

Annual Report to the ACCC pursuant to section 118PN of the Radiocommunications Act

Financial Year 2008-2009

Public version

Digital Radio Joint Venture Companies

Adelaide, Brisbane, Melbourne, Perth and Sydney

24 December 2010

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Executive Summary

Background

This document constitutes an annual report by the digital radio multiplex transmission licensees in Adelaide, Brisbane, Melbourne, Perth and Sydney (**JVCs**) under section 118PN of the *Radiocommunications Act 1992* (Cth).¹

On 22 April 2009, the Australian Competition & Consumer Commission (**ACCC**) determined that an ACCC-modified access undertaking was to apply to multiplex transmission capacity services by the JVCs pursuant to section 118NF(5) of the Radiocommunications Act (the **access undertaking**).

Section 118PN of the Radiocommunications Act provides that, if an access undertaking is in force during the whole or part of a financial year, the JVCs must submit annual reports to the ACCC within 60 days of the end of the financial year, on the following:

- matters specified in the *Digital Radio Multiplex Transmitter Licence Procedural Rules 2008* made by the ACCC under section 118PO of the Radiocommunications Act (**Procedural Rules**); and
- matters that relate to:
 - compliance during that financial year with the access undertaking; or
 - compliance during that financial year with the standard access obligations (if any) applicable to the licence; or
 - compliance during that financial year with the excess-capacity access obligations (if any) applicable to the licence; or
 - compliance during that financial year with the distributed-capacity access obligations (if any) applicable to the licence; or
 - compliance during that financial year with the obligations that are applicable to the licence under section 118NP.

The Procedural Rules require the JVCs to cover the following matters within an annual report:

- compliance during that financial year with the access undertaking
- compliance during that financial year with standard access obligations (if any) applicable to the licence

¹ Further details about the entities that have lodged this annual report are set out in Attachment 1.

- compliance during that financial year with excess-capacity access obligations (if any) applicable to the licence
- compliance during that financial year with obligations that are applicable to the licence under section 118NP of the Radiocommunications Act (i.e. the JVC's non-discrimination obligation)
- any non-compliance (including reasons) with the above
- steps taken to rectify non-compliance
- expected completion dates for matters requiring rectification
- changes to the membership of the JVCs that have occurred during the financial year
- any authorisation of third party users.

This annual report covers the matters identified in section 118PN of the Radiocommunications Act and the Procedural Rules.

Overview of findings

The access undertaking commenced operation on 22 April 2009.

Digital radio services officially commenced on 1 July 2009 in Adelaide, Brisbane, Melbourne, Perth and Sydney.² However, the supply of digital radio multiplex transmission services commenced earlier on a progressive basis in each capital city, in May and June 2009.

Accordingly, this annual report covers a period of less than 3 months in which the JVCs were in the start up phase of their operations.

The JVCs entered into access agreements with all incumbent commercial radio broadcasters in the 2008-2009 financial year. Most of these agreements took effect on 30 June 2009 (i.e. the last day of the financial year), although a very small number of these agreements took effect earlier, on 5 June 2009.

These agreements provided the basis for incumbent commercial broadcasters to take up their standard access entitlements in accordance with the Radiocommunications Act and the access undertaking.

No access fees were payable by access seekers for these standard access entitlements in the 2008-2009 financial year, given the following:

- the official start date for digital radio services in the five capital cities was 1 July 2009

² This was the date that ACMA nominated as the digital radio start up day for each of the five capital cities. See, Australian Communications and Media Authority, *Media Release: ACMA announces 1 July 2009 as digital radio start-up day*, 26 June 2009. http://www.acma.gov.au/WEB/STANDARD/pc=PC_311779

- the date on which nearly all access agreements between the JVC and access seekers took effect was 30 June 2009 (i.e. the last day of the 2008-2009 financial year)
- the budgets for the JVCs, which also determined the amount of the access fees, were not finalised until 28 August 2009.

As a consequence, many aspects of the pricing principles contained within the access agreement did not apply during the 2008-2009 financial year, notwithstanding the fact that the costs incurred by the JVCs in this financial year (and the preceding year) have been incorporated into the JVC cost base and reflected in access fees for subsequent financial years.

Accordingly, this annual report does not review compliance with those aspects of the pricing principles in Schedule 2 of the access agreement that relate to the calculation or application of the access fees (e.g. WACC, review of access fees, etc).³ This annual report only considers issues around the inclusion of costs within the JVC cost base, which are recoverable in access fees payable by access seekers in subsequent financial years.

Digital community broadcasters did not lodge requests for access to multiplex capacity during this period, given the lack of funding available to the community sector for this purpose. Accordingly, no allocations of standard access entitlements were made to digital community broadcasters during this financial year.

The JVCs did not allocate any excess-capacity access entitlements in the 2008-2009 financial year, as this was not required until 2009-2010 financial year under section 118NT of the Radiocommunications Act.

Confidentiality

There are aspects of this Annual Report (including some attachments) that are confidential to the JVCs.

It is requested that, aspects of this report that are identified as confidential not be disclosed to the public in accordance with section 13 of the Procedural Rules.

The JVCs do not object to the disclosure of this annual report (including the attachments) in its entirety to the Australian Communications and Media Authority in accordance with section 16(1)(f) of the Procedural Rules.

³ Please note these issues are considered in detail in the annual report for the 2009-2010 financial year.
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Annual Report

1 Compliance with digital radio access undertaking

1.1 Overview

This section sets out the extent to which the JVCs have complied with key aspects of the digital radio access undertakings, including the access agreement that forms part of the access undertakings.

We have not sought to cover all aspects of the access undertaking and access agreement as part of our report, given that there are many aspects of these documents that are non-substantive or which were not operative during the 2008-2009 financial year.

We have, however, sought to cover areas that we envisage are likely to be of interest to the ACCC, notwithstanding the fact that some of these areas of the access agreement were not operative during the financial year.

The areas of the access undertaking and access agreement covered in this section include:

- operational manual requirements under clause 2.2 of the access agreement
- the JVCs supply obligations in respect of the multiplex transmission service under clause 9 of the access agreement
- the JVCs obligations in respect of financial security under clause 14 of the access agreement
- the JVCs compliance with certain aspects of the pricing principles in Schedule 2 of the access agreement, including the efficient cost principle for the inclusion of capital expenditure, operating expenditure and overheads into the JVC cost base under clause 3.3

This section does not explicitly consider the issue of compliance with the standard access obligations and excess-capacity access obligations, which are covered in sections 2 and 3 below, respectively.

1.2 Operational manual

Clause 2.2(a) of the access agreement provides that the JVC must develop an operational manual in consultation with all Access Seekers to deal with the technical and operational matters in relation to the access agreement. The access agreement does not impose a timeline for the development of such a manual.

Clause 2.2(b) of the access agreement requires the JVC to undertake the following tasks in order to develop the Operational Manual:

- establish a consultative process for the development of the Operational Manual
- consult with all Access Seekers in good faith
- use its reasonable endeavours to accommodate any reasonable requests by Access Seekers during the consultation process relating to the development of the Operational Manual
- ensure that the Operational Manual is consistent with the Access Agreement.

The JVCs did not develop the operational manual in the period between 22 April and 30 June 2009, even though a limited number of access agreements took effect prior to 30 June 2009.

The JVCs do not consider that this represents a non-compliance with the access agreement, as the obligation to develop the operational manual is not time sensitive.

The development of the operational manual commenced in 2009-2010 financial year following finalisation of certain technical and operational issues. The development of the operational manual is discussed in greater detail in the annual report for the 2009-2010 financial year.

In light of the above, the JVCs do not consider that they were non-compliant with their obligations under clause 2.2 of the access agreement.

1.3 Financial security

The JVCs did not require a financial security from access seekers in the 2008-2009 financial year.

In particular, the JVCs did not:

- request a financial security from access seekers as a condition precedent to the entry into an access agreement pursuant to Attachment A (Conditions Precedent)
- review the creditworthiness of any access seeker (or require the payment of a financial security) pursuant to clause 14 of the access agreement.

1.4 Supply obligations

Clause 9 of the access agreement:

- forbids the JVCs from preventing an access seeker from obtaining access to the multiplex transmission service in accordance with the access agreement

- prohibits the JVCs from discriminating between access seekers to which it supplies the multiplex transmission service in relation to technical and operational quality of the service itself, and the technical and operational quality and timing of the fault detection, handling and rectification supplied in respect of the service – this requirement implements the non-discrimination requirement in section 118NP of the Radiocommunications Act
- requires the JVCs to make the standard access entitlements and excess-capacity access entitlements available to content service providers.

The JVCs are not aware of any non-compliance with clause 9 of the access agreement in the 2008-2009 financial year. In particular:

- the JVCs did not prevent any access seeker from receiving the multiplex transmission service during that period
- to the extent that the JVCs supplied the multiplex transmission service prior to the official launch of digital radio services on 1 July 2009, the JVCs supplied the multiplex transmission service on an identical basis to all access seekers from a technical and operational quality perspective during that period
- the JVCs allowed all holders of standard access entitlements to acquire those entitlements by entering into an access agreement with the relevant JVC.⁴

1.5 Efficient cost principle

Clause 3.3 of Schedule 2 of the access agreement limits the costs that the JVCs can recover from access seekers to those costs that have been efficiently incurred. The same clause also includes criteria to guide whether the various costs elements that comprise the multiplex transmission service (i.e. capital expenditure, operating expenditure and overheads) have been efficiently incurred.

While the JVCs have not engaged experts to express a definitive view on the efficiency of all JVC costs, the JVCs consider that the costs that have been included within its cost base, which in turn drive the quantum of access fees payable by access seekers, reflect the efficient costs incurred by the JVCs.

In particular:

- all digital radio multiplex infrastructure and services (i.e. the major cost components in respect of the multiplex transmission service) were subject to a competitive tender process – further information about key infrastructure and services contracts are set out in Attachment 2 **[C-I-C]**

- vendor responses to the tender process were considered by an industry technical group, which consisted of representatives from all access seekers, which in turn made recommendations to the JVC boards on vendor selection – this ensured that decisions were made in accordance with good industry practice and that the most efficient option available to the JVCs at the time it was chosen
- while contracts were entered into individually by each JVC (or in some cases, by CRA as the agent of the individual JVCs), the contracts were negotiated collectively to ensure the best possible price from vendors
- notwithstanding the collective approach to negotiation, for those contracts where the amount payable by individual JVCs varied (e.g. due to local differences), each JVC paid the local price to the relevant vendor (rather than an averaged price), thereby ensuring that the costs incurred by individual JVCs reflected the efficient cost of service provision in that specific market
- the operating expenditure incurred by the JVCs (i.e. the contracts described above are treated as operating expenditure in company accounts) reflected what was necessary to meet expected demand and was essential to achieving quality, reliability and security of supply in respect of the multiplex transmission service – for example, while the JVCs have engineered the multiplex transmission service to achieve a high degree of reliability, the JVCs have not invested in a second backup transmission facility at this point in time, given the early stage of the digital radio platform in Australia
- the value attributed to these contracts is consistent with those contained in audited accounts for the relevant financial year.

In light of the above, the JVCs are not aware of any non-compliance with the efficiency principles contained within the pricing principles in the access agreement.

2 Compliance with standard access obligations

Section 118NL of the Radiocommunications Act imposes standard access obligations on the JVCs, which in turn require the JVCs to supply multiplex capacity to those content service providers that hold standard access entitlements.

The process for the implementation of standard access entitlements is set out in section 118NQ of the Radiocommunications Act. Clause 6.3 and 6.4 of the access agreement provide the contractual basis for the implementation of these legislative requirements.

The JVCs have made standard access entitlements available to incumbent commercial broadcasters pursuant to section 118NQ of the Radiocommunications Act and clause 6.3 of the access agreement.

The JVCs did not provide digital community broadcasters with standard access entitlements pursuant to section 118NR of the Radiocommunications Act and clause 6.4 of the access agreement, as no such entitlements were requested by digital community broadcasters in the 2008-2009 financial year due to the lack of funding made available for this period.

The Radiocommunications Act also requires that the JVCs reserve two-ninths of multiplex capacity under each digital radio multiplex transmitter licence for digital community broadcasters that are nominated by the digital community radio broadcasting representative company to claim the standard access entitlement.⁵ The JVCs have also met this requirement.

A detailed breakdown of the fractions of multiplex capacity that have been allocated to individual access seekers is set out in Attachment 3, together with information on reserved capacity and excess capacity that existed in the 2008-2009 financial year.

The JVCs are not aware of any non-compliance with their standard access obligations for the 2008-2009 financial year.

3 Compliance with excess-capacity access obligations

The JVCs were not subject to any excess-capacity access obligations in the 2008-2009 financial year.

Excess-capacity access entitlements only came into existence during the 2009-2010 financial year following the completion of the auction process contemplated in section 118NT(2) of the Radiocommunications Act.

4 Compliance with non-discrimination obligation

Section 118NP of the Radiocommunications Act prohibits discrimination by the JVCs between content service providers that have access to multiplex capacity in relation to the following:

- the technical and operational quality of the services supplied to the content service providers
- the technical and operational quality and timing of the fault detection, handling and rectification supplied to the content service providers.

This obligation is also reflected in clause 9.3 of the Access Agreement.

⁵ Radiocommunications Act, section 118NR(2). See also, clause 6.4(b) of access agreement.
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The JVCs are not aware of any non-compliance with their non-discrimination requirements. In particular, the JVCs have supplied the multiplex transmission service on an identical basis to all access seekers from a technical and operational quality perspective, including in respect of fault detection, handling and rectification.

5 Changes to membership

There were no changes to the membership of any of the JVCs during the 2008-2009 financial year.

The membership of the JVCs (including the percentage of shareholdings) is set out in Attachment 4.

6 Authorisation of third party users

Section 114(1) of the Radiocommunications Act provides that the JVCs may, by written instrument, authorise a third party to operate radiocommunications devices under the licence. During the 2008-2009 financial year, the JVCs have not authorised any third parties to operate radiocommunications devices, under this section.

Attachment 1 – List of JVCs submitting this annual report

This annual report for 2008-2009 has been submitted by the following entities:

- Digital Radio Broadcasting Adelaide Pty Ltd (ACN 128 742 772) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901330
- Digital Radio Broadcasting Brisbane Pty Ltd (ACN 1280742 950) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901423 and 1901424
- Digital Radio Broadcasting Melbourne Pty Ltd (ACN 128 742 898) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901421 and 1901422
- Digital Radio Broadcasting Perth Pty Ltd (ACN 128 742 638) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901331
- Digital Radio Broadcasting Sydney Pty Ltd (ACN 128 742 978) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901419 and 1901420.

Attachment 2 – Overview of key infrastructure and service contracts [C-I-C]

Attachment 3 – Standard Access Entitlements for 2008-2009

BSA Radio Area	Access Seeker	Multiplex Capacity (1/9 equivalent to 128 Kbps)
1. Adelaide	Austereo Pty Ltd	1/9
	Triple M Adelaide	1/9
	Nova 91.9 Pty Ltd	1/9
	Festival City BC	1/9
	Southern State BC	1/9
	5AD Broadcasting	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	1/9
	Total Multiplex Capacity	9/9
2. Brisbane (Channel 9A)	Today FM Brisbane (9A)	1/9
	Triple FM Brisbane (9A)	1/9
	Nova 106.9 Pty Limited (9A)	1/9
	ARN Comms Pty Limited (9A)	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	3/9
		Total Multiplex Capacity
3. Brisbane (Channel 9B)	Brisbane FM Radio (9B)	1/9
	Broadcasting Station 4IP (9B)	1/9
	Radio 4BH Brisbane (9B)	1/9
	Radio 4BC Brisbane (9B)	1/9
	Digital Community	<i>(2/9 reserved)</i>

BSA Radio Area	Access Seeker	Multiplex Capacity (1/9 equivalent to 128 Kbps)
	Broadcasters – no allocation	
	Excess Capacity – no allocation	3/9
	Total Multiplex Capacity	9/9
4. Melbourne (Channel 9A)	Triple M Melbourne	1/9
	Austereo Pty Ltd	1/9
	Nova 100 Pty Ltd	1/9
	Vega 91.5 Pty Ltd	1/9
	Double T Radio	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	2/9
	Total Multiplex Capacity	9/9
5. Melbourne (Channel 9B)	ARN BC Aust Pty Ltd	1/9
	3UZ	1/9
	Vic Radio Network	1/9
	Malbend Pty Ltd	1/9
	Radio 3AW Melbourne	1/9
	Radio 1278 Pty Ltd	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	1/9
	Total Multiplex Capacity	9/9
6. Perth	Consolidated BC Sys WA	1/9
	Perth FM Radio Pty Ltd	1/9
	DMG Radio Perth Pty Ltd	1/9
	Radio Perth Pty Ltd	1/9

BSA Radio Area	Access Seeker	Multiplex Capacity (1/9 equivalent to 128 Kbps)
	Radio 96FM	1/9
	Radio 6PR Perth Pty Ltd	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	1/9
	Total Multiplex Capacity	9/9
7. Sydney (Channel 9A)	Today FM Sydney	1/9
	Triple M Sydney	1/9
	Nova 96.9	1/9
	Vega 95.3	1/9
	Commonwealth BC Corp	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	2/9
Total Multiplex Capacity	9/9	
8. Sydney (Channel 9A)	ARN Communications	1/9
	2KY 1017 AM	1/9
	Radio 2SM	1/9
	Radio 2UE	1/9
	Radio 2CH	1/9
	Harbour Radio	1/9
	Digital Community Broadcasters – no allocation	<i>(2/9 reserved)</i>
	Excess Capacity – no allocation	2/9
	Total Multiplex Capacity	9/9

Attachment 4 - JVC membership for 2008-2009 financial year⁶

Digital Radio Broadcasting Adelaide Pty Ltd	Number of shares	Shareholding percentage
5AD Broadcasting Company Pty Limited	13,000	16.66%
Austereo Pty Limited	13,000	16.66%
Festival City Broadcasting Pty Limited	13,000	16.66%
Nova 91.9 Pty Limited	13,000	16.66%
Southern State Broadcasters Pty Limited	13,000	16.66%
Triple M Adelaide Pty Limited	13,000	16.66%
Total	78,000	100%

Digital Radio Broadcasting Brisbane Pty Ltd	Number of shares	Shareholding percentage
ARN Communications Pty Limited	10,000	12.50%
Brisbane FM Radio Pty Limited	10,000	12.50%
Broadcasting Station 4IP Pty Limited	10,000	12.50%
Nova 106.9 Pty Limited	10,000	12.50%
Radio 4BH Brisbane Pty Limited	10,000	12.50%
Radio 4BC Brisbane Pty Limited	10,000	12.50%
Today FM Brisbane Pty Limited	10,000	12.50%
Triple M Brisbane Pty Limited	10,000	12.50%
Total	80,000	100%

⁶ Please note that shareholdings have been rounded to 2 decimal places.

Digital Radio Broadcasting Melbourne Pty Ltd	Number of shares	Shareholding percentage
3UZ Pty Limited	7,000	9.09%
Arn Broadcasting Pty Limited	7,000	9.09%
Austereo Pty Limited	7,000	9.09%
Double T Radio Pty Limited	7,000	9.09%
Malbend Pty Limited	7,000	9.09%
Nova 100 Pty Limited	7,000	9.09%
Radio 1278 Melbourne Pty Limited	7,000	9.09%
Radio 3AW Melbourne Pty Limited	7,000	9.09%
Triple M Melbourne Pty Limited	7,000	9.09%
Classic Rock 91.5FM Pty Limited	7,000	9.09%
Victorian Radio Network Pty Limited	7,000	9.09%
Total	77,000	100%

Digital Radio Broadcasting Perth Pty Ltd	Number of shares	Shareholding percentage
Consolidated Broadcasting System (W.A.) Pty Limited	13,000	16.67%
DMG Radio (Perth) Pty Limited	13,000	16.67%
Perth FM Pty Limited	13,000	16.67%
Radio 6PR Pty Limited	13,000	16.67%
Radio 96FM Perth Pty Limited	13,000	16.67%
Radio Perth Pty Limited	13,000	16.67%
Total	78,000	100%

Digital Radio Broadcasting Sydney Pty Ltd	Number of shares	Shareholding percentage
2KY Broadcasters Pty Limited	342,425	9.27%
ARN Communications Pty Limited	416,964	11.29%
Commonwealth Broadcasting Pty Limited	416,964	11.29%
Harbour Radio Pty Limited	7,000	0.19%
Nova 96.9 Pty Limited	416,964	11.29%
Radio 2CH Pty Limited	7,000	0.19%
Radio 2SM Pty Limited	416,964	11.29%
Radio 2UE Sydney Pty Limited	416,964	11.29%
Today FM Sydney Pty Limited	416,964	11.29%
Triple M Sydney Pty Limited	416,964	11.29%
Classic Rock 95.3 FM Pty Limited	416,964	11.29%
Total	3,692,137	100%