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By email

Response to the CBAA submission on the proposed variation of the digital radio access undertaking under section 118NH of the *Radiocommunications Act 1992*

Dear Isolde,

We act for the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Perth and Sydney (each a **JVC** and together the **JVCs**).

We appreciate the opportunity to comment on the CBAA's submission to the ACCC dated 9 August 2013 on the proposed variations to the digital radio access undertaking (**CBAA Submission**).

The JVCs are pleased that the CBAA supports nearly all of the proposed amendments to the digital radio access undertaking. We look forward to maintaining our co-operative working relationship with the CBAA in the future.

This submission sets out our response to some of the issues that have been raised in the CBAA Submission. We have not responded to points raised in the CBAA Submission where the CBAA has agreed with our proposed amendments to the digital radio access undertaking.

1 Variations to access undertaking to take account of on-channel repeater services

The JVCs welcome the CBAA's support for the implementation of on-channel repeater (**OCR**) services in each of the five BSA radio areas.

Notwithstanding the broad level of support, the CBAA has also raised certain concerns in relation to the OCR implementation and has proposed further amendments to the digital radio access undertaking to address its stated concerns.

The CBAA's concerns broadly include:

- a query as to whether the selected number of OCR sites, their priority in terms of timing of deployment, or their exact location, is optimal;¹
- that the OCRs have been scoped to support the provision of digital radio services by commercial radio broadcasters, community radio broadcasters and the national broadcasters, and that the costs incurred by the JVCs in repeating the digital radio services of the ABC and SBS have not been recouped from the national broadcasters directly, essentially resulting in over-charging of the commercial and community broadcasters and a cross-subsidy in favour of the national broadcasters. Further, if costs are recouped from the national broadcasters in relation to OCR services, then the CBAA argue that any income should be offset against the total cost of operating each multiplex;² and
- that the proposed changes to the definition of the RF Service in clause 1.4 of Attachment A of the access undertaking can be read to exclude OCR costs from the RF Service.³

Based on the above, the CBAA has proposed additional language for inclusion in the access undertaking, including:

- an amendment to clause 1.4 of Attachment A of the access undertaking that would identify each OCR site in respect of which the JVC could supply the RF Service;⁴ and
- an amendment to clause 9.7 of the access agreement which would, for any additional OCR sites that are not otherwise listed in clause 1.4 of Attachment A of the access undertaking, require the JVCs to:⁵
 - consult with access seekers in relation to the establishment of those additional OCRs and any associated changes to the fixed recurring charges arising from that investment; and
 - take account of any feedback from access seekers, and based on that feedback, either abandon the OCR implementation, revise the site location or design or technical or operational parameters, or the fixed recurring charges.⁶

While the CBAA understandably wishes to minimise the fixed recurring charges that are payable for the multiplex transmission service and the JVCs also share this goal (given the fact that the JVC shareholders are also access seekers), the JVCs do not consider the CBAA's proposal to be either necessary or practical.

¹CBAA Submission, paragraph 3.13.

²Ibid, paragraphs 3.16 and 3.19.

³Ibid, paragraph 3.24.

⁴Ibid, paragraph 3.34(a).

⁵Ibid, paragraph 3.34(b).

⁶Further, if the JVC does not comply with proposed clause 9.7, the CBAA has proposed that if the JVC fails to undertake such a review, then it will not be permitted to recover the costs associated with the additional OCR as part of the fixed recurring charges.

The JVCs consider that the inclusion of the proposed consultation and adjustment process within the digital radio access undertaking will have limited utility as key planning and implementation decisions in relation to the OCR project have already been settled.

For example, out of the 15 OCR sites, capital costs have already been incurred for the first 11 of these sites. Site access arrangements for these initial sites have also been finalised (or are close to finalisation). The only material pending issue in relation to OCR services is the finalisation of changes to the licences of the JVCs and the National DAB Licence Company by ACMA.⁷

For the remaining 4 OCR sites that are expected to come online in the next 18 months, the site selection, budgeting and implementation process is also already underway, although capital costs have not yet been incurred.

If the CBAA's proposal was accepted, the proposed process would result in the planning and implementation decisions that have been made to date (and the associated cost and time) being subject to a retrospective challenge. This would be neither proportionate nor necessary, particularly since the access undertaking already imposes measures to ensure that the JVCs incur costs prudently.

Finally, the JVCs do not agree with the reasoning and assumptions that have underpinned the CBAA's proposed amendments to clause 1.4 of Attachment A of the access undertaking and clause 9.7 of the access agreement. The JVCs responds to these points in sections 1.1 - 1.3 below.

1.1 OCR site deployments are optimal and efficient

The JVCs strongly disagree with the suggestion that the number and timing of OCR site deployments is sub-optimal, thereby resulting in the JVCs incurring costs inefficiently.

The JVCs have carefully selected the location and number of OCR sites on the basis of their location within or adjacent to identified black spots, using a combination of coverage planning tools, field measurements and anecdotal experience. While conjecture about alternative locations is always possible with hindsight, there is no evidence to suggest that the methodology used by the JVCs is deficient. The JVCs would be pleased to provide further information to the ACCC to show that this is the case.

The adopted methodology for the selection of OCR sites was subject to customer engagement through DTAC. In addition, ACMA has also had visibility of the site selection process from a licensing and technical planning and interference management perspective.

More importantly, the initial capital expenditure associated with the deployment of OCRs is being wholly covered through the auction revenues that were received by the JVCs as part of the auction of excess-capacity access entitlements. Therefore, the initial capital cost of the OCR rollout does not form part of the fixed recurring charges paid by access seekers and is essentially being subsidised by the commercial radio broadcasters that acquired excess-capacity access entitlements at auction.

⁷ The one exception to this is 101 Collins Street, Melbourne, which is being operated by the JVC using a scientific licence issued by ACMA. 61004640.5

It cannot therefore be reasonably argued that the initial OCR related capital costs will be passed through to access seekers.⁸ To the extent that these capital costs are not spent in a financial year and the capital costs need to be incurred in a subsequent year, then the auction revenues will be applied in the subsequent financial year to offset capital costs. It is only when additional capital costs are incurred which cannot be covered by the auction revenue that such costs will be incorporated into the fixed recurring charges. This is not expected to occur for some time and would be subject to the efficiency measures that already exist under the access undertaking in any event.

Further, while the “switch on” of OCR sites has been dependent on the JVCs securing an agreement with the national broadcasters on interference mitigation and the approval of licence amendments by ACMA (which in turn were dependent on the JVCs securing agreement with the national broadcasters), the JVCs have sought to ensure that the operational costs associated with each OCR site access agreement are optimised to the extent possible by minimising the time between initial access to the site (e.g. for preparatory works) and the commencement of OCR services.

Other major items of operational expenditure, such as electricity, maintenance and monitoring costs, are payable based on usage and are therefore not payable until the OCR services are switched on.

When taken together, the above suggests that the operational expenditure associated with the OCR project has been efficiently incurred on the whole.

1.2 Cost recovery arrangements between the JVCs and the national broadcasters

While the OCRs have been scoped to support the supply of OCR services to commercial broadcasters, community broadcasters and national broadcasters, the initial capital costs associated with the dimensioning of OCR services have, as noted above, been funded by the commercial radio broadcasters that acquired excess-capacity access entitlements at auction.

Therefore, to the extent that there have been any additional capital costs associated with dimensioning the OCRs to support digital radio services for all three categories of broadcasters, these initial capital costs are not reflected in the fixed recurring charges payable by access seekers.

Further, under the current agreement between the JVCs and the national broadcasters, the JVCs have agreed to repeat the ABC/SBS main transmitter signal at low power from the OCR sites for the purpose of eliminating any potential interference that full power OCR transmissions of Channel 9A/9B may cause to Channel 9C services.

As the repeater transmission service will initially be provided to the national broadcasters for interference management purposes only and will not provide any additional benefit to the national broadcasters (e.g. coverage improvements), it is appropriate that the JVCs do not charge for this service.

⁸ While the capital costs associated with the OCR project has been funded from auction revenue and therefore is not included within the access fees payable by access seekers, the JVCs have nonetheless taken a prudent approach to incurring these costs. For example, OCR equipment has been procured using a competitive tendering process, with the selection of vendor made having regard to the total cost of ownership over the economic life of the assets. Further details about this process and the outcome are set out in the JVC Annual Report for 2012-2013 submitted to the ACCC.

However, if government funding becomes available to the national broadcasters for the improvement of digital radio services in each capital city, it is expected that the JVCs will provide the repeater transmission service to the national broadcasters at full power, which in turn will result in coverage area improvements for the ABC and SBS. Given the benefits that would accrue to the national broadcasters in this situation, the JVCs expect the national broadcasters to contribute to the costs associated with each OCR site as part of a long term arrangement.

For example, In the case of Sydney, Melbourne and Brisbane, where there are two commercial / community multiplexes and one ABC/SBS multiplex that will receive the OCR service at full power as part of a long term arrangement, the JVCs would expect the ABC/SBS to contribute one-third of the fees that are payable in relation to each OCR. In the case of Adelaide and Perth, where there is only one commercial/community multiplex and one ABC/SBS multiplex, the JVCs expect the ABC/SBS to contribute half of the fees for each OCR.⁹ Where the national broadcasters contribute to the costs, then these costs will not flow through to access seekers as fixed recurring charges.

Therefore, if full power OCR services are supplied to the national broadcasters:

- the national broadcasters will be required to contribute to the costs associated with the operation of the OCR at full power; and
- as per the CBAA's requirements, those contributions from the national broadcasters will be taken into account when the JVC determines the access fees payable by access seekers, meaning that there will be no double recovery.

1.3 Definition of RF Service

The JVCs do not agree that the proposed amendments to the definition of the RF Service would prevent the JVCs from recovering the costs of the OCR project. The drafting intends to create the opposite situation.

The JVCs consider that the changes proposed to clause 1.4 of Attachment A of the access undertaking make it clear that the RF Service can comprise more than one transmitter, which in turn means that the costs associated with each transmitter can be recovered through the access fees for the Multiplex Transmission Service (in respect of which the RF Service forms a component).

2 Safe Operation of Multiplex Transmitter Service

In its variation request, the JVCs proposed a new clause 9.6 for inclusion in the access agreement to ensure the safe operation of systems, equipment and facilities in connection with the Multiplex Transmission Service.

The CBAA has accepted our proposed amendment, but has proposed the following additional clause:

⁹The one exception to this arrangement is 101 Collins Street, Melbourne, where the JVCs have agreed to supply the OCR repeater service to the national broadcasters at full power without a financial contribution from the national broadcasters. While the JVCs are not currently charging for this specific service, the JVCs intend to charge for these services once the national broadcasters are able to secure government funding for this purpose.

“Nothing in this Clause prevents an Access Seeker from operating its own systems, equipment or facilities in a manner of its own choosing provided such operation complies with clause 9.6(c).”¹⁰

The JVCs have no objection to the inclusion of this proposed clause if the ACCC wishes to issue a variation notice under section 118NH(5) of the Radiocommunications Act requiring the JVCs to make alterations to the access undertaking.

3 Electronic Program Guide

In the CBAA Submission, the CBAA expresses support for the introduction of an Electronic Program Guide (**EPG**) for digital radio services and encourages the ACCC to consider whether the existing access regime ensures equal treatment of access seekers and their respective services if an EPG is introduced in some form in the future.¹¹

While the JVCs consider that the introduction of an EPG would be highly desirable, there is no intention to introduce an EPG for digital radio services at this time. There are several reasons why the JVCs consider the implementation of an EPG to be premature, including most importantly, the absence of affordable DAB+ receivers that have the functionality to support an EPG.

If the JVCs decide to consider introducing an EPG, this decision will be taken in consultation with all access seekers and the technical solution for implementation will be agreed through DTAC. To the extent that the service description within the access undertaking (or any other aspect of it) requires amendment to support an EPG, then this will need to be subject to a further variation request and ACCC approval.

In any event, as an EPG will most likely be delivered as part of the Multiplex Transmission Service, this will mean that the “no hindrance of access” and “non-discrimination” safeguards in clauses 9.2 and 9.3 of the access agreement will apply to EPG services. This will operate to ensure that all access seekers, including the community broadcasters, are given the opportunity to participate in an EPG on an equal basis.

Finally, the supply of an EPG by the JVCs would also potentially be subject to the competition safeguards in Part IV of the Competition and Consumer Act, including most relevantly, the prohibition in section 45(2) against exclusionary provisions. Any exclusionary arrangements in relation to an EPG against the community broadcasters would not be compliant with these legislative requirements.

* * *

Thank you for the opportunity to comment on the CBAA Submission.

Please do not hesitate to contact me if you have any questions.

¹⁰CBAA Submission, paragraph 4.3.

¹¹Ibid, paragraphs 8.1 – 8.2.
61004640.5

Yours sincerely
Webb Henderson

A handwritten signature in black ink, appearing to read 'A. Margossian', with a long horizontal flourish extending to the right.

Ara Margossian
Partner