

Submission on the *Proposal to vary the Queensland DRCP and declare a foundation DRMT licence for the Gold Coast* (“Consultation Paper”)

Stakeholders

1. This submission is made by Grant Broadcasters Pty Ltd ACN 000 667 470 (“**Grant Broadcasters**”), on behalf of three of its wholly owned subsidiary companies, which own and operate three licences relevant to the matters raised in the Consultation Paper:
 - (a) In **Gold Coast RA1** - 4HTB SL1150463, licensee Hot Tomato Australia Pty Limited ACN 100 626 739, broadcasting “102.9 FM Hot Tomato” (“**Hot Tomato**”).
 - (b) In **Nambour RA1** - 4MCY SL1150116, licensee Hot 91 Pty Ltd ACN 101 804 371, broadcasting as “Hot 91.1 FM, Maroochydore, Sunshine Coast” (“**Hot 91**”).
 - (c) In **Ipswich RA1** - 4MIX SL1121, licensee, Star Broadcasting Network Pty Ltd ACN 083 443 501 broadcasting as “River 949, Ipswich” (“**River 949**”).

Extension

2. We record that this submission is made outside the advertised consultation period by virtue of an extension granted by the Australian Media and Communications Authority (“**ACMA**”).

Gold Coast

3. Grant Broadcasters welcomes and supports the ACMA’s proposals to:
 - (a) determine that a single category 1 DRMT licence be issued for the Gold Coast area; and
 - (b) allot the frequency block 9D for use by the licensee of the category 1 DRMT licence.

Grant Broadcasters eagerly anticipates the launch of DAB+ to this large and important regional market in Australia.

4. Grant Broadcasters also supports the revised DRCP for the Gold Coast with an output of 25kW. The revised DRCP allows for greater coverage within the service area of Gold Coast RA1 and reduces the overspill into Brisbane from the originally planned DRCP of 5kW.

Brisbane

5. Grant Broadcasters opposes the ACMA’s proposal to vary the technical specifications for the three DRMT licences in the Brisbane area to allow greater ERP levels and to increase the antenna height in the Brisbane area using the technical specifications set out in Appendix C of the Consultation Paper (“**the ACMA’s Proposed Technical Specifications**”).

6. The Consultation Paper states:

“The proposed changes are intended to balance the interests of licensees in the Brisbane area with those of licensees in adjacent licence areas.”

7. Grant Broadcasters submits that the ACMA’s approach here is an incorrect application of the laws and regulations. We remind the ACMA of the submission made on behalf of Grant Broadcasters, among others, on 31 August 2018 in relation to the *Draft Radiocommunications (Digital Radio Channels — Queensland) Plan Variation 2017 (No. 1) (the Proposed Variation)* by Mallam Lawyers Pty Ltd (“**the 2018 Submission**”). A copy of the 2018 Submission is **attached** as Annexure A for ease of reference. The 2018 Submission set out the correct application of the law in response to an identical representation by the ACMA in that earlier proposed variation:

“The difficulty with this approach is that, while the competing interests of licensees might be a relevant matter under section 44A(6) of the Radiocommunications Act (as to which see further below), preparation of digital radio channel plans takes place within the regulatory context of the Broadcasting Services Act. There is nothing in either the Broadcasting Services Act or the Radiocommunications Act that displaces the operation of the regulatory provisions of the Broadcasting Services Act. The Broadcasting Services Act clearly continues to apply to a commercial radio broadcasting licensee when broadcasting in digital mode. Consequently, it is a necessary implication of section 44A that the ACMA will not plan digital radio services in a manner that places a licensee in breach of the Broadcasting Services Act.

This implied qualification is very important. For example, as the ACMA is aware, clause 8(3) of Schedule 2 to the Broadcasting Services Act relevantly provides that:

(3) Each commercial radio broadcasting licence is also subject to the condition that the licensee will not provide commercial radio broadcasting services under the licence outside the licence area of the licence unless:

(a) the provision of those services outside that licence area occurs accidentally; or

*(b) the provision of those services outside that licence area occurs as a **necessary result** of the provision of commercial radio broadcasting services within the licence area; or”*
[emphasis added].

8. Grant Broadcasters submits that the ACMA’s Proposed Technical Specifications and the resulting overspill are not a “necessary result” of the provision of DAB+ within Brisbane RA1. There are alternative solutions available that the ACMA has not considered, that will enable the Brisbane RA1 DAB+ signal to be increased, without the significant increase in overspill. Technical details of an alternative arrangement are set out in paragraphs 17 to 23 below.
9. Further, even if the ACMA’s approach as quoted in paragraph 6 above were correct, Grant Broadcasters submits that the ACMA has not balanced the rights of the licensees in adjacent licence areas, particularly the Nambour RA1. The comparison of affected populations sizes between those in Brisbane RA1 currently receiving a reduced DAB+ signal and those in Gold Coast RA1, Nambour RA1, or Ipswich RA1 who would now receiving overspilled Brisbane DAB+ broadcasts is not a comparative reflection of the detriment suffered by the licensees Hot

Tomato, Hot 91 and River 949, versus any detriment currently being experienced by the Brisbane RA1 licensees. 11% of currently affected Brisbane residents versus a potential 18.4% of the adjoining licensee's much smaller markets suddenly impacted by overspill does not appear to be reasonable "balance" to Grant Broadcasters.

10. To reiterate from paragraph 7, and summarise points from the 2018 Submission, the *Broadcasting Services Act 1992 (Cth)* ("BSA") continues to apply to a commercial radio broadcasting licensee when broadcasting in digital mode. The ACMA is legally obliged under clause 8(3)(b) of Schedule 2 to ensure that signal overspill is a necessary result, or inevitable, from the provision of services within a licence area, and therefore to consider various alternative configurations of the signal within the licence area. The question of cost is not relevant to the test of "necessary result" in clause 8(3)(b) of Schedule 2 in the *Broadcasting Services Act 1992*. The test of "necessary result" looks to a consequence that is inevitable, not one that is convenient or cost-minimal.

Overspill

11. Grant Broadcasters notes that there are three areas of overspill from the Brisbane DRCP that affect the neighbouring three regional markets where we operate our regional stations. To the south into Gold Coast RA1 (affecting Hot Tomato), to the west into Ipswich RA1 (affecting River 949) and to the north into Nambour RA1 (affecting Hot 91).
12. We note that there have been adjustments to the antenna pattern that reduces the level of overspill to the south into the Gold Coast RA1. We are satisfied that there are no further adjustments that can be made to the DRCP that would reduce the overspill without affecting the signal into the Brisbane RA1.
13. We note that there have been adjustments to the antenna pattern that reduces the level of overspill to the west into the Ipswich RA1. We are satisfied that there are no further adjustments that can be made to the DRCP that would reduce the overspill without affecting the signal into the Brisbane RA1.
14. It is the overspill into the northern region and into Nambour RA1 that would significantly increase due to the changes proposed by the ACMA in the Consultation Paper; namely the removal of the northern antenna notch and the increase in power at Mt Coot-Tha. This will also result in the Mt Mee translator being able to be operated at full power (currently -10dB down). Pictured below is the predicted coverage after the increase in power, the removal of the notch and the Mt Mee translator at full licenced power: - See Figure 1 on the following page. All coverage plots in this submission have been produced by Kordia in ATDI ICS Telecom V1.14 using ITU-R P.525 propagation model and Deygout 1994 diffraction model.

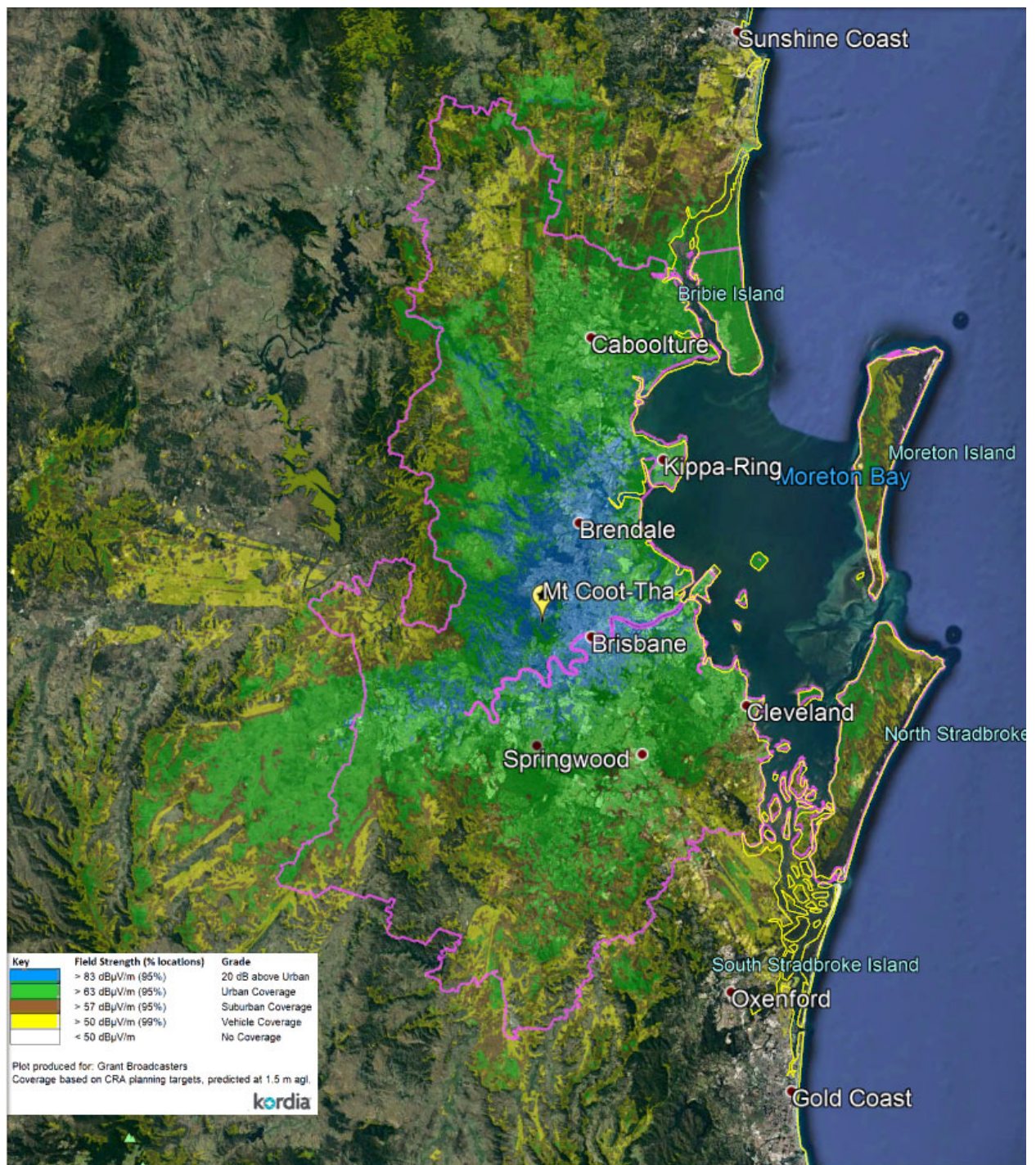


Figure 1 - ACMA Proposal - Mt Coot-Tha 50kW proposed Antenna (-2deg DT) DAB+ Coverage (wide area)

15. Zooming into the north, there is significant overspill into the Nambour RA1 LAP:-



Figure 2 - ACMA Proposal - Mt Coot-Tha 50kW proposed Antenna (-2deg DT) DAB+ Coverage (zoomed)

16. Grant Broadcasters submits that the DRCP should be amended to reduce the overspill into the Nambour RA1. Whilst we accept there will be a level of overspill that is unavoidable, the current overspill is excessive.

Technical alternative to the Consultation Paper

17. As a solution to the signal difficulties with Brisbane DAB+ and the problem of overspill into Nambour RA1, Grant Broadcasters proposes amendments to the ACMA's Proposed Technical Specifications.
18. There are two elements to our proposed amendments:- Firstly, **A -10dB notch at 18 degrees in the Mt Coot-tha antenna pattern. The proposed HRP and predicted coverage from this notch to the north of Brisbane are pictured below. See Figure 3 on the following page.**

Proposed Mt Coot-Tha HRP:-

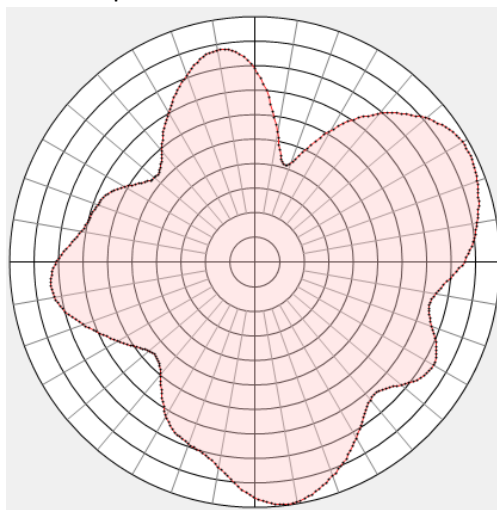


Figure 3 – RFS Mt Coot-Tha HRP with -10dB notch at 18 degrees centre

19. Reduction in overspill to Nambour RA1 as a result of the proposed HRP:-

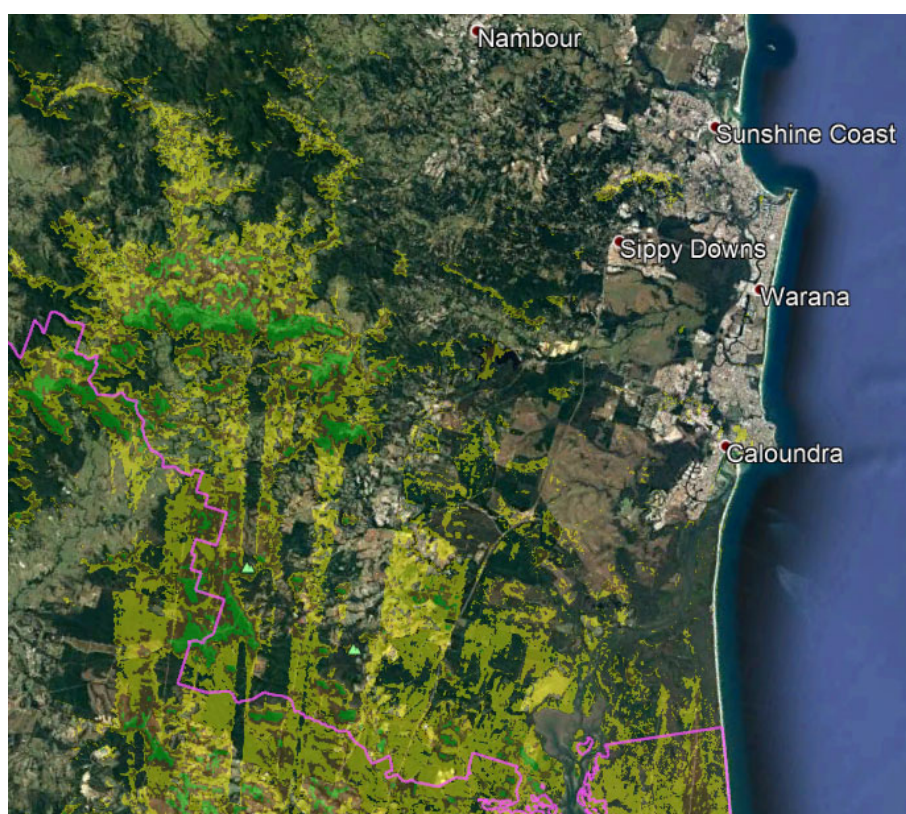


Figure 4 - Mt Coot-Tha 50kW proposed Antenna (-2deg DT) DAB+ with -10dB notch at 18 degrees centre (zoomed)

20. The second element to Grant Broadcasters's proposed amendments to the ACMA's Proposed Technical Specifications is **relocating the antenna at Mt Mee to be on the south-west side of the tower or replacing the antenna with a back-screened type antenna. The proposed HRP and predicted coverage from this is pictured in Figure 5 on the following page.**

Proposed Mt Mee HRP:-

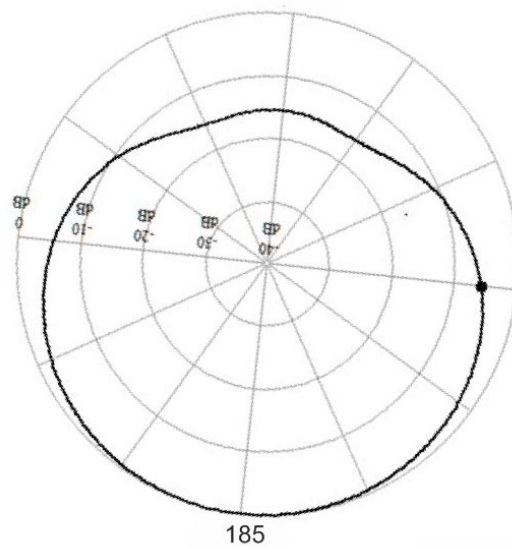


Figure 5 – Proposed Mt Mee HRP with -15dB back-screen reduction

21. Reduction in overspill to Nambour RA1 as a result of the proposed HRP:-



Figure 6 – Mt Mee 500W proposed Antenna with -15dB back-screen reduction

22. Maintained signal coverage inside the Brisbane RA1 licence area:-

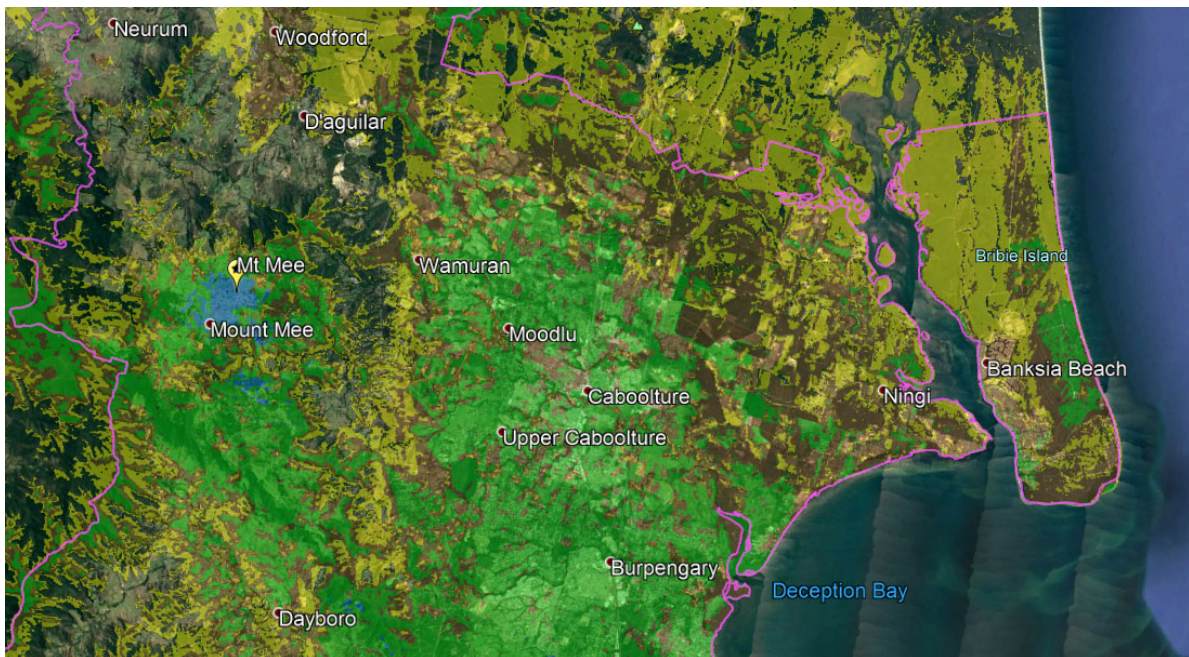


Figure 7 – Combined Mt Coot-Tha 50kW proposed Antenna (zoomed) (-2deg DT) DAB+ with -10dB notch at 18 degrees centre and Mt Mee 500W proposed Antenna with -15dB back-screen reduction

23. Grant Broadcasters submits that when combining both of these amendments, the overall coverage for the Brisbane DRCP is pictured on the following page in Figure 8. It is quite clear that the coverage into the Brisbane RA1 is largely able to increase DAB+ signal coverage to the same standard as that anticipated in the ACMA's Proposed Technical Specifications, whilst the overspill into Nambour RA1 is significantly reduced. Both of these amendments can be made easily and with minimal outlay of costs.



Figure 8 – Combined Mt Coot-Tha 50kW proposed Antenna (wide area) (-2deg DT) DAB+ with -10dB notch at 18 degrees centre and Mt Mee 500W proposed Antenna with -15dB back-screen reduction

24. Grant Broadcasters submits that in the proper application of clause 8(3)(b) of Schedule 2 in the BSA, it is incumbent on the ACMA to consider and test the proposed technical amendments set out in this submission, rather than to simply apply the ACMA's Proposed Technical Specifications. We are happy to assist the ACMA with any further information it may require in the pursuit of this review.
25. Grant Broadcasters thanks the ACMA for the opportunity to make this submission.

Annexure A

to Grant Broadcasters's submission on the *Proposal to vary the Queensland DRCP and declare a foundation DRMT licence for the Gold Coast* - 6 November 2020

Submission to the Australian Communications and Media Authority (ACMA)

Draft Radiocommunications (Digital Radio Channels — Queensland) Plan Variation 2017 (No. 1) (the Proposed Variation)

Background

We act for The Hot Tomato Broadcasting Company Pty Ltd, Sunshine Coast Broadcasters Pty Ltd and Grant Broadcasters Pty Ltd.

As the ACMA is aware, our clients are the holders and controllers of commercial radio broadcasting licences serving the Gold Coast RA1 and the Nambour RA1 licence areas and have made various submissions to the ACMA in relation to the Proposed Variation.

We appreciate that pursuant to section 44A(6) of the *Radiocommunications Act*, the ACMA has held a consultation period in relation to the Proposed Variation. We nevertheless respectfully request that the ACMA give urgent consideration to the submissions below. These submissions in summary are that:

- The decision-making process undertaken by the ACMA in relation to the Proposed Variation is infected by legal error and, without correction, is liable to be set aside by the Federal Court.
- The ACMA has misconceived its function, as a passive reviewer of a proposal put forward by the Brisbane commercial radio broadcasting licensees, thereby compounding the error identified above.
- In accordance with administrative law principles, the ACMA is obliged to have regard to the most recent material available to it and therefore must further consider the Proposed Variation.
- The Proposed Variation does not have adequate regard to its impacts on licence areas adjacent to the Brisbane RA1 licence area.

These errors can be rectified only by further consideration of the Proposed Variation, including a further opportunity for submissions to be put to the ACMA.

We address each of these matters below.

Legal Error

Our clients submit that the ACMA has misdirected itself in making the Proposed Variation. Consequently, any final determination of the Proposed Variation would be ultra vires and liable to be set aside, unless further consideration of the relevant issues is undertaken by ACMA to correct the legal error into which it has fallen.

This error may be stated very shortly. As the Consultation Paper for the Proposed Variation makes clear, the ACMA has conceived its role as being to balance the competing interests of licensees serving the Brisbane and adjacent licence areas. For example, the Consultation Paper states:

The changes proposed are intended to balance the legitimate interests of licensees in the Brisbane licence area with those of licensees in adjacent licence areas.

A similar statement is made in relation to proposed changes relating to other licence areas.

The difficulty with this approach is that, while the competing interests of licensees might be a relevant matter under section 44A(6) of the *Radiocommunications Act* (as to which see further below), preparation of digital radio channel plans takes place within the regulatory context of the *Broadcasting Services Act*. There is nothing in either the *Broadcasting Services Act* or the *Radiocommunications Act* that displaces the operation of the regulatory provisions of the *Broadcasting Services Act*. The *Broadcasting Services Act* clearly continues to apply to a commercial radio broadcasting licensee when broadcasting in digital mode. Consequently, it is a necessary implication of section 44A that the ACMA will not plan digital radio services in a manner that places a licensee in breach of the *Broadcasting Services Act*.

This implied qualification is very important. For example, as the ACMA is aware, clause 8(3) of Schedule 2 to the *Broadcasting Services Act* relevantly provides that:

- (3) Each commercial radio broadcasting licence is also subject to the condition that the licensee will not provide commercial radio broadcasting services under the licence outside the licence area of the licence unless:
 - (a) the provision of those services outside that licence area occurs accidentally; or
 - (b) the provision of those services outside that licence area occurs as a necessary result of the provision of commercial radio broadcasting services within the licence area; or

.....

The clause has various other exceptions that are of no relevance here. Importantly, within the current context, a licensee complies with paragraph 8(3)(b) only if what is colloquially described as signal overspill outside its licence area occurs as a **necessary result** of the provision of commercial radio broadcasting services within the licence area (our emphasis). The Shorter Oxford Dictionary relevantly defines “necessary” as:

Determined, existing, or happening by natural laws or predestination;
inevitable.

‘a necessary consequence’

The Macquarie Dictionary is to similar effect: “happening or existing by necessity”.

The effect of the interaction between section 44A and the *Broadcasting Services Act* is that before considering the competing interests of licensees, the ACMA is legally obliged to undertake a prior step, which is to ensure that its planning processes will result in the provision of services that comply with the *Broadcasting Services Act*. To ensure that signal overspill is a necessary result, or inevitable, from the provision of services within a licence area, the ACMA is required to consider the various alternative configurations of the signal within the licence area. For example, if in-fill translators can address an area of signal deficiency, while reducing the signal overspill compared with a single very powerful signal, it is necessary to consider that alternative. The Consultation Paper clearly fails to do this.

Importantly, paragraph 8(3)(b) of Schedule 2 does not attach the “necessary result” to a particular signal configuration, but to the broader objective of providing commercial broadcasting services within the relevant licence area. It is not sufficient, and is legally incorrect, for the ACMA to merely determine that signal overspill is a necessary result of the particular signal configuration advanced by a licensee. Instead, the ACMA must consider which, of the available signal configurations it could determine, satisfies paragraph 8(3)(b). The Consultation Paper fails to do this. As the ACMA states, it has conceived its role as balancing the competing interests of licensees, which is a misconception of the statutory framework within which it must make its determination.

This error is underlined by the ACMA’s observation that the Proposed Variation relating to Brisbane will have “minimal impact on the adjacent licence areas” (an observation contested by our clients). With respect, the question is not whether a particular signal configuration has minimal impact on adjacent licence areas, but instead, of the available solutions, which solution achieves an outcome that satisfies paragraph 8(3)(b) of Schedule 2.

Failure to have regard to Relevant Consideration

The critical legal error described above can also be characterized as a failure by the ACMA to have regard to a consideration that it is required to take into account under section 44A.

As the ACMA is aware, paragraph 44A(8)(a) of the *Radiocommunications Act* provides that:

- (8) In preparing a plan under subsection (1) or varying a plan under subsection (6), the ACMA must have regard to:
 - (a) the digital commercial radio broadcasting services that are, or will be, authorised by commercial radio broadcasting licences for the designated BSA radio area;
 -

It is necessarily the case that the relevant digital commercial radio broadcasting services are to be considered within the context of the regulatory framework within which they may lawfully provide services. A role that merely balances the competing interests of licensees wholly fails to consider this context. It is therefore a failure by the ACMA to properly discharge the obligation cast upon it by paragraph 44A(8)(a).

In a somewhat different context, the President of the Administrative Appeals Tribunal made relevant observations about the then Australian Broadcasting Authority's planning function (*Re Star Broadcasting Network Pty Ltd v ABA* (2003) 79 ALD 637:

There is no doubt that the Authority's power to control where a radio station's transmitter is located and to dictate the directional power of the signal has an important effect in limiting the extent to which signals can be received outside licence areas. It might be said to be the best means to achieve the legislative policy.

While these observations were made in relation to planning of analogue services, nothing in the planning provisions of the *Radiocommunications Act* displaces the matrix of important regulation governing licensees under the *Broadcasting Services Act*. Indeed, the legislature expressly considered the interaction between the two Acts at section 310 of the *Radiocommunications Act* (noting that section 310 has no application in the current context). These observations only reinforce that paragraph 44A(8)(a) requires the ACMA to consider the nature of the services to be provided within the licensing structure under which they are to be provided and not merely within the context of the competing interests of various affected licensees.

In our submission, this conclusion is abundantly clear. However, if any further support for it is required, it can be found in the objects of the *Radiocommunications*

Act, as expressed in section 3 of that Act. Paragraph 3(f) relevantly provides as one object, to:

- (f) support the communications policy objectives of the Commonwealth Government;

There can be no clearer statement of the Commonwealth's communications policy objectives, within the activity of broadcasting, than the *Broadcasting Services Act*. The entire policy foundation of that Act is that commercial broadcasting is to be licensed on the basis of defined licence areas, with licensees being licensed to serve only their related licence areas, except in the very limited circumstances provided in clause 8(3)(a) of Schedule 2. This is the manner in which the interests of competing licensees are to be regulated, and not using an intuitive balancing exercise.

Role of the ACMA

It is also apparent from the ACMA's Consultation Paper and Engineering Report dated January 2017 that the ACMA has confined its role to considering a proposal put to it by the Brisbane licensees. However, the planning role of the ACMA is not confined to the passive reception of proposals put to it by licensees, who are motivated by commercial self-interest. The ACMA is required to consider the most appropriate planning solution within the regulatory context that its planning decisions are made.

We are instructed that in-fill translators provide the most appropriate planning solution for any reception deficiencies within the Brisbane licence area. As the ACMA is aware, there is no spectrum scarcity in relation to the use of translators. Furthermore, mobile phone towers and tall building structures are readily available to achieve this solution. Such a readily available solution has been used in a wide variety of other licence areas.

So far as our clients can discern, the ACMA has not considered this solution for the simple reason the Brisbane licensees did not advance it. The reasons for this omission are grounded in commercial self-interest. Firstly, a single powerful signal with substantial overspill extends the commercial footprint of the Brisbane licensees and therefore the commercial demand for their services. Secondly, the installation of translators involves some (although not great) cost that the Brisbane licensees do not incur if they merely increase the strength of their existing signals.

It also bears noting that the question of cost is not relevant to the test of "necessary result" in clause 8(3)(b) of Schedule 2 to the *Broadcasting Services Act*. The test of "necessary result" looks to a consequence that is inevitable, not one that is convenient or cost-minimal.

More generally, the approach of the ACMA in confining its role to assessment of a proposal advanced by the Brisbane licensees, without considering the most appropriate planning solution, is a failure to properly perform its statutory function. By way of example only, the ACMA has concluded that substantial signal overspill will occur only in relation to certain elevated areas of the Nambour licence area and that this is an acceptable result. Even if this signal strength analysis is correct (which our clients do not accept), this conclusion wholly fails to address the test posed by clause 8(3)(a) of Schedule 2 - namely, is this signal overspill a necessary (or inevitable) result of the provision of the Brisbane services within their licence area? For the reasons already stated, it is immediately apparent that the answer to this question is “No”. However, in order to properly address the correct legal question, the ACMA is required to issue a new Consultation Paper and undertake a further period of consultation.

Obligation to consider Most Current Information

It is well established that a decision-maker must make the preferable or correct decision on the basis of circumstances as they exist at the time of the decision: see the judgment of the High Court in *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286. This judgment reflects the longstanding principle articulated by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45:

In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.

These observations are germane to the Proposed Variation, because the analysis on which it is based relied on 2011 Census data. In fairness, 2016 Census data was not available at the time of the Authority's Consultation Paper, but it has since been made available and is very relevant to the underlying analysis used to support the Proposed Variation. The Authority is obliged to have regard to this material and to provide the parties with the opportunity to make further submissions based on it.

Moreover, the demographic, social and economic characteristics of the licence areas in question are very dynamic. The analysis undertaken by the Authority is both stale and static. It had no regard to likely trends within the relevant licence areas. As a simple example, the 2016 Census data highlighted that significantly more people used

a car for daily travel on the Gold Coast than the Australian average (around 10% more persons, as a proportion of population). This fact is highly relevant to our clients' submissions regarding the impact of mobile DAB+ reception on the Gold Coast, which is of great relevance to the question of signal overspill (as to which, see below). On the other hand, 2016 Census data underlines that significantly more persons on the Gold Coast reside in apartments, when compared with the national average. On-the-ground calculations of signal strength are therefore likely to understate the actual level of reception within elevated dwellings, especially along relatively flat areas of coastline.

The Nambour licence area is undergoing rapid change of an order that is similar to the Gold Coast licence area. For example, it is anticipated that an entirely new regional city of some 50,000 people will be created in the Aura region. More generally, 2016 Census data underlines that the Nambour region exhibits similar characteristics to the Gold Coast region, with a significantly higher reliance on car travel than the national average (and consequent implications for mobile DAB+ reception). While apartment occupation is lower than the Gold Coast, it remains above the national average. Furthermore, as the ACMA notes, Nambour has large population concentrations in elevated areas, with the result that reception in elevated areas of growing population will represent substantial signal overspill, not only on 2016 Census data, but also population growth trends, neither of which have taken into account by the ACMA.

Competing Interests of Licensees

As noted above, to the extent that the competing interests of licensees are relevant to the ACMA's deliberations under section 44A, we submit that the ACMA's misconception of its role has resulted in a failure to adequately consider the likely impacts of the Proposed Variation. This has occurred because, by starting with a proposal advanced by the Brisbane licensees, that proposal is given primacy and preference over any other alternative (noting the apparent failure to consider any alternatives). Moreover, once the ACMA has addressed the correct legal question posed by clause 8(3)(a), it becomes apparent that there is unlikely to be residual scope to address the competing interests of licensees, because clause 8(3)(a) subsumes that issue.

Accordingly, we make the following submissions on the question of competing licensee interests, only if and to the extent that this might arise as a residual issue (which in our submission is unlikely, for the reason given above). In relation to the interests of our clients, we submit that the Consultation Paper has given insufficient consideration to the impacts of the Proposed Variation in an increasingly digital world, where most radio reception will be digital. For example, the Proposed Variation will provide significant coverage of rapidly developing regions within the Nambour licence area. In this respect the Consultation Paper is backward looking rather than forward looking. Indeed, its reliance on 2011 Census information, without

regard to 2016 Census information now available, underlines this failure. To properly address the issues under consideration, it is essential to consider forward population projections for the Gold Coast and Nambour licence areas, which are two of the most rapidly expanding and demographically dynamic areas in Australia. The absence of consideration of future population, social and economic trends is, in this context, a failure to have regard to a critical consideration.

In terms of mobile digital reception, the Proposed Variation will create substantial overspill into the Gold Coast licence area and Nambour licence areas. Future population trends, combined with a rapid increase in installation of digital radios in cars, will have the result that the impact of the Proposed Variation is far greater than assumed by the ACMA. This is particularly the case as commuter traffic between all three licence areas (Nambour, Brisbane and the Gold Coast) continues to increase.

The flawed initial approach of the ACMA has in our submission resulted in a flawed evaluation of the likely future effects of the Proposed Variation.

In addition to these submissions, our clients rely on the written submissions previously made to the Authority in relation to the competing interests of licensees.

Conclusion

The ACMA as a statutory regulator is obliged to ensure that it follows a correct legal process and makes lawful decisions. It is important that the flaws identified above are corrected. This can be undertaken very simply, by inviting further submissions that take into account the most recent available information (such as 2016 Census information released over the course of 2017) and invites consideration of planning alternatives (and not the Proposed Variation alone).

We further note that there is no urgency relating to the Proposed Variation and even if there was, urgency or convenience is no answer to legal error.

Our clients reserve their rights, including the right to commence proceedings for orders setting aside the Proposed Variation and any determination based on it, injunctions restraining the ACMA from acting on the basis of any such determination and costs.

We also request an undertaking that the ACMA will provide us with immediate notice of any determination made on the basis of the Proposed Variation, in order that our clients may promptly commence proceedings to have it set aside.

Our clients are open to a discussion of these issues at any time.

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31 August 2018