

The Broadcasting Legislation Amendment (Digital Radio) Bill 2008

Referral to the Committee

1.1 On 25 September 2008, the Senate referred the Broadcasting Legislation Amendment (Digital Radio) Bill 2008 (hereafter 'the bill') to the Senate Environment, Communications and the Arts Committee for inquiry and report by 13 October 2008.

1.2 Due to the reporting time frame, the committee did not advertise the inquiry in the press. However, details of the inquiry were placed on the committee's website and the committee also wrote to a number of organisations and stakeholder groups inviting written submissions by 2 October 2008.

1.3 The committee received submissions from two organisations, as listed at Appendix 1. The committee also wrote to the Department of Broadband, Communications and the Digital Economy (the Department) seeking a response to issues raised by Commercial Radio Australia (CRA) during the inquiry.

1.4 Parts of the submission from CRA were provided to the committee on a commercial-in-confidence basis. Only those parts that CRA was happy to have published were publicly released by the committee as submission one to this inquiry. However, in order to ensure the committee was as fully informed as possible, it provided the entire submission to the Department, with CRA's agreement. It asked the Department to respond to all issues raised in the full submission, and has treated the response on an in-confidence basis.

1.5 The committee thanks both CRA and the Department for their assistance in examining potentially sensitive commercial matters that are relevant to the current bill. In order to protect the in-confidence nature of some of the material provided, the committee has not published the correspondence from the Department. This report does however quote key parts of that correspondence in relation to the committee's inquiry.

Background to the inquiry

1.6 Digital radio broadcasting is a relatively new method of assembling, broadcasting and receiving communications services. It will provide for better reception of radio services and deliver higher quality sound than current amplitude modulation (AM) and frequency modulation (FM) radio broadcasts; as well as carry ancillary services – in the form of audio, images, data and text – providing:

- program information associated with the station and its audio programs (such as station name, song title, artist's name and record label),

- other information (e.g. Internet downloads, traffic information, news and weather), and
- other services (eg paging and global satellite positioning).

A fundamental difference between analog and digital broadcasting is that digital technology involves the delivery of digital bit streams that can be used not only for sound broadcasting but all manner of multimedia services.¹

1.7 Digital radio systems convert the audio signal from an analog waveform to a digital signal, which is digitally compressed, transmitted and decoded by digital radio receivers.²

1.8 In October 2005, the then government introduced a policy framework for digital radio and in March 2007 two bills, the Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (the Digital Radio bill) and the Radio Licence Fees Amendment Bill 2007, were introduced into Parliament to implement the government's digital radio policy. Both bills were referred to the Senate Environment, Communications, Information Technology and the Arts Committee for inquiry and report.

1.9 The Digital Radio bill proposed a number of amendments to the *Broadcasting Services Act 1992*, *Radiocommunications Act 1992*, and the *Trade Practices Act 1974* so as to enable the licensing, planning and regulation of digital radio services, including to:

- enable the provision of digital radio services by commercial and wide-coverage community radio broadcasting licensees, and the national broadcasters, using the Digital Audio Broadcasting (DAB) technology;
- establish a new multiplex transmitter licence category to accommodate the shared transmission platforms ('multiplexes') of the DAB system;
- require incumbent commercial radio broadcasters and multiplex licensees to commence, and to continue to provide, digital radio services – in the case of the state capital city markets on or before 1 January 2009;
- provide the opportunity for existing commercial and wide-coverage community broadcasters to control the multiplex licences for their initial services, with subsequent licence allocations to be undertaken via a priced-based method;

1 Australian Communications and Media Authority (ACMA), 'Digital radio', http://www.acma.gov.au/WEB/STANDARD/pc=PC_90054, accessed 30 September 2008.

2 Australian Communications and Media Authority (ACMA), 'Digital radio', http://www.acma.gov.au/WEB/STANDARD/pc=PC_90054, accessed 30 September 2008.

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- establish minimum access rights to multiplex transmission capacity for the commercial, wide-coverage community and national broadcasters on relevant multiplex licences;
 - establish a multiplex access regime to ensure operators of commercial multiplexes provide access to transmission capacity on terms that are open, efficient and generally non-discriminatory;
 - introduce a six year moratorium on the issue of new licence area planned commercial digital radio licences from the commencement of services in the respective market; and
 - provide the Australian Competition and Consumer Commission (ACCC) with appropriate powers to enforce the access regime.³

1.10 The committee tabled its final report on these bills on 9 May 2007,⁴ and the bills were passed.

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1.11 The current bill seeks to amend the *Broadcasting Services Act 1992* to:

- extend the deadline for commercial broadcasters to commence digital radio services in the mainland state capital cities to 1 July 2009; and
- defer the rollout of digital radio services to Hobart by redefining Hobart as a regional licence area; and

to amend the *Radiocommunications Act 1992* to:

- provide further opportunity for community radio stations to take up shares in the joint venture companies managing the transmission of digital radio services.

1.12 Regarding the first of these three amendments, the Second Reading Speech noted that:

Commercial radio broadcasters in these markets are currently required to have commenced their digital radio services by 1 January 2009. Failure to do so could expose them to sanctions including the cancellation of their right to broadcast in digital.

It has become apparent that due to a range of reasons broadcasters will be unable to comply with this deadline. In this regard, I note that the

3 Broadcasting Legislation Amendment (Digital Radio) Bill 2007, EM, pp 2–3.

4 Senate Standing Committee on the Environment, Communications, Information Technology and the Arts, Inquiry into Broadcasting Legislation Amendment (Digital Radio) Bill 2007 [Provisions] and Radio Licence Fees Amendment Bill 2007 [Provisions], May 2007 at: http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/report/index.htm.

commercial radio sector recently announced that the national switch-on for digital radio will take place on 1 May 2009.

To facilitate this, the Bill will extend, by six months, the deadline for start-up. The new deadline of 1 July 2009 will give commercial broadcasters additional flexibility to resolve any further infrastructure issues relating to the rollout of transmission equipment as they prepare for the launch of the new digital services.⁵

1.13 The proposal to extend the legislated timetable for commercial broadcasters to commence digital radio broadcasting from 1 January to 1 July 2009 was flagged in the 2008-2009 budget measures. As part of this proposal the community sector's funding was re-profiled to commence in the 2009-10 financial year. It was noted that the extension would not prevent the commercial, community or national broadcaster from commencing digital radio earlier, subject to the necessary regulatory approvals being in place.⁶

1.14 The second proposed amendment to the Broadcasting Services Act removes Hobart from the list of markets where broadcasters are required to commence digital radio services from the new deadline of 1 July 2009, as

Hobart's commercial radio broadcasters have expressed strong concerns that they would not be in a position to commence digital radio services at the same time as services in the larger mainland state capital cities. The bill will allow digital radio services to start in Hobart at the same time as other, similar sized markets such as Newcastle, Geelong and Wollongong.⁷

1.15 The third amendment proposed in this bill would amend the *Radiocommunications Act 1992* and proposes to give the community broadcasting sector an opportunity to participate in the ownership of the transmission infrastructure that will be used to broadcast their digital radio services.

1.16 The Second Reading Speech states that Government is supportive of the community broadcasters' participation in digital radio and considers that community broadcasters play a vital role in promoting diversity, local content and grassroots participation in the media sector. However,

As a consequence [of the re-profiling of the community sector's funding] the community sector was unable to claim a share in the joint venture companies, formed in 2008, that own digital radio transmission infrastructure. This amendment will restore to the community broadcasting sector an opportunity to participate in the joint venture companies in line with the original intent of the legislation introduced in May 2007.⁸

5 Senate *Hansard*, 17 September 2008, p. 2.

6 *Budget Paper No. 2, Budget Measures 2008-2009*, p. 101.

7 Senate *Hansard*, 17 September 2008, p. 2.

8 Senate *Hansard*, 17 September 2008, p. 2.

1.17 No submitters raised concerns about the first two proposed amendments; however the committee received a submission from CRA raising certain issues about the third amendment.

Community broadcasting and the joint venture companies

1.18 The original digital radio legislation in 2007 amended the Radiocommunications Act to facilitate the establishment of joint venture companies that would administer digital radio multiplex licences. Commercial broadcasters wishing to participate in digital radio were to become members of these joint ventures.

1.19 The legislation also gave community broadcasters the opportunity to participate in these joint ventures.⁹ However, the committee understands that, for financial reasons, community radio was unable to take up the opportunity to become shareholders in the joint ventures at the time of their foundation. The Department explained:

The initial offer for representative companies to take up shares in the JV [joint venture] companies in the state capitals closed in April 2008 before the Government confirmed in the 2008-09 Budget context that due to the tight fiscal environment, and in light of the decision to extend the deadline for the compulsory commencement of commercial digital radio services, it would defer funding to the 2009–2010 financial year. This level of funding uncertainty meant that, while not prevented from doing so, the representative companies were reluctant to unconditionally agree to the level of financial commitment sought by the JV companies in their initial share offer. Once formed, the JV companies are not obliged to make further share capital available to the representative companies.

This amendment restores to community radio broadcasters the opportunity to purchase shares in the JV company in line with the intent of the original legislation.¹⁰

1.20 Thus the government's current bill is designed to create a second opportunity, on terms the same as those in the original legislation, for the community radio sector to become shareholders in the joint venture companies that administer the foundation multiplex licences.

1.21 The Community Broadcasting Association of Australia (CBAA), which represents community radio, was supportive of this mechanism. It believed that the bill:

will ensure the community broadcasting sector retains the right to participate in the ownership of digital radio transmission infrastructure that will be jointly used by the commercial and community sectors. It is

9 *Radiocommunications Act 1992*, Sections 102C(5) and 102D(5).

10 Department of Broadband, Communications and the Digital Economy, Correspondence to the committee, 8 October 2008.

appropriate and entirely consistent that the option of an ownership role be retained in the legislative framework in line with the extended start date, and in light of the Federal Government's funding commitment commencing in the 2009-10 financial year to facilitate the participation of community broadcasters in the digital radio framework.¹¹

1.22 The committee notes both the government and CBAA have identified funding constraints as underpinning some of the challenges in achieving a successful transition to digital broadcasting. CBOonline, in its recent survey of community broadcasters, has shown that the majority of such broadcasters have an annual income of less than \$200 000 from all sources.¹² While many of the metropolitan stations are larger than this, financial constraints clearly have the potential to have a significant bearing on community radio's ability to participate in new media environments. The committee accepts the legitimacy of the argument that these financial constraints should be taken into account in managing the transition to digital broadcasting.

1.23 The body representing commercial radio broadcasters, CRA, objected to the particular way in which the government proposes to address this issue in the bill. It argued that the bill represents retrospective intervention in the operation of a private company:

...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.¹³

1.24 Regarding community radio's objectives, it said:

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.

11 CBAA, *Submission 2*.

12 CBOonline, *Community Broadcasting Database: Survey of the community radio sector, 2005-06 financial period*, Public Release Report, December 2007, p. 20.

13 CRA, *Submission 1*.

This remains the case irrespective of the reasons for which the amendments in relation to shareholding for the community representative companies are proposed.¹⁴

1.25 The committee does not agree that the reasons for legislative amendment are not relevant to the matter. The fact that the current bill is effectively designed to preserve the intent of the original legislation in the face of changed economic circumstances is important, however the committee notes that this has been necessitated by budget delays. The fact that the bill specifically indicates that the Commonwealth would be liable to pay compensation, should its effect be to acquire property within the meaning of section 51(xxxi) of the Constitution, also explicitly limits any risk to which joint venture partners are exposed by the bill.

1.26 The committee rejects the notion that the effect of this bill is 'draconian'. It also notes that CRA is incorrect in characterising either the original legislation or the current bill as involving 'the forced issue of shares to a third party'. The issuing of such shares is not, and never has been, 'forced', and the conditions on which community radio representatives are to be invited to obtain shares is unchanged from the original framework. As the Department noted in its correspondence to the committee:

As with the existing legislation this amendment will not force community broadcasters to join the JV companies. It remains a decision for the community broadcasters and their representative companies to make, weighing up the relevant commercial benefits, costs and risks, as to whether they will choose to seek a role in the JV companies.¹⁵

1.27 CRA also objected to the timeframes proposed for the renewed share offer in the current bill. It opposed giving the representative companies up to 12 months after the digital radio start-up date to request an issue of shares. CRA said that, if there was to be a time limit, it should not extend beyond that start-up date.

1.28 The Department responded:

The Department does not support this suggestion. This is because the Australian Communications and Media Authority (ACMA) can declare a start-up date for the commencement of digital radio services in the mainland state capitals at anytime between now and, if the proposed amendments in the Bill are passed by Parliament, 1 July 2009. On 9 September 2008 the commercial radio sector and the ABC announced that the national switch-on of their digital radio services will take place on 1 May 2009. It would therefore appear likely that ACMA will declare a start-up date for the mainland state capitals on 1 May 2009 which is some two months in advance of when the community broadcasting sector will

14 CRA, *Submission 1*.

15 Department of Broadband, Communications and the Digital Economy, Correspondence to the committee, 8 October 2008.

gain access to the digital radio funding the Government has provided from 2009-10.

...it is doubtful the representative companies would request the issue of shares before the community sector receives funding from the Government for digital radio in 2009-10. The amendments proposed by CRA could have the effect of preventing the representative companies from subscribing to shares in the JV companies in the five mainland state capital cities as funding from the Government will not be available before July 2009.¹⁶

1.29 The committee notes there may be some misapprehension about the way the legislated regime gives community radio an opportunity to broadcast. Under section 118NR of the current Radiocommunications Act, community broadcasters have a guaranteed right to participate in broadcasting on foundation multiplex transmitter licences. They do not need to be members of the joint ventures that manage the multiplex licences in order to broadcast. Equally, if they are unable or unwilling to participate in the joint ventures, their rights to broadcast under section 118NR are unaffected. They will always have the right to broadcast on the 2/9ths of the relevant foundation multiplexes. The current legislation does not affect this arrangement.

Recommendation 1

1.30 The committee recommends that the bill be passed.

**Senator Anne McEwen
Chair**

16 Department of Broadband, Communications and the Digital Economy, Correspondence to the committee, 8 October 2008.