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COMMERCIAL RADIO AUSTRALIA

Response to:

**Discussion Paper
Media Reform Options**

APRIL 2006

1. INTRODUCTION

Commercial Radio Australia is the peak industry body for commercial radio broadcasting stations in Australia.

Commercial Radio Australia has 252 members and represents approximately 98% of the commercial radio broadcasting industry in Australia.

Commercial Radio Australia welcomes the opportunity to comment on the Discussion Paper on Media Reform Options: "*Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age*", released by the Minister for Communications, Information Technology and the Arts on 14 March 2006 (**DCITA Discussion Paper**).

At the outset, and as a general comment in relation to the DCITA Discussion Paper and the recently announced framework for digital radio, Commercial Radio Australia wishes to express its general support for initiatives aimed at ensuring that Australian audiences continue to have access to high quality broadcasting services, and that encourage the use of digital technology (where possible).

2. **EXECUTIVE SUMMARY**

Commercial Radio Australia seeks to make specific comment on issues in relation to the Media Reform paper including on the future use of the two unallocated channels of digital spectrum in the broadcasting services bands (**BSB**) and proposals to increase the powers of the Australian Media and Communications Authority (ACMA).

2.1 **ACMA Powers**

Commercial Radio Australia seeks to reiterate its previous submissions in response to the proposed changes to the Australian Communications and Media Authority's regulatory powers and the regulation of narrowcasting (at section 5 of this submission).

2.2 **Unallocated BSB Channels**

These unallocated channels were originally reserved for the provision of digital "datacasting" services, which were proposed to be provided in accordance with the scheme in Schedule 6 of the *Broadcasting Services Act* 1992 (**BSA**). For the purposes of this submission, the unallocated channels are referred to as the "**unallocated BSB channels**".

The DCITA Discussion Paper explains that the future use of the unallocated BSB channels is under review, and makes some suggestions about how those unallocated BSB channels could be used for new digital media services.

Commercial Radio Australia has some significant concerns about the proposed uses of the unallocated BSB channels.

2.2.1 **Spectrum is needed for digital radio**

First, the DCITA Discussion Paper does not acknowledge that some of the unallocated BSB channels may be needed for digital radio under the Government's announced Digital Radio Policy Framework.¹

VHF BSB spectrum is the most suitable spectrum for digital radio broadcasting using the Digital Audio Broadcasting (**DAB**) standard (known as Eureka 147). Commercial Radio Australia's submission is that where such spectrum is available, it should not be planned for uses other than digital radio.

To elaborate, Commercial Radio Australia views digital radio as a replacement technology which will require robust transmission networks. Until planning for digital radio networks is complete, Commercial Radio Australia's submission is that available VHF Band III channels should remain unallocated. This is discussed in more detail at section 3.2 of this submission.

¹ As announced by the Minister for Communications, Information Technology and the Arts (**Minister**) at the Commercial Radio Australia Conference on 14 October 2005

2.2.2 Audio content condition must continue

Second, Commercial Radio Australia is concerned that any “relaxation” of the datacasting content restrictions not involve any changes to the audio content condition that applies to datacasting licensees under clause 21 of Schedule 6 of the BSA (**audio content condition**).

The audio content condition prevents datacasting licensees from transmitting matter that would be a radio program if it were broadcast on a commercial radio service.

The retention of the audio content condition in its present form will ensure that datacasting licensees are not able to become commercial radio broadcasters by stealth.

The Government’s decision to impose a moratorium on additional digital licences, and the former Australian Broadcasting Authority’s decision to impose a moratorium on the issue of additional analog commercial radio licences, illustrates that the Australian radio sector is a highly competitive and crowded place.

The retention of the audio content condition is crucial to ensuring that neither of these moratoriums is undermined. In addition, there is no demonstrated need for the audio content condition to be removed. These issues are discussed in more detail at section 3.2 of this submission also.

As a separate matter, Commercial Radio Australia’s strong view is that if the unallocated BSB channels are allocated for purposes other than datacasting (under a different licensing regime), a condition that is consistent with the audio content condition should be imposed.

Again, the key point is that the unallocated BSB channels must not be used in a way that would undermine the existing moratoriums.

2.2.3 Planning priorities

Third, it is important that interference management issues and planning priorities also be recognised when the use of the unallocated BSB channels is considered.

Specifically, digital radio and digital television services must have “priority” over any new types of digital media services using the unallocated BSB channels, particularly if interference issues arise.

Commercial Radio Australia will make detailed submissions to the Australian Communications and Media Authority (**ACMA**) about this issue.

Some key points are noted at section 6 of this submission.

2.2.4 Additional suggestions

Commercial Radio Australia also seeks to make some additional suggestions about how the new services that are provided on the (presently) unallocated BSB channels should be regulated and allocated (at section 3.3 of this submission),

In particular, Commercial Radio Australia suggests that the privilege of using BSB spectrum should be accompanied by appropriate “social responsibilities” (including content regulation and the requirement to pay for spectrum and pay licence fees).

Commercial Radio Australia strongly endorses the proposal that new digital media services that use the unallocated BSB channels should be funded by subscription fees rather than advertising revenue.

These suggestions and submissions are discussed in more detail below.

3. NEW DIGITAL SERVICES IN THE BSB

The future use of the unallocated BSB channels is a central issue in the DCITA Discussion Paper. When releasing the DCITA Discussion Paper, the Minister said that the Government has:

“a strong interest in deploying this spectrum to provide significant opportunities for new innovative digital service options of interest and value to consumers and provide the opportunity for new entrants into the market”.²

The Minister also said:

“However, the datacasting spectrum would not be a de facto way of providing a look-alike traditional TV station but rather should offer something new to Australian consumers. Therefore the framework favours designing the use of this spectrum to help increase diversity in the Australian market.”³

Part 2 of the DCITA Discussion Paper outlines some proposals for the future use of the unallocated BSB channels.

As the Government has ruled out using the unallocated BSB channels for a fourth commercial television network, the DCITA Discussion Paper considers other ways in which these channels could be used.

For instance, the DCITA Discussion Paper suggests:

“allocation for digital broadcasting and related services (such as subscription services, narrowcasting, or data services, which can be provided to fixed or mobile receivers).”⁴

It also states:

The use of spare spectrum channels for this expanded range of applications ... [has] the potential to contribute to greater choice and diversity and to provide extra content and services for viewers that do not replicate traditional television services. The Government therefore proposes to build on the legislated end date of provisions that currently restrict the types of datacasting services that can be provided on this spectrum and make these channels available for this expanded range of services.⁵

² Minister’s address to CEDA : “*Meeting the Digital Challenge: Reforming Australia’s Media in the Digital Age*”, 14 March 2006

³ *ibid.*

⁴ DCITA Discussion Paper, page 20.

⁵ DCITA Discussion Paper, page 22.

As indicated in the Executive Summary, the future use of the unallocated BSB channels raises some important issues from the perspective of the commercial radio industry.

A crucial point to emphasise at the outset is that if new digital services on the unallocated BSB channels can't mirror commercial television services, they must not mirror commercial radio services either. This is discussed in more detail at section 3.1 below.

3.1. Moratorium issues

When considering the future use of the unallocated BSB channels, it must be remembered that the Government has committed to the introduction of digital radio services across Australia, through its announced Digital Radio Policy Framework.

The first phase of the "rollout" of permanent digital radio services will involve the six State capital cities receiving digital radio services by 1 January 2009.⁶

As noted, as part of the Digital Radio Policy Framework, the Minister has announced that there will be a six year moratorium on the issue of new commercial digital radio licences in the broadcasting services bands (**moratorium on additional digital radio licences**).

The moratorium on additional digital radio licences reflects the fact that the Australian radio sector is a highly competitive and crowded place.

It also reflects the fact that the former Australian Broadcasting Authority (**ABA**) planned a huge number of new radio services in the course of its licence area planning (**LAP**) process.

At the end of the LAP process, the ABA applied a moratorium on the planning and allocation of additional analog commercial radio licences.

However, neither of these moratoriums is reflected in the DCITA Discussion Paper, which does not refer directly to radio services when it discusses the proposed future uses of the unallocated BSB channels.

Commercial Radio Australia also notes that the Minister recently stated (in relation to the unallocated BSB channels):

...if this spectrum is allocated, it will not be permitted to be used for a new free-to-air (FTA) commercial television service, but this does not mean that there are not other interesting FTA services that could be permitted.⁷

⁶ Minister's media release "*Digital Radio to be introduced by 2009*", 4 April 2006.

⁷ Minister's address to the ABN AMRO Conference, 6 April 2006.

While Commercial Radio Australia has assumed that the Minister did not intend to include digital radio services within the “other interesting FTA services that could be permitted” on the unallocated BSB channels, Commercial Radio Australia is now seeking confirmation that this assumption is correct.

Specifically, we seek confirmation that the Minister’s intention is that unallocated BSB channels **cannot** be used to provide new services that sound like, or resemble in any way, commercial radio services.

To elaborate, Commercial Radio Australia’s firm position is that the unallocated BSB channels should not be used by “new entrants” to provide commercial digital radio services or any other types of digital radio service (whether through use of a “datacasting transmitter licence” or otherwise). Not only would such use undermine the forthcoming introduction of digital radio services by incumbent commercial radio broadcasters, it would be inconsistent with the moratoriums described above.

Accordingly, Commercial Radio Australia requests that it be confirmed that the unallocated BSB channels will **not** be able to be used by datacasting licensees (or other types of licensees, such as narrowcasters) to provide radio services.

In particular, Commercial Radio Australia seeks confirmation that there will be no changes to the audio content condition that applies to datacasting licensees, and that a similar condition will also apply if the unallocated BSB channels are allocated in some other way (ie other than through the regulatory framework for datacasting).

3.2. New services, spectrum scarcity and digital radio

Commercial Radio Australia has noted the Minister’s statements about the unallocated BSB channels being used for new types of services, and that the offering of such services may encourage more digital television conversion. For instance, in releasing the DCITA Discussion Paper and announcing the proposed “Digital Action Plan”, the Minister said:

To complement this energetic plan to drive digital take-up in Australia we need to look at removing impediments to new digital only services emerging ... During the transition to digital, there is the opportunity to allocate spectrum for new, digital only services on two currently unallocated digital channels in the BSB that could be put to a variety of uses ...⁸

In this context, it needs to be noted that Australian consumers are already being offered a very wide array of new types of digital media and entertainment services.

⁸ Minister’s address to CEDA : “*Meeting the Digital Challenge: Reforming Australia’s Media in the Digital Age*”, 14 March 2006

In addition to the new digital television services already being offered by commercial television broadcasters (through the analog/digital simulcast) and subscription television broadcasters (including through Foxtel Digital and Austar Digital), many new types of digital media services are now available to Australian audiences/consumers.

These include new 2.5G and 3G “mobile television” services being offered by telecommunications carriers (eg on Vodafone Live!, 3 Mobile and Optus Zoo), “IPTV” and broadband download services (eg Telstra BigPond offers movies, television programs and itunes videos), diverse services from global content providers such as CNN & BBC (on both fixed and portable devices), and a vast array of other Internet-based services, from “podcasts” to games.

These services, and anticipated “on demand” services do offer (and will offer) consumers control of not only the relevant content, but where they consume it and how they receive it. Significant sums are being spent by consumers and operators to establish these new services. Given the small Australian population, it is expected that there may be market confusion associated with even more choice as a result of the issue of licences to provide yet more services on the unallocated BSB channels (particularly if these are used for mobile television).

This array of new digital media and entertainment choices (and the inevitable digital divide that will result when not all are able to afford them), should be considered alongside the very significant numbers of free to air analog radio services that are offered to Australian audiences, as noted above, and the fact that additional digital radio services will be offered in the near future.

When the ABA announced that it had completed the LAP process in 2001, it stated that:

“In terms of new services available, in addition to the 448 transmitters for new national services across Australia, the ABA has planned 95 new commercial services, 181 new community services and 262 wide and medium coverage open narrowcasting services”.⁹

Commercial Radio Australia understands that there are over 2,600 free to air radio services currently being provided to Australian audiences in the BSB, in addition to the vast number of audio services available over the Internet. This demonstrates the diversity of radio and audio services in Australia.

When the radio industry starts providing digital radio services on a permanent basis, this is expected to offer yet more choice to consumers (eg given the program enhancements that are technically possible on digital radio platforms).

⁹ “ABA Completes Licence Area Plans”, 21 December 2001, at http://www.acma.gov.au/ACMAINTER.65646:STANDARD:1230691594:pc=PC_911267

Commercial Radio Australia is concerned that the Digital Radio Framework be implemented smoothly and efficiently, and that it not be hampered by premature allocation of the unallocated BSB channels.

Commercial Radio Australia is particularly concerned that there will be insufficient VHF Band III spectrum will be available for digital radio broadcasts (when new services commence from 2009), and that this could mean that Australian audiences do not receive digital radio services in a timely and equitable way.

Specifically, audiences in regional Australia should not be denied digital radio services because the available, appropriate spectrum has already been allocated.

Commercial Radio Australia views digital radio as a replacement technology which will require robust transmission networks. Where possible, the maximum transmission power (up to 20kw) must be allowed from the main digital radio transmission sites in each licence area.

Until planning for digital radio networks is complete, Commercial Radio Australia would strongly recommend that all VHF Band III channels remain unallocated, so as not to limit power in an adjacent channel or adjacent market, where a Band III channel is planned for digital radio (as is the case in Alice Springs, for example).

For this reason, Commercial Radio Australia requests that any unallocated VHF Band III spectrum (from 174MHz to 230MHz in BSB) that is not required for digital television conversion be reserved for digital radio services.

Commercial Radio Australia will outline these suggestions in more detail in the submission that it provides to the Australian Communications and Media Authority (**ACMA**) in response to the consultation process that it is conducting in relation to these matters.¹⁰

3.3 General issues: allocation and regulatory framework for new digital services

If the Government proceeds to allocate any of the unallocated BSB channels (in each licence area) for new digital media services, Commercial Radio Australia suggests that the regulatory framework for those services reflect the following principles.

¹⁰ The ACMA released a separate discussion paper entitled "*Future Use of Unassigned Television Channels*" on 22 March 2006, and Commercial Radio Australia will respond to that discussion paper separately.

a) Consistent regulation

i) Content regulation

The spectrum in the broadcasting services bands is a scarce and valuable resource. Commercial Radio Australia suggests that the use of that spectrum be accompanied by appropriate social responsibilities, including the need to ensure that the content that is delivered over that spectrum reflects community standards.

We understand that the subscription television industry was required to comply with such social responsibilities (including compliance with licence conditions regulating content) as soon as those services commenced. It is appropriate for the same approach to apply to new digital media services in the broadcasting services bands.

ii) Licence fees

Commercial Radio Australia also suggests that users of the unallocated BSB channels (once allocated) be required to pay revenue-based licence fees. It is noted that commercial radio licensees not only pay for new spectrum at auction, but they are required to pay licence fees that are calculated in accordance with the *Radio Licence Fees Act 1964*. A similar regime applies to commercial television licensees.

Commercial Radio Australia's position is that all licensees in the broadcasting services bands, other than providers of national broadcasting services, should be required to pay revenue-based licence fees.

This should include narrowcasting licensees that use the broadcasting services bands (these services do not presently pay licence fees). There is no good reason why providers of narrowcasting services and other new digital services on the unallocated BSB channels (once allocated) should be immune from licence fees.

Commercial Radio Australia suggests that this inconsistency be reviewed.

It may also be timely for the Government to consider whether those community broadcasting licensees that receive **significant** revenues from on air "sponsorship announcements" should also be included. While community broadcasting licensees are "not for profit", they receive spectrum for nothing and actively compete for advertising/sponsorship revenue with commercial radio.

b) Subscription model

Commercial Radio Australia supports the proposal that new digital media services that use the unallocated BSB channels should be funded by subscription fees rather than advertising revenue.

Commercial radio broadcasters already operate in a very crowded radio sector where they compete with the other radio categories (national, community and narrowcasting) in attracting listeners and (in the case of narrowcasters) in directly selling airtime to advertisers. Commercial radio stations also experience revenue competition from community stations which are also able to sell airtime in the form of “sponsorship announcements”. The introduction of additional services funded through advertising will have a negative impact on the revenues and profitability of incumbent commercial radio broadcasters.

Further, as the intention is that the new digital services on those channels should not be like commercial broadcasting services, then a key way of differentiating those services is to prohibit advertising.

For clarification, Commercial Radio Australia confirms that its suggestion about the application of revenue-based licence fees (at (a)(ii) above) applies if the new digital media services are to be subscription services.

c) Allocation issues

Commercial Radio Australia considers that licences to use the unallocated BSB channels should be allocated on a licence area by licence area basis. This would enable those unallocated BSB channels that are VHF Band III channels to be reserved for digital radio broadcasting.

It is important to reiterate that people living in regional Australia should not be prevented or restricted from receiving digital radio services by the fact that the necessary spectrum has already been allocated for datacasting services or other types of niche services.

4. NEW DIGITAL SERVICES ON OTHER PLATFORMS

The DCITA Discussion Paper indicates that the Government proposes to legislate to transfer the decision-making power for the allocation of new commercial television licences (both within the BSB and outside the BSB) from the ACMA to the Government.

In that context, the DCITA Discussion Paper notes that the Government will consider applications for non-BSB commercial television licences after 31 December 2006, and that the Government will consider whether the allocation of such licences is in the public interest. The DCITA Discussion Paper also notes that further consideration is to be given to the extent that other regulation should apply to these services, but that as far as possible a consistent approach should be adopted to regulation across different types of digital services.

As a general principle, Commercial Radio Australia supports proposals for a consistent regulatory approach (as noted at section 3.3 above).

However, Commercial Radio Australia wishes to emphasise that in its experience, the allocation of licences for “offband” commercial broadcasting services (particularly commercial radio services) is difficult to justify as being in the public interest.

Commercial Radio Australia’s members have ongoing problems with section 40 licensees holding themselves out as “genuine” commercial radio broadcasters to investors, audiences and advertisers alike. Given that many radio receivers cannot receive “offband” services, it is difficult to see why allocating spectrum for this purpose is an appropriate use of the spectrum.

5. ACMA POWERS AND NARROWCASTING

As noted above, the DCITA Discussion Paper proposes that some changes will be made to ACMA’s powers under the BSA.

It is noted that this is a separate issue to the proposed reforms to the ACMA’s powers that were canvassed in the Issues Paper “*Proposed Reforms to the Broadcasting Regulatory Powers of the ACMA*” in November 2005 (**November Issues Paper**). The DCITA Discussion Paper also refers to these proposed reforms.¹¹

Commercial Radio Australia provided a detailed submission to the November Issues Paper (**previous submission**).¹² In summary, Commercial Radio Australia’s key submissions to the November Issues Paper in its previous submission included that:

- the ACMA has a wide range of effective regulatory powers at its disposal and the current regulatory system is effective. In this context, it is unclear why additional powers are needed;
- many of the proposals in the November Issues Paper are regressive, in that they are a shift away from “co-regulation” and a return to the highly litigious environment that was administered by the former ABT; and
- only a few of the proposals appear useful. For instance, Commercial Radio Australia would support the ACMA having the power to seek injunctive relief to enforce section 137 (which relates to the provision of broadcasting services without a licence), but it cannot see why the proposals relating to enforceable undertakings or civil monetary penalties are needed.

¹¹ DCITA Discussion Paper, page 44.

¹² A copy of this submission is available at http://www.dcita.gov.au/data/assets/pdf_file/35245/ACMA_powers_Commercial_Radio_Australia_submission_Dec_2005.pdf

Importantly, Commercial Radio Australia's previous submission also made detailed submissions about the way narrowcasting services are defined under the BSA.

This was in response to the discussion in the November Issues Paper of the problems which the ACMA has experienced in trying to regulate narrowcasting services.

Narrowcasting is also a relevant issue in this context, as the Discussion Papers suggest that the unallocated BSB channels could be used to provide narrowcasting services.

Commercial Radio Australia considers that the definitions of open narrowcasting services and subscription narrowcasting services in sections 17 and 18 of the BSA need to be revisited. Specifically, Commercial Radio Australia considers that the definitions should be restricted to services that provide programs "of limited appeal".

In a radio context, Commercial Radio Australia's view is that open narrowcasting services have not operated as originally intended.

As outlined in Commercial Radio Australia's previous submission, narrowcasting services were intended to be used for the provision of specialised or niche programming or to be used for experimental purposes. This is why they were subjected to a low level of regulation (on the basis that they would have a limited "degree of influence").

However, in practice, there have been many instances of narrowcasting licensees providing what are essentially commercial radio services and flouting the conditions of their licence.

This is particularly evident in narrowcasting services that broadcast significant amounts of music. Commercial Radio Australia's experience is that narrowcasters will "push the boundaries" of their licence conditions wherever possible, and that they will often exceed those boundaries.

If the unallocated BSB channels are made available for narrowcasting services, this is likely to present ongoing challenges to the ACMA, as it will need to ensure that the services that are provided are not like existing free to air television services or free to air commercial radio services.

While Commercial Radio Australia has provided suggestions in its previous submission for a further section 19 clarification notice to address this issue, the narrowcasting proposals in the DCITA Discussion Paper illustrates that a full review of the narrowcasting criteria in the BSA is timely. Commercial Radio Australia would support such a review.

6. SPECTRUM AVAILABILITY AND TECHNICAL ISSUES

As introduced at section 3.2 above, Commercial Radio Australia wishes to emphasise that the new digital services that it will shortly roll out will require VHF BSB spectrum. VHF BSB spectrum is suitable for digital radio broadcasting using the Digital Audio Broadcasting (**DAB**) standard (known as Eureka 147).

Commercial Radio Australia understands that the proposed extension of the simulcast period for television services in analog mode and digital mode (**the television simulcast period**)¹³ is likely to delay the availability of VHF Band III spectrum for digital radio services. This is why Commercial Radio Australia's view is that any "spare" VHF BSB spectrum should be reserved for digital radio.

In addition, Commercial Radio Australia will make suggestions to the ACMA about possible revisions to the Digital Channel Plan for television that will assist the roll-out of digital radio.

As a separate technical matter, Commercial Radio Australia is also concerned that interference management priorities are taken into account if and when the unallocated BSB channels are allocated for new services.

Commercial Radio Australia notes that when digital radio services are planned, an important consideration is the need to ensure that there is no interference with other types of broadcasting services. However, Commercial Radio Australia considers that digital radio and digital television services must have "priority" over any new types of digital media services using the unallocated BSB channels, particularly if interference issues arise.

Existing commercial broadcasters should not have to "work around" datacasting services or other types of new digital media services, and should take precedence over those services (from a planning and interference management perspective). Again, Commercial Radio Australia will make more detailed submissions to the ACMA about this issue.

CONCLUSION

Commercial Radio Australia understands that there are some important policy decisions to be made before the unallocated BSB channels are allocated. In this context, Commercial Radio Australia requests that such decisions be made with reference to the moratoriums on the issue of new commercial radio licences, and the spectrum needs for forthcoming digital radio services.

The commercial radio industry is pleased to have had the opportunity to comment on the issues outlined in the DCITA Discussion Paper and would welcome the opportunity to provide responses to any further proposals.

¹³ The proposed extension of the simulcast period is discussed at Part 1 of the DCITA Discussion Paper.