



## **Broadcasting Legislation Amendment (Digital Radio) Bill 2008**

Commercial Radio Australia (**CRA**) welcomes the opportunity to make submissions to the Environment, Communications and Arts Committee (**Committee**) relating to the Broadcasting Legislation Amendment (Digital Radio) Bill 2008 (**Bill**). CRA is the peak national industry body for Australian commercial radio stations. CRA has 260 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

### **Summary**

#### ***Definition of metropolitan markets and digital start up date***

CRA strongly supports the reasoning behind the proposed changes to sections 8AC(3)(a), 8AC(8)(e) and 8AC(8)(f) of the *Broadcasting Services Act 1992* (**BSA**), in relation to the alteration to the definition of metropolitan markets and the extension of the mandatory digital start-up date.

CRA makes no further comments relating to these amendments.

#### ***Joint venture companies***

The commercial radio industry strongly objects to the proposed amendments to the *Radiocommunications Act 1992* (**Act**), which will force the eligible joint venture companies (**JVCs**) established under section 102C of the Act to issue shares to the digital community radio broadcasting representative companies (**Community Representative Companies**).

The commercial radio industry believes that the proposed amendments to the Act – or any alternative amendments intended to force the JVCs to issue shares at this stage – should not be included for the reasons detailed below.

In the event that the industry's primary argument is rejected, and an amendment that forces the JVCs to issue shares to the Community Representative Companies is considered necessary, the industry urges the Committee to take account of the submissions set out below regarding the drafting of such amendments.

It is vital that the industry's comments are incorporated so as to ensure that the acquisition takes place on just terms – in accordance with section 51(xxxi) of the Constitution – and existing JVC shareholders are not prejudiced by the late acquisition of shares by the Community Representative Companies.

We attach a draft of the Bill with the industry's suggested mark-ups at **Annexure 1**.

CRA's key comments are:

- The JVCs are private incorporated companies, owned by the existing shareholders who have funded the companies to date. It would set a worrying precedent – with the potential to affect other private companies – were the Bill to force the JVCs to open up their share registers against the will of existing shareholders.
- The Act prescribes a timetable that applies to both the commercial and community radio industries. The commercial radio industry complied with and relied upon that timetable, bore the initial risks of setting up the JVCs, entered into supply agreements and supplied the initial funding. It would be inequitable to allow the Community Representative Companies to buy shares in the JVCs at this stage, without having offered identical terms to the commercial radio industry.
- If government does proceed with an amendment forcing the JVCs to issue shares to the Community Representative Companies, any amendment must make it absolutely clear that the Community Representative Companies must pay 2/9 of all sums already expended by the existing JVC shareholders.
- The Community Representative Companies must not be allowed to use their delayed entry into the JVCs to escape their obligation to contribute to the substantial capital required during the early stages of digital roll-out.
- Lastly, it is worth emphasising that membership or otherwise of the JVCs in no way affects broadcasters' legislative entitlement to access multiplex capacity. The access entitlements are prescribed by the legislation and the Community Representative Companies are guaranteed 2/9ths access to multiplex capacity, irrespective of whether they are JVC shareholders.

A discussion of these points, together with other comments, is below.

## **Detail**

### **1. Interference in running of private company**

The commercial radio industry is concerned that the Bill reflects an apparent willingness on the part of government to interfere in the running of a private company. The forced issue of shares to a third party, no matter who that third party is - accompanied by a consequential dilution in the shares of existing shareholders - is a draconian step.

Approval of the Bill would signify a disturbingly interventionist approach. As a matter of general principle, private companies in Australia should be allowed to run their businesses in accordance with applicable legislation, without involvement by government.

Deviation from this approach has the potential negatively to affect all private business in Australia.

The JVCs were constituted in accordance with detailed and prescriptive legislation. The

JVC shareholders feel strongly that they should now be allowed to run those companies as envisaged by the existing legislation and without further governmental interference.

### **3. Broadcasters should operate under the same legislative framework**

The Act sets out a timetable which the commercial radio industry has adhered to and relied upon.

The commercial radio industry chose to take the risk of involvement during the initial set-up period, when contracts were negotiated, equipment was ordered, capital was expended and liabilities accrued. It was not open to the commercial radio industry to join the JVCs once this period had passed.

The industry understands and is sympathetic to the funding problems encountered by the Community Representative Companies. However, it submits that a change to the legislative framework at this stage would unfairly prejudice the commercial radio industry and could create uncertainty regarding the legislative processes applicable in the future.

The legislation was very clear about where principles of non-discrimination would apply and how the rights to take up shares would apply to different categories of broadcasters. To change that now, after those original shareholders (who acted in accordance with the legislative timetable) have been required to carry risk and debt, is not appropriate.

This remains the case irrespective of the reasons for which the amendments in relation to shareholding for the community representative companies are proposed.

It could also create ongoing uncertainty if the Bill allowed third parties to depart retrospectively from the framework outlined in the Act. The commercial radio industry has relied on the fact that the processes set out under the Act will be followed. In order to plan an effective digital roll-out, the industry needs certainty as to the legislative processes that will apply.

### **4. Amendments to the Bill**

The industry's primary position is that the amendments to the Act should not be included, for the reasons outlined above. However, if the above arguments are rejected, and amendments to the Act are made, the industry urges the Committee to recommend that the below drafting amendments are incorporated into the Bill. The changes are shown in mark-up at Annexure 1.

Our view is that these amendments are necessary in order to satisfy the requirements of section 51(xxxi) of the Constitution, which requires that the compulsory acquisition of property be on "just terms". The industry will consider taking action under the proposed section 113A(2) if the Bill becomes law without incorporating the below amendments.

- (a) Delete existing section 109D(3)(c)(ii)

The industry objects strongly to the provision allowing the Community Representative Companies to make a request for shares within 12 months after the digital radio start-up day. If the amendments to the BSA go ahead, this would give the Community Representative Companies until 1 July 2010 to request shares in the JVC. This is far too lengthy a period.

To have uncertainty regarding the composition of the JVC shareholders until July 2010 would be unworkable from a practical perspective. In order to plan effectively the JVCs must be able to calculate the amount of funding available and required from shareholders. This becomes very difficult if the composition of shareholders is liable to change significantly over such a long period.

The industry submits that in order to reach a workable compromise, the Community Representative Companies should be allowed to request the issue of shares only until the digital radio start-up day.

(b) Add new sections 109D(3)(c)(ii)(A) to (C)

In making their request for shares, the Community Representative Companies must undertake to do certain acts in order to ensure that they enter the JVCs on the same terms as the existing shareholders. It would be wholly unacceptable for the Community Representative Companies to hold their shares on terms that are not identical to those of the existing shareholders.

- A. The Community Representative Companies must undertake to sign a deed of adherence to ensure that they will be bound by the existing shareholders agreement and by any agreements entered into by the shareholders with any third parties. The latter obligation will ensure that the JVCs do not find themselves in breach of any existing commercial arrangements, or in a position where they are forced to take up additional liabilities on behalf of the Community Representative Companies.
- B. To avoid prejudicing the existing shareholders, the Community Representative Companies must undertake to pay their share of monies expended prior to the issue of their shares. The new share price must reflect the increased value of the JVCs, by reference to the amount already spent by the existing shareholders.
- C. The Community Representative Companies must comply with all resolutions passed by the board or shareholders of the JVC.

(c) Amend section 109D(3)(g)

The industry will object strongly to the requirement that the offer to be kept open for 120 days. A period of this length will create an unacceptable level of uncertainty for the existing shareholders and will make it impossible for the JVCs to plan properly. If new shareholders are to be added, this must be done within as short a time period as possible, to enable the JVCs to continue with their operational planning with the least disruption.

We have amended the period within which the offer must be accepted to 30 days. This is consistent with the 30 day period within which the licensee must make the offer after receiving the request.

(d) Amend section 109D(3)(h)

We have added the word "obligations" to ensure that the Community Representative

Companies hold their shares on exactly the same terms as the existing JVC shareholders.

(e) Amend section 109(3)(i)

We have amended this section to ensure that the share price paid by the Community Representative Companies reflects the increased value of the JVC companies, by reference to the funding already contributed by the existing shareholders.

It would be entirely unacceptable if this legislation enabled the Community Representative Companies to acquire shareholdings at the initial offer price, without taking into account the substantial funding subsequently contributed by existing shareholders.

We have amended the formula by reference to which the share price is calculated so that it takes into account the additional funding contributed by the existing shareholders.

This will place the Community Representative Companies in exactly the same financial position as they would have been had they joined as shareholders at the outset.

CRA would welcome the opportunity to discuss or amplify any of these points with the Environment, Communications and Arts Committee. The Committee should contact Joan Warner on 9281 6577 if it wishes to do so.

## ANNEXURE 1

### EXPOSURE DRAFT

#### A Bill for an Act to amend the law relating to broadcasting, and for other purposes

The Parliament of Australia enacts:

##### **1 Short title**

This Act may be cited as the *Broadcasting Legislation Amendment (Digital Radio) Act 2008*.

##### **2 Commencement**

This Act commences on the day after it receives the Royal Assent.

##### **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

##### **Schedule 1—Amendments**

###### ***Broadcasting Services Act 1992***

###### **1 Paragraph 8AC(3)(a)**

Omit "1 January 2009", substitute "1 July 2009".

###### **2 Subsection 8AC(8) (paragraph (e) of the definition of metropolitan licence area)**

Omit "Australia; or", substitute "Australia".

###### **3 Subsection 8AC(8) (paragraph (f) of the definition of metropolitan licence area)**

Repeal the paragraph.

###### ***Radiocommunications Act 1992***

###### **4 At the end of section 109D**

Add:

*Issue of shares to digital community radio broadcasting representative company*

(3) The licence is subject to the condition that, if:

(a) there is a digital community radio broadcasting representative company (the **representative company**) for the designated BSA radio area; and

(b) the representative company gives the licensee a written request under this paragraph to be issued with shares in the licensee; and

(c) the request is made:

(i) before the digital radio start-up day for the designated BSA radio area; or and

(ii) the request includes a written undertaking from the representative company that, as a prior condition of the issue of shares, it will:

- A. execute a deed of adherence and do all other things (including arranging any required guarantees) that are necessary to ensure that it is bound by and compliant with all agreements between the existing shareholders; and
  - a. the licensee; and
  - b. any third party, in relation to the activities of the licensee; and
- B. pay the offer price per share calculated in accordance with subsection 109D(3)(i) below within 30 days of the acceptance by the representative company of the offer made pursuant to subsection 109D(3)(e) below within 12 months after the digital radio start-up day for the designated BSA radio area; and
- C. comply with all resolutions passed by the board or shareholders of the licensee; and

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(d) if an invitation was made to the representative company under whichever of paragraph 102C(5)(a) or 102D(5)(a) applied in relation to the formation of the licensee—no shares were issued to the representative company in connection with the invitation;

the licensee must:

(e) by written notice given to the representative company, offer to issue to the representative company a number of shares in the licensee such that, if the offer were accepted, the representative company would hold two-ninths of the shares in the licensee; and

(f) ensure that the offer is made within 30 days after the licensee receives the request; and

(g) keep the offer open for at least 3+20 days after the offer is made; and

(h) ensure that the rights, obligations and restrictions (if any) attached to the shares the subject of the offer are the same as the rights, obligations and restrictions (if any) attached to the shares held by existing shareholders in the licensee; and

(i) ensure that the offer price per share does not exceed the amount worked out using the formula:

Total price of pre-offer shares  
Number of pre-offer shares

PLUS

total expenditure,  
Number of post-offer shares

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where:

*number of post-offer shares* is the number of pre-offer shares added to the number of shares in the licensee issued to the representative company.

*number of pre-offer shares* is the number of shares in the licensee (~~the pre-offer shares~~) that were issued before the offer was made.

*total price of pre-offer shares* is the total amount paid or payable to the licensee as consideration for the issue of the pre-offer shares.

*total expenditure* is all financial sums paid or payable and all expenses paid or accrued by the licensee (including interest), as at the date of issue of the shares to the representative company.

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(4) The digital community radio broadcasting representative company for the designated BSA radio area is not entitled to make more than one request under subsection (3).

(5) For the purposes of subsection (4), disregard a request if the request does not result in compliance by the licensee with the requirements of subsection (3).

Note: The heading to section 109D is replaced by the heading "**Conditions of foundation digital radio multiplex transmitter licences**".

Note: The following heading to subsection 109D(1) is inserted "*Scope*".

Note: The following heading to subsection 109D(2) is inserted "*Ownership of shares in licensee*".

### **5 At the end of Division 3 of Part 3.3**

Add:

#### **113A Constitutional safety net—issue of shares to digital community radio broadcasting representative company**

(1) If the operation of subsection 109D(3) would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

**acquisition of property** has the same meaning as in paragraph 51(xxxi) of the Constitution.

**just terms** has the same meaning as in paragraph 51(xxxi) of the Constitution.

*Broadcasting Legislation Amendment (Digital Radio) Bill 2008 No. , 2008 5*