

EXPLANATORY STATEMENT

Issued by the Australian Competition and Consumer Commission

Digital Radio Multiplex Transmitter Licences Procedural Rules 2018

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)) and for matters required or permitted by any other provision of Division 4B (paragraph 118PO(1)(c)).

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 *Legislation 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.

The Rules repeal and replace the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008*.

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* (the Act) and the *Competition and Consumer Act 2010* (then *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 occurred among incumbent commercial and community broadcasters in accordance with specified access entitlements. Subsequent licence allocations are 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 fifty days 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 a 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 (section 118NO).

Under section 118NH a licensee may give to the ACCC a variation of an access undertaking. Section 118NH also provides that the ACCC can require a variation to be made to an access undertaking.

The access regime was modelled on key elements of existing access regimes, in particular Part IIIA and Part XIC of the *Competition and Consumer Act 2010* (then *Trade Practices Act 1974*) with appropriate amendment due to particular features of the access regime for digital radio.

A report relating to the digital radio framework including the operation of the access regime was released in July 2015 found no fundamental changes were required to the legislative arrangements governing the digital terrestrial radio access regime.

Statement of Compatibility with Human Rights

This section of the explanatory statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the instrument

This instrument has been made by the ACCC under Section 118PO of the *Radiocommunications Act 1992* 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 when an access undertaking or a variation of an access undertaking is being assessed. This instrument replaces the 2008 instrument with minor amendments.

Human rights implications

The ACCC has assessed whether the instrument is compatible with human rights and has determined that this Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Self-Assessment and Certification

In lieu of preparing a Regulation Impact Statement, the ACCC has undertaken a self-assessment process, has certified to the Office of Best Practice Regulation that the instrument is required for ongoing regulation, is fit for purpose and remakes the instrument without significant changes (OBPR ID: 23635).

Consultation

On 23 March 2018, the ACCC sought feedback on the current digital radio access undertaking regime. Interested stakeholders were asked to make submissions to the ACCC by 13 April 2018.

The ACCC received submissions from Commercial Radio Australia (CRA) and the Community Broadcasting Association of Australia (CBAA) and has taken these submissions into account in making the Determination. Both submissions considered that the Procedural Rules should be remade in substantially the same form, and that the access regime is currently working effectively and efficiently in facilitating access to the Digital Radio Multiplex Transmitter (DRMT) service.

The CRA submission proposed changes to the Procedural Rules in order to support a truncated public consultation and submission process whereby DRMT licensees submitting a digital radio access undertaking or a variation to an access undertaking that is substantially similar to an access undertaking that the ACCC has considered previously. The ACCC notes that Subrule 8(3) provides that the ACCC may determine the periods for lodging of submissions and consultations, and so has expanded in the Explanatory Statement on how these submission and consultation periods can be expedited.

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 2018*.

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 – Repeal

Rule 3 repeals the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008*.

Rule 4 - Object of Rules

Rule 4 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 5 - Definitions

Rule 5 provides that the Dictionary in Schedule 1 of the Rules defines terms used in the Rules.

Rule 6 – Relief from Rules

Rule 6 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 rule 1.34 of the *Federal Court Rules 2011* 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 7 – Documents given to the ACCC to be electronic

Rule 7 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 must be electronic unless otherwise approved by the ACCC.

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

Electronic documents may be provided to the ACCC in accordance with any requirements that are specified on the ACCC website. For example, the ACCC would be able to specify that electronic documents may be submitted by means of an email sent to a specified address or a USB delivered to an ACCC office, with a requirement that the electronic documents include an index that clearly describes the subject matter of each document. The ACCC is able to set requirements to ensure that it is able to properly receive and read electronic documents that are given to the ACCC. The acceptable means and requirements are to be updated on the ACCC website, allowing the ACCC to respond quickly to changes and improvements in technology and to ensure appropriate accessibility for the public.

This rule also provides the procedure a licensee or member of the public must use when giving 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 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. The periods for the lodging of submissions and consultations are flexible and are intended to be set by reference to procedural fairness. The ACCC may determine an appropriate period that is shorter or longer than another process having regard to all the circumstances. For example, it may be

appropriate to have an expedited process if an access undertaking or a variation of an access undertaking is substantially similar to a previous access undertaking or a variation of an access undertaking accepted by the ACCC.

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(3)).

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.