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Department of Infrastructure, Transport, Regional Development and Communications

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Introduction

In June 2020, the Department of Infrastructure, Transport, Regional Development and Communications (the Department) released an exposure draft of the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (the Bill) for public consultation. This Bill is part of the Australian Government's commitment to modernise the legislative framework for spectrum management, in response to the recommendations of the 2015 Spectrum Review (the Spectrum Review).

These amendments have been designed to deliver targeted reforms to the spectrum management framework. A consultation process was undertaken to seek feedback from industry and spectrum users on the proposed amendments.

This paper sets out the main views and recommendations raised in submissions to the public consultation and outlines the changes progressed by the Government in response. It is designed to assist stakeholders in understanding the outcomes of the consultation process and the next steps in this important reform project.

Background: Spectrum Review

The Spectrum Review was finalised in March 2015. This review was intended to consider the policy and regulatory reforms that would be needed to cope with changes in technology, demand for spectrum, markets and consumer preferences. In its [final report](#), the Spectrum Review made three recommendations and a series of sub-recommendations which supported replacing the existing legislative framework with one that was more outcomes focussed and consistent, and which delivered improved certainty. This was to be done by simplifying regulatory structures, streamlining processes, clarifying the respective roles of the Minister and ACMA, and reviewing spectrum pricing arrangements.

In response to these recommendations, the Government committed to reform of the spectrum management framework. Reviews of spectrum pricing and Commonwealth-held spectrum took place, with the final reports for both presented in 2018. Then, in 2019, following consideration of stakeholder views received in response to a consultation undertaken in 2017, the Government announced that, instead of proceeding with a repeal and full re-write of the *Radiocommunications Act 1992* (the Act), it would progress with a set of targeted amendments that addressed areas of priority to help bring important reforms sooner while reducing the transitional burden for industry and stakeholders.

Purpose of the Bill

The Bill is intended to implement reforms that were identified as a priority, informed by the recommendations of the Spectrum Review and stakeholder feedback received from consultation processes related to the former re-write Bill in 2017.

The technological landscape has changed significantly since the original legislative framework was first introduced in 1992. Regulatory arrangements for spectrum management must not only respond to these changes, but also be flexible enough to adapt to future innovation and changing demand for spectrum. The Bill is designed to add flexibility to the legislative framework, remove unnecessary prescription and legislative barriers, and streamline processes, ensuring the spectrum management framework remains fit-for-purpose in a rapidly changing environment.

Summary of submissions

Public consultation on the Bill closed on Friday 17 July 2020, with submissions received from a wide variety of industry and government bodies. Submissions were supportive of the decision to pursue targeted amendments instead of a complete re-write of the Act. Stakeholders were especially supportive of the provisions of the Bill that serve to improve flexibility, and decision-making and enforcement for ACMA.

Most submissions provided suggestions for how the Bill could be amended to function better, or proposed additional reforms for the Government to consider as part of the Bill. A large number of recommendations related to ACMA's enhanced powers under the Bill, proposing increased guidance on how ACMA intends to exercise these powers, further consultation and reporting requirements, and in some instances limitations on the use of powers. Many other recommendations were specific to an individual stakeholder's sector or interests.

In response to the feedback generated by submissions, the Government has implemented a number of changes to the Bill and provided further clarification on the operation of the Bill in the explanatory materials. Key among these responses are:

- Implementation of limitations on ACMA's power to unilaterally vary the renewal statements of spectrum licences
- Extension of the Defence related exemptions under the Act
- Further consideration of comments around guidance from ACMA on how it will exercise its powers in the implementation of the reforms.

The Bill and associated explanatory material introduced into the Parliament will address the matters raised in public consultation as set out in this paper.

Overview of submissions (by issue)

Object of the Act

The object of the Act sets out the purpose of the legislation and assists the Courts, the regulator and others to interpret the legislation. The amended object is designed to provide greater clarity, while continuing to emphasise that the primary object of the Act is to promote the long-term public interest derived from management of the spectrum.

Submissions from stakeholders were largely supportive of the amended object provision, particularly the primary and overarching objective of promoting the long-term public interest. Suggestions from stakeholders focussed on potential additions to the amended object.

Stakeholders requested a number of sector- or service-specific changes to the amended object clause to place greater emphasis on certain purposes as part of promoting the public interest. This included defence and national security, and the role of competition. Similarly, some stakeholders suggested that their operations be recognised as an example of a commercial or non-commercial purpose.

One submission considered that the amended object dilutes the assurances of the current provisions as it merely 'facilitates the use of' spectrum for certain purposes rather than mandating sufficient usage. Consequently, the submission advocated for a legislative guarantee of the provision of spectrum for non-commercial purposes, such as law enforcement and public safety.

Stakeholders also requested that subclause (a) of the proposed object should reference transparency along with the efficient planning, allocation and use of the spectrum.

As noted in the consultation paper, the current object of the Act comprises many sub-objects, without a clear hierarchy and with repetition between the general object and some sub-objects. This can lead to confusion and the assumption that all the sub-objects are equally important. The Government is seeking to avoid recreating this situation through the proliferation of sub-objects. Moreover, a shorter and less prescriptive object of the Act better reflects the scope of the proposed legislative framework, which is intended to be more flexible and streamlined.

However, considering the input of stakeholders, the Government has decided to amend the Bill to include 'defence and national security' as part of the object of the Act, in recognition of the importance of this use of the spectrum. Additionally, the Government notes the broad range of other uses of the spectrum and the importance of sufficient provision of spectrum for these where appropriate, and the role of competition considerations. Consequently, the Government has expanded discussion of these matters in the explanatory material of the Bill.

Ministerial policy statements

The Bill aims to clarify the roles and responsibilities of the Minister and ACMA in the spectrum legislative framework. To do this, the amendments propose to create the power for the Minister to issue Ministerial policy statements (MPSs). These policy statements are intended to set out the government's policy goals for spectrum management and how ACMA is expected to work towards them. This will reaffirm the Minister's role and responsibility in setting policy direction, while enabling ACMA to act more independently.

Feedback from the majority of stakeholders has been supportive of the intent and proposed function of MPSs. Suggestions for the proposed amendments come largely from industry submissions. These stakeholders viewed MPSs as a valuable tool for not only communicating guidance to ACMA but also to industry, given that MPSs may be high level and strategic, or specific to a particular aspect of the legislative framework. Industry stakeholders also expressed a willingness to see MPSs deployed to clarify the intended operation of other parts of the Bill, such as the application of public interest tests and ACMA's decision-making processes on direct allocations and re-allocation limits. In these instances, MPSs could be used to inform ACMA's actions without the need for prescriptive measures in the legislation.

Given the importance that industry stakeholders see in MPSs, some submissions advocated for stakeholders to be more closely involved in the development of MPSs. Several submissions called for a requirement in the Act that public consultation be conducted prior to the finalisation of an MPS. Multiple submissions also requested that indicative drafts of the initial MPSs, such as those that will be needed for transitional arrangements, should be made publicly viewable prior to the passage of the Bill.

The proposed subsection 28C(1) of the Bill requires ACMA to have regard to any relevant MPS and subsection 28C(2) provides that a failure to do so does not affect the validity of ACMA's actions. This wording requires ACMA to take into account the contents of any relevant policy statements when exercising its spectrum management powers, but protects decisions under the Act from challenge on the basis of an alleged failure to have regard to a relevant MPS. This is to provide certainty to industry who rely on these decisions. Telstra's submission disagreed with this rationale, submitting that while ACMA should be able to depart from the guidance in an MPS, doing so should only be possible in

exceptional circumstances. Telstra also submitted that ACMA should self-report all instances where it has knowingly decided to not comply with an MPS and that such a decision should be reviewable.

While recognising the important role that MPSs can have in industry's strategic planning, the Government considers that the current provisions of the Bill allow for sufficient consultation and transparency from ACMA and the Minister, and that no further amendments to the Act are needed to address these concerns.

It is expected that consultation will take place on the development of MPSs where necessary, but a prescriptive requirement to consult on every MPS is not supported by the Government. In circumstances where a stakeholder raises concerns after an MPS has been made, there will be opportunities to refine it. MPSs will be notifiable instruments and therefore published on the Federal Register of Legislation, providing additional visibility and transparency after they have been made. Similarly, the current and proposed reporting obligations provide an opportunity for ACMA to explain how it has considered MPSs in its decision making, including when an MPS has not been closely adhered to, for example, in order to address another MPS or to further the object of the Act. Again, the Government preferred to avoid including prescriptive guidelines in the Act, as it is important that ACMA have the flexibility to make the best decision in response to MPS advice.

ACMA work programs

In line with the recommendations of the Spectrum Review, the Bill proposes to require ACMA to produce annual work programs covering its proposed activities in relation to its spectrum management functions and powers for the following five years.

Most stakeholders who commented on this issue were supportive of a statutory work program, while noting the need for public consultation to take place (in a similar way to the current consultation process for the Five Year Spectrum Outlook (FYSO)) or suggesting specific aspects the work program could address. One submission suggested permitting real-time variation of the work programs (subject to consultation) to provide greater flexibility as MPSs are issued or priorities change.

Other stakeholders, however, were concerned that this ability to vary and repeal work programs would affect their usefulness in providing certainty to industry and spectrum users. Some submissions added that it was unclear what benefit an annual work program would have over the current, administrative, FYSO process, and saw legislating a work program as an unnecessary and complex step.

The Government views annual work programs as a way of building on the current FYSO process, to provide greater clarity and transparency. The importance of consultation is acknowledged in the provisions, which require ACMA to undertake any consultation that it considers appropriate and practicable, before determining a work program. An MPS on the subject of the annual work program and consultation requirements could also be considered by the Minister, should stakeholder concerns on this matter be realised in the future. Such an MPS would provide additional guidance and could set out more specific requirements for how ACMA consults or reports on its annual work program.

Streamlined allocation and re-allocation processes

In line with the recommendations of the Spectrum Review, the amendments aim to streamline allocation and re-allocation processes within the Act by removing unnecessary prescription, clarifying the roles of the Minister and the regulator, and giving ACMA additional flexibility.

Submissions were generally supportive of this aim, provided there is appropriate transparency and communication between ACMA and stakeholders.

Greater flexibility for ACMA to allocate spectrum and apparatus licences

Submissions were generally supportive of a framework that reduces the Minister's involvement in routine administrative tasks and grants ACMA greater decision-making power in allocation and re-allocation processes. Some respondents argued that this will help industry access spectrum more quickly and help bring innovative technologies and services to market sooner.

Several submissions supported ACMA being able to issue spectrum licences and apparatus licences in the same frequency bands as a way of better addressing the needs of licensees and spectrum users, but there were some comments that ACMA should not overly rely on mixing licence types within the same band.

One submission suggested that—similar to the proposed requirement for ACMA to consult the Australian Competition & Consumer Commissions (ACCC) on allocation limits—ACMA should be required to consult an appropriate organisation before allocating spectrum for non-commercial purposes. The National Cabinet Reform Committee on Infrastructure and Transport was suggested as a body that would have the appropriate State and Federal membership to provide guidance and recommendations on the allocation of spectrum for non-commercial purposes, such as emergency services communication.

Those submissions that addressed the question for consideration set out in the consultation paper agreed that the re-allocation declaration process continues to be of use within the context of the proposed amendments. As with other aspects of the Bill, however, there were calls to ensure appropriate industry consultation and a completely transparent approach in how ACMA will exercise its new powers.

The Government considers that the concerns expressed about how ACMA will make decisions on whether to mix licence types within a frequency band, and how ACMA should make choices between different purposes and users of spectrum, can be considered and addressed through avenues such as consultation on ACMA annual work programs. As such, no further amendments to the Act have been implemented.

Direct allocation

The amendments propose to grant ACMA the power to directly allocate spectrum licences in situations where it is preferable to allocate a spectrum licence to a particular person and as a partial replacement for the conversion process currently in the Act.

Submissions expressed some concern about the use of this power, including whether using this kind of non-market mechanism would appropriately ensure spectrum goes to its highest-value use, promotes the public interest and avoids causing competition issues. Suggestions to counter these concerns included requiring ACMA to report on the reason for a direct allocation, the opportunity cost

and the way in which the price for the licence was determined. Other submissions argued that competition matters should be an explicit consideration when determining whether a direct allocation is in the public interest, and that ACMA should publish guidelines setting out how it plans to exercise this new power.

Direct allocation is intended to be just one of a number of tools ACMA can use to allocate spectrum as part of a more flexible and fit-for-purpose framework. It is not necessarily envisaged as a common practice. As mentioned above, it is intended to partially replace the conversion process and to provide a more straightforward process than is currently available in the legislation to allocate spectrum licences in situations where market mechanisms like auctions, tenders and negotiations are not deemed to be as appropriate. This potentially includes as part of defragmentation, or for defence, public safety and community purposes.

ACMA will have the discretion to determine when direct allocation of spectrum licences may be appropriate and will still be required to create a relevant marketing plan. As a marketing plan is a legislative instrument, this means consultation would be expected to take place with potentially interested or affected parties. In addition, the person to whom a licence is to be directly allocated will pay the spectrum access charge as determined by ACMA. ACMA is required to publish these determinations, meaning transparency over the price of the licence will be maintained.

Allocation limits

In line with the wider policy intent of devolving more spectrum management decisions to ACMA, the amendments in the Bill are designed to give ACMA the power to set allocation limits without the need for a specific Ministerial direction and to have regard to aggregate spectrum holdings.

The ACCC (and others) supported the explicit requirement in the Bill for ACMA to consult the ACCC on allocation limits, and the continuation of a consultative and transparent approach between the two bodies on this issue. Other submissions suggested a requirement that ACMA set out the criteria it uses to make decisions regarding allocation limits, and that related matters such as the use of credits in allocation processes should be limited and subject to advice from the ACCC.

Considering comments, such as those from the ACCC, in support of the promotion of competition within the Bill, the Government has decided to extend ACMA's proposed power to set allocation limits to also include administrative allocations. This addresses the risk that market power could be obtained by one party through the administrative allocation of apparatus licences.

The information provided by submissions on issues where additional guidance would be useful to stakeholders, will form an important part of the Government and ACMA's considerations in implementing the reforms.

Re-allocation of encumbered spectrum

As with other amendments, the proposed changes to re-allocation processes are designed to give ACMA greater flexibility and discretion, including the power to issue, vary and revoke spectrum re-allocation declarations. This is intended to streamline re-allocation processes, reduce unnecessary delays, but still provide existing spectrum users with appropriate notice and opportunities for input.

There was support in the submissions for the proposed changes to the timeframes associated with re-allocation declarations. One submission not only supported the move to a shorter, 12-month minimum length for re-allocation periods, but further suggested that there should be specific justification provided when a longer re-allocation period is set and the introduction of a maximum re-allocation period of three years.

Others, however, expressed concerns at the removal of checkpoints and the Minister's involvement. It was argued that this might allow ACMA to rush into re-allocation decisions that could be significantly disruptive to current licensees and users. The submission suggested that ACMA should publish guidelines on how it intends to exercise its new powers relating to re-allocation.

Should ACMA decide that a re-allocation declaration is the most appropriate way to facilitate the re-allocation of a frequency band, the amendments would allow it to issue such a declaration itself, but ACMA would still be bound by a number of conditions and balances. This includes the fact that spectrum re-allocation declarations are legislative instruments and subject to consultation requirements. This would provide an opportunity for comment on elements such as the proposed length of the re-allocation period. ACMA will also need to be satisfied that it will be able to issue licences over the re-allocated spectrum prior to the re-allocation deadline, meaning the speed of re-allocation will also need to consider the necessary timeframes for licence allocation.

Reducing regulatory barriers between spectrum and apparatus licences

The Bill proposes a number of reforms to reduce the regulatory barriers between spectrum and apparatus licences, improve the governance of licence renewals and provide greater certainty for licence holders. This approach was adopted over the introduction of a single licence type, following consideration of the views expressed during the 2017 consultation process.

Stakeholders have expressed broad support for the sum of the proposed reforms in the Bill.

Greater maximum licence terms

In order to create greater flexibility across both licence types, the Bill proposes to extend the maximum duration of spectrum and apparatus licences to 20 years.

As far as this change relates to spectrum licences, stakeholders expressed near unanimous support, noting that the longer terms would provide the stability to help facilitate long-term investment in networks. Some stakeholders noted that their support was conditional on 20 year licences not becoming the default. The Government confirms this is not the intended outcome: as noted in the consultation paper, ACMA will have discretion to decide licence terms, and it is not envisaged that all licences will be issued for the new maximum term of 20 years.

Most stakeholders were supportive of the proposal to increase the maximum duration of apparatus licences to 20 years. Satellite service providers, many of whom use apparatus licences, were especially supportive, given the large financial investments that are necessary to develop and operate those networks. However, submissions from telecommunications companies expressed concerns about the consequence of this change, as it was perceived to elevate the level of apparatus licences to parity with spectrum licences. While some of these submissions accepted that there are circumstances where longer apparatus licence terms are useful, it was recommended that apparatus licences that are issued or renewed for longer than five years should be subject to a public interest test.

The Government appreciates the concern that longer term licences are not always the most appropriate option, particularly where this locks spectrum into a specific use, limiting, for example, the ability to adapt to new and innovative uses. As noted above, this is not the intention of the reforms and ACMA will continue to have the discretion to determine the appropriate licence term in particular circumstances. Conversely, the Government recognises that there may be benefit in enabling the provisions relating to longer term licences to commence sooner than the remainder of the reforms. Accordingly, the Government has amended the Bill to allow a separate commencement date for these provisions. The specific date will be determined as the Government makes decisions about the implementation of the Bill.

Other stakeholders noted that they saw benefits to further guidance from ACMA about what criteria it would consider when making a decision about the term of an initial licence or licence renewal. It was suggested that the Minister could consider issuing an MPS on this matter to provide guidance on this matter to ACMA.

Clearer processes governing licence renewal

The proposed amendments aim to provide greater clarity to licensees about the prospect and process for having a further licence issued at the expiry of an existing licence.

Stakeholders strongly backed a clearer process governing licence renewal and expressed that the process should provide insight not only into the likelihood of a licence renewal, but also into how a decision on licence renewal would be made. Accordingly, recommendations from stakeholders largely revolved around providing greater guidance and certainty for licensees.

Submissions from telecommunications companies proposed that ACMA should release details on how it intends to administer licence renewal decisions. As part of this, it was requested that ACMA define what constitutes a 'specified circumstance' when licence renewal is at ACMA's discretion, and provide greater guidance for licensees as to whether that circumstance has been met. Furthermore, when ACMA comes to a decision about whether to renew or not renew a licence, stakeholders recommended this be accompanied by consultation, even when there is a 'deemed refusal' resulting from ACMA not informing the licence holder of a decision. The Government has addressed stakeholder comments regarding a 'deemed refusal' by amending the Bill to require ACMA, in such instances, to provide a statement explaining why a decision was not made within the applicable timeframe.

The ACCC's submission made a similar proposal, though for different reasons. This submission proposed that section 50 of the *Competition and Consumer Act 2010* apply to renewal of spectrum licences, permitting the ACCC to consider whether a spectrum acquisition would have the effect of, or be likely to have the effect of, substantially lessening competition. As an alternative to this, the ACCC proposed that the framework could be improved by providing greater clarity on the matters that ACMA may take into account in deciding whether to renew a licence, and the process under which ACMA will make this decision.

Some stakeholders also expressed concern regarding provisions of the Bill which enable ACMA, when considering whether to renew a licence, to have regard to whether the licensee or a person authorised by them has contravened the conditions of the licence. It was noted that this could serve to discourage the authorisation of third parties to operate radiocommunications devices under a licence. To address these comments, the Government has limited the scope of this consideration, so that

ACMA may only consider whether the licence holder was aware or ought to have been aware of the contravention by the third party and failed to take reasonable steps to prevent the contravention.

The other significant point of discussion among stakeholders about the governance of licence renewal was a presumption of renewal. The consultation paper directly stated that there is no presumption that a further licence will be issued, in order to promote efficient spectrum use and allow spectrum to move to where its highest-value use changes over time. The ACCC's submission supported this position, noting that given the proposed maximum licence duration of 20 years, one licence renewal could result in an amount of spectrum being locked to a single party for 40 years. Contrary to this, submissions from industry strongly recommended the opposite approach for spectrum licences. It was proposed that the default position be a presumption that a spectrum licence will be renewed except in certain circumstances, such as when it is not in the public interest, when there is a need to harmonise with international spectrum bands, or if ACMA has included a direct statement in a licence that renewal will not be considered.

The Government acknowledges comments from submissions in support of a presumption of renewal, but notes that such a proposal is counter to the intent of the reforms, as far as it concerns increasing ACMA's flexibility to manage the spectrum. The intention of the reforms is to balance certainty for licensees and broader public interest considerations where licensees have greater certainty around how end-of-licence decisions will be approached, without presuming that licences will be renewed where that would not further the object of the Act. Accordingly, the explanatory material of the Bill now includes an expanded discussion of how a renewal statement may be used by ACMA to provide certainty to licensees.

Renewal statements

As part of the clearer processes governing licence renewal, the Bill proposes to introduce renewal statements. These will be included within licences and will serve to clarify from the moment of issuing the initial licence whether no further licence will be issued, whether a further licence may be issued at the discretion of ACMA and whether there are any conditions that need be met in order for AMCA to consider issuing a further licence.

Feedback from stakeholders appreciated the greater certainty provided by renewal statements, which would support investment planning and third-party trading towards the end of a licence term. As with decisions about renewal, recommendations from stakeholders dealt with ways to further increase the certainty gained from renewal statements.

It was proposed by a handful of stakeholders that the Bill should include a requirement for ACMA to consult on a proposed renewal statement and provide reasoning as to why a particular renewal statement is being proposed.

Stakeholders also requested adjustments to the timeframes included within renewal statements. Submissions from telecommunications companies proposed that the renewal process should start no later than 5 years prior to the date of the licence's expiry and the terms of renewal should be finalised 3 years before then, thus containing the renewal decision-making process to a maximum of two years. Similarly, satellite service providers requested that the default renewal application period for apparatus licences with a duration of 10 years or more be 2 years, rather than 6 months. The most contentious aspect of renewal statements was the ability for ACMA to vary them without the consent of the licensee. The variation of a renewal statement by ACMA is a reviewable decision, but submissions from telecommunications companies strongly recommended more restrictions, as it was

considered that this power would undermine the certainty provided to licensees by renewal statements and unfairly devalue spectrum licences. Some of these submissions proposed that renewal statements should be considered a core condition of a licence and, accordingly, any variation or revocation of a renewal statement should only be possible with the consent of the licensee. Other submissions suggested that if the power is not removed, it should at least be severely limited, for example by preventing it from being used in the last 5 years of a licence's duration, requiring significant consultation beforehand and entitling the licence holder to compensation.

In response to these concerns, the Government has amended the Bill to limit ACMA's power to vary a renewal statement without the consent of the licensee. It is now proposed that ACMA would only be able to vary a renewal statement that states that a licence is eligible for renewal in specified circumstances, where exceptional circumstances warrant a variation to the specified circumstances in the renewal statement. Other aspects of a renewal statement would be unable to be varied without consent, meaning a licensee that holds a licence that is eligible for renewal would not lose the ability to apply for renewal. The Government notes that ACMA will be able to set the time at which a renewal application may be made and, for spectrum licences, the timeframe in which ACMA will have to make a decision on the application, through the renewal application period and renewal decision period statements in the licence.

Public interest test

In instances where a spectrum licence or apparatus licence is being renewed for a period of 10 years or more, the proposed amendments require ACMA to apply a public interest test beforehand in order to ensure that spectrum is being used efficiently, and is not being locked up in a function that is no longer the highest-value use.

A variety of stakeholders from both industry and government expressed support for the application of public interest tests. Submissions generally either provided suggestions for AMCA to consider when conducting such a test, or called for more guidance on what factors a public interest test would consider, a matter which will be considered further in implementing these reforms.

Submissions from satellite service providers supported the use of a public interest test for long-term licence renewal, provided that it properly evaluates the value of a satellite network, including the value of the in-orbit and terrestrial support as well as the customer base. One of these submissions noted that use of 'highest-value use' as an evaluation tool is limiting in some respects, as it implies that a single service is more valuable than a mix and prioritises high-density services, while satellite is capable of providing the same service to both rural and urban areas.

SBS's submission called for national broadcasters to be entirely exempt from public interest tests when applying for an initial licence or licence renewal. This submission noted that national broadcasters already deliver an essential public service through the provision of broadcasting under their respective Acts, and therefore their operations are inherently in the public interest. The Bill meets this recommendation by introducing the ability for ACMA to allocate a spectrum licence to a particular person in situations where it is preferable, for example, as it relates to defence, public safety and community purposes.

Several submissions called for further guidance on what factors ACMA may consider when conducting a public interest test. This would assist potential applicants for a licence renewal in understanding what to address when applying, and would inform industry and the public more widely on how renewal decisions will be made. These submissions did not all agree on how this information should

be provided, however. Some recommended including detailed criteria within the Act itself, while others suggested that sufficient guidance could be included in the explanatory memorandum or an MPS. The Government has not amended the Bill to include such guidance, so as to preserve maximum flexibility. This is an acknowledgement that the public interest may vary for different parts of the spectrum. The explanatory memorandum, however, now provides examples of some of the matters that ACMA may consider in making a decision regarding the public interest when renewing a spectrum licence.

Hierarchy of licence types

In their submissions, several telecommunications companies expressed a broad concern about maintaining a hierarchy of licence types. Spectrum licences come with a set of property rights; the submissions argued that these rights and the very value of spectrum licences are at risk of being undermined by other licence types.

Some, but not all, of the causes for this concern relate to the proposed amendments to the Bill. For example, submissions cited a concern that airport body scanners, which have been authorised under a class licence, could cause interference to mobile networks operating under a spectrum licence. The proposed subsection 138(2) of the Bill allows a class licence to be issued over frequency used by a spectrum licence, provided ACMA is satisfied it is in the public interest. Some stakeholders are apprehensive of the provisions of the Bill that reduce the distinctions between spectrum and apparatus licences, such as the proposal to allow both of them to be issued for a maximum of 20 years.

To address this issue, some stakeholders proposed that a hierarchy of licence types be established such that apparatus licences cannot infringe on the property rights associated with spectrum licences, and class licences cannot infringe on the rights associated with either apparatus or spectrum licences. Stakeholders were not unanimous, however, on how such a hierarchy should be implemented. Some stakeholders requested that the Act itself be amended, while others suggested an MPS could be sufficient.

The Government does not consider a prescriptive hierarchy to be necessary, noting that spectrum, apparatus and class licences each operate to meet certain needs of spectrum users and that all licensees need to comply with the conditions of their licence as determined by ACMA. While this reform package aims to bring spectrum licences and apparatus licences closer in a number of respects, spectrum licences continue to have specific rights attached to them that apparatus licences do not. This includes the fact that spectrum licences can only be resumed where compensation is paid for the market value of the licence and any loss, injury, damage or expense reasonably incurred by the licensee as a result of the resumption. Apparatus licences would continue to be subject to cancellation through a spectrum re-allocation declaration, following the appropriate notification, consultation and re-allocation period.

Modernised equipment rules

The Bill proposes to introduce a new framework that will enable ACMA to determine technical regulation requirements through equipment rules, thereby increasing flexibility for ACMA and reducing the regulatory burden on suppliers and manufacturers. This will be supported by improvements to compliance and enforcement, which will give ACMA access to tools specific to technical regulation, such as permanent bans, interim bans and recall notices for non-compliant devices. The Bill also proposes to empower ACMA to issue exemptions from compliance provisions

related to the equipment rules, in order to facilitate the development and testing of new devices that would otherwise be unlawful.

Stakeholders' feedback has been in most cases supportive of the increased flexibility afforded to ACMA through the determination of technical regulations and the introduction of additional regulatory tools. Telecommunications companies particularly welcomed the introduction of amnesty provisions for the surrender of banned equipment as an important tool for removing non-compliant devices from circulation. Recommendations from stakeholders, as with other schedules of the Bill, focussed on transparency, further consultation requirements and provisions to streamline processes for industry members.

Ai Group's submission, while supportive of enhanced flexibility for ACMA, noted caution about a lack of assurance that ACMA will take into account stakeholder input when developing technical standards or directly adopting international standards. This submission recommended that technical standards should be developed with consensus-based stakeholder input and the support of ACMA, and that a similar standard of consultation should apply to the review and adoption of any international standards. Similarly, submissions from telecommunications companies recommended that where ACMA intends to exercise its proposed powers to issue a permanent ban or issue an exemption allowing an individual to operate a banned device capable of operating on a frequency containing spectrum licences, it should be required to hold consultation with the public or with affected licensees.

The Government does not consider that an amendment to the Bill on this issue is necessary: ACMA already has a range of mechanisms for engaging stakeholders on technical frameworks and will be required to consult on the development of equipment rules.

A number of submissions suggested expanding the proposed exemption powers. One stakeholder advocated for ACMA to have the ability to issue a 'manufacturing licence', which would permit manufacturers to produce devices, such as jamming equipment, that are usually unlawful and currently produced only for existing Australian defence orders. The Government notes that subsection 302(2) of the proposed Bill allows for ACMA to make an exemption from the compliance provisions for a specific person or 'act', provided that ACMA is satisfied doing so is in the public interest. This avenue could be used to exempt the production of prohibited devices, so no change to the Bill is required to meet this recommendation.

Other submissions called for the implementation of a mechanism to allow the 'bulk authorisation' of prohibited devices, noting that the current requirement of one-to-one authorisation is not well suited to deal with mass market products such as mobile repeaters. Some of these submissions recognise that the above-mentioned section 302(2) could be used to facilitate bulk authorisations but submit a preference that ACMA develop specific equipment rules to permit bulk authorisations. The Government recognises this preference, and notes comments from stakeholders that these equipment rules could be developed after the Bill is enacted. As ACMA will be responsible for developing equipment rules and exemptions, these matters will be considered further in implementation.

The Bill proposes to expand on the success of accreditation schemes in allowing ACMA to outsource certain kinds of work to qualified individuals. Under the proposed amendments, ACMA would be able to provide accreditation in accordance with accreditation rules made under section 266. The amendments would also allow ACMA to apply this accreditation model to additional areas of its work.

Stakeholders agreed that accreditation schemes have been a noteworthy success of the current legislative framework, and supported expanding the scheme to allow a wider range of work to be performed by suitably skilled persons.

Submissions from the telecommunications sector, while supportive of expansions to the accreditation regime, noted concern about the operation of the new proposed section 70. This section allows ACMA to, by legislative instrument, determine that a spectrum licence, or each licence in a specified class of spectrum licences, is taken to include one or more specified conditions. The intent of this section is to give force to the expanded accreditation scheme by enabling persons with an accreditation to perform functions that form part of the conditions of spectrum licences. However, stakeholders have expressed concern that section 70 could be used by ACMA to exercise a much broader power to materially alter the conditions of spectrum licences after they have been issued, without consent and without any of the accompanying protections as in other sections of the Act.

To address the concerns raised by stakeholders, the Government has amended the Bill so that it is better targeted to facilitating the accreditation arrangements, without permitting material changes to the conditions of spectrum licences.

A modernised compliance and enforcement regime

The Bill aims to modernise the enforcement and compliance regime in the Act by providing ACMA with new ways to deter and respond to breaches of the legislative framework. This will give ACMA greater flexibility to address minor issues without having to commit financial and administrative resources to a lengthy criminal investigation.

The amended framework received overwhelming support from a wide array of stakeholders. Submissions noted that the reforms should enable ACMA to be more timely and efficient in managing interference, including from illegal or non-standard equipment. Recommendations from stakeholders mainly took the form of additions to improve the amended framework.

A number of submissions underlined the importance of tackling the supply of illegal equipment, such as illegal repeaters. It was noted in these submissions that the number of non-compliant devices in Australia is growing, particularly in regional Australia where there is high demand for mobile boosters and repeaters. In these cases, operators often unwittingly acquire illegal devices due to their low cost and misrepresentation from their online, overseas-based suppliers.

One submission advocated for strong actions to be taken against online suppliers and the websites that support them, including on-the-spot fines for first time offenders, large fines and criminal penalties for repeated cases of non-compliance, compelling online platforms to remove users that offer to supply illegal devices, investigating marine vessels for illegal devices, and funding a community education campaign. Some of these initiatives are out of the scope of the reform, but may be considered by ACMA as part of its compliance activities. Regarding tougher penalties for serious offences, while the proposed amendments will provide ACMA with graduated tools to respond to minor issues, criminal penalties and sanctions will remain available in a limited number of cases where this is justified by the seriousness of the potential breach. The Government considers the proposed array of powers will provide the regulatory tools necessary to deal with non-compliant devices.

A number of other stakeholders concerned about interference issues proposed that there should be a mechanism that allows an organisation or individual who identifies an issue to report it to ACMA for resolution. The Government understands that there is currently a mechanism for reporting

interference issues on ACMA's website, or to otherwise contact ACMA. Further consideration could be given to improving ways of reporting non-compliance to ACMA.

Multiple submissions supported the amended provisions but advocated that the increased flexibility of the compliance and enforcement framework ought to be accompanied by clear rules of application, to provide certainty for industry. Ai Group's submission makes multiple recommendations to support this position. Firstly, it was proposed that ACMA adopt a principle that the costs of compliance and enforcement action should be less than the benefits. Secondly, Ai Group recommended a hierarchy that clarifies how ACMA will distinguish between cases requiring different levels of graduated responses. Thirdly, it was suggested that consultation be undertaken where practical with affected businesses before product recalls, interim bans or warnings are issued. Ai Group submitted that consultation would maximise the effectiveness of regulatory action. The Government notes that a number of these matters would need to be considered in the implementation of these reforms, including in ACMA's enforcement strategy.

The Australian Radio Communications Industry Association (ARCI) expressed concern that, while the amended provisions increase the options available to ACMA for enforcement, there may not be sufficient resources to follow through on the expanded regime. ARCI submitted that ACMA Field Operations staff require longer than before to respond to interference problems outside the main population centres. ARCI's submission suggested measures to lessen the strain on ACMA's resources by linking the resources of ACMA Field Operations to the revenue generated from its enforcement activities, or enabling spectrum licensees to pursue civil action where their use of the spectrum is being interfered with by others, without ACMA needing to be involved. Similarly, SBS's submission advocated that the cost of any action ACMA takes to resolve a dispute, such as interference management, should fall to the at-fault spectrum users, whether the costs are part of a civil or criminal breach. The Government does not consider it necessary to amend the Bill to account for the resourcing or costs of enforcement.

In order to maintain proper checks and balances, the Government has amended the Bill to require ACMA's inspectors to obtain a warrant prior to entering premises to adjust a transmitter that is causing loss or damage. However, inspectors will maintain the ability to enter unoccupied premises without a warrant in an emergency, where this is essential to the safety of human life.

Appropriate information gathering powers

To support ACMA in carrying out its spectrum management functions, including monitoring compliance, the Bill proposes new information gathering powers for ACMA. These powers may only be exercised where ACMA believes on reasonable grounds that a person has information or a document that is likely to assist ACMA in managing interference or health and safety concerns. The proposed amendments also empower ACMA to seek information about future or planned uses of spectrum and to issue written notices requiring a person to provide information or documents, subject to the same pre-conditions.

Relatively few submissions engaged directly with the proposals for information gathering powers. No submission rejected the proposed framework, but many echoed recommendations raised in the 2017 consultation process.

SBS's submission highlighted concerns about the potential regulatory and administrative burden of information gathering powers. It was noted that for certain institutions, such as national broadcasters,

the ability of ACMA to seek information about future or potential uses of spectrum could duplicate existing requirements to report decisions to government, creating unnecessary work for the spectrum user. Additionally, SBS was concerned that this power could be employed in a way that forces the disclosure of information which compromises commercial negotiations and the independent decision-making powers of the broadcaster.

Submissions from telecommunications stakeholders raised similar concerns about the scope of information gathering powers. It was submitted that, even with the stipulation that ACMA may only obtain information documents or information relevant to the operation of the Act or equipment rules relating to interference, these powers could encompass a wide range of business records, the contents of which would be irrelevant to ACMA's spectrum management responsibilities. Accordingly, a number of submissions advocated for stronger pre-conditions for the use of information gathering powers, suggesting that they only be triggered where there is substantial interference to radiocommunications. This would differ from the current drafting—which allows information gathering powers to be used in respect of any level of interference—and would have the effect of limiting the number of circumstances in which ACMA may exercise these proposed powers.

Many of the same submissions also proposed that the scope of information gathering powers be extended to include radiocommunications receivers, as the current drafting refers exclusively to transmitters causing interference.

Nokia's submission called for an alternative mechanism for ACMA to be able to gather information through open dialogue and cooperation with industry, such as through the development of public hearings or technical groups, instead of relying solely on the issuing of written notices with the attached threat of potential civil penalties.

In the 2017 consultation process, stakeholders also expressed concerns regarding the burden of having to produce large amounts of information under a broad information gathering power. In response to these concerns, the proposed powers were narrowed to their current form, wherein their use is limited to instances where it is reasonably likely that the information would assist ACMA in performing its spectrum management functions, or is otherwise relevant to the operation of the Act and the equipment rules, or the operation of radiocommunications devices. The Government recognises that some stakeholders still consider this power to be too broad, but considers the benefit to spectrum users from ACMA having this information available for the performance of its spectrum management functions will outweigh any increase in regulatory burden. Accordingly, these powers remain unchanged in the Bill, but the explanatory memorandum now includes description of how ACMA is expected to use the new information gathering powers.

Repeal of unused provisions

Schedules 9 and 10 of the Bill are intended to repeal unused provisions in the Act. These relate to ACMA's power to hold public inquiries and the datacasting transmitter licence framework.

There was concern expressed by the community broadcasting sector over the repeal of the definition of community television broadcasting service as part of the repeal of the datacasting transmitter licence framework. This definition is being repealed from the Act as it only appears in section 109A, which is also being repealed by the Bill, meaning there would no longer be any instances of this term in the Act once amended. The repeal of this definition from the Act does not affect any definition or use in the *Broadcasting Services Act 1992* (the BSA), especially given that the current definition in the Act merely points to, and is subordinate to, the definition in the BSA.

Transitional arrangements

The majority of the Bill is intended to commence within a six-month period after it receives Royal Assent. Transitional arrangements have been designed to minimise disruption to users, licensees and ongoing processes, while allowing the benefits of the amended framework to be leveraged as soon as possible.

A number of submissions provided general comments regarding transitional arrangements, including that any MPSs (or draft MPSs) dealing with the transition to the new framework should be available for public scrutiny as soon as possible, and an opposition to any blanket grandfathering of processes as this could introduce unnecessary delays.

More specific opinions expressed regarding transitional arrangements stated that it should be clarified in the transitional arrangements that a legislative instrument regarding renewal statements for a specific class of apparatus licences (dealt with in subsection 103A(5) of the Bill) would not apply to any apparatus licences issued before commencement.

There were also some comments regarding the powers of inspectors. It was suggested that inspectors should be able to rely on the new suite of powers in the amended Part 5.5, whether investigating an offence that took place (or is alleged to have taken place) before or after commencement. The transitional arrangements in the exposure draft of the Bill include a provision that Part 5.5 (as amended by the Bill), so far as it relates to an offence or alleged offence, does not apply to an offence committed, or allegedly committed, before commencement.

One submission also asked for additional clarity around the proposed scope of powers held by inspectors under the Bill and how the transitional arrangements would work. In particular, there was confusion as to how the transitional provision that determines that references to Part 5.5 of the current Act in an instrument appointing inspectors, will be deemed to be a reference to the corresponding provision in Part 5.5 as amended, would work.

The Government and ACMA will continue to work with stakeholders on the implementation of these reforms, including to provide advice on how transitional matters will be handled. The Government has addressed concerns around renewal statements for transitioned apparatus licences through amendments to the relevant sections of the Bill.

Additionally, as discussed earlier in this paper, the commencement provision in the Bill has been amended to allow certain Schedules or provisions to commence earlier, or independently from the bulk of the Bill. This is designed to help make the transition smoother and reduce delays, for example in the appointment of State-nominated officers as inspectors under the new provisions.

Other matters

Defence exemptions

The Department of Defence's submission re-emphasised matters that had been raised by Defence in response to the 2017 consultation process. As part of this, Defence proposed expanding the framework which exempts certain operational matters of Defence and the Australian Defence Force from the obligations of the Act. Defence proposed extending the framework to additional classes of persons, to ensure that contemporary operating contexts and associated operational requirements, including training, for Defence are reflected within the legislation. It was noted that this change is

needed to permit appropriate development and sustainment of Defence capabilities, rapid decision-making and action when swift responses are required in complex operational scenarios.

The Government recognises this need and has amended the Bill to provide broader exemptions to Defence operations, reflecting the requirements of these operational contexts.

Taxation arrangements for long term apparatus licences

Under the current provisions of the *Radiocommunications (Transmitter Licence Tax) Act 1983* and the *Radiocommunications (Receiver Licence Tax) Act 1983* (the apparatus licence tax Acts) licensees generally have a choice as to whether they pay the relevant taxes annually (by instalment) or up front. This contrasts with the arrangements for the payment of the spectrum access charge for spectrum licences, which is generally paid up front, with ACMA able to determine if payments are to be made in instalments.

With the greater potential for longer-term, high-value apparatus licences as a result of the amendments proposed by the Bill, it is appropriate in some circumstances for ACMA, rather than the licensee, to be able to determine whether tax must be paid upfront or by instalments, to avoid causing distortions in demand between licence types.

Accordingly, the Government is proposing amendments to the apparatus licence tax Acts so that ACMA will be able to develop a legislative instrument to determine whether the licensees of particular classes of apparatus licence pay the licence tax upfront or by instalments.

Regional coverage

A number of submissions from service providers advocated for using the legislative framework to improve coverage in regional and remote areas. It was noted that while spectrum sharing is possible under the current regime, it is not common in the Australian market and consequently spectrum that would be suitable for uses such as private LTE is unused in nation-wide allocations to larger service providers, who have little incentive to deploy networks in low-populations areas.

These stakeholders propose a 'use it or lose it' approach to spectrum allocations, mandating minimum use levels for remote and regional areas. Where a licence holder has been issued with spectrum in these areas, but evidence shows that it has not been used and there are no existing plans for it to be used, ACMA should have discretion to review the licence with the ability to withdraw and re-allocate spectrum where appropriate. The incumbent licence holder would have to prove that they have plans to use the relevant spectrum if that is the case, and would be compensated for any spectrum they are obliged to share.

The Government notes these concerns. Regional connectivity issues raise important policy considerations for both the Government and ACMA to consider in the implementation of these reforms. Where appropriate, such matters could be considered for inclusion in an MPS.

Next steps

The Government thanks stakeholders for their insightful submissions on the Bill, and their interest and commitment to a modernised and streamlined legislative framework. The feedback received has allowed the Bill to better meet the needs of stakeholders while achieving the broader objectives of the proposed reforms.

The Bill, along with two separate Bills that address the minor tax matters discussed above, has been introduced into the Parliament.

The Department is willing to discuss the outcomes of consultation with stakeholders. A meeting can be arranged for this purpose, if preferred. To do this, or if you have any questions regarding the outcomes of consultation, please send an email to spectrumreform@communications.gov.au or contact:

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