

EXPLANATORY STATEMENT

Issued by the Australian Competition and Consumer Commission

Digital Radio Multiplex Transmitter Licences Procedural Rules 2008

Radiocommunications Act 1992

Legislative provisions

Section 118PO of the *Radiocommunications Act 1992* (the Act) provides that the Australian Competition and Consumer Commission (the ACCC) may make, by legislative instrument, rules in relation to the practice and procedure to be followed by the ACCC in performing its functions or exercising powers under the access regime established by Division 4B of Part 3.3 of the Act (paragraph 118PO(1)(a)). The rules may also make provision for, or in relation to, all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the ACCC under Division 4B of Part 3.3 of the Act (paragraph 118PO(1)(b)).

Rules made under subsection 118PO(1) are to be known as Procedural Rules (subsection 118PO(2)).

The Procedural Rules may make provision for or in relation 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 the Australian Communications and Media Authority (the ACMA) about the operation of Division 4B; or the giving of information by the ACMA to the ACCC that is relevant to the operation of Division 4B of Part 3.3 of the Act (subsection 118PO(3)).

The Procedural Rules may also provide for the ACCC to refuse to consider an undertaking if the ACCC is satisfied that the undertaking given is frivolous, vexatious or was not given in good faith or was given for the purpose of frustrating or undermining the effective administration of Division 4B of Part 3.3 of the Act (subsection 118PO(5)).

The instrument setting out the Procedural Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Purpose

The purpose of the Procedural Rules (the Rules) is to promote the expeditious and efficient exercise of the ACCC's functions and powers under Division 4B of Part 3.3 of the Act. The ACCC has made the Rules in order to provide regulatory certainty and assistance to digital radio multiplex transmitter licensees.

Background

In October 2005, the government announced its policy framework for the introduction of digital radio services in Australia. The framework was implemented by the

Broadcasting Legislation Amendment (Digital Radio) Bill 2007, passed in May 2007, which amended the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* and the *Trade Practices Act 1974*.

Division 4B of Part 3.3 of the Act establishes an access regime for digital radio multiplex transmitter licences. Under this access regime initial allocation of multiplex capacity will occur among incumbent commercial and community broadcasters in accordance with specified access entitlements. Subsequent licence allocations will be undertaken via a price-based method. Licence allocations are conducted by the ACMA.

The ACCC is responsible for implementing and enforcing the access regime for digital radio multiplex transmitter licences.

Section 118ND of the Act provides that a digital radio multiplex transmitter licensee (the licensee) must, within three months after the issue of the licence, give the ACCC a written access undertaking.

The access undertaking is an undertaking that a licensee or a person authorised to operate a multiplex transmitter under the licence will comply with the access obligations provided for in an undertaking in relation to standard access obligations, excess-capacity access obligations and distributed-capacity access obligations (subsection 118ND(1)). This access must be provided on terms and conditions as are ascertained in accordance with the undertaking.

For the purposes of the access regime, a person authorised by a licensee to operate a multiplex transmitter is not an employee of the licensee.

The initial allocation of digital radio multiplex transmitter licences consists of nine foundation digital radio multiplex transmitter licences. Foundation digital radio multiplex transmitter licences are category 1 and 2 digital radio multiplex transmitter licences that provide standard access entitlements and are designed to accommodate incumbent commercial and community broadcasters. The access obligations relevant to foundation digital radio multiplex transmitter licences are standard access obligations under section 118NL and excess-capacity access obligations under section 118NM of the Act.

The access regime also applies to non-foundation digital radio multiplex transmitter licences. 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. The Rules relate only to foundation category 1 and category 2 digital radio multiplex transmitter licences. If non-foundation digital radio multiplex transmitter licences are issued in the future, the ACCC will make the necessary amendments to the Rules.

Under section 118NH a licensee may give to the ACCC a variation of an access undertaking. Section 118NH also requires such a licensee to give the ACCC a variation of an access undertaking if required to do so by the ACCC.

The access regime is modelled on key elements of existing access regimes, in particular Part IIIA and Part XIC of the *Trade Practices Act 1974* with appropriate amendment due to particular features of the access regime for digital radio.

A statutory review of matters relating to the digital radio framework including the operation of the access regime under Division 4B of Part 3.3 of the Act and whether this division should be repealed is to be conducted before 1 January 2014 (section 313B).

Regulation Impact Statement

The ACCC has obtained the advice of the Office of Best Practice Regulation (OBPR) that a Regulation Impact Statement is not required for the Procedural Rules as the Rules do not have a significant impact on business or the economy (OBPR Ref No. 9612).

Consultation

On 11 April 2008, the ACCC published an exposure draft of the Rules for public comment. The instrument setting out the draft Rules was published on the ACCC's website www.accc.gov.au and submissions from interested stakeholders were sought at that time. Interested stakeholders were asked to make submissions to the ACCC by 28 April 2008. The ACCC further extended the time for making submissions to 9 May 2008.

The ACCC did not receive any submissions in relation to the Rules.

Notes on the Procedural Rules

PART 1 - PRELIMINARY

Rule 1 – Name of Rules

Rule 1 provides that the Rules are to be known as the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008*.

Rule 2 – Commencement

Rule 2 provides that the Rules commence on the day after they are registered on the Federal Register of Legislative Instruments.

Rule 3 – Object of Rules

Rule 3 provides that the object of the Rules is to promote the expeditious and efficient exercise of the ACCC's functions and powers under Division 4B of Part 3.3 of the Act.

Rule 4 - Definitions

Rule 4 provides that the Dictionary in Schedule 1 of the Rules defines terms used in the Rules.

Rule 5 – Relief from Rules

Rule 5 provides that the ACCC may dispense with compliance with any of the requirements of the Rules before or after the occasion for compliance arises.

This rule is analogous to Order 1, rule 8 of the *Federal Court Rules* and is intended to apply in circumstances where a licensee or member of the public is unable to meet a procedural requirement of the Rules due to unforeseen matters.

The rule is expressed broadly to give the ACCC maximum flexibility in dealing with such circumstances.

PART 2 – DOCUMENTS

Rule 6 – Documents given to the ACCC

Rule 6 provides that supporting documents, annual reports or submissions given to the ACCC by a licensee or member of the public in connection with an access undertaking or variation of an access undertaking may be in either electronic or non-electronic format.

The terms “electronic document” and “non-electronic document” are defined in the Dictionary.

Electronic documents may be provided to the ACCC by either delivering a CD or DVD containing the documents to an ACCC office. Documents may also be provided by emailing them to an address specified by the ACCC (*i.e.*, not the ACCC's general email address).

Non-electronic documents may be provided to the ACCC by delivering them to an ACCC office.

This rule is intended to make it clear that when giving documents to the ACCC an index which clearly describes the subject matter of each individual document must also be included. Specifically, documents provided electronically should clearly indicate (where practicable) the name of individual computer files. This will assist the ACCC to accurately identify the documents being referred to or relied upon.

This rule also provides the procedure a licensee or member of the public must use when giving electronic or non-electronic documents to the ACCC which contain confidential information. A document which contains confidential information must be endorsed with the words "Confidential Restriction on Publication Claimed". This practice is in accordance with the process required by the Australian Competition Tribunal Practice Direction No. 3.

Rule 7 – Form of documents

Rule 7 provides that to the extent it is practicable to do so, a licensee or member of the public must provide a document to the ACCC in electronic format. It is expected that most documents will be provided to the ACCC electronically (in either an original or "scanned" format). However, the ACCC acknowledges that there may be circumstances where documents will be provided to it in a non-electronic format.

The intention of the ACCC in requiring lodgement of an electronic document in both a preferred electronic format and an accessible electronic format is for information concerning the digital radio access regime to be broadly accessible to as many people as possible. Requiring documents to be text-searchable reduces administrative overheads for the ACCC with no inconvenience to a licensee in many cases.

The terms "preferred electronic format" and "accessible electronic format" are defined in subrule 7(6).

The ACCC has also included requirements that an electronic document must have the capability of being printed and must allow for text and images to be copied from the document. These requirements are necessary as the ACCC has in the past received documents electronically that restrict its ability to access and assess the information contained in the document.

This rule accords with the practice of the Australian Competition Tribunal (which may review certain decisions of the ACCC under Division 4B of Part 3.3 of the Act).

The ACCC has required that documents be provided in an accessible electronic format as well as a preferred electronic format to the extent that it is practicable to do so to provide greater transparency in decision-making by ensuring that barriers are

removed that prevent people who are vision impaired from obtaining equal access to information.

Rule 8 – Supporting documents and submissions

Rule 8 provides that a licensee must provide supporting documents to the ACCC at the time of giving an access undertaking or a variation of an access undertaking. The purpose of this rule is to allow the assessment of an access undertaking or variation of an access undertaking to occur in a timely manner and avoid any delay in the assessment process as well as facilitate public consultation processes that the ACCC is required to undertake.

The term “supporting document” is defined in the Dictionary.

The ACCC is required to undertake a consultation process inviting members of the public to make submissions before it:

- accepts an access undertaking (subsection 118NF(3));
- accepts an access undertaking in terms that it has specified (subsection 118NF(6));
- accepts a variation of an access undertaking (subsection 118NH(4));
- accepts a variation of an access undertaking in terms it has specified (subsection 118NF(7)); or
- unilaterally varies an access undertaking (subsection 118NH(12)).

Subrule 8(3) provides that the ACCC may determine the periods for the lodging of submissions by members of the public in regard to an access undertaking or a variation of an access undertaking.

As required by the Act, the ACCC must consider any submission received in a specified period (as determined under subrule 8(3)). However, the ACCC is not obliged to consider any submission received outside the specified period (subrule 8(4)).

The term “submission” is defined in the Dictionary.

The purpose of this rule is to promote the object of the Rules as outlined in rule 3 and also prevent “rolling submissions” where submissions from members of the public continue to be sent to the ACCC up until when it makes its decision.

PART 3 – INFORMATION AND ALTERATIONS

Rule 9 – Information to be provided

Rule 9 requires a licensee providing an access undertaking or variation of an access undertaking to the ACCC to also provide the ACCC with information about a person who can be contacted on the licensee’s behalf.

The purpose of this rule is to obtain as much information as possible from a licensee in order to assess the access undertaking or variation of an access undertaking without delay.

Rule 10 – Requests for further information

Sections 118NE and 118NI of the Act permit the Procedural Rules to make provision for a time limit in regard to the giving of further information in respect of an access undertaking or variation of an access undertaking.

In accordance with these sections, rule 10 will apply where the ACCC requests a licensee to give the ACCC further information about an access undertaking or a variation of an access undertaking.

The consequence for non-compliance with a time limit for the giving of further information is that the ACCC may reject an access undertaking or variation of an access undertaking.

The ACCC may extend the time limit for complying with a request for further information either before or after the time limit for complying with the request has passed.

However, the ACCC may not extend the time limit for complying with a request for further information if the access undertaking or variation of an access undertaking has been rejected under subrules 10(4) or 10(5).

The purpose of this rule is to ensure an access undertaking or a variation of an access undertaking is progressed in a timely manner in order to provide regulatory certainty.

Rule 11 – Altered access undertakings and altered variations of access undertakings

Subsection 118NF(4) of the Act provides that if the ACCC rejects an access undertaking, the ACCC may give the licensee a written notice advising the licensee that, if the licensee makes such alterations to the access undertaking as are specified in the notice and gives the altered access undertaking to the ACCC within the time limit allowed by the Procedural Rules, the ACCC will accept the altered access undertaking.

Subsection 118NH(5) of the Act provides that if the ACCC rejects a variation of an access undertaking, the ACCC may give the licensee a written notice advising the licensee that, if the licensee makes such alterations to the variation as are specified in the notice and gives the altered variation to the ACCC within the time limit allowed by the Procedural Rules, the ACCC will accept the altered variation.

In accordance with these subsections, rule 11 will apply where the ACCC has given a licensee a written notice under either subsection 118NF(4) or 118NH(5).

If a licensee does not make the alterations to the access undertaking or the variation of the access undertaking within the time limit specified in the written notice or within

the time limit specified under subrule 11(3), the initial decision to reject the access undertaking or the variation of the access undertaking still applies.

The ACCC may extend the time limit for complying with the notice either before or after the time limit for complying with the notice has passed.

PART 4 – CONFIDENTIAL INFORMATION

Rule 12 – Documents that must not contain any confidential information

In the interests of transparency in decision-making, rule 12 provides that an access undertaking or a variation of an access undertaking must not contain any confidential information.

The term “confidential information” is defined in the Dictionary.

Under subsections 118NF(3) and 118NH(4) respectively the ACCC must publish a copy of an access undertaking or variation of an access undertaking on the ACCC’s Internet site before accepting either the access undertaking or the variation.

For this reason, the ACCC has made a rule requiring licensees not include confidential information in an access undertaking or a variation of an access undertaking.

Rule 13 – Confidential information contained in supporting documents, annual reports, or submissions

The ACCC considers supporting documents or submissions given to it in regard to an access undertaking or a variation of an access undertaking are received on a voluntary basis and should be made publicly available for consultation purposes. Consultation is required to be carried out by the ACCC under sections 118NF and 118NH of the Act.

However, the ACCC recognises that in giving information to the ACCC in order for it to assess an access undertaking or a variation of an access undertaking there may be detailed information concerning a licensee’s business which may be commercially sensitive. The ACCC also recognises that in certain circumstances submissions made by members of the public may also contain commercially sensitive information.

Additionally, a licensee may give the ACCC an annual report which contains commercially sensitive information.

Rule 13 provides the procedure for licensees who wish to give the ACCC supporting documents or annual reports in connection with an access undertaking or variation of an access undertaking and who wish to make a claim for confidentiality in respect of information contained in those supporting documents or annual reports.

This rule also provides the procedure for members of the public who wish to give the ACCC submissions about an access undertaking or variation of an access undertaking

and who wish to make a claim for confidentiality in respect of information contained in those submissions.

If, at the time of giving the supporting documents, annual report or submissions to the ACCC, a licensee or member of the public makes a request that the ACCC not make the whole or a part of the document, report or submission publicly available on the ACCC's Internet site, the licensee or member of the public must provide the ACCC with reasons why the information is claimed to be confidential. A request for confidentiality will be determined on the basis of the reasons the licensee or member of the public has provided to the ACCC.

After considering those reasons, the ACCC may decide not to make the whole or a part of the document, report or submission publicly available.

Where a request for confidentiality is made, the licensee or member of the public must also at the time of giving the supporting documents, annual report or submissions to the ACCC provide:

- an unmarked copy of the document, report or submission including the parts in respect of which confidentiality is claimed;
- a copy of the document, report or submission, marked up so as to show clearly the parts in respect of which confidentiality is claimed;
- a copy of the document, report or submission, with the parts in respect of which confidentiality is claimed masked so that these parts are not disclosed.

The onus is on the licensee or member of the public to clearly identify information that is claimed to be confidential. If information is not clearly identified and marked as being confidential that information may be treated by the ACCC as not being confidential.

This rule accords with the process required by the Australian Competition Tribunal Practice Direction No. 3.

PART 5 – USE OF INFORMATION

Rule 14 – Purported limitations

As discussed in rule 13, the ACCC considers supporting documents or submissions given to it in regard to an access undertaking or a variation of an access undertaking are received on a voluntary basis. The ACCC will generally not accept supporting documents or submissions which impose or purport to impose any limitation on the ACCC's use of that supporting document or submission. This is because the ACCC must be free to verify or assess information contained in those documents or submissions when assessing access undertakings or variations of access undertakings.

While a licensee is required to give an annual report to the ACCC in accordance with section 118PN of the Act, the ACCC will generally not accept such a report which imposes or purports to impose any limitation on the ACCC's use of that report for the same reasons.

However, the ACCC will permit limitations on its use of the supporting documents, annual reports or submissions given to it where the ACCC has accepted a request for confidentiality or has agreed to limit its use in writing before the documents, report or submissions are given.

Rule 15 – Provision of information by the ACMA to the ACCC

Rule 15 provides a list of the information that the ACMA must give to the ACCC. The information contained in this list is relevant to the operation of Division 4B of Part 3.3 of the Act.

The ACMA will only be required to notify the ACCC by email in regard to the information listed in paragraphs 15(1)(b), 15(1)(c), 15(1)(e) and 15(1)(j).

Rule 16 – Provision of information by the ACCC to the ACMA

Rule 16 provides a list of the information that the ACCC must give to the ACMA. The information included in the list is relevant to the operation of Division 4B of Part 3.3 of the Act.

Rule 17 – Refusal to consider an access undertaking

Rule 17 provides that the ACCC may refuse to consider an access undertaking if the ACCC is satisfied that the access undertaking is frivolous, vexatious or was not given in good faith, or was given for the purpose of frustrating or undermining the effective administration of the access regime.

The purpose of this rule is to permit the ACCC to protect its own processes against unwarranted usurpation of its time and resources in performing its functions or exercising its powers under Division 4B of Part 3.3 of the Act.

PART 6 – ANNUAL REPORTS

Rule 18 – Matters to be included in annual reports

Rule 18 provides that in accordance with section 118PN of the Act, a licensee is required within 60 days of the end of the financial year to give the ACCC a report about matters that have been specified in the Procedural Rules and relate to compliance during that financial year with the:

- access undertaking;
- standard access obligations;
- excess-capacity access obligations; and
- obligations not to discriminate between content service providers who have access to multiplex capacity under the licence.

The terms “annual report” and “financial year” are defined in the Dictionary.

Rule 18 also provides that the ACCC may make an annual report given to the ACCC publicly available on its Internet site.