

EXPANSION OF DIGITAL RADIO TO REGIONAL AUSTRALIA

Proposed principles for licence area deeming

August 2020

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA appreciates the opportunity to comment on the ACMA's *Proposed principles for licence area deeming* (**Deeming Principles**).

CRA strongly objected to the recent decision by the ACMA, set out in the *Broadcasting Services (Deemed Digital Radio Licence Areas) Amendment Determination 2019 (No.1)*, under which the Hobart RA3 licence area was deemed to be the same as the Hobart RA1 licence area (the **Hobart Determination**).

CRA's view is that the Deeming Principles must be sufficiently specific to enable the ACMA to refuse to deem an expansion of the magnitude given in the Hobart Determination. CRA submits that the Hobart Determination strays beyond Parliament's intent in conferring deeming powers on the ACMA.

The Deeming Principles offer an opportunity to clarify the ACMA's power – to the benefit of all parties – in relation to deeming. However, the Deeming Principles can only provide this benefit if they contain specific detail regarding the area of overlap that will generally be permitted. CRA recognises that this may be subject to exceptions but nonetheless submits that a specific guiding percentage is the only way to provide sufficient clarity.

1. Legislative framework

The DAB+ multiplex transmitter licences apply to a '*designated BSA radio area*'.¹

'*Designated BSA radio area*' is defined in s5 *Radiocommunications Act 1992* (**Radcoms Act**) as:

- (a) *The BSA licence area of a commercial radio broadcasting licence; or*
- (b) *The BSA licence area of a community radio broadcasting licence, where that BSA licence area is the same as the BSA licence area of a commercial radio broadcasting licence.*

¹ ss118NQ and 118NR *Radiocommunications Act 1992*.

The ACMA, under section 8AD(3) of the *Broadcasting Services Act 1992 (BSA)*, has the power to determine that a community radio broadcasting licence area is the same as the licence area of a commercial radio broadcasting service. This process is known as 'deeming'.

2. The Hobart Determination should not underpin the Deeming Principles

CRA's view is that the Hobart Determination was flawed and the reasoning behind it should not underpin the Deeming Principles.

Even if the ACMA does not agree that the Hobart Determination was flawed, CRA asks the ACMA to accept that it was an unusual decision and should not be used to underpin principles that can be applied to a broad range of circumstances.

There are 3 reasons for this:

- first, the Hobart Determination departs significantly from past decisions by the ACMA (see above);
- second, the Hobart Determination does not align with the legislative intent of the enabling provision; and
- third, the ACMA's choice of a 30% threshold when evaluating whether the degree of population overlap between the radio licence areas warrants a deeming decision imports policy considerations that should not be applied more generally. A 30% threshold appears arbitrary and unjustified.

(i) The ACMA's decisions to date

The ACMA has exercised its deeming powers under section 8AD(3) on 5 occasions in addition to the Hobart Determination:

- three of these covered 100% of the population of the relevant commercial radio licence area (NSW Community RA1, Victorian Community RA1 and Canberra RA2); and
- two covered 67% of the population of the relevant commercial radio licence area.

By contrast, the Hobart Determination was granted despite a **population overlap of only 31%**. The Hobart Determination departed significantly from the previous decisions and was highly unusual.

(ii) The Hobart Determination did not align with Parliamentary intent

The Hobart Determination was not in line with the general legislative intent of section 8AD(3) of the BSA.

Section 8AD(3) was enacted for a specific purpose, which is outlined in the explanatory memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (Cth)* (the **Explanatory Memorandum**). The Explanatory Memorandum states that section 8AD(3) was intended to:

“...remedy a situation parallel to that of Hobart where the licence area of a wide coverage community broadcasting station does not exactly match that of the relevant commercial licence area, should this arise in another area.”²

The Hobart situation referenced in the Explanatory Memorandum concerned two community radio broadcasting services—in Hobart RA2 and Hobart RA4—serving a “**significant proportion of the population of the commercial licence area...**”³ The ACMA’s consultation paper that preceded the Hobart Determination (the **Consultation Paper**) noted that these areas each serve 77% of the Hobart RA1 population.

This percentage provides an important insight into what Parliament meant when it referred to a “*significant proportion*”, which is intended to address situations where two licence areas have *significant* overlap, whether in population or geographical area.

Neither of these existed in respect of Hobart RA1 and Hobart RA3. Hobart RA3 accounts for 31% of the Hobart RA1 population and only 2.5% of the geographical area.

Such percentages cannot reasonably be treated as “*significant proportion[s]*” for the purposes of subsection 8AD(3) of the BSA.

(iii) The 30% threshold was arbitrary and unjustified

The Consultation Paper references instances within the BSA that explicitly prescribe 30% population threshold, with the implication that this can be extrapolated to subsection 8AD(3) to be used as a significance threshold.

CRA objects to this reasoning.

CRA submits that the ACMA’s approach is potentially problematic because it imports thresholds that were developed in different policy contexts, designed to achieve different outcomes. Specifically, they deal with either:

- circumstances where it is appropriate to treat two licence areas as one for issuing licences in solus and two-station markets; or
- for the purposes of licence ownership and control restrictions under the BSA.

These policy objectives do not have a close nexus to section 8AD(3). Instead, section 8AD(3) contemplates situations where it is appropriate to treat two overlapping, but different, licence areas as the same given that the same digital radio transmission infrastructure will be used to serve both licence areas.⁴

CRA further suggests that if Parliament had intended for the 30% threshold to apply more generally, it would have done so rather than prescribe it in discrete instances within the BSA.

² Explanatory Memorandum at page 43.

³ Explanatory Memorandum at page 43.

⁴ Explanatory Memorandum at page 43.

3. Overarching principles for deeming – Principle two

Principle two requires ‘*significant correlation between commercial and community licence area populations*’.⁵

CRA notes that the ‘*significant correlation*’ wording is similar to the ‘*significant proportion*’ principle set out in the Explanatory Memorandum relating to section 8AD of the BSA. CRA assumes that it is intended to have a very similar meaning, as the ACMA presumably is keen to follow the Parliamentary intent set out in the Explanatory Memorandum.

(i) Measurement of the correlation

The Deeming Principles consider the way in which the correlation of one licence area to another might be measured. In particular:

- whether the population or geographic licence area overlap should be used; and
- whether the overlap should be measured by looking at the extent to which the commercial licence area overlaps the community area, or the extent to which the community licence area overlaps the commercial licence area.

CRA agrees with the ACMA that the population licence area overlap is likely to be the best indication of the correlation of the community and commercial licence areas.⁶

The extent of geographic coverage frequently does not reflect the number of potential listeners, or commercial value of the area, particularly in sparsely populated regional areas.

CRA submits that the level of population overlap should be assessed by looking at the extent to which the community licence area overlaps with the commercial licence area for two key reasons:

- this is the approach taken to date by the ACMA in making its deeming determinations; and
- this approach accurately reflects the deeming process, under which the community radio broadcasting licence area becomes the same as the licence area of a commercial radio broadcasting service. In this context, the overlap of the community licence area into the commercial licence area is the relevant measure.

(ii) Meaning of significant correlation

CRA has no fundamental objection to the ‘*significant correlation*’ principle as one that underlies the Deeming Principles, although **CRA would prefer that ‘correlation’ is replaced by ‘proportion’, which has a more specific meaning and better reflects the Explanatory Memorandum.**

⁵ Page 4, Deeming Principles.

⁶ Page 5, Deeming Principles.

However, the ACMA's past decisions show that the interpretation of 'significant' is wide ranging - covering overlap ranges of 31% to 100% of population - and it is this issue that the Deeming Principles must address in detail.

CRA submits that the ACMA must provide more specific detail, including a percentage of population overlap that will generally be considered to be 'significant'.

CRA accepts that this may be a guide rather than an inflexible threshold, but nonetheless submits that a threshold will assist the ACMA in making decisions that are predictable and consistent.

CRA recommends that:

- (i) 'Significant correlation' is replaced by 'significant proportion' to provide more clarity and to reflect Parliament's intention as set out in the Explanatory Memorandum;**
- (ii) a threshold to measure whether there is likely to be a 'significant correlation/proportion' of commercial and community populations should be provided in the Deeming Principles. CRA's view is that a guiding percentage in the range of 60 to 75% would be reasonable. An overlap of only 31% of population overlap cannot be considered to be significant;**
- (iii) the Deeming Principles should expressly state that without a significant proportion of overlap in licence areas, no deeming will occur; and**
- (iv) for the avoidance of doubt, the Deeming Principles should also state that overspill into populations outside the relevant licence areas will not be taken into account.**

CRA does not object to other factors being included in the deeming assessment, but considers it important to set expectations regarding the level of population overlap that is likely to be considered significant.

4. Overarching principles for deeming – Principle three

CRA supports the ACMA's intention to consider the relevance of the community interest represented by the community radio broadcasting licensee to the community of the commercial licence area.

As the ACMA notes:

If a community radio licence area is deemed, an affected community radio broadcasting licence may be able to serve a different, perhaps larger audience, in digital mode in addition to that which it is authorised to provide under its analog service.

Deemed community licence areas should not have a disproportionately negative effect upon existing commercial radio licensees. If community licensees are permitted to expand their licence areas they must not also be allowed to expand their purpose.

CRA is pleased to see that the ACMA will be 'mindful' that individual community broadcasting licensees will need to consider how best to comply with their licence conditions.⁷

CRA recommends that:

- (i) **the ACMA should include an express sentence in the Deeming Principles reminding community licensees that they must continue to comply with their licence conditions, notwithstanding the different audience that they may be serving; and**
- (ii) **the ACMA should make it clear that it may not permit an extended deemed licence area in the absence of a nexus between the community of the commercial licence area and the services offered by those community licensees who would be subject to the deeming decision.**

Please contact Joan Warner, on 02 9281 6577, for clarification on any aspect of this submission.

Commercial Radio Australia

⁷ Page 8, Deeming Principles.