impose rollout and coverage obligations on multiplex transmitter licensees.

Item 166 ‘Conditions of category 1 and category 2 digital radio multiplex transmitter licences access’

Item 166 also inserts new section 109C, which sets out conditions of category 1 and category 2 digital radio multiplex transmitter licences in relation to access arrangements.

The Bill establishes an access regime to address competition issues arising from the introduction of multiplex transmitter licences. Multiplex licensees have the potential to act as gatekeepers in accessing digital radio multiplex facilities in any market, with the power to set terms and conditions of access which may be unreasonable or discriminatory. The access regime established through Division 4B is designed to address this concern by providing for efficient, open and generally non-discriminatory access to digital radio multiplexes (see Item 172 of Schedule 1, new Division 4B).

Division 4B applies to category 1 and category 2 multiplex transmitter licences and new section 109C makes compliance with its requirements a licence condition for these licensees.

Category 1 and 2 multiplex transmitter licensees are subject to the following licence conditions related to access:

- the licensee, and each person authorised by the licensee, must comply with obligations under Division 4B of Part 3.3 of Chapter 3 of the Radcomms Act (which sets out the requirements for access undertakings, standards access, excess-capacity and distributed-capacity access obligations, and the capacity cap) (new paragraph 109C(1)(a));
- the licensee, and each person authorised by the licensee, must comply with an access undertaking in force under Division 4B (development of these access undertakings is also mandatory) (new paragraph 109C(1)(b));
- the licensee, and each person authorised by the licensee, must not provide access otherwise than in accordance with the standard, excess-capacity and distributed-capacity access obligations that are applicable in relation to that licence (new paragraphs 109C(1)(c)); and
- where a foundation digital radio multiplex transmitter licensee receives net proceeds from the allocation of excess-capacity access entitlements (under new subsection 118NT(6)) and the foundation digital radio multiplex transmitter licence was not allocated under a price-based system, those proceeds must be set aside in a separate account and may only be used to maintain that account, discharge a liability arising from the auction or to promote the digital radio broadcasting platform in Australia (new subsection 109C(2)).

The provisions relating to the net proceeds from the allocation of excess-capacity access entitlements ensure that foundation digital radio multiplex transmitter licensees do not profit from the allocation of access capacity as a result of the issue of a licence

for which they were not charged, other than by way of an administrative fee. They also encourage promotion of digital radio.

Item 166 – ‘conditions of foundation digital radio multiplex transmitter licences – ownership of shares in licensee

New s109D provides that, during the moratorium, a holder of a foundation digital radio multiplex transmitter licence in a designated BSA radio area which was not allocated by price-based system must take all reasonable steps to ensure that a person does not hold share in the licensee unless the person is a digital radio commercial broadcasting licensee for that area, or the digital radio community broadcasting representative company for that area, the holder of a commercial radio broadcasting licence allocated in accordance with subsection 35D(3) of the *Broadcasting Services Act 1992*, or if it is a category 2 multiplex licence, a national broadcaster.

Item 167 makes a consequential amendment to section 110.

Item 168 and 169 amend section 111 of the Radcomms Act to enable ACMA to vary or revoke a condition relating to a multiplex transmitter licence made under 109B(1)(t) (paragraph 111(1)(c)), and to enable the Minister to direct ACMA in relation to these powers (new subsections 111(6) and (7) of the Radcomms Act).

Items 170 and 171 amend section 114 of the Radcomms Act, to require that, in the case of digital radio multiplex transmitter licences, third party authorisations can only be given to qualified companies.

Item 172 ‘Division 4B – Access to digital radio multiplex transmitter licences’

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 is require to comply with access obligations are 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.

Depending on the licence type, the terms and conditions for access will relate to one, or to a combination, of the following access types: ‘standard access’, ‘excess-capacity access’ and/or ‘distributed capacity access’.

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. 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.

New section 118NB inserts into the Radcomms Act definitions that are used in Division 4B, including definitions for the different types of multiplex capacity that can be provided under the different types of multiplex transmitter licences (i.e. ‘standard access’ entitlements and obligations, ‘excess-capacity access’ entitlements and obligations and/or ‘distributed capacity access’ entitlements and obligations).

The term ‘multiplex capacity’ is defined, in relation to a digital radio multiplex transmitter licence, to mean the gross transmission capacity of a single digital radio multiplex transmitter (and the gross transmission capacity of a single digital radio multiplex transmitter and one or more repeater multiplex transmitters if the licence is for a main multiplex transmitter and one or more repeater multiplex transmitters) that is available for the transmission of content services, including the capacity to provide error protection for those services.

The inclusion of error protection for content services affords content service providers the flexibility to decide on the ‘ruggedness’ of their service or services. Typically, there is trade-off between the level of error protection applied to a service and the data throughput available for audio quality or additional services. This definition of multiplex capacity excludes the capacity used to describe the multiplex configuration, information about the programs and services carried on the multiplex, and error protection associated with this information.

New section 118NC provides that national broadcasters are taken to be entitled to provide digital national radio broadcasting services in each designated BSA radio area.

Access undertakings

The Division contains provisions that describe the essential features of access undertakings (section 118ND), the process and criteria for acceptance or rejection of an access undertaking by the ACCC (sections 118NE, 118NF), the variation of an access undertaking that is in force (section 118NH) and the rights to enforce access undertakings in the Federal Court (sections 118NZ and 118P).

New section 118P will impose a requirement on category 1 and category 2 digital radio multiplex transmitter licensees to submit an access undertaking to the ACCC within three months after the issue of the licence.

The access undertaking is an undertaking that any holder of the licence or person authorised to use the licence will comply with the access obligations provided for in the undertaking in relation to ‘standard access’, ‘excess-capacity access’ and ‘distributed capacity access’ (section 118ND(1)). This access must be provided on terms and conditions provided for by the access undertaking (section 118ND(1)(e)-(g)). The terms and conditions may include, for example, the price of access to multiplex capacity.

Subsection 118ND(2) provides that the undertaking must be in a form approved by the ACCC. In this context, the word 'form' refers to the format of the undertaking document rather than the form of access.

The undertaking must be submitted within 3 months after the issue of the digital radio multiplex transmitter licence and must be accompanied by an administrative fee (if a fee is specified in the Procedural rules). The undertaking must be without limitations or subject to limitations specified in the undertaking (subsections 118ND(1), (3) and (4)).

New section 118NE will provide for the ACCC to request the applicant to provide further information about the undertaking. The ACCC may refuse to consider the undertaking until the information is provided. If provided for in procedural rules, the ACCC may reject an undertaking if the information is not given within a time limit. Subsection 118NE(6) provides that information obtained under this section will be subject to the same confidentiality provisions that apply to information obtained by the ACCC under Part XIB or XIC of the *Trade Practices Act 1974*. Subsection 118NE(6) will be repealed at the commencement of Schedule 2 to this Bill (see Clause 2).

New section 118NE provides that the ACCC may accept or reject an undertaking. This decision will be governed by any criteria made by the ACCC by legislative instrument under new section 118NJ. Before deciding to accept or reject an undertaking, the ACCC must conduct a public consultation process. If the ACCC rejects an undertaking, it will be able to specify alterations to the undertaking that, if made by the licensee, would lead to the ACCC's acceptance of the undertaking (section 118NF(4)) or, by written notice to the licensee, determine that an undertaking in the terms specified in the determination is the access undertaking in relation to the licence (section 118NF(5)). Any decision to reject an undertaking under section 118NF(2) or to determine a new undertaking under section 118NF(5) is subject to review by the Australian Competition Tribunal (ACT) (see new section 118PE). Before determining an undertaking under section 118NF(5) the ACCC must undertake public consultation (subsection 118NF(6)). The ACCC must notify licensees of its decisions (sections 118(7) and (8)).

New section 118NG specifies the period that an undertaking remains in force. An undertaking comes into force at the time of acceptance or determination of the undertaking by the ACCC. It continues in force while the licence is in force, although it is suspended for any period that the licence itself is suspended (new subsections 118NG(1) and (2)). An undertaking also continues in effect in the same way if the licence is transferred to another person (subsection 118NG(3)). Where a licence is renewed, the undertaking continues to apply to the renewed licence in the same way that it applied to the original licence (subsection 118NG(4)). Variations can be made in situations where licences are transferred or renewed.

New section 118NH provides that the licensee may elect to give the ACCC a variation of an undertaking and must provide a variation if required to do so by the ACCC. The section provides that the ACCC may accept or reject a variation of an undertaking proposed by a licensee. The decision will be governed by any criteria made by the ACCC by legislative instrument under new section 118NJ. Before deciding to accept or reject a variation, the ACCC must conduct a public consultation

process. If the ACCC decides to reject a variation, it will be able to specify alterations to the variation that, if made by the licensee, would lead to the ACCC's acceptance of the variation (see section 118NH(6)), or it may, by notice in writing vary the access undertaking). Any decision to reject a variation under section 118NH(3) or to determine a new undertaking under section 118NH(6) is subject to review by the Australian Competition Tribunal (ACT) (see new section 118PE). Before determining a variation under section 118NH(7) the ACCC must undertake public consultation (subsection 118NF(7)). The ACCC must notify licensees of its decisions (sections 118NH(8) and (9)).

Subsections 118NH(10),(11) and (12) set out the circumstances in which a licensee is required to give a variation. The ACCC can require a variation to be made to the undertaking, but it may not require a licensee to provide a variation before 1 January 2015. This date is a year after the statutory review of access arrangements provided for under section 313B. It would be appropriate to revisit access undertakings at this time to ensure they reflect any changes arising from the review. At and after that date, the ACCC can require a variation every 5 years where the ACCC is satisfied that the undertaking would be rejected if it were given to the ACCC at that time. The ACCC also has the power to vary an access undertaking where a requested variation is not accepted, subject to a public consultation requirement. Such a decision is also subject to public consultation requirements and review by the ACT.

The ability for the ACCC to require a variation has been included to address the potential for an undertaking to become outdated and ineffective over the extended life of the undertaking i.e.15 years on allocation, and longer if a foundation digital radio multiplex transmitter licence is renewed (see Item 162). The limits as to when the ACCC can require a variation are considered necessary because an open-ended power would introduce an element of uncertainty in the regulation of multiplex operations.

New section 118NI provides for the ACCC to request the applicant to provide further information about the proposed variation. If provided for in procedural rules, the ACCC may reject an undertaking if the information is not given within a time limit. The ACCC may refuse to consider the variation until the information is provided. Subsection 118NI(6) provides that information obtained under this section will be subject to the same confidentiality provisions that apply to information obtained by the ACCC under Part XIB or XIC of the *Trade Practices Act 1974*. Subsection 118NI(6) will be repealed at the commencement of Schedule 2 to this Bill (see Clause 2).

New section 118NJ provides for the ACCC to determine, by legislative instrument, criteria that it must apply in its decisions whether or not to accept an access undertaking or a variation of an access undertaking.

New section 118NK requires the ACCC to keep a register of all access undertakings that are in force. This includes any undertaking currently varied under section 118NI. The register must be made available for inspection on the Internet.

Subdivision C – Standard access obligations, excess-capacity access obligations and distributed-capacity access obligations

New subdivision C includes new sections 118NL to 118NU which contain definitions used in Division 4B.

New section 118NL sets out the ‘standard access obligations’. A digital radio multiplex transmitter licensee must give a content service provider that has a ‘standard access entitlement’ in relation to a fraction of multiplex capacity under a digital radio multiplex transmitter licence, access to that multiplex capacity and to services that facilitate the use of that capacity. The licensee is not required to comply with the obligation unless or until an access undertaking is in force in relation to the licence.

New section 118NM sets out the ‘excess-capacity access obligations’. A digital radio multiplex transmitter licensee must give a content service provider that has an ‘excess capacity entitlement’ in relation to a fraction of multiplex capacity under a digital radio multiplex transmitter licence, access to that multiplex capacity and to services that facilitate the use of that capacity. The licensee is not required to comply with the obligation unless or until an access undertaking is in force in relation to the licence.

New section 118NN sets out the ‘distributed-capacity access obligation’. A digital radio multiplex transmitter licensee must give a content service provider that has an ‘distributed-capacity access entitlement’ in relation to a fraction of multiplex capacity under a digital radio multiplex transmitter licence, access to that multiplex capacity and to services that facilitate the use of that capacity. The licensee is not required to comply with the obligation unless or until an access undertaking is in force in relation to the licence.

New section 118N0 imposes on a digital radio multiplex transmitter licensee the obligation to comply with any access obligations as set out in sections 118NL, 118NM and 118NN that are applicable to the digital radio multiplex transmitter licence on such terms and conditions as are ascertained in accordance with an access undertaking in force in relation to the licence.

New section 118NP imposes on digital radio multiplex transmitter licensees an obligation not to discriminate between content service providers who have access to multiplex capacity under the digital radio multiplex transmitter licence, in relation to the technical and operational quality of services supplied, and the technical and operational quality of fault detection, handling and rectification processes.

New section 118NQ ‘standard access entitlements of commercial broadcasters’

An incumbent digital commercial radio broadcasting licensee may claim, via written notice given to a foundation digital radio multiplex transmitter license and within 30 days of the allocation of the foundation licence, access to one ninth of the multiplex capacity under that licence (called a ‘standard access entitlement’) (subsection 118NQ(2)). The incumbent digital commercial radio broadcasting licensee may only use the ‘standard access entitlement’ to provide one or more digital commercial radio broadcasting services in the designated BSA radio area (paragraph 118NQ(2)(b)).

The right can only be claimed in relation to one multiplex in a licence area (subsection 118NQ(5)). A digital commercial radio broadcasting licensee may only use a standard access entitlement for the purpose of providing, under the digital

commercial radio broadcasting licence, one or more digital commercial radio broadcasting services in the designated BSA radio area (paragraph 118NQ(2)(d) and subparagraph 118NQ(7)(d)(ii)).

Digital radio multiplex transmitter licensees must notify the ACCC within 7 days when they receive a notice claiming an entitlement (subsection 118NQ(4)). Subsection 118NQ(6) provides for the ACCC to determine that a subsection (2) notice claiming access to a foundation digital radio multiplex is cancelled in relation to that multiplex transmitter and has effect in relation to another foundation digital radio multiplex transmitter, if the multiplex transmitter in relation to which the application was made cannot accommodate the request for capacity, taking into account prior claims for standard access entitlements and capacity reserved for designated community broadcasters under section 118NR(2) and national broadcasters under subsection 118NS(2). This subsection will provide a means of resolving a situation where the majority of commercial broadcasters in a market decide to exercise their entitlements on the one multiplex and there is insufficient capacity to accommodate them all.

Commercial broadcasters' rights to exercise their standard access entitlements in relation to a particular multiplex are also limited by the entitlements of community radio broadcasters and national broadcasters and the capacity cap (subsections 118NR, 118NS and 118NV).

An incumbent digital commercial radio broadcasting licensee cannot transfer its standard access entitlement (paragraph 118NQ(2)(e)). If a licensee holds a standard access entitlement and loses its digital commercial radio broadcasting licence under subsection 35D(2) of the BSA, the standard access entitlement is transferred to ACMA and then to the replacement licensee (where a new digital commercial radio broadcasting licence is issued under BSA 35D(3)) (subsection 118NQ(7)).

In some licence areas commercial broadcasting licensees may hold more than one commercial radio broadcasting licence for that area. There would be standard access entitlements for each of those licences. For example, if Licensee X held two licences (X1 and X2) and licensee Y held two licences (Y1 and Y2), there would be four standard access entitlements in total, one for the licensee of X1, one of the licensee of X2 (even though they may be the same person), one for the licensee of Y1 and one for the licensee of Y2.

New section 118NR 'Standard access entitlements of community broadcasters'

New subsection 118NR(2) provides that two-ninths of multiplex capacity under a foundation digital radio multiplex transmitter licence is reserved for digital community radio broadcasting licensees nominated in accordance with subsections 118NR(3), (7) or (10).

To access this reserved capacity, digital radio community broadcasting licensees will need to be nominated by the community broadcasting representative company for the licence area (see Item 146 of Schedule 1). The fraction of reserved multiplex capacity which a licensee may use will vary in accordance with the approach adopted by the representative company, which will be given effect by the type of notice given to the

multiplex licensee by the company. A notice may be given under subsections 118NR(3), (7) or (10).

In a notice given under section **118NR(3)**, the representative company may determine what fraction of multiplex capacity each nominated broadcaster is to use. The fractions nominated cannot exceed the total of the capacity reserved for community radio broadcasters (section 118NR(4)). As a default option, where a notice does not specify fractions for each nominated broadcaster, the Bill provides that the available capacity is to be distributed evenly between the nominated licenses (subsections 118NR(7) and (8)). This provision is intended to apply if the representative company is unable to come to an agreement on the multiplex capacity nominated for each licensee. Where only one broadcaster is nominated, the Bill provides that the broadcaster is entitled to half of the multiplex capacity reserved for community radio broadcasters (that is, the single nominee would be entitled to access one-ninth of the total multiplex capacity) (subsection 118NR(10)). These provisions require that a nominated licensee may only use that standard access entitlement for the purpose of providing, under the digital community radio broadcasting licence, one or more digital community radio broadcasting services in the designated BSA radio area (paragraphs 118NR(3)(d), (7)(d) and (10)(d)).

A representative company may give a multiplex licensee only one section 118NR notice at a time (subsections 118NR(6), (9) and (13)) and it cannot vary that notice (subsection 118NR(17)). However the company may give another notice if it is accompanied by a notice revoking the first notice. The use of a notice under one subsection does not prevent the company using a notice under a different subsection on a later occasion (subsections 118NR(11), (12) and (14) to (16)).

To ensure that the entitlements remain available for community broadcasting services, licensees will be prevented from transferring the standard access entitlement (subparagraphs 118NR(3)(e), (7)(e) and (10)(e)).

New subsection 118NR(18) provides that a licensee can only be nominated once in its designated BSA area.

New section 118NS ‘Standard access entitlements of national broadcasters’

The national broadcasters are each entitled to access one ninth of the multiplex capacity of a foundation category 2 digital radio multiplex transmitter licence (a standard access entitlement) (subsection 118NS(2)). A national broadcaster may transfer this entitlement only to another national broadcaster (paragraph 118NS(2)(c)). The standard access entitlement may only be used for the purpose of providing one or more digital national radio broadcasting services in the designated BSA radio area (paragraph 118NS(2)(b)).

New section 118NT relates to ‘*excess capacity entitlements*’

In each market, there is likely to be an amount of capacity on each foundation multiplex that is in excess of the standard access entitlements. To ensure this excess capacity is distributed in an equitable manner, the Bill establishes a process that must be followed for the distribution of excess capacity.

Subsection 118NT(1) provides that excess multiplex capacity in relation to a foundation digital radio multiplex transmitter licence exists where the capacity available under the digital radio multiplex transmitter licence exceeds the aggregate of the *standard access entitlements* arising under subsection 118NQ(2) (commercial broadcaster standard access entitlements) and subsection 118NS(2) (national broadcaster standard access entitlements in relation to category 2 multiplexes) and the capacity reserved under subsection 118NR(2) for community broadcasters. The assessment of demand for excess multiplex capacity and the establishment of excess capacity entitlements is provided for on the digital start-up day for the area, or at any time after the 12-month period beginning on the digital start-up day for the area. This provides for an initial assessment of excess multiplex capacity and for subsequent assessments after 12 months if necessary.

Under new subsection 118NT(2), 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* under subsections 118NQ(2) and 118NS(2) and the capacity reserved under subsection 118NR(2), 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. 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 (paragraph 118 NT(2)(b)).

Subsection 118NT(3) provides that, if at any time after the 12-month period beginning on the digital start-up day for the area, the multiplex capacity available under the digital radio multiplex transmitter licence exceeds the aggregate of the *standard access entitlements* under subsections 118NQ(2) and 118NR(2) and the capacity reserved under subsection 118NS(2), the digital radio multiplex transmitter licensee may 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. If the multiplex licensee proposes to assess demand for this excess multiplex capacity, they must give at least 30 days notice and invite expressions of interest (paragraph 118NT(3)(b)).

Subsection 118NT(4) provides that if the demand for access to the excess capacity, as ascertained under subsections either subsections 118NT(2) or (3), falls short of the actual excess multiplex capacity, each interested content service provider is entitled to access to the fraction of multiplex capacity sought by the interested content service provider. This entitlement is called an '*excess-capacity access entitlement*'. Such entitlements can be transferred but may only be used for provision of content services by providers entitled to provide content services to the designated BSA radio area.

Subsection 118NT(5) provides that access to the 'excess-capacity access entitlement' commences thirty days after the demand for excess capacity was ascertained or at an earlier time if agreed to by the digital radio multiplex transmitter licensee.

Subsection 118NT(6) provides that, if the demand for access to the excess multiplex capacity, as ascertained under subsections either subsection 118NT(2) or (3), is greater

than the excess multiplex capacity, an auction process must be used to determine which content service providers are to have access to which fractions of multiplex capacity. This process must be completed within sixty days from the day on which the demand from interested content service providers is ascertained (paragraph 118NT(6)(b)).

Subsection 118NT(7) provides that a content service provider is entitled to access to that fraction of the multiplex capacity as is allocated to it under the auction process in subsection 118NT(6) (which entitlement is called an ‘excess-capacity access entitlement’). Such entitlements can be transferred but may only be used for provision of content services by providers entitled to provide content services to the designated BSA radio area.

Subsection 118NT(8) provides that the ‘*excess-capacity access entitlement*’ referred to in subsection (7) commences thirty days after the auction process referred to in subsection (6) is completed, or an earlier time if agree to by the multiplex licensee. The subsection (6) auction process is completed when the content service provider makes the relevant auction payment (subsection 118NT(9)).

An excess-capacity access entitlement may be transferred (paragraphs 118NT(4)(c) and (7)(c)) and in the circumstances prescribed in subsection 118NT(10), further transferred or successively transferred (subsection 118NT(10)).

The total fraction of multiplex capacity that can be obtained by digital commercial radio broadcasting licensees as standard access entitlements, excess capacity access entitlements and distributed-capacity access entitlements is limited by section 118NV.

If the digital radio multiplex transmitter licensee receives the net proceeds from an auction of excess capacity under subsection 118NT(6), and the licence is a foundation digital radio multiplex transmitter licence that was not allocated under a price-based system, those proceeds must be set aside in a separate account and may only be used to maintain that account, discharge liabilities arising from the auction or to promote the digital radio broadcasting platform in Australia (new subsection 109C(2), Item 166 of Schedule 1).

New section 118NU relates to ‘*distributed capacity access entitlements*’

This new section establishes a process for the distribution of multiplex capacity on non-foundation digital radio multiplex transmitter licences. The provision parallels section 118NU. However, these licences will not be subject to standard access entitlements, therefore, the provisions deal with multiplex capacity in general terms, rather than in terms of that capacity that is in excess of standard access entitlements.

New subsection 118NU(2) requires that before commencing to transmit a content service, the digital radio multiplex licensee must ascertain the level of demand, giving at least thirty days notice of the digital radio multiplex transmitter licensee’s intention ascertain demand and inviting expressions of interest. The digital radio multiplex transmitter licensee may repeat this process at any time after this initial assessment (subsection 118NU(3)).

Subsection 118NU(4) provides that if the demand for access to the multiplex capacity falls short of the actual multiplex capacity, each interested content service provider is entitled to access to the fraction of multiplex capacity sought by the interested content service provider. This entitlement is called a '*distributed-capacity access entitlement*'. Such entitlements can be transferred but may only be used for provision of content services by providers entitled to provide content services to the designated BSA radio area.

Subsection 118NU(5) provides that access to the 'distributed-capacity access entitlement' commences thirty days after the demand for multiplex capacity was ascertained or at an earlier time if agreed to by the digital radio multiplex transmitter licensee.

Subsection 118NU(6) provides that, if the demand for access to the multiplex capacity is greater than the multiplex capacity, an auction process must be used to determine which content service providers are to have access to which fractions of multiplex capacity. This process must be completed within sixty days from the day on which the demand from interested content service providers is ascertained (paragraph 118NU(6)(b)).

Subsection 118NU(7) provides that a content service provider is entitled to access to that fraction of the multiplex capacity as is allocated to it under the auction process in subsection 118NU(6) (which entitlement is called a '*distributed-capacity access entitlement*'). Such entitlements can be transferred but may only be used for provision of content services by providers entitled to provide content services to the designated BSA radio area.

Subsection 118NU(8) provides that the 'distributed-capacity access entitlement' referred to in subsection (7) commences thirty days after the auction process referred to in subsection (6) is completed, or an earlier time if agree to by the multiplex licensee. The subsection (6) auction process is completed when the content service provider makes the relevant auction payment (subsection 118NU(9)).

A distributed-capacity access entitlement may be transferred (paragraphs 118NU(4)(c) and (7)(c)) and in the circumstances prescribed in subsection 118NU(10), further transferred or successively transferred (subsection 118NU(10)).

The total fraction of multiplex capacity that can be obtained by digital commercial radio broadcasting licensees as distributed-capacity access entitlements, standard access entitlements and excess capacity access entitlements is limited by section 118NV.

New Section 118NV 'Capacity cap—digital commercial radio broadcasting licensees'

The arrangements for the distribution of multiplex capacity to digital commercial radio broadcasting licences provided for in sections 118NQ, 118NT and 118NU are subject to the capacity cap set out in this section.

Subsection 118NV(1) provides that where there is only one digital radio multiplex transmitter licence for a designated BSA radio area, a digital commercial radio

broadcasting licensee cannot access more than two-ninths of multiplex capacity under the digital radio multiplex transmitter licence.

Subsection 118NV(2) provides that where there are two or more digital radio multiplex transmitter licences for a designated BSA radio area, a digital commercial radio broadcasting licensee cannot access more than the designated fraction of the total multiplex capacities under those digital radio multiplex transmitter licences.

Subsection 118NV(3) defines ‘designated fraction’ for the purposes of section 118NV. This fraction of the total multiplex capacities of the digital radio multiplex transmitter licences is equivalent to two-ninths of the capacity of any one digital radio multiplex in the licence area. This means that any one digital commercial radio broadcasting licensee is not entitled to access more than a total of two-ninths of multiplex capacity (or approximately 256kbps capacity) in any designated BSA radio area regardless of how many digital radio multiplex transmitter licences are issued for that area.

New section 118NW ‘Suspension of access entitlements’

This section provides that standard access entitlements, excess-capacity access entitlements and distributed-capacity access entitlements will be suspended if the digital radio multiplex transmitter licence to which each relates is suspended.

New section 118NX ‘Transfer of digital radio multiplex transmitter licence’

Category 1 and 2 digital radio multiplex transmitter licences can only be transferred to a person who is a qualified company and where an access undertaking is in force under Division 4B of the Radcomms Act. A category 3 digital radio multiplex transmitter licence can only be transferred to a person who is a qualified company and where the shares in that company are beneficially owned by a national broadcaster or broadcasters. A digital radio multiplex transmitter licence that was not issued under a price-based allocation cannot be transferred during the moratorium period (Item 175 of Schedule 1).

New section 118NX provides that the transfer of a digital radio multiplex transmitter licence does not affect the continuity of a standard access entitlement, excess capacity entitlement or distributed-capacity access entitlement applicable in relation to the licence. Nor does the transfer of a digital radio multiplex transmitter licence prevent the transfer of an access entitlement.

New section 118NY ‘Renewal of digital radio multiplex transmitter licence’

New section 118NY provides that the renewal of a digital radio multiplex transmitter licence does not affect the continuity of a standard access entitlement, excess capacity entitlement or distributed-capacity access entitlement applicable in relation to the licence. Nor does the renewal of a digital radio multiplex transmitter licence prevent the transfer of an access entitlement.

New section 118NZ ‘Judicial enforcement of access obligations etc.’

Under this new provision, if the ACCC or a person whose interests are affected believes that a multiplex transmitter operator has contravened any standard, excess-

capacity or distributed-capacity access obligations or other obligations under new section 118NP that are applicable to the digital radio multiplex transmitter licence, they can apply to the Federal Court for an order (new section 118NZ).

If the Federal Court is satisfied that a person has contravened an obligation, the court may make:

- an order directing the person to comply with the obligation (paragraph 118NZ(1)(g));
- an order directing the person to compensate any other party who has suffered loss of damage as a result of the contravention (paragraph 118NZ(1)(h)); or
- any other order that the Court thinks is appropriate (paragraph 118NZ(1)(i)).

New section 118P ‘Enforcement of access undertakings’

If an undertaking is in force in relation to a digital radio multiplex transmitter licence, the ACCC, or a person whose interests are affected by an undertaking, believes that a third party has breached the access undertaking, they may apply to the Federal Court for an order.

If the Federal Court is satisfied that a person has breached the undertaking, the court may make:

- an order directing the person to comply with the undertaking;
- an order directing the person to compensate any other party who has suffered loss of damage as a result of the breach; or
- any other order that the Court thinks is appropriate.

New sections 118PA, 118PB, 118PC and 118PD ‘ External audits’

Where an undertaking is in force, and the ACCC has reasonable grounds to suspect that the digital radio multiplex transmitter licensee has breached, is breaching, or proposes to breach an undertaking or obligation, the ACCC may, by notice, require a person to initiate an external audit of their compliance with:

- the undertaking;
- the standard, excess-capacity or distributed-capacity access obligations that apply to the licence; or
- the obligations not to discriminate between content service providers as to the quality of services supplied.

The external auditor’s report is to be given to the ACCC.

The external auditor may not be an officer, employee or agent of the multiplex licensee, or a person or company in a position to exercise control of the digital radio multiplex transmitter licence (subsection 118PB).

In carrying out an audit, an auditor may have regard to the results of a previous audit conducted within the preceding two years (section 118PC)

The ACCC may authorise a specified individual to be an external auditor (section 118PD).

Subdivision F ‘Review of ACCC decisions relating to undertakings’

A person whose interests are affected by a decision to accept or reject an undertaking or a variation of an undertaking may apply to the Australian Competition Tribunal (ACT) for a review of the decision (section 118PE).

In the case of an access undertaking, the ACT may:

- affirm the ACCC’s decision (paragraph 118PF(1)(a));
- in the case of an ACCC decision to accept an undertaking, set aside the ACCC’s decision (paragraph 118PF(1)(b));
- in the case of an ACCC decision to reject an undertaking, set aside the ACCC’s decision and accept the undertaking (paragraph 118PF(1)(c)); or
- in the case of an ACCC decision to reject an undertaking and determine an undertaking in its stead, set aside the decision, or set aside the decision and make a new determination (paragraphs 118PF(1)(d) and (e)).

In the case of a variation to an undertaking, the ACT may:

- in the case of an ACCC decision to accept a variation, set aside the ACCC’s decision (paragraph 118PF(1)(f)); or
- in the case of an ACCC decision to reject a variation, set aside the ACCC’s decision and accept the variation (paragraph 118PF(1)(g)); or
- in the case of an ACCC decision to determine a variation to an undertaking, set aside the decision, or set aside the decision and make a new determination (paragraph 118PF(1)(h) and (i)).

In a review process, the ACT may require the ACCC to give relevant information and other assistance to the ACT (subsection 118PF(3)). The ACT may only have regard to certain information (subsection 118PF(4)).

If, within 6 months of receiving an application for review, the ACT has not made a decision, the ACT is taken to have set aside the ACCC’s decisions, and where the

ACCC's decision was to reject the undertaking of variation, the ACT is taken to have accepted the undertaking or variation (subsection 118PF(5)).

However, the ACT may, by notice to the applicant, extend the 6 month review period for a further 3 months. The notice must be accompanied by a statement explaining the reasons why the ACT has been unable to make a decision within the 6 months (subsection 118PF(6)).

Subdivision G 'Injunctions'

The ACCC will be able to apply to the Federal Court for an injunction where a digital radio multiplex transmitter licensee is engaging, or proposing to engage in any conduct in contravention of the access regime or otherwise will not comply with the regime under Division 4B. The Federal Court may grant injunctions restraining a person from engaging in conduct, or if it considers it desirable to do so, requiring certain actions (new section 118PI).

The Federal Court will also be able to grant interim injunctions and may vary or discharge an injunction (sections 118PJ and 118PK).

New section 118PL clarifies circumstances in which the Federal Court may issue restraining or performance injunctions in relation to this Division.

Subdivision H – Miscellaneous

New section 118PN Annual reports

The digital radio multiplex transmitter licensee is required, within 60 days of the end of the financial year, to give the ACCC a report about matters as specified in the procedural rules and which relate to compliance with the:

- access undertaking;
- standard, excess-capacity and distributed-capacity access obligations; or
- obligations not to discriminate between content service providers as to the quality of services supplied

during that financial year (section 118PN).

New section 118PQ Procedural Rules

The Bill provides the ACCC with the capacity to make rules, by legislative instrument, in relation to the practice and procedure to be followed by the by the Commission in performing its functions or exercising powers under the access regime (section 118PQ).

These rules may relate to: the confidentiality of information given to the ACCC; the form and content of access undertakings, variations or other documents; the giving of information by the ACCC to ACMA; or the giving of information by ACMA to the ACCC (subsection 118PQ(3)). The rules may also make provision for ACCC to make decisions of an administrative character (118PQ(4)).

These rules may also provide for the ACCC to refuse to consider an undertaking if the Commission is satisfied that it is frivolous, vexatious or was not given in good faith,

or was given for the purpose of frustrating or undermining the effective administration of this Division (subsection 118PQ(5)).

New section 118PP Constitutional safety net

This provision is a constitutional safeguard which ensures that if the access regime results in the acquisition of property other than on just terms the Commonwealth is liable for compensation. This can be pursued through the Federal Court where the Commonwealth and affected parties cannot agree.

Division 4C – Access to broadcasting transmission towers etc. by digital radio multiplex transmitter licensees and authorised persons

Division 4C introduces an access regime for access to infrastructure modelled on the transmitter access regime in Part 5 of Schedule 4 to the BSA.

The owner or operator of broadcasting transmitter infrastructure including towers (section 118QD), designated associated facilities (section 118QE) and the site of the tower (section 118QF) must provide digital radio multiplex transmitter licensees or persons authorised by the licensee under section 114 with access to that infrastructure. (A designated associated facility is an antenna, combiner, feeder system or facility specified in the regulations which is associated with a transmitter and where the facility is able to be used to transmit a digital commercial, community or national radio broadcasting service or a restricted datacasting service (section 118QB).

This access is to be granted to:

- allow the access seeker to install or maintain a multiplex transmitter or associated facilities; or
- to use designated associated facilities or services provided by them.

The access seeker must give reasonable notice and the access transmitter or facilities are to be used in connection with transmission of designated content services (subsections 118QD(2), 118QE(2) and 118QF(2)). Access is not required to give access if this is not technically feasible and ACMA may have regard to specified factors in determining whether access is technically feasible (subsections 118QD(3) to (5), 118QE(3) to (5) and 118QF(3) to (5)). Regulations can be made in relation to access to designated associated facilities (subsections 118QE(7) and (8)).

Access to transmission tower sites is conditional on the owner of the tower having rights to use the site (paragraph 118QF(1)(d)).

Terms and conditions of access are to be agreed between the owner/operator of the infrastructure and the access seeker. Where agreement cannot be reached, terms and conditions should be determined by an arbitrator appointed by the parties. The ACCC will arbitrate where parties cannot jointly agree to an arbitrator. Owners and operators of towers and facilities must abide by these terms and conditions. Regulations may be made in relation to the conduct of arbitration (section 118QG).

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. Access seekers and owners and operators of towers and facilities must comply with the code (section 118QH).

New section 118QI is a constitutional safeguard provision which provides that a provision in Division 4C that authorises the conduct of an arbitration has no effect to the extent that it would be invalid because of paragraph 51(xxxi) of the Constitution.

New section 118QJ excludes an access seeker who is seeking access to a broadcasting transmission tower or a site from the operation of Part 3 of the *National Transmission Network Sale Act 1998*.

Item 173 makes a consequential amendment to section 129(1), which extends the application of that section to non-foundation digital radio multiplex transmitter licences. This means that non-foundation digital radio multiplex transmitter licensees are not able to apply for licence renewal and their duration is limited to 15 years.

Item 174 makes a consequential amendment to subsection 131(1).

Item 175 inserts new subsections into 131AA which set out the circumstances in which digital radio multiplex transmitter licences can be transferred. Category 1 and 2 digital radio multiplex transmitter licences can only be transferred to a person who is a qualified company and where an access undertaking is in force under Division 4B of the RCA. A category 3 digital radio multiplex transmitter licence can only be transferred to a person who is a qualified company and where each national broadcaster beneficially owns shares in the company, or where one national broadcaster beneficially owns shares in the company and the other national broadcaster has consented. A foundation digital radio multiplex transmitter licence issued otherwise than in accordance with a price-based allocation system determined under section 106 must not be transferred to a person unless the digital radio moratorium period for the designated BSA radio area concerned has ended (new subsections 131AA(5)-(8)).

Item 176 makes a consequential amendment to paragraph 285(f) of the Radcomms Act, to provide that licence conditions made by ACMA under paragraph 109B(t) are administrative decisions subject to internal review and to review by the AAT.

Item 177 inserts section 313B. This section and new section 215B of the BSA provide for review by the Minister of the digital radio regulatory regime.

Under new section 313B, the Minister is required to cause to be conducted, before 1 January 2014, a review of the matters relating to the digital radio framework, including:

- the use of spectrum for the transmission of digital radio broadcasting services and restricted datacasting services (paragraph 313B(1)(a));
- the availability of additional frequency channels for the transmission of digital radio and restricted datacasting services (paragraph 313B(1)(b));

- the operation of the Radcomms Act in relation to digital radio (paragraph 313B(1)(c));
- the operation of the access regimes in Division 4A and 4B of the Radcomms Act, and whether either of these division should be repealed (paragraph 313B(1)(e)).

The Minister must cause a report of the review to be tabled in each House of Parliament within 15 sitting days after the completion of the report (subsections 313B(2) and (3)).

Items 178 – 182 amend section 155 of the Trade Practices Act 1974 (TPA)

Section 155 of the TPA relates to the ACCC's powers to obtain information, documents and evidence. Item 86 amends subsection 155(1) to extend the operation of section 155 to enable the ACCC to obtain information relating to a contravention of Division 4A or 4B of the Radcomms Act.

Item 87 amends subsection 155(1), replacing 'telecommunications' with 'communications', to enable the ACCC to obtain information relevant to a 'designated communications matter'.

Item 87A amends paragraph 155(7)(b). Subsection 155(7) overrides the privilege against self incrimination in relation to the furnishing of documents by a person to the ACCC under section 155(1). Therefore, a person will not be able to rely on the privilege against self incrimination if requested to provide to the ACCC documents relating to a contravention of Division 4A and 4B or information relevant to a 'designated communications matter'. Subsection 155(7) prescribes circumstances in which the information provided to the ACCC under section 155 is not admissible in evidence against the person providing the information. New paragraph 155(7)(b) extends these circumstances, in the case of a body corporate, to include proceedings under section 113 of the Radcomms Act that relate to a condition set out in paragraph 109A(1)(ij) or 109C(1)(a),(b) or (c) of that Act.

Item 88 amends subsection 155(9), to replace 'designated telecommunications matter' with 'designated communications matter'.

Item 89 inserts new paragraph 155(9)(d) into the definition of 'designated communications matter' in subsection 155(9). The new paragraph provides that Division 4A and Division 4B of the Radcomms Act are 'designated communications matters' for the purposes of section 155.

Part 2 – Transitional provisions

Item 183 Frequency allotment plan prepared under section 25 of the *Broadcasting Services Act 1992*

The provision clarifies that the amendments made by Schedule 1 of this Act to section 25 of the BSA and section 31 of the Radcomms Act do not affect the continuity of the frequency allotment plan.

Item 184 Instrument made under subsection 31(1) of the Radiocommunications Act 1992

The provision clarifies that the amendments made by Schedule 1 of this Act to section 25 of the BSA and section 31 of the Radcomms Act do not affect the continuity of an instrument that was made under subsection 31(1) of the Radcomms Act that was in force immediately before the commencement of Schedule 1 of the Act.

Item 185 Modification of Ministerial direction given under repealed section 162 of the Broadcasting Services Act 1992

This transitional provision confines the operation of The *Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No. 1 of 2003*. After the commencement of Schedule 1 of this Act, the Direction will be confined in its operation to analog commercial radio services.

This Direction was made to allow for the issuing of a new commercial radio broadcasting licence by the regulator in circumstances where a change of ownership results in a reduction in the number of radio services of general appeal in the market. The Bill provides that the current Direction is an analog instrument and will continue to apply to analog radio broadcasting services, irrespective of the introduction of digital radio. As analog audiences will, for the foreseeable future, be the major audience, this means the Direction will continue to be effective regardless of its being confined to analog.

The application of the Direction to digital would have given rise to a number of concerns. For example, practical difficulties would have arisen in allocating new digital radio licences when all capacity on a digital radio multiplex transmitter had been allocated and utilised.

Item 186 Pre-commencement transmitter licences issued under the Radiocommunications Act 1992

This is a grandfathering provision which ensures that transmitter licences in force before the commencement of Schedule 1 of the Bill that are authorised to operate using spectrum which, after the commencement of the Act is designated under subsection 31(1A) of the Radcomms Act, will not be affected by any subsection 31(1A) designation. In particular, a subsection 31(1A) designation will not affect the continuity of the licence, operations authorised by the licence or the renewal of the licence.

This provision is intended to safeguard the operation of licences already authorised to operate in spectrum that may be designated as BSB for digital radio purposes.

Schedule 2 – Other Amendments

Item 3 of Schedule 2 amends the *Trade Practices Act 1992* to insert sections 118NE and 118NI into the definition of protected information under proposed section 155AAA of the TPA. This proposed amendment is consequential to changes proposed in the *Corporations (NZ Closer Economic Relations) and Other Legislation*

Amendment Bill 2007 which includes proposed new s 155AAA of the Trade Practices Act 1974, which would provide information-sharing arrangements between ACMA and the ACCC including in relation to digital radio multiplex transmitter licence access undertakings. If the *Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Bill 2007* is passed, the information sharing provisions in it would replace the provisions in the Bill which provide similar information sharing arrangements. Items 1 and 2 of Schedule 2 remove these matters from the Radcomms Act.

RADIO LICENCE FEES AMENDMENT

BILL 2007

Clause 1 Short title

Clause 1 provides for the citation of the *Radio Licence Fees Amendment Act 2007* (the Amendment Act).

Clause 2 Commencement

Clause 2 provides that the Amendment Act would commence on Royal Assent.

Clause 3 Schedule(s)

By virtue of this clause, a provision of the *Radio Licence Fees Act 1964* (the Act) is amended as set out in Schedule 1 to the Bill.

Schedule 1 – Amendment

Radio Licence Fees Act 1964

Item 1 – Subsection 4(1) (definition of *gross earnings*)

Item 1 amends the definition of ‘gross earnings’ in subsection 4(1) of the Act to relate to one or more services provided under a commercial radio broadcasting licence.

Item 1 is related to the amendments to be made in the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* (the Digital Radio Bill). The Digital Radio Bill provides that a commercial radio broadcasting licence will authorise the provision of more than one service from ‘digital radio start-up day’.