



Broadcasting Legislation Amendment (Digital Radio) Bill 2008

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Broadcasting Legislation Amendment (Digital Radio) Bill 2008

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House: Senate

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Commencement: On the day after the date of the Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to modify the existing framework for the introduction of digital radio. The Bill amends the *Broadcasting Services Act 1992* (Broadcasting Services Act) and the *Radiocommunications Act 1992* (Radiocommunications Act) so that:

- the deadline for commercial broadcasters to commence digital radio services in the mainland state capital cities will be extended to 1 July 2009
- broadcasters in Hobart need only commence digital radio services at the same time as other markets of comparable size, and
- community radio stations have a further opportunity to take up shares in the joint venture companies managing the transmission of digital radio services.

Background

Digital radio technologies turn sound into digital signals which are then compressed, transmitted and decoded back into sound by digital radio receivers.¹ Digital radio can provide an improved listening experience for audiences in comparison with AM and FM broadcasting. Its benefits include better sound quality and reception and, due to its more efficient use of radio spectrum, greater choice of stations and potentially a greater number

1. Australian Communications and Media Authority (ACMA), 'Digital radio', http://www.acma.gov.au/WEB/STANDARD/pc=PC_90054, accessed on 23 January 2008.

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of specialist program formats.² It is also able to use single frequency network technology which allows the broadcast of stations through a number of transmitters on the same frequency across a region or nationally. This is not possible with analogue transmissions 'as in areas that receive signals from different transmitters broadcasting on the same frequency there is considerable mutual interference'.³

Basis of policy commitment

The adoption of digital radio using the Eureka DAB technology was first recommended in 1997 by the Digital Radio Advisory Committee (DRAC).⁴ By March 1998, the then Minister for Communications, Information Technology and the Arts Richard Alston announced that digital radio would be available to Australians by 2001.⁵ However, delays in the commencement of digital radio trials and uncertainty about the merits of various digital radio technologies meant that, at the time of the 2004 election, digital radio was still not a reality. At the time this situation evoked extensive criticism of the Howard Government. However, during the 2004 election campaign, the government responded to this criticism with a commitment to work with the radio industry in developing digital radio policy. It announced a five-year moratorium on the issue of new commercial digital radio licences, arguing that this timeframe was needed to resolve technology and spectrum issues and to determine the timetable for the rollout of digital services.⁶

In October 2005, the government introduced a policy framework for digital radio. The framework was particularly welcomed by commercial broadcasters who committed to investing an estimated \$400 million to make digital radio happen.⁷

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2. Australian Broadcasting Corporation, ABC Radio, digital radio page, <http://www.abc.net.au/radio/digital/>, accessed on 23 January 2008.
 3. See also explanation on the digital Radio Mondiale website, <http://www.drmmradio.co.uk/html/sfn.html>, accessed on 28 August 2008.
 4. DAB radio uses a multiplex to combine a number of programs into a single data stream for transmission. A DAB multiplex is made up of 'bits' which are used for carrying audio, data and an error protection system against transmission errors. It is possible to allocate a different number of bits on a multiplex to different services at different times and stations. Typically, DAB radio can deliver five compact disc quality stereo radio services (or more, if the services are of lesser audio quality) over a medium bandwidth of approximately 1.5 MHz.
 5. R. Alston, (Minister for Communications, Information Technology and the Arts), *Digital broadcasting a step closer*, media release, Parliament House, Canberra, March 1998.
 6. The Howard Government, Election 2004 policy, *21st century broadcasting*, <http://parlinfoweb.parl.net/parlinfo/Repository1/Library/partypol/NP2E60.pdf>, accessed on 30 January 2008.
 7. Commercial Radio Australia, *Industry welcomes digital announcement*, press release, 14 October 2005,

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In March 2007, legislation was introduced into Federal Parliament to implement the government's digital radio plans. The legislation was referred to a Senate inquiry which noted some of the issues that will affect the introduction of digital radio and which had been previously raised by stakeholders. These included the scarcity of spectrum available for digital transmissions, limitations of the DAB technology in servicing regional and remote areas and the need for broadcasters to co-operate in the use of a single data stream within the DAB technology multiplexes.⁸ The majority of the Senate committee considered the concerns were insufficient to delay the introduction of digital radio further and supported the legislation. Relevant amendments to the *Broadcasting Services Act 1992* to give effect to the digital radio framework were passed in May 2007.⁹

At the same time as legislation was introduced into Parliament, the radio industry announced that a new, superior standard for Eureka 147 technology, the DAB+ standard, had been developed and that this technology would be used when digital radio was launched in Australia. The first digital radio services were due to commence in the state capital city markets on 1 January 2009.

Following the 2007 election, the Rudd Government provided an option in its first Budget for broadcasters to delay this requirement to commence digital transmissions by six months. It noted at the time, however, that this extension did not prevent operators from

http://www.commercialradio.com.au/index.cfm?page_id=1265#100241, accessed on 10 July 2008.

8. 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, Senate Standing Committee on the Environment, Communications, Information Technology and the Arts, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/report/report.pdf, accessed on 28 July 2008.
9. See bills at: [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0403FA6E2A49519ACA2572AD007E7AE7/\\$file/07044B.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0403FA6E2A49519ACA2572AD007E7AE7/$file/07044B.pdf) and [http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/DCEA1D48AF42102FCA2572AE0001CBCB/\\$file/07043B.pdf](http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/0/DCEA1D48AF42102FCA2572AE0001CBCB/$file/07043B.pdf) accessed on 19 March 2008. The Broadcasting Legislation Amendment (Digital Radio) Bill 2007 (the Digital Radio Bill) amended the *Broadcasting Services Act 1992*, the *Radiocommunications Act 1992* and the *Trade Practices Act 1974* (known as the 2007 Digital Radio Legislation) to enable the licensing, planning and regulation of digital radio services and to give ACMA and the ACCC powers to undertake such activities. The Radio Licence Fees Amendment Bill 2007 complemented the Digital Radio Bill amending the *Radio Licence Fees Act 1964* to ensure that all revenue earned from analogue and digital radio broadcasting services is counted for the purposes of calculating radio broadcasting licence fees.

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commencing broadcasts of digital radio services on 1 January 2009 as had been legislated by the previous government.¹⁰ There was initially some confusion as to the intent of this announcement, but this was quickly overcome and a number of broadcasters indicated that while this option may be available for some operators that many intended to commence digital transmission from 1 January 2009.¹¹

Position of significant interest groups/press commentary

In a submission to the Senate inquiry into the digital radio legislation in 2007 the Community Broadcasting Association of Australia (CBAA) raised a number of concerns about how the legislative framework for transition to digital would affect community broadcasting. The first concern was that the legislation did ‘not provide capacity for community radio broadcasting services on all available multiplexes¹², which had previously been guaranteed in the Howard Government’s digital radio framework.

Secondly, the CBAA expressed concern about the collaborative management structure that would be imposed on wide-coverage community radio broadcasters by way of a ‘digital representative company’.¹³

Under the collaborative structure, Digital Representative Companies were to determine how the community radio stations in each city collectively and collaboratively accessed digital spectrum. The companies were also required to become shareholders with commercial radio licensees in what were labelled joint venture companies. These joint venture companies would then own and operate transmission multiplexes.

CBAA argued that imposing this extra layer of management obligation on the community radio sector was unduly prescriptive. CBAA suggested that instead of the proposed model, a direct licensing model similar to that which applied to commercial broadcasting be adopted.¹⁴

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10. Australian Government, *Budget Paper No 2: Budget Measures 2008–09*, Commonwealth of Australia, Canberra, 2008, p.101.
 11. J. Hogan, ‘Six-month delay for digital radio, the *Age*, 19 May 2008, <http://business.theage.com.au/business/sixmonth-delay-for-digital-radio-20080518-2flz.html>, accessed on 28 July 2008.
 12. The term ‘multiplexes’ is explained in items 4 and 5 of the Main Provisions of this Digest.
 13. Submission by Community Broadcasting Association of Australia (CBAA) to the Senate Standing Committee on Environment, Information Technology and the Arts, Broadcasting Legislation Amendment (Digital Radio) Bill 2007 [Provisions], Radio Licence Fees Amendment Bill 2007[Provisions], May 2007, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/submissions/sub05.pdf, accessed on 13 May 2008.
 14. *ibid.*

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The community station Triple R also expressed its concern to the Senate committee about the proposed digital representative companies which Triple R believed placed ‘unnecessary additional management requirements and costs on the community broadcasting sector’ and which it considered would restrict the development of ‘more creative solutions to content collaboration, management and delivery’ in a digital environment.¹⁵

In its submission to the committee, Commercial Radio Australia, on the other hand, considered that the community sector had been given ‘excessive’ access to DAB multiplexes. It was also supportive of the idea that community radio was required to form digital representative companies believing this to be ‘a far more workable approach’ than that suggested by CBAA.¹⁶

The Senate committee sought advice on this and a number of other relevant matters from the Department of Communications, Information Technology and the Arts and eventually concluded that it was likely the community radio sector’s concerns were ‘unduly pessimistic’.¹⁷ The Digital Radio Bill was passed without changes to the company provisions.¹⁸ This meant that eligible metro-wide community radio stations had to elect to join a digital representative company by 9 April 2008, that these companies needed to join

15. Submission by Triple R Broadcasters Ltd to the Senate Standing Committee on Environment, Information Technology and the Arts, Broadcasting Legislation Amendment (Digital Radio) Bill 2007 [Provisions], Radio Licence Fees Amendment Bill 2007[Provisions], May 2007, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/submissions/sub06.pdf, accessed on 19 September 2008.
16. Submission by Commercial Radio Australia to the Senate Standing Committee on Environment, Information Technology and the Arts, Broadcasting Legislation Amendment (Digital Radio) Bill 2007 [Provisions], Radio Licence Fees Amendment Bill 2007[Provisions], May 2007, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/submissions/sub07.pdf accessed on 13 May 2008.
17. Senate Standing Committee on Environment, Information Technology and the Arts, Broadcasting Legislation Amendment (Digital Radio) Bill 2007 [Provisions], Radio Licence Fees Amendment Bill 2007[Provisions], May 2007, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/report/report.pdf, accessed on 13 May 2008. See also Department of Communications, Information Technology and the Arts, correspondence to the Senate Standing Committee, 30 April 2007, http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/report/e02.pdf, accessed on 19 September 2008.
18. Senate Standing Committee, op. cit.

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with joint venture companies by 21 April 2008 and that joint venture companies were required to apply for multiplex apparatus licenses by 9 May 2008.¹⁹

Following the 2007 election, the CBAA petitioned the Rudd Government to bring forward \$2.4 million of the funding promised by the previous government to help the community sector to comply with these deadlines. When the government did not respond by the April 2008 deadline, media commentator Margaret Simons made the point that:

Without signing [to establish joint venture companies], community radio risks being locked out of the discussions that will guide the future of digital radio. Yet signing meant making major financial commitments to companies effectively managed by the commercial radio stations, without any clarity on the potential liabilities in the future.

Around the country community radio has been scraping the bottom of the till to find the money to sign up. Some stations simply haven't been able to pay their share, and are either locked out or else being subsidised by others.²⁰

Simons was of the opinion that even those community stations that managed to join joint venture companies would be dominated within the companies by commercial radio members and further disadvantaged by the fact that they would receive access to significantly less spectrum than the commercial sector.²¹

There was no funding provided to assist the community radio sector in transferring to digital technology in the 2008–09 Budget, but it appears that funding of \$11.2 million provided over three years has been set aside from the 2009–10 financial year.²² The President of the CBAA has been quoted as being relieved that this funding will give community radio some sort of 'digital future'.²³

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19. See the invitation to apply for licences on the ACMA website http://www.acma.gov.au/WEB/STANDARD/pc=PC_310503, accessed 15 July 2008.
 20. M. Simons, 'Will digital kill the community radio star?' 22 April 2008, <http://www.crikey.com.au/Media-Arts-and-Sports/20080422-Will-the-digital-radio-sign-up-kill-the-community-radio-star.html>, accessed on 11 July 2008.
 21. Simons, op. cit.
 22. Community Broadcasting Foundation (CBA) website, 'Sector funding 2008–09', <http://www.cbf.com.au/Content/templates/news.asp?articleid=286&zoneid=16>, accessed on 21 July 2008. The CBA reports: 'There will be a one-year delay in funding for digital radio. That is —no funding in 2008–09 but an \$11.211 million commitment over the subsequent three years phased as \$6.906 m in 2009/10, \$2.129 m in 2010–11, and \$2.176 m in 2011–12'.
 23. 'A mixed bag in the budget for community broadcasters', 16 May 2008, CBAA website, http://www.cbaa.org.au/content.php/236.html?newsid=1302&refpg=1&refid=346#mod_346_top accessed on 21 July 2008.

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The Explanatory Memorandum to this Bill acknowledges that the government's decisions to defer funding for community broadcasters prevented representative companies from obtaining shares in joint venture companies. This bill 'seeks to extend to the community broadcasting sector the option of taking up shares in [joint venture companies]'.²⁴

Coalition/Greens/Family First policy position/commitments

Australia Labor Party members on the Senate committee that considered the digital radio legislation in 2007 argued that the condition imposed on community broadcasters was 'onerous'.²⁵

There appears to be no comments from the other parties recorded in relation to this Bill.

Pros and cons

The *first* measure in this legislation provides more flexibility for commercial radio broadcasters who may be experiencing difficulty in meeting the previously legislated deadline for the introduction of digital radio.²⁶ The measure does not, however, disadvantage those operators who may be able to meet the earlier deadline.

The *second* measure also provides flexibility for the capital city market of Hobart to commence digital transmissions within a time frame more suitable to a market of its size.²⁷

It is the *third* measure in the Bill which is regarded as the most contentious.²⁸ It can be argued that given the difficulty that community radio stations experienced in raising sufficient capital to participate in the joint venture companies that will own digital radio transmission infrastructure, the extension of time to allow them a further opportunity to become part of the digital radio landscape is also a reasonable concession to this broadcasting sector. However, the argument advanced by the community sector that the requirement – which is maintained in this Bill - to form digital representative companies in each capital city is excessively onerous has some merit.

24. Explanatory Memorandum, Broadcasting Legislation Amendment (Digital Radio) Bill 2008, p.4.

25. Senators Kate Lundy, Dana Wortley, Ruth Webber and Stephen Conroy, Labor Members Minority Report, Senate Standing committee, op. cit.
http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/digital_radio/report/d01.htm, accessed on 22 September 2008.

26. The first measure is in item 1 of the Bill.

27. The second measure is in items 2 and 3 of the Bill.

28. The third measure is in items 4 and 5 of the Bill.

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While there is a concession in this Bill which accommodates market size for commercial radio in relation to the Hobart case, there is no such consideration in relation to the community sector. As the CBAA noted in 2007, because of the nature of the sector, collaboration and cooperation for a number of community stations may be more appropriate at a national or a 'communities of interest' level, rather than on a city by city basis.²⁹ While there clearly needs to be a management structure for digital radio infrastructure, it appears that the one chosen previously and perpetuated in this bill does not best serve the interests of all broadcasters who will be required to share digital multiplexes.

Committee consideration

At its meeting of 18 September 2008, the Selection of Bills Committee deferred consideration of the Bill until its next meeting.³⁰

Financial implications

According to the Explanatory Memorandum, the measures in the Bill are not expected to have any financial impact on Commonwealth revenue.³¹ However, it should be noted that the Bill provides that if, as a result of the amendments in the Bill, there is an acquisition of property from a person otherwise than on just terms, the Commonwealth will be liable to pay a reasonable amount of compensation.

Main provisions

Items 1-3 of the Bill amend existing section 8AC of the Broadcasting Services Act which provides for the digital radio start-up day.

Existing paragraph 8AC(3)(a) provides that the Australian Communications and Media Authority (ACMA) must ensure that the digital radio start-up day for a metropolitan licence area³² is not later than 1 January 2009. **Item 1** amends paragraph 8AC(3)(a) so that the start-up day is 1 July 2009.

Existing subsection 8AC(8) defines the term '*metropolitan licence area*' as a licence area in which is situated the General Post Office of the capital city of each of the states of

29. CBAA submission, op.cit.

30. Selection of Bills Committee, *Report No. 11 of 2008*, 18 September, 2008, paragraph 4.

31. Explanatory Memorandum, p. 1.

32. Subsection 8AD(8) of the *Broadcasting Services Act 1992* defines the term '*licence area*' as either the licence area of a commercial radio broadcasting licence or the licence area of a community radio broadcasting licence, where that licence area is the same as the licence area of a commercial radio broadcasting licence.

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Australia. **Items 2 and 3** amend existing paragraphs 8AC(8)(e) and (f) so that Tasmania is removed from the definition. The effect of this amendment is to remove the requirement for broadcasters to commence digital radio services in Hobart by the extended deadline of 1 July 2009.³³

Items 4 and 5 amend the Radiocommunications Act. Existing section 109D sets out the various conditions which apply to ‘*foundation digital radio multiplex transmitter licences*’.

Spectrum issues have been a factor in the development of Australia’s digital radio framework. In Australia, much of the spectrum suitable for digital radio broadcasting is already being used for analog and digital television, and Defence communications. As a result, unoccupied spectrum appropriate for digital radio services is limited, particularly in Sydney and Melbourne. For digital radio, the spectrum is split into ‘multiplexes’, allowing a number of different streams of content to be broadcast within the one spectrum band. Overseas experience has shown that management of each multiplex can be a contentious issue, as the manager or ‘owner’ has a potential gatekeeper function with respect to access to content streams.³⁴

According to the relevant [Bills Digest](#)³⁵, the *Broadcasting Legislation Amendment (Digital Radio) Act 2007* implemented the following multiplex management and access arrangements:

- drawing a distinction between *foundation* digital radio multiplex transmitter licences and *non-foundation* digital radio multiplex transmitter licences:
 - *foundation digital radio multiplex transmitter licences* are licences that provide standard access entitlements for digital commercial, digital community and digital national radio broadcasting operators in an area. They are licences designed to accommodate incumbent operators.
 - *non-foundation* digital radio multiplex transmitter licences are any additional licences issued in an area which do not provide for standard access entitlements. They are licences intended to accommodate any future digital radio broadcasters.
- licences are divided into three categories:
 - *Category 1* licences are provided to commercial broadcasters and wide-coverage community broadcasters who elect to jointly operate multiplexes for a service in their licence area. Any such election is subject to minimum requirements for

33. Explanatory Memorandum, p. 2.

34. Bronwen Jagers, ‘Broadcasting Legislation Amendment (Digital Radio) Bill 2007, *Bills Digest no. 142*, Parliamentary Library, Canberra, 2006-07, p. 5.

35. *ibid.*

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community broadcasters, to ensure the *joint venture* operates fairly and transparently.³⁶

- *Category 2* licences are offered to *joint ventures* which may comprise commercial, community and national broadcasters. Incumbents were offered first choice to take up the licence, for an administration fee only. If incumbents choose not to apply for a *Category 2* licence, or the application is rejected, ACMA may allocate the licence to newcomers on an auction system.³⁷
- *Category 3* licences are reserved for the national broadcasters (ABC and SBS), to jointly manage a multiplex in all markets, separate from the other broadcasters.³⁸

Item 4 of this Bill inserts **proposed subsections 109D(3)-(5)** which contain further conditions for foundation digital radio multiplex transmitter licences. Those conditions relate to the ownership of shares in the *joint venture* company.

Proposed subsection 109D(3) operates when each of the following circumstances is satisfied:

- there is a digital *community* radio broadcasting representative company³⁹ which gives the licensee⁴⁰ a written request to be issued with shares in the licensee and
- that request is made either before the relevant digital start-up day or within 12 months after the digital radio start-up day and
- no shares were issued to the digital *community* radio broadcasting representative company even if an invitation was made to it under either paragraph 102C(5)(a) or 102D(5)(a) in relation to the formation of the licensee.

In that case the licensee must do all of the following:

- give the digital *community* radio broadcasting representative company a written offer of a number of shares in the licensee which, if accepted, would give the digital *community* radio broadcasting representative company two-ninths of the shares in the licensee: **proposed paragraph 109D(3)(e)**

36. Section 102C of the *Radiocommunications Act 1992*.

37. Section 102D of the *Radiocommunications Act 1992*.

38. Section 102E of the *Radiocommunications Act 1992*.

39. The term ‘digital community radio broadcasting representative company’ is defined in section 9C of the *Radiocommunications Act 1992*.

40. For a spectrum licence, the term ‘licensee’ is defined in section 5 as the person specified in the licence as the licensee, whether the licence was originally issued to that person or subsequently assigned to him or her.

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- make the offer to the digital *community* radio broadcasting representative company within 30 days after the written request is received: **proposed paragraph 109D(3)(f)**
- keep the offer open for at least 120 days: **proposed paragraph 109D(3)(g)**
- make sure that any rights and restrictions attached to the shares are the same those attached to the shares held by existing shareholders in the licensee: **proposed paragraph 109D(3)(h)** and
- ensure that the offer price per share does not exceed the amount worked out using prescribed formula: **proposed paragraph 109D(3)(i)**

Under **proposed subsection 109D(4)** digital *community* radio broadcasting representative company is entitled to make only one request under proposed subsection 109D(3). However, where a licensee fails to comply with the terms of proposed subsection 109D(3) then any request by the digital *community* radio broadcasting representative company is to be disregarded for the purposes of the once only request limit in section 109D(4): **proposed subsection 109D(5)**.

There is, entrenched in section 51(xxxi) of the *Constitution*, a guarantee which stipulates that property acquired by the Commonwealth Government must be acquired 'on just terms'.

Item 5 refers to an acquisition otherwise than on just terms in the context of section 51(xxxi) of the *Constitution* but then provides that the Commonwealth is liable to pay a 'reasonable amount of compensation'. It should be noted that **proposed section 113A**:

- does not specifically apply paragraph 51(xxxi) of the *Constitution* to the acquisition
- does not require 'just terms'
- provides that the Commonwealth is liable to pay a 'reasonable amount of compensation', as distinct from 'just terms'.

However, use of such a provision is commonplace, for example, section 152AQC of the *Trade Practices Act 1974* and in section 60 of the *Northern Territory Emergency Response Act 2007*.

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