



Australian Government

Department of Communications and the Arts

Legislative Proposals Consultation Paper

Radiocommunications Bill 2016

March 2016

Introduction

Spectrum will become increasingly important to a digitally networked economy. The services it supports promote economic growth and social wellbeing. The economic value of Australia's spectrum to the national economy is estimated to be \$177 billion over 15 years¹. The extent to which these benefits are realised or improved upon will depend in part on the ability of the spectrum management regulatory arrangements to accommodate rapid technological change and respond to increasing demand. Australia's current regulatory framework has been in place since 1992.

The Spectrum Review report (the Review) prepared by the then Department of Communications was released in May 2015.

The Review found that the current spectrum management arrangements are slow, rigid and administratively cumbersome, and unnecessarily costly for users. Simpler, more flexible spectrum management arrangements are required to efficiently accommodate new technologies and to enable the regulatory arrangements to better respond to increasing demand for spectrum. Without significant reform, Australia will not be able to realise the full economic potential of spectrum.

In August 2015 the Government announced it had decided to implement the three main recommendations of the Review:

1. Replace the current legislative arrangements with new legislation that removes prescriptive process and streamlines licensing, for a simpler and more flexible framework.
2. Better integrate the management of public sector and broadcasting spectrum to improve the consistency and integrity of the framework.
3. Review spectrum pricing to ensure consistent and transparent arrangements to support the efficient use of spectrum and secondary markets.

The Government also undertook at that time to continue to consult with industry on implementation of the recommendations, including development of a new Radiocommunications Bill (the Bill).

The proposed approach in preparing draft new legislation is to:

- simplify regulatory structures for planning, licensing and equipment regulation;
- streamline regulatory processes, particularly for allocating licences;
- clarify the role for Government, the Australian Communications and Media Authority (ACMA) and spectrum users;
- bring broadcasting spectrum into the general spectrum framework while also providing certainty for the broadcasting sector; and
- provide for graduated and proportionate enforcement and compliance tools.

New legislation will be drafted rather than amending the current legislation. This provides more opportunity to ensure efficient arrangements are put in place that minimise the cost to industry and Government.

To a large extent the Government's proposed reforms aim to free up opportunities for spectrum users. The Government is not requiring particular approaches, rather it is seeking to remove barriers to

¹The economic value of spectrum', Research report prepared for the [then] Department of Communications by the Centre for International Economics, January 2015.

innovation. The extent to which these opportunities are utilised will depend on the decisions of users in response to market developments.

This paper sets out, for stakeholder comment, the proposed approach to key provisions in the new legislation. In doing so, the proposals set out in this paper build on the extensive stakeholder feedback provided in response to the Spectrum Review Issues Paper (May 2014) and Spectrum Review Potential Reform Directions (November 2014), as well as the industry workshop convened in January 2015.

This paper does not deal with pricing issues. A review of the broad framework for spectrum pricing is currently underway and is considering the pricing of licences under the new licensing framework.

This consultation paper addresses the transitional arrangements at a high level. Transitional arrangements have not yet been settled and the Department will work with industry on the available options. More detailed discussions will occur with broadcasters given the nature of the changes proposed in that case.

Feedback on the proposals is requested by **COB Friday 29 April 2016**. This can be either provided in a written form or we would welcome direct discussions.

Written comments can be emailed to the Spectrum Reform mailbox:
spectrumreform@communications.gov.au.

Radiocommunications Bill 2016—overview of proposals

1. Objects and span

Current arrangements:

Part 1.2 of the current Act sets out its objects. Inclusion of objects provides a general understanding of the purpose of the legislation and assists the Courts, the regulator and others in the interpretation of the legislation. The Review noted that the objects of the Act would be reviewed to ensure that these support the aims of the new spectrum management framework. In particular, encouraging efficiency, innovation and certainty of investment, and ensuring regulation does not unnecessarily constrain spectrum use.

An objects clause was inserted into the 1992 Act to *guide the Spectrum Management Agency and the Minister in the administration of the new Radiocommunications regime, and in the exercise of powers under the Bill.*²

Section 3 of the Act provides for the following:

The object of this Act is to provide for management of the radiofrequency spectrum in order to:

- (a) maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum;
- (b) make adequate provision of the spectrum:
 - (i) for use by agencies involved in the defence or national security of Australia, law enforcement or the provision of emergency services; and
 - (ii) for use by other public or community services;
- (c) provide a responsive and flexible approach to meeting the needs of users of the spectrum;
- (d) encourage the use of efficient radiocommunication technologies so that a wide range of services of an adequate quality can be provided;
- (e) provide an efficient, equitable and transparent system of charging for the use of spectrum, taking account of the value of both commercial and non-commercial use of spectrum;
- (f) support the communications policy objectives of the Commonwealth Government;
- (g) provide a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international markets;
- (h) promote Australia's interests concerning international agreements, treaties and conventions relating to radiocommunications or the radiofrequency spectrum.

² Radiocommunications Bill 1992, Explanatory Memorandum, p 6.

In reviewing section 3 of the Act a number of issues were identified:

- the provision has one primary object, that is, to provide for management of the radiofrequency spectrum, but specifies eight separate aims to be achieved. The Act provides no hierarchy for these aims. In the absence of a clear priority it is assumed that all eight aims are to be given equal weighting. This can lead to conflict and confusion;
- the provision lacks specificity;
- some of the current subparagraphs simply rephrase aspects of more general subparagraphs;
- the provision includes matters that are no longer relevant or significant in terms of the management and planning of spectrum in Australia; and
- the current language used mixes both outcomes to be attained and the means for achieving those outcomes.

Proposed approach:

Since the Act commenced in 1992, significant change has occurred in the communications industry and the spectrum management market has continued to mature. It is proposed that the Bill will retain the use of objects however, these will be drafted to ensure clarity and their usefulness to guide administration and application of the legislation.

It is proposed that the stated object of the Bill will be to promote the long-term public interest derived from the use of radiofrequency spectrum by:

- facilitating efficient, flexible and innovative allocation and use of spectrum; and
- providing arrangements for the provision of spectrum for public or community purposes.

It is intended that explanatory material to the legislation will indicate that public or community purposes will include use such as for defence or national security, law enforcement, meteorology and the provision of emergency services. The approach will not limit any particular public or community purpose.

The span of the Bill is intended to specify the rights, powers and obligations of:

- the Minister;
- users of radiofrequency spectrum;
- third party administrators (e.g. private band managers); and
- persons involved in the supply chain of devices.

The ACMA will continue to undertake important functions in relation to the regulation of radiofrequency spectrum. Retaining objects in the Bill will assist in distinguishing between the role of the ACMA as a contributor to achieving the objects as opposed to the ACMA having primary responsibility and accountability for the objects.

2. Application

Current arrangements:

Part 1.4 of the current Act sets out the scope of the legislation. This part contains four Divisions:

- Division 1 – General
 - This provision binds the Crown.
- Division 2 – Provisions relating to location and similar matters
 - Application of the Act to the external Territories, State/Territory offshore areas, the Western Greater Sunrise area, limitations on application outside of Australia, and application to the atmosphere.
- Division 3 – Provisions extending the concept of radiocommunication
 - Brings certain activities within the concept of radiocommunications for the purposes of the Act.
- Division 4 – Matters to which the Act does not apply
 - Situations and activities that are or may be exempt from the operation of the Act (e.g. defence and intelligence functions, law enforcement, emergency and defence personnel).

Proposed approach:

It is not proposed to change the current scope of application of the Act. However given its age, the language and drafting of the provisions will be reviewed to ensure the equivalent provisions in the Bill reflect current legislative drafting practice and take account of any relevant court decisions that have been delivered since the 1992 Act was enacted.

3. Ministerial direction powers, policy guidance and accountability

Current arrangements:

The current Act provides for significant Ministerial control and direction in regard to matters which are primarily day-to-day operational decisions of the ACMA. Of the 24 provisions enabling Ministerial intervention, 16 are related to matters of process.

These arrangements are a legacy feature of the Act. When enacted the arrangements represented a significant change in how spectrum was managed in Australia by introducing market mechanisms, including market allocations and secondary trading of spectrum licences. The inclusion of provisions that enabled direct Ministerial intervention in administrative activities reflected concerns about how a market based system might operate. In particular, that non-commercial users may be denied access to spectrum.

Since that time the spectrum market has matured and management of these mechanisms is now well understood. More broadly, the approach taken by governments to regulation has evolved significantly. “Black letter” rules-based approaches have been progressively replaced with outcomes focused arrangements. Strong Ministerial control was a feature of these more dated regimes and is out of step with contemporary approaches to regulatory governance.

Stakeholders have indicated that they want greater transparency and accountability in decision-making, and a clear distinction between the responsibilities of the Minister to set policy and the ACMA to implement policy. This includes transparent disclosure of decisions and the reasoning behind decisions, regular updates on processes and explanations when things change. Stakeholders are also seeking clear guidance on future spectrum policy and management priorities.

Proposed approach:

It is proposed that the Bill set out clear accountability arrangements. The Bill will clarify the role and responsibilities of the Minister and the ACMA, including accountabilities for regulatory decision making.

It is proposed that the Minister's role will be focused on setting strategic priorities to guide the delivery of the ACMA's spectrum management regulatory functions. To this end it is proposed that the Bill will empower the Minister to issue policy statements (referred to as *Ministerial policy statements*) that are to apply to:

- the performance of any of the ACMA's spectrum management functions; and
- the exercise of any of the ACMA's spectrum management powers.

Ministerial policy statements would not, themselves, be legislative instruments however the ACMA would be required to have regard to any relevant Ministerial policy statements in performance of the ACMA's functions and the exercise of its powers. The Bill will specify that Ministerial policy statements are to be published on the ACMA website. The ACMA will be required to annually report on how it has accounted for Ministerial policy statements in performance of its functions and exercise of powers.

For example, the ACMA will be required, in consultation with the Commonwealth and spectrum users, to identify information requirements to support the spectrum market and facilitate spectrum sharing, taking an open-data approach. This will build upon the current Act's requirement to maintain a Register of Licences.

The Minister has the power to direct the ACMA in relation to the performance of its functions and the exercise of its powers through section 14 of the ACMA Act. In accordance with existing practice, Ministerial directions are published and ordinarily accompanied by statements that explain the rationale for the direction.

The establishment of the Ministerial policy statement mechanism is anticipated to reduce the need for the Minister to actively intervene in spectrum management through exercising a section 14 ACMA Act directions power.

4. Annual spectrum work plan

Current arrangements:

The ACMA currently issues an annual five-year spectrum outlook (FYSO), although there is no requirement to do so. The FYSO provides only general indications of the ACMA's actual work program or spectrum work plan in the coming 12 months and has a strong technical focus. There is also no requirement for the ACMA to notify the Minister in advance of it making any significant decisions.

The Review identified that there needed to be greater visibility of the ACMA's future work plan regarding allocation of spectrum, implementation and timing.

Proposed approach:

The Bill will specify that the ACMA is required to prepare and publish an annual spectrum work plan and that the scope of the plan will be set out in a Ministerial policy statement.

It is generally expected that the plan will identify priorities over a three to five year timeframe whilst also providing greater detail on activities to be undertaken in the forthcoming 12 months. Matters to be addressed in the annual work plan would include:

- proposed licence issues, timeframes and consultation requirements;
- progress on implementation of initiatives and any planning changes;
- any Ministerial directions on policy objectives and the ACMA's plan to respond to these directions; and
- advice on any changes to priorities.

The ACMA will also be expected to give the Minister reasonable notice of any significant issues it becomes aware of in relation to its spectrum management functions and notify the Minister before making a decision relevant to that issue.

5. Radiofrequency planning

Current arrangements:

Under the current Act, the ACMA has a range of spectrum planning powers. These are set out in Chapter 2 and cover:

- Part 2.1 – Spectrum plans and frequency band plans (including broadcasting services bands):
 - The spectrum plan divides the radiofrequency spectrum into a number of frequency bands and specifies the general purpose for which bands may be used;
 - Frequency band plans may cover the particular parts of the spectrum in more detail;
 - Broadcasting licence areas plans made by the ACMA under the *Broadcasting Services Act 1992* (BSA) cover the particular parts of the spectrum that have been specifically designated by the Minister for broadcasting services.
- Part 2.2 – Conversion plans and marketing plans:
 - Designation by the Minister of parts of the spectrum for spectrum licences;
 - Conversion plans govern conversion from apparatus licences to spectrum licences;
 - Marketing plans provide the process for issuing spectrum licences for both encumbered and unencumbered spectrum.
- Part 2.3 – Digital radio channel plans.

The ACMA incorporates Article 5 (Table of Regulations) of the ITU Radio Regulations into Australian law through the Australian Radiofrequency Spectrum Plan.

Proposed approach:

The radiocommunications planning framework is largely working well, however there is scope to further streamline the current arrangements. It is proposed that the Bill consolidate the current separate planning powers for spectrum plans, radiofrequency band plans and broadcasting licence area plans into a single, discretionary, legislated power. This will provide the ACMA with greater flexibility in its approach to planning.

Plans made under these provisions will be legislative instruments but would not be subject to section 42 (disallowance) of the *Legislation Act 2003*. In accordance with the *Legislation Act 2003*, plans made as a legislative instrument will be legally binding, published and subject to consultation, improving certainty for industry.

The single licensing framework (discussed at section 6) will remove the requirement to develop conversion plans. Marketing plans would be done as a matter of administrative practice.

It is proposed that the Bill will continue to specify that plans may provide for parts of the spectrum to be reserved for the provision of public or community services.

6. Licensing of spectrum

Current arrangements:

The current Act provides for the use of market mechanisms, alongside administrative and commons approaches, to manage spectrum. While this model has served Australia well, the proliferation of new digital technologies and communications services exposed the lack of flexibility of existing spectrum management tools.

The rigid boundaries between licence categories (spectrum, apparatus and class licences) and the prescriptive rights that apply under the Act have limited the ACMA's ability to design licences that meet users' needs and opportunities for licence holders to trade and share spectrum.

While the current Act provides for licences (apparatus and spectrum) to be transferred, traded or for third party authorisations to be granted, secondary market activities have been limited by a number of factors including:

- the specific nature of licences (that is, not sufficiently generic to be tradeable);
- lack of interest from industry or emergence of a trading market;
- there may be insufficient information available to the market; and
- lack of certainty regarding renewal rights.

The Review recommended reforms that would facilitate greater market-based activity.

As an illustration of the complexity of the existing three licence categories, the Review noted that the current Act contains over 180 pages of rules relating to the three licence types. Conversion and/or reallocation from apparatus to spectrum licences involve complicated and lengthy processes which may serve as a barrier to secondary trading.

Proposed approach:

The Bill would establish a single licence category and will facilitate and encourage secondary market activities, by allowing assignment, sharing and subdivision (subject to any licence restrictions).

Replacement of spectrum and apparatus licences with a single licensing system will remove the need to designate parts of the spectrum for spectrum licensing (s 36), for conversion between the two types of licences (Part 2.2) and for reallocation processes (Part 3.6).

The current class licences would not be incorporated into the single licence system. The proposed arrangements for the authorisation of commons spectrum and other applications that will not require a licence are set out at section 11 of this paper.

Licences will be required to specify core conditions including:

- parts of the spectrum;
- geographic information (area/site); and
- payment of any applicable charges (including taxes).

The Bill will specify that licences may be issued for terms of up to 20 years (spectrum licences are currently limited to 15 years). The ACMA would retain the legislative power to set licence conditions, providing the flexibility to tailor licences to suit different uses.

To remove impediments to spectrum sharing, it is proposed to expressly authorise the ACMA to issue a licence, or make a spectrum authorisation within parts of the spectrum for which the ACMA has already issued a licence or provided an authorisation. In practice this would only occur where arrangements are in place to manage any interference between different uses.

Legislation with respect to third party authorisations would be simplified. Licensees will continue to be able to authorise other persons to operate devices under their licence, subject to any restrictions or limitations in the licence. Records of third party authorisations would still need to be retained by licensees but only for the duration of the authorisation.

7. Licence issue

Current arrangements:

As outlined in the Review, the Act currently details the licence application and issue processes. For example, spectrum licences can only be issued once the Minister designates spectrum bands for such licences or makes a re-allocation declaration. These are not able to be readily changed or adapted to new market requirements.

The Act prescribes a number of processes that the ACMA must undertake when issuing licences. Allocation and re-allocation processes for spectrum licences are complex and lengthy, and require Ministerial involvement in routine processes.

The ACMA normally creates separate legislative instruments for each spectrum licence allocation, and is also required to prepare a marketing plan, by legislative instrument.

The current Act also prevents the ACMA from issuing an apparatus licence that authorises the operation of radiocommunications devices within part of the spectrum that is designated to be allocated to spectrum licences (unless special circumstances apply). The practical impact of this is that there is limited flexibility to use spectrum sharing technologies.

Proposed approach:

It is proposed that the Bill streamline and simplify arrangements for issuing licences.

Provisions in the Bill would empower the ACMA to issue licences on written application or in accordance with a licence issue scheme. The *licence issue schemes* will set out the procedures and rules for the issue of licences by various allocation mechanisms. Like radiofrequency plans, these schemes would be made as legislative instruments which would not be subject to disallowance. The ACMA would be required to consult with stakeholders consistent with the requirements under the *Legislation Act 2003*.

It is expected that the ACMA would develop administrative documents setting out the issue process for a relevant allocation. Details relevant to a specific allocation which are currently included in marketing plans (such as the type of auction, arrangements for advertising of the auction, and detail of how to participate in the auction) would be expected to be set out in the relevant administrative document prior to an allocation.

Consistent with existing provisions of the Act, it is proposed that refusal of a licence by the ACMA would be a reviewable decision – both internally and subsequently by the Administrative Appeals Tribunal (see section 18 of this paper).

8. Licensing—limits

Current arrangements:

The current Act includes provisions which enable limits (commonly referred to as competition limits) to be imposed at the time a spectrum or apparatus licence is issued. These limits may restrict use by any single person, a specified person or a specified group of persons of a specified part of the spectrum, a specified area or a specified population reach.

The ACMA can, however, only implement these limits on a direction from the Minister. Before determining allocation procedures the ACMA must consult the Australian Competition and Consumer Commission (ACCC) whether the procedures should include a requirement for the ACMA to provide specified information to the ACCC. Consultation with the ACCC on the actual limits is not mandatory but it is the usual practice.

Under the current law, when a competition limit is imposed, s 50 of the *Competition and Consumer Act 2010* (CCA) continues to apply to the relevant spectrum acquisition. Section 50 prohibits the acquisition of shares or assets where this would have, or be likely to have, the effect of substantially lessening competition in a market. Therefore, under the current law, there are effectively two competition regimes imposed. While it has not created practical difficulties to date, this arrangement has the potential to be duplicative and add uncertainty and delay to an allocation process.

Proposed approach:

It is proposed that the legislation enable the ACMA to determine, in writing, limits for licence issue without first having to be directed by the Minister. The Minister may, however, through s 14 of the ACMA Act, direct the ACMA on the limits. A determination by the ACMA on limits would not be a legislative instrument.

The proposed legislation will provide that s 50 of the CCA will not apply to a particular licence issue if limits have been set. This approach is intended to improve certainty surrounding an allocation process whilst still ensuring that competition issues are addressed. However, s 50 will continue to apply to licence issues where competition limits are not determined, secondary trading and third party authorisations. It is proposed that the legislation will also provide for s 50 of the CCA to apply to renewal of a licence.

It is proposed that the legislation will require the ACMA to consult with the ACCC on licence issue limits where appropriate and reasonably practicable. This will reflect the current practice of consulting with the ACCC on such matters but give the ACMA the flexibility not to do so in instances where it is not appropriate or reasonably practicable.

9. Licensing—renewal rights

Current arrangements:

Under the current regulatory arrangements, licensees do not have automatic renewal rights.

With apparatus licences, the Act enables the licensee to apply for licence renewal and refusal by the ACMA to renew the licence is a reviewable decision. As a matter of administrative practice, the ACMA generally renews apparatus licences.

In regard to spectrum licences, the current reissue process is uncertain and has proven to have been very time consuming. The Act assumes that all spectrum licences will be returned to the market on expiry. The Minister can determine by legislative instrument a class of services where re-issue to the same licensees would be in the public interest. This enables the ACMA to then re-issue the licence if it is satisfied the licence has been used in the provision of a service included in the class of services. Alternatively, the ACMA may re-issue if it is satisfied special circumstances exist such that it would be in the public interest for the same person to hold the licence. What constitutes 'use' in the provision of a service or 'special circumstances' is not defined in the Act and is at the discretion of the ACMA. To date the ACMA has relied on the 'use' test instead of considering re-issue based on special circumstances.

Indicative of the delays created by these provisions, it took nearly 2 years to assess that reissuing the 15 year spectrum licences would be in the public interest, which culminated in 2012 with the Minister making a determination and pricing direction. Following the making of these instruments, the ACMA then had to assess whether the relevant licences had been 'used' in provision of a service specified in the determination.

The Review noted that while stakeholders want a more flexible licensing system, they also seek certainty particularly in regard to renewal rights.

Proposed approach:

To balance the needs of flexibility in respect to planning and certainty of licensee's rights, and having regard to the move to single licensing, it is proposed the Bill will not specify renewal rights but instead will mandate that a licence must include a statement outlining the licensee's right to licence renewal and the circumstances when that will apply.

The Bill will also contain a reserve power for the ACMA to refuse renewal, despite the specifications of a licence statement, if:

- the licence to be renewed is inconsistent with the current radiofrequency plans;
- the licensee is in breach of the existing licence; or
- the renewal would breach another law of the Commonwealth.

10. Licensing – resumption

Current arrangements:

The current Act enables the ACMA to resume spectrum licences by agreement or by compulsory process but only with the Minister's approval. Two schedules to the Act set out the detailed process to apply for compulsory resumption as well as the mechanism for determining any compensation payable.

The Review recommended the new Act retain the right to compensation for resumption but noted that it would continue to be a last resort in limited circumstances.

Proposed approach:

It is proposed that the Bill will provide for the ACMA to continue to have the power to compulsorily resume licences subject to the Minister's approval. The resumption provisions will, however, be simplified and rather than incorporate detailed processes and compensation formulas into schedules to the Bill, the ACMA will be empowered to provide for such matters in legislative instruments. Consistent with the move to a single licence category, compulsory resumption will be a tool available in respect to any licence.

The Bill will also enable the ACMA to enter into agreements with licensees for the making of a payment as an incentive to surrender a licence.

11. Spectrum authorisations (class licences)

Current arrangements:

Class licences are one of the three licence types that are provided for under the current Act. Class licences regulate the 'commons' use of spectrum such as low interference devices (e.g. Wi-Fi, cordless phones, garage door openers etc.). In addition, many consumer devices whose operation is ancillary to licensed uses of spectrum (for example, mobile telephones and satellite receivers) are authorised under class licences. Class licences are also used where it is appropriate to authorise a class of persons to operate devices for a particular purpose (e.g. public safety use).

A class licence is a limited type of licence, as many of the standard licence terms are not applicable. Further, users under class licences are afforded more limited rights in contrast to those provided to holders of other licences, such as certainty of tenure or greater levels of interference protection (undisturbed use). No fee is payable by class licensed users.

The Review considered how best to accommodate class licences within the single licensing scheme. Options considered included:

- merging apparatus and spectrum licences, but retaining class licences as a separate category;
- excluding class licences from the single licensing system but providing for unlicensed spectrum use (a spectrum authorisation);
- incorporating class licences fully into the single licensing system.

A 'commons' form of regulated use of spectrum exists in most international spectrum management frameworks. This allows operation of certain services and devices using common frequencies on a shared basis with limited right to interference protection. The risk of interference and health related concerns in class licensed spectrum is also managed through requirements to comply with technical conditions and equipment standards.

Proposed approach:

It is proposed that class licences will be replaced by 'spectrum authorisations', rather than regulated through the single licensing system. This reflects the limited nature of class licensees' rights and obligations, in contrast to those currently applying to holders of spectrum and apparatus licences.

The Bill will enable the ACMA to authorise (by legislative instrument) the use of devices outside of the licensing framework under a *spectrum authorisation*. The legislation will not specify which types of devices should be authorised outside the licensing system. This will provide the ACMA with the flexibility to apply a spectrum authorisation and/or licensing approach as appropriate. The Bill will

indicate that spectrum authorisations may include conditions such as technical requirements, frequencies, purpose, area and periods of operation. In addition, the Bill will enable the ACMA to continue to regulate equipment (and ancillary requirements such as labelling and record-keeping) where appropriate.

12. Interference management

Current arrangements:

Currently the ACMA uses a substantial amount of resources to monitor and resolve technical issues and disputes. To a large extent, the cost of these resources flows through to industry and therefore consumers. Stakeholders have expressed concern regarding the difficulty in resolving disputes. The conciliation procedures provided for in the current Act are detailed and have rarely been used. Also, the ability to take civil action in relation to interference is currently limited to spectrum licensees.

Proposed approach:

In order to simplify the legislative regime, it is proposed that the conciliation process will not be included in the Bill however the Bill would provide enhanced scope for licensees to resolve interference and disputes, without recourse to the ACMA in the first instance.

It is proposed:

- to extend eligibility to take civil action in relation to interference to all impacted licensees
- the ACMA may develop non-legislative interference management guidelines to assist stakeholders in their resolution of interference disputes. The guidelines would encourage stakeholders to directly implement dispute resolution options without involving the regulator; and, if suitable, the ACMA may provide alternative dispute resolution services to assist in resolving interference disputes; and
- the Bill will continue to provide the ACMA with the discretion and power to investigate and take action against interference, particularly where the interference is most serious (e.g. it relates to safety of life).

Efficient planning of the spectrum (section 5 of this paper) will continue to be a key tool for the ACMA in its interference management.

13. Equipment regulation

The primary elements of equipment regulation arrangements (currently provided for in Part 4.1 of the Act and referred to as technical regulation) are the technical standards for specified devices, the testing, labelling and record-keeping requirements imposed on suppliers (importers and manufacturers or their authorised agents) through labelling notices and the specific prohibitions imposed by the ACMA on the supply, possession and operation of certain devices.

The current arrangements have a number of limitations including:

- insufficient flexibility to regulate equipment proportionate to the risk and specific circumstances of their supply and operation. For example; the ACMA has separate and different instrument-making powers for each kind of requirement, such as standards, labelling and record-keeping, and it is not able to target compliance requirements to specific persons in the supply chain other than Australian manufacturers or importers (or their agents);

- the Act is overly detailed and duplicative;
- all breaches are criminal, which limits enforcement options. Further, the ACMA can only issue a permanent ban and has no recourse to interim bans or recalls; and
- labelling and record-keeping requirements can only be imposed on Australian manufacturers and importers, and therefore fail to capture relevant parties in supply chains. For example, requirements cannot be imposed and action cannot be directed against intermediaries in the supply chain such as persons organising direct/drop shipments from overseas.

It is standard practice amongst other Australian regulators such as the ACCC and international jurisdictions, such as the UK, Sweden and Norway, to provide the ability to issue interim bans and recalls to address product or device safety issues. Further detail on compliance tools are set out in section 14 of this paper.

Proposed approach:

The new model for equipment regulation will adopt an outcomes-based approach. It is proposed the Bill will enable the ACMA to make *equipment rules*, by legislative instrument, directed towards achieving a number of key objectives. The objectives will be listed in the Bill and include objectives to ensure the electromagnetic compatibility of equipment, contain interference and protect the health and safety of persons from radio emission. The equipment rules will enable the ACMA to prescribe standards for equipment and impose obligations in respect of quality assurance, tests, labelling and record-keeping.

This approach will provide the ACMA with increased flexibility to make equipment rules commensurate with risk of the equipment and enable it to devise rules that cover all standards and/or requirements in relation to a class of devices (e.g. the standards, testing, labelling and record-keeping requirements that apply) or to create separate instruments for each standard/requirement.

14. Compliance and enforcement

Current arrangements:

The current Act's compliance and enforcement regime is outdated and does not reflect contemporary regulatory approaches. The penalties rely on criminal sanctions and there is limited scope for a graduated approach to compliance.

For example, in the event of a breach of a spectrum licence condition, the ACMA's only options are suspension or cancellation of the licence. Whilst the ACMA would ordinarily issue a formal warning in the first instance, there is no scope to use remedial directions or civil penalties, which may be more appropriate in a given set of circumstances.

Criminal sanctions require a higher standard of proof than for civil actions. Further, the Director of Public Prosecutions, rather than the ACMA, is required to initiate legal action for breaches of criminal offence provisions. This should not be necessary in most spectrum cases and in practice means prosecutions do not often occur.

The limited compliance and enforcement toolkit in the current Act often prevents timely action by the ACMA to address minor breaches. Stakeholders have advocated for a more effective compliance and enforcement regime to be implemented.

Proposed approach:

The Bill would provide for a simple, graduated approach to offences and penalties, and provide for an expanded range of enforcement tools. Key elements of this approach include:

- introduction of civil penalties – with the size of the penalty reflecting current Commonwealth practice and the seriousness of the breach;
- only having criminal penalties apply to conduct that involves or has the potential to cause considerable harm to society or individuals (consistent with the *Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*);
- not replicating provisions that are already sufficiently provided for in other Commonwealth or State legislation;
- adoption, with minor variation, of the standard provisions included in the *Regulatory Powers (Standard Provisions) Act 2014* in respect to investigations, civil penalties, infringement notices, enforceable undertakings and injunctions;
- broadening the provisions to which injunctions may apply and introducing new enforcement tools such as remedial directions and those particular to equipment regulation (interim and permanent bans, and recalls).

The ACMA would continue to be able to use other tools to encourage compliance including education, written warnings and public warning notices.

15. Information provision

Current arrangements:

Efficient spectrum management and market transactions rely on information being available to market participants and the regulator on what spectrum is available, where, under what conditions, and the prices paid. More readily available information reduces transaction costs, aids price disclosure and supports spectrum sharing, secondary trading and new market entry. Unlike other legislation that is administered by the ACMA, the Act provides limited power to gather information.

The ACMA is currently limited in what role it can play in providing information because it can only obtain:

- information required for the Register of Licences;
- access to records regarding device testing and quality assurance; and
- copies of licences, authorisations or other documents or records required to be kept or held under the Act.

Proposed approach:

The Review recommended improving the arrangements for the provision of information to assist the ACMA and provide quality information to the market. It is proposed that the Bill would enable the ACMA to require persons to provide the following information:

- the value of the consideration paid in respect to licence trades or third party authorisations. This information would be able to be published by the ACMA so as to improve information available to the market. The ACMA would have the discretion to also publish the information in aggregate or a form not likely to enable the identification of the licensee; and

- device supply related information for the purpose of managing interference. This information will assist the ACMA in its compliance management activities and to better target education initiatives.

It is further proposed that the Minister will require, through Ministerial policy statement, the ACMA to report through its annual work plan on efforts to improve and maintain the range, availability and quality of information to support the market.

16. User involvement: accreditation, delegation, industry codes

Current arrangements:

The Act has limited scope for the ACMA to devolve functions to industry. This results in a dependence on the regulator to undertake most spectrum management functions. Examples of the limitations in the current Act include:

- no provision for industry codes in the Act;
- limited private band management is possible using third party authorisations, however, whilst third party authorisations are well utilised, in practice band management does not occur. The current Act limits the scope and flexibility of these arrangements and places significant liabilities on the manager in relation to conduct of the managed parties; and
- most spectrum management activities require, at minimum, final approval by the ACMA.

Where the ACMA can devolve functions to industry, this has proven effective in reducing the regulator's workload. For example, the ACMA may accredit persons to issue certain certificates that relate to the engineering work required before a decision can be made to licence or allow operation of a device – frequency assignment and interference impact certification – a large majority of this work is now performed by industry.

The Review identified opportunities for increased user involvement in the management of spectrum. The objective of increasing user involvement is to facilitate more flexible and efficient use of spectrum and allow for more innovative management arrangements.

Proposed approach:

To encourage greater user involvement in spectrum management it is proposed to include the following in the Bill:

- continue to enable the ACMA to accredit other persons to issue certificates, such as frequency assignment certificates;
- provide scope for industry to be able to develop codes, limiting the ACMA's role to code approval; and
- enable the ACMA to delegate spectrum management functions to facilitate private band management and to deliver certain functions more efficiently (the ACMA will be able to designate what roles and functions are to be delegated to a person, the conditions which will apply and they will be empowered to revoke any delegation and direct a delegate in the exercise of the delegated powers where appropriate).

17. Broadcasting

Current arrangements:

Historically spectrum used by the broadcasters has been treated separately from the general spectrum framework.

Planning and licensing of spectrum for broadcasters is complex and split across the radiocommunications and broadcasting legislation (BSA). Specifically, under the current Act:

- Section 31 provides that the Minister may designate a part of the spectrum primarily for broadcasting. Once designated, the spectrum in the Broadcasting Services Bands is referred to the ACMA for planning, mostly under the BSA. The BSA plans this spectrum using instruments called Licence Area Plans (LAPs) and Television Licence Area Plans (TLAPs)). The detailed requirements of these plans is included in the BSA. The ACMA also plans digital radio spectrum use under digital radio channel plans (DRCPs) made under the Act.
- Section 102 requires the ACMA to issue a transmitter licence to certain commercial and community broadcasters holding a licence under the BSA. However, this licence can only be used by the licensee to provide its own broadcasting services. This restricts the ability of broadcasters to share infrastructure, and trade or lease their spectrum. Other broadcasters have varying degrees of statutory provisions relating to transmission licensing. In particular, digital radio has its own licensing and access arrangements within the Act.

Current broadcasting spectrum planning and licensing arrangements are complex, inflexible and lack consistency with the rest of the spectrum framework. As identified in the Department's Digital Television Regulation Consultation Paper (January 2015), in an environment of changing technology and increasing competition for content services, broadcasters will face commercial pressure to innovate. To facilitate this, the constraints imposed by the current spectrum regulatory framework need to be eased to enable broadcasters to offer new services and better manage their costs, through the use of more spectrally efficient technologies and / or shared infrastructure.

Proposed approach:

Consistent with the Review recommendations, it is proposed that the Bill integrate broadcasting spectrum into the general spectrum management framework. This will be done in a manner that provides certainty of access to spectrum to deliver broadcasting services under the new framework for those broadcasters currently required to be issued with a transmitter licence.

To provide enhanced clarity on the roles of the two Acts, it is intended that the new Bill address spectrum-related matters and the BSA will focus on broadcasting policy matters (for example, the mix of broadcasting services, market access issues and content regulation). To enable this, it is proposed that planning and licensing of spectrum for licensed and national broadcasters will be covered in the general spectrum framework under the new Bill. Specifically, it is proposed to:

- remove the current legislative requirement for the Minister to designate spectrum specifically for broadcasting services and instead rely on the general planning powers provided for in the Bill. To ensure continued access, Government policy would require the ACMA to set aside spectrum under its spectrum plan primarily for broadcasting use;
- remove the detailed transmitter licensing requirements specified under the current Act and instead rely on the general licensing provisions to licence broadcaster spectrum use; and
- remove spectrum-related technical matters currently included in LAPs/TLAPs/DRCPs and include this detail in the licences.

Transitional arrangements have not yet been settled and the Department will work with industry on the available options. Noting the complexity of the existing arrangements it is proposed that broadcasters would be transitioned to the new framework over time. New licences would be issued by the ACMA in consultation with broadcasters within the first five years of commencement of the Bill. As specified earlier in the paper, licences, rather than the legislation would specify licence conditions, the licence term/duration, areas of operation and renewal rights. The proposed legislation will authorise the ACMA to vary licences subject to statements limiting such variation contained in the licence. For new licences, it is intended that a Ministerial policy statement would provide guidance as to licence term, renewal arrangements and pricing for broadcasters.

Subject to any statements in the licence to the contrary, it is proposed that broadcasters will be able to share, trade or lease all or part of their spectrum with or to other broadcasters or for non-broadcasting uses (i.e. the provision restricting use of a broadcaster's spectrum to their own broadcasting service will be removed). This will provide consistency in the management of spectrum and will provide broadcasters with increased flexibility in the long term as to their use of the spectrum. Approval would be required for non-broadcasting use of this spectrum, noting the technical complexities likely to be present in such circumstances. The relevant Ministerial policy statement would address these matters.

The requirement for the ACMA to issue free-to-air commercial and community broadcasters with a radiocommunications licence if their broadcasting licence is in force would also be removed as these licences would be issued under the general framework.

To provide certainty, current broadcasting licensees will be issued new radiocommunications licences under the new licensing system under transitional legislation. In the case of digital radio multiplexes, the radiocommunications licences would be issued to the multiplex licensee. In making the decision to plan for the issue of BSA licences, the ACMA will still need to have regard to spectrum availability as planned under the Bill (in addition to other statutory criteria under the BSA). It is proposed to include this as a legislative requirement under the BSA.

The current Act includes two access regimes for digital radio: a regime for accessing digital radio multiplex licences and a separate regime for accessing transmission towers, associated facilities and sites. These access regimes relate to participation in the broadcasting market, therefore it is proposed to incorporate these regimes into the BSA.

18. Review of decisions

Current arrangements:

The current Act provides for certain decisions of the ACMA to be reviewed internally by the ACMA and then subsequently by the Administrative Appeals Tribunal (AAT).

Proposed approach:

It is proposed that the legislation will continue to provide for certain decisions of the ACMA to be able to be reviewed by the ACMA and then the AAT. These are:

- refusal to issue a licence;
- inclusion of licence conditions;
- decision to vary or refusal to vary a licence;
- decision to suspend/cancel a licence;
- resumption of a licence or part of a licence;
- decision to change information or refuse to correct information in the Register of Licences;

- refusal to issue or cancellation of a qualified operator certificate of proficiency; and
- refusal to give, or withdrawal of a person's accreditation.

Additional decisions to be reviewed would be included in order to accommodate new decision making powers in the Bill, including decisions not to renew a licence contrary to any rights in the licence.

19. Transitional arrangements

The Review indicated that transitional arrangements would need to be worked through carefully with stakeholders and that the full transition to a new framework would take place over a number of years. In transitioning to the new framework, the rights of existing licence holders will not be diminished. In this regard, it is proposed that:

- the legislation will commence approximately one year after passage of the Bill through Parliament;
- licensing processes currently underway will continue under the current framework;
- where practicable, class licences will be deemed as spectrum authorisations on commencement of the Bill;
- apparatus licences will transition to the new framework over a period of time in a staged approach; and
- spectrum licences will continue until expiry unless the parties agree to transition earlier.

Detailed transitional provisions will be released at or about the time of the exposure draft of the Bill for stakeholder feedback. A draft ACMA annual work plan will also be released for public consultation during the transition to the new Act.

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