



23 February 2009

Mr Richard Home
General Manager
Strategic Analysis and Development Branch
Australian Competition and Consumer Commission
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Dear Mr Home

**SHAREHOLDING IN EJVC – EFFICIENT COSTS
DIGITAL RADIO MULTIPLEX TRANSMISSION SERVICES**

I write further in relation to your consideration of digital radio Access Undertakings and Agreements, specifically in relation to the submission lodged by Commercial Radio Australia on 23 January 2009.

In that submission it was suggested that 'gold plating' is not a serious risk with respect to investment in digital radio multiplexing facilities.

It was further suggested there are incentives that exist outside and independently of the access undertaking that are in themselves sufficient to ensure that the costs incurred by the EJVCs are efficient, including 'the common shareholding that exists (or, in the case of digital community broadcasters, which will shortly exist) between EJVCs and access seekers.

The CBAA believes it is over simplistic and inappropriate to presume that external incentives and the notion of 'common shareholding' between EJVCs and access seekers are sufficient to ensure costs incurred by the EJVC are efficient'.

With such weight being put upon the notion of shareholding, the CBAA believes that the ACCC has a duty to closely examine the Constitution and Shareholders Agreements of the EJVCs.

The Constitution and Shareholders Agreement does in no way treat all shareholders equally or in a non-discriminatory manner. Neither does shareholding prevent minority - community or commercial - shareholders from being out-voted in key infrastructure decisions by a dominant grouping of shareholders.

We draw the ACCC's attention to the fact that the EJVC Constitution and Shareholders Agreement does not appropriately align directorship numbers or voting rights with the economic interest of all shareholders in the JVC. Instead the structure is quite discriminatory.

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For example, in each capital city the EJVC Constitution and Shareholders Agreement ascribes one directorship and one vote for each commercial broadcaster who holds a one-ninths shareholding in the multiplex. This contrasts with the community sector where the documents provide for one director and one vote, irrespective of shareholding interest.

We note that the community sector is entitled to at least two ninths equity and shareholding in each multiplex. If voting were to align with shareholder equity on a non-discriminatory basis then this would ordinarily result in two votes for the community sector. However there is only one.

Where there are two multiplexes – Melbourne, Sydney and Brisbane – the situation is even more out of balance. Shareholder equity would ordinarily result in four votes. However there is only one.

Thus, there is no need to ponder whether the EJVC may or may not act in a discriminatory manner. It already has by virtue of its Constitution and Shareholders Agreement diminishing the voting rights of certain shareholders.

The Commercial Radio Australia submission goes on to presume that the community broadcasters will take up shareholding in the EJVCs. This is by no means a certainty.

It is true that legislation has been passed that re-opens that option for the community broadcasters.

The community broadcasters will certainly consider the option seriously and have previously expressed a strong preference to take up shareholding. There remains the voting rights issue to be resolved. There also remains the issue of how to deal with shareholding inappropriately exposing non-profit community organisations to unlimited expenditure calls.

The CBAA strenuously negotiated these and other points in March and April 2008. Ultimately stations provided a consent to shareholding that was conditional and limited to be within the extent of future government funding support. These were rejected by the EJVCs. (Attached)

If the ACCC has any regard whatsoever for the intersection of shareholding and access seekers in ensuring costs incurred by the EJVC are efficient then the CBAA believes the ACCC should fully appraise itself of the EJVC Constitution and Shareholders agreements.

As a final point, we note that Commercial Radio Australia has submitted a revised access agreement which contains a new definition of efficient costs at Schedule 2, section 3.3. We believe that at Page 38 clause 3.3 (a)(i) and corresponding clause 3.3 (b)(i) should be deleted.

Yours sincerely



Michele Bawden
GENERAL MANAGER