



Radio's Digital Future

The Federal Government recently announced its policy framework for digital radio. Carolyn Lidgerwood sums it up.

On 14 October 2005, the policy framework for the introduction of digital radio was announced by Senator the Hon Helen Coonan, the Minister for Communications, Information Technology and the Arts (**Minister**). To say that this policy framework has been a long time in the making is an understatement. Long-time readers of *Communications Law Bulletin* will recall the Digital Radio Advisory Committee (**DRAC**) (chaired by CAMLA's own Victoria Rubensohn) as suggesting that Eureka 147 was the right technology for digital radio over nine years ago¹.

In announcing the Government's digital radio policy framework, the Minister observed that radio is "the only significant broadcasting platform that remains analogue only" and that accordingly, the radio industry has "limited capacity to respond to the challenges and opportunities posed by new digital technologies"². When combined with the radio industry's clear support for the introduction of digital radio (as illustrated in submissions to the Department's Digital Radio Issues Paper, dated December 2004)³, this provides the foundation for the announced framework.

Significantly, the Minister has acknowledged that "the radio industry's desire to be treated in an equivalent manner to television" is an appropriate objective, and that radio will be offered "equivalence of treatment" with the television industry where appropriate.

However, in doing so the Minister also acknowledged that a lesson from the digital television experience was that a regulatory model that does not "at least encourage" new digital-only services will be a "significant factor that inhibits consumer interest in the new platform".

This view reflects various submissions to the recent consultation process on digi-

tal radio policy that has been conducted by the Department of Communications, Information Technology and the Arts (as referred to above). For example, the ABC noted that:

*"Better technical quality alone will never be a compelling reason for consumers to move to digital. It is instead one of a number of likely drivers of consumer take-up of the technology. Other important drivers include new or enhanced content, including program-associated data (text information and multimedia content); ease of tuning; the possibility of "rewind" or audio recording; and the availability of affordable receivers"*⁴

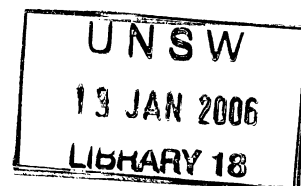
Overall, there appears to be much in the digital radio policy framework for the radio industry (particularly commercial radio broadcasters) to be pleased with. Having said that, there are some mixed views about some of the details of the announced policy framework, particularly in relation to the amount of spectrum that will be made available to each commercial radio broadcaster and national broadcaster for digital broadcasting.

This article summarises the key components of the digital radio policy framework, and identifies some issues that remain outstanding (at the date of writing).

Access to digital spectrum

As outlined in the Minister's media release:

*"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"*⁵



Volume 24 (No 3)
December 2005

Digital radio spectrum in VHF Band III will be made available for a "small administrative charge" to:

- existing commercial radio broadcasters in the broadcasting services bands;
- existing high powered community broadcasters in the broadcasting services bands who wish to broadcast in digital mode; and
- the ABC and the SBS.

This can be compared with the "loan" of digital spectrum to the free to air television broadcasters, as contained in Schedule 4 of the *Broadcasting Services Act 1992*.

L-Band spectrum may also be used for localised services and in areas where VHF Band III spectrum is in short supply.

Commercial radio broadcasters

As announced, the digital radio policy framework would grant existing commercial radio broadcasters in the broadcasting services bands the right to access one-fifth of a multiplex (ie around 256kbps of data capacity) – subject to the very important qualification of "spectrum availability", as discussed below.

Those commercial radio broadcasters will also have "first right of refusal" to manage the relevant multiplex and to hold the licences that are required (under the *Radiocommunications Act 1992*) to operate that multiplex. However, there are practical issues that need to be addressed in the "crowded" spectrum markets of Sydney and Melbourne in particular.

The VHF Band III spectrum that is available in Sydney and Melbourne for digital radio is limited to channel 9A, which the Minister has stated will hold three digital multiplexes. The Minister has indicated that this spectrum is unlikely to be enough to allow all the relevant radio broadcasters in those markets to have access to a full one-fifth of a multiplex. For this reason, the announcement of the policy framework indicated that the relevant radio broadcasters will have guaranteed minimum rights to 128kbps per service, with the ability to be allocated additional capacity of "up to" a maximum of 256kbps on the condition that the additional capacity is used to provide new services.

At the time the policy was announced, the Minister considered that 128kbps will be adequate to provide "FM standard" digital broadcasts. However, vari-

ous members of the commercial radio industry hold contrary views. The Minister's media release⁶ refers to newer versions of Eureka 147 technology (having more advanced compression standards) as being a possible solution to this issue, but this remains unclear. It is understood that further discussions about these issues are ongoing.

Commercial Radio Australia's response to the digital radio policy framework was positive, but it included the following qualification:

"There are some elements of this policy that need a lot more discussion. We want to ensure the amount of spectrum allocated to commercial radio allows us to provide the additional services and features that are necessary to take full advantage of the technology and drive consumer uptake. Under the current compression technology, 128 kb is not enough to do this, we need 256kb"

If broadcasters do not wish to operate the multiplex themselves, then the Australian Communications and Media Authority (ACMA) may allocate licences to third party multiplex operators. However, as noted in the Minister's speech, Commer-

cial Radio Australia has previously stated that its members are keen to manage the operation of digital infrastructure themselves.

Nevertheless, if third party multiplex operators do emerge in some markets, they will be required to offer access to commercial radio broadcasters (and wide coverage community broadcasters) on published and non-discriminatory terms, and subject to the oversight of the Australian Competition and Consumer Commission⁸.

National broadcasters

As noted, digital spectrum is also to be made available to the national broadcasters, the ABC and the SBS. The Minister's media release indicated that the timing of this is to be considered further in the context of the budget process for the national broadcasters.

However, and by contrast with the commercial radio broadcasters, the Minister stated that she expects that the ABC and the SBS will use third party multiplex operators (consistent with the outsourcing of their existing analogue transmission services to Broadcast Australia). The Minister has stated that spectrum will be reserved for the ABC and the SBS to jointly manage a single multiplex in each relevant market. Again, this appears to raise the issue whether this will be "adequate" spectrum for the five ABC radio networks and for the SBS radio services that operate in capital cities and major regional centres.

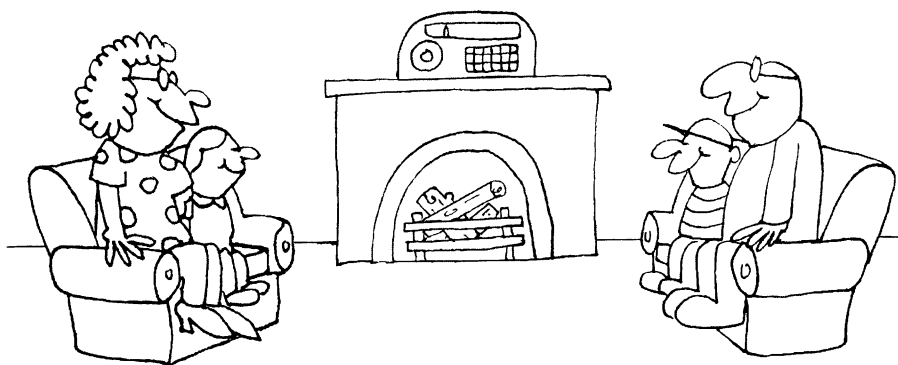
Community broadcasters

"Wide coverage" community broadcasters are also to have a right to access digital spectrum. The digital radio policy envisages "joint access rights" to a minimum 128kbps per analogue service, up to a possible maximum of 256kbps per available multiplex. It will be a matter for the community broadcasters to decide between themselves how this spectrum is to be shared.

Other services

Low powered community broadcasters, and open narrowcasters, will not be included within the initial planning of digital radio (which will first focus on capital city commercial, national and high powered community services, as discussed in more detail below). However, these categories of broadcasters are to be considered at a later time.

A family eagerly huddles around their new radio set



to hear the magic of digital radio

Pierre

Further, services that are currently provided outside the broadcasting services bands will not be allocated digital spectrum in the broadcasting services bands. This includes those services which operate under licences issued under section 40 of the BSA. Such licences are not "planned" under the licence area planning process, and instead are made available "over the counter" and for a minimal fee, reflecting that the spectrum they use is not in the broadcasting services bands.

The Minister has stated that the provision of digital services by operators outside the broadcasting services bands will continue to be a commercial decision for them. As an example, Austar has provided digital subscription audio services by satellite for some years. However, press reports have reported protests by World Audio, a section 40 operator, about this aspect of the policy framework⁹.

Big cities first

The planning of digital radio services by the ACMA will be staged, commencing in the state capital cities, and expanding to regional areas at a later time.

The digital radio policy framework envisages that there will be "start dates" contained in legislation, as well as dates by which "equivalent coverage" should be achieved (ie as between existing analogue services and new digital services). It is envisaged that Eureka 147 will be the relevant technology platform in the capital cities.

Regional areas will be planned on the basis of broadcaster interest in delivering digital radio, and following the completion of technical trials. Given that Eureka 147 may not be suitable for coverage across regional and remote markets, the Minister has indicated that trials of alternative technologies such as Digital Radio Mondiale (DRM) need to be pursued. Submissions to the digital radio inquiry have suggested that a "hybrid" Eureka 147 and DRM solution may be appropriate, so it is expected that this will be tested.

While there was some criticism of the "staged" approach from some quarters (notably from World Audio), it was applauded as a "smart" decision from others, with the Chairman of Macquarie

Regional Radioworks being reported as stating that it was preferable for digital radio to be launched in the country after it was "tried and tested in metro areas first"¹⁰.

Importantly, the Minister's media release also indicated that "capped" financial assistance for regional broadcasters will be considered when technical issues are resolved, subject to the success of the rollout in state capitals.

No simulcasting required

There will be no obligation for radio broadcasters to use digital spectrum to simulcast their analogue services – it will be a matter for the broadcasters to decide whether they wish to do so, or whether they wish to offer new types of content or data services.

This is a key difference from the digital television policy in Schedule 4 of the BSA. On one level, it reflects the very different structure of the commercial radio industry. On another, it may also reflect an acknowledgement that improved technical quality will not be enough to encourage mass adoption of digital radio.

No analogue switchoff

The Minister has stated that digital radio may never be a complete replacement for analogue radio. This is a key area of difference between the digital television policy (in Schedule 4 of the Broadcasting Services Act) and the digital radio policy framework.

This view appears to have been based on the sheer number of radio services that are currently on air, as well as the number of analogue receivers in the community (estimated by the Minister as at least 35 million).

The commercial radio industry had proposed a different approach, with digital services completely replacing analogue services over time. However, a key feature of the announced policy framework is flexibility, as well as an assumption that not all radio broadcasters may wish to convert to digital.

Moratorium

The commercial radio industry had lobbied for a ten year moratorium on the issue of new commercial radio licences in the digital spectrum. The Minister has agreed to a shorter moratorium, subject to a couple of important conditions.

At the end of 2004, the Minister announced that there would be a moratorium on new "Licence Area Planned (LAP) commercial digital radio licences for an initial period of five years" to commence "once technology and spectrum issues are resolved and a timetable for roll out of digital services determined"¹¹. This period has now been extended, in that the announced moratorium related to a period of six years (instead of five years), and commencing from the start of the first digital broadcasts, rather than from the date when that a rollout timetable is settled.

The length of this moratorium could be compared with that for commercial television (ie digital television commenced in 2000, and the section 28 prohibition on new licences technically falls away on 31 December 2006). However, the commercial radio industry's key argument in support of a moratorium was a point of contrast rather than similarity – ie the commercial radio industry has absorbed a significant amount of additional competition in recent years as a result of the former Australian Broadcasting Authority's licence area planning process¹².

For instance, at the conclusion of the former ABA's radio licence planning process at the end of 2001, the ABA announced that its planning "has resulted in nearly one thousand new national, commercial community and narrowcast services becoming available around Australia"¹³.

As noted, the announced moratorium is subject to two important conditions. The first of these requires compliance with the direction made by the ABA in 2003 in relation to the maintenance of the number of radio services of "general appeal" in licence areas¹⁴.

The second condition requires commercial radio broadcasters to comply with digital implementation frameworks (including coverage and rollout requirements). For example, for commercial radio broadcasters in state capital cities, this will involve the commencement of digital broadcasts by dates determined in legislation, and the provision of coverage that is equivalent to their analogue coverage by the end of the moratorium period (as noted at section 2 above). These requirements may be more tailored in regional markets.

It is not yet clear who will develop these frameworks – but if the digital television scheme is used as a guide, this could involve

the broadcasters developing these frameworks and lodging them with the Minister or the ACMA for approval.

The Way Ahead

It is expected that "permanent" digital radio services will commence in state capital cities in around two to three years, following the completion of existing trials and planning of digital spectrum by the ACMA. Importantly, on 9 November 2005, the ACMA announced that it had adopted a general policy that gives consideration to restricting the availability of remaining broadcasting services bands spectrum that may be needed for digital radio¹⁵.

The significance of the digital radio policy is well summarised by Commercial Radio Australia:

*"We acknowledge it is going to take significant investment over a number of years to get digital radio up and running and to drive consumer uptake, but this is a strategic and necessary move for the industry to ensure that radio remains relevant to our listeners into the future"*¹⁶

Commercial Radio Australia has also announced that its members would invest an estimated \$400 million in rolling out digital radio services across Australia.

There are likely to be some very interesting regulatory issues that will need to be addressed before "permanent" digital radio services commence, particularly in relation to the categorisation and licensing of the new "services". This would be consistent with the "blurring" of the old distinctions that have arisen with the commencement of other kinds of digital broadcasting and content services on other platforms. Interestingly, the emergence of these issues was also predicted by the DRAC, and they have become no less complicated over time.

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Carolyn is an external legal adviser to Commercial Radio Australia and some of its members, and has also advised community radio broadcasters.

1. Digital Radio Advisory Committee, A discussion paper on Digital Radio Broadcasting in Australia (September 1996)

2. The Minister's announcement was made at Commercial Radio Australia's annual conference

– see at http://www.minister.dcita.gov.au/media/speeches/digital_radio_-_commercial_radio_australia_conference

3. Department of Communications, Information Technology and the Arts, Introduction of Digital Radio: Issues Paper (December 2004).

4. http://www.dcita.gov.au/__data/assets/pdf_file/25532/ABC_-_submission.pdf. Similar observations about the “drivers” of digital radio were also made by Broadcast Australia in its submission – see at http://www.dcita.gov.au/__data/assets/pdf_file/26075/Broadcast_Australia_public_submission.pdf

5. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

6. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

7. See news release dated 14 October 2005,

“Industry welcomes digital announcement”, at <http://www.commercialradio.com.au> or <http://www.commercialradio.com.au/pdf/Industry%20welcomes%20digital%20announcement%202005.pdf>

8. http://www.minister.dcita.gov.au/media/media_releases/framework_for_the_introduction_of_digital_radio

9. See Porter, J: “World Audio’s digital hopes off-air for now” in The Sydney Morning Herald, 15 October 2005 at <http://www.smh.com.au/news/national/world-audios-digital-hopes-off-air-for-now/2005/10/14/1128796712358.html?from=moreStories>

10. See MacLean, S, “Audio angry at being tuned out”, in The Australian, 15 October 2005, at <http://finance.news.com.au/story/print/0,10119,16922583,00.html>

11. http://www.minister.dcita.gov.au/media/media_releases/introducing_digital_radio_to_australia

12. http://www.dcita.gov.au/__data/assets/pdf_file/25583/Commercial_Radio_Australia_-_submission.pdf

13. See news release dated 21 December 2001, “ABA Completes Radio Licence Area Plans”, at http://www.acma.gov.au/ACMAINTER.65674:STANDARD:1674406071:pc=PC_91126

14. Australian Broadcasting Authority (Revisiting Radio LAs) Direction No 1 of 2003. This direction was made to address concerns about formats of existing commercial radio services in regional areas being changed to formats of more “narrow” appeal – eg racing radio.

15. http://www.acma.gov.au/ACMAINTER.65674:STANDARD:649793122:pc=PC_100296

16. See news release dated 14 October 2005, “Industry welcomes digital announcement”, at <http://www.commercialradio.com.au>

Measuring Media Diversity - Recent Developments in the US

An important factor in promoting media diversity is how to measure it. Luke Waterson looks at what they’re doing in the United States

Introduction

One of the key principles underlying the proposed reform of Australian media ownership laws is the need to preserve media diversity. This principle is common to many countries, including the United States.

In *Prometheus Radio Project v Federal Communications Commission*; United States of America, 373 F 3d 372 (3rd Cir, 2004) (**Prometheus**), the United States Court of Appeal for the Third Circuit considered various mechanisms proposed by the Federal Communications Commission (**FCC**) to measure and protect media diversity in the context of cross-media mergers in the United States².

This article outlines some implications of the Prometheus decision for the development of media diversity regulation in Australia.

The Australian regulatory regime

The effect of section 60 of the *Broadcasting Services Act 1992* (Cth) is to prohibit a person from controlling more than one of the following types of media businesses operating in the same coverage area: a free-to-air television station, a commercial radio station and a newspaper (**cross media rule**).

Changes to the cross media rule were proposed in the Broadcasting Services Amendment (Media Ownership) Bill 2002 (**Bill**)³.

A key condition in the Bill relating to the preservation of media diversity was the “5/4 voices test”. In essence, the Bill required at least five separately owned and controlled “voices” (or four in regional areas) to remain after a cross-media merger (with each separately owned entity constituting a single “voice”).

The Bill also contained a number of other mechanisms intended to preserve diversity - for example, a requirement for editorial independence between the merged businesses and a restriction on owning more than two types of media operation in the same area. However, the Minister for Communications, Information, Technology and the Arts has recently announced a proposal to remove these other mechanisms and focus on the “5/4 voices test”:

“The simplest way to protect diversity is to place a floor under the number of media groups permitted in a market to preclude undue concentration of ownership. If we do this in an environment that allows us to balance any greater concentration of ownership amongst existing players with opportunities for new services, I think we will have a more attractive approach than the regime proposed last time”⁴

The proposed FCC rules

In July 2003, the FCC announced a new set of rules (**Order**) regulating media ownership in the United States, including cross media ownership⁵.