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**Submission to the Department of Communications**

**Spectrum Review - Potential Reform Directions**

4 December 2014

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## 1. Executive Summary

Telstra welcomes the opportunity to make this submission to the Commonwealth Department of Communications on its Spectrum Review Potential Reform Directions consultation paper (the **Paper**).<sup>1</sup> Telstra believes this is an important review - not only because of the changes being proposed but also because it is the first significant review of the radio spectrum regulatory regime since the Productivity Commission review in 2002.

Spectrum is a critical resource that is used by Telstra and other companies to deliver telecommunications services to all Australians. The revision of the spectrum management framework is an opportunity to put in place a new framework that will better facilitate the investment certainty, flexibility of spectrum use, and quality of spectrum necessary to provide consumers and business with the latest telecommunications products and services that they are seeking.

Telstra is generally supportive of the headline principles being proposed in the Paper, but also recognises that these are high level principles and for many of them the significance will lie in the detail. It will be important for the Department to continue to work with stakeholders on this detail and to do so in a way that ensures there is sufficient time for the proposals to be developed constructively. Equally, Telstra believes (as noted in its previous submission to the Department)<sup>2</sup> there is still an important need, to undertake a comprehensive review of the fundamental building blocks of the existing regulatory framework, prior to proceeding to develop detailed changes to the framework. This “stocktake” should describe all the existing elements of spectrum regulation being used currently, and assess whether these elements are working well or poorly.

While many of the changes being proposed by the Department are elements of reform that are well overdue, reform should not be pursued in a manner or timeframe that results in sub-optimal outcomes. The quality of the review is as important as its timeliness.

Telstra’s key submissions on the proposals included in the Paper are as follows:

- Telstra welcomes the proposals to introduce an over-arching policy framework and create a clearer delineation between the roles of the Department and Minister as policy developer, and the ACMA as a policy implementer. However, any Ministerial powers of direction or intervention should be exercisable only in clearly defined and limited circumstances following adequate public consultation.
- Telstra supports the exploration of a single parameter-based licensing framework, on the basis that this should result in more efficient management and use of the spectrum resource, and also recommends that the legislative cap on licence tenure be removed so there is flexibility for government to consider tenures of 20 years or longer for some licences.
- Telstra supports the use of market-based pricing mechanisms as the primary approach to efficiently allocating and transferring spectrum between users.
- In addition to revising the device supply and other technical regulations to properly address the import and supply of illegal devices in Australia (such as mobile repeaters and GPS jammers), it is important that the ACMA be adequately resourced to take action to enforce those regulations through awareness campaigns and enforcement actions.

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<sup>1</sup> Commonwealth Department of Communications (November 2014), *Spectrum Review Potential Reform Directions*, available at [http://www.communications.gov.au/consultation\\_and\\_submissions/spectrum\\_review](http://www.communications.gov.au/consultation_and_submissions/spectrum_review) as at 20 November 2014.

<sup>2</sup> Telstra Corporation Limited (June 2014), *Submission to the Commonwealth Department of Communications*, pg 6, available at [http://www.communications.gov.au/consultation\\_and\\_submissions/spectrum\\_review](http://www.communications.gov.au/consultation_and_submissions/spectrum_review) as at 20 November 2014

- Telstra remains concerned that the introduction of a general information gathering power for the ACMA will impose an undue compliance burden on licensees and therefore suggests that the Department provide further details on the need for and nature of the power, so that the likely costs and benefits of the proposal can be properly considered by industry.
- Telstra is open in principle to further outsourcing or delegation of the ACMA's spectrum management functions where cost-benefit analysis demonstrates a clear overall benefit to stakeholders, but considers that certain responsibilities (e.g. aspects of the dispute resolution and interference management roles) should remain with the ACMA. Care must also be taken to avoid the risk of licensees being subject to "hostile" private band managers.

## 2. Comments on the introduction and context

Before turning to the specific proposals, Telstra offers the following general observations on the introductory section of the Paper.

### 2.1. Economics of spectrum

Telstra agrees with the Department that the commercial use of spectrum makes a major contribution to the Australian economy.

In terms of the references in the Paper to "social" benefits of spectrum, it is important to emphasise that evidence-based decisions about the allocation of spectrum must be primarily about quantifying the benefits of an allocation decision. Therefore, benefits should not be construed as "economic" or "social" but rather as "quantifiable" or "unquantifiable" (respectively). To the extent that a benefit is quantifiable in economic terms, it should be duly accounted for in the quantification of the overall public benefit of allocation options. Where benefits cannot be quantified they should be identified as such and there should be clear communication to industry of:

- the reasons why their valuation is not possible, or is unreliable; and
- how any unquantifiable or qualitative benefits have otherwise been factored into an allocation decision (alongside the measurement of all quantifiable benefits).

### 2.2. International context

Telstra agrees with the statements in the Paper about the international dimension of spectrum management and the importance of international harmonisation. International developments and trends in the use of spectrum are very important to the Australian economy and industry especially given Australia is primarily a "technology taker" (rather than a "technology maker").

Further, when the ACMA engages internationally with the ITU and other intergovernmental organisations, it should have regard to a strategic plan for the realisation of Australia's spectrum interests. This plan should be developed by the Department and the Minister following appropriate consultation. A clear long term plan would provide guidance for Australia's official representatives who participate in international forums, particularly when there are competing interests amongst domestic spectrum stakeholders. It would also guide the ACMA in determining which international forums it should prioritise for attendance by its staff.

## 3. Principles for reform

Telstra broadly supports the Department's reform principles, but notes the following:

- **Transparency.** A clear and transparent policy framework and direction is important and this applies equally to the exercise of powers by the ACMA in discharging its regulatory obligations under the framework.
- **Efficiency.** In addition to further implementation of market principles and mechanisms into the spectrum management framework, reforms should address the removal of existing disincentives in the framework. Examples are the need for

removal of stamp duty on spectrum licence transactions which continue to be applied by several of the states and territories; as well as the removal of unnecessary costs from procedures in the spectrum management framework.

- **Certainty.** Telstra is pleased to see the Paper acknowledge the importance of maintaining certainty for incumbent spectrum users including the need for transition plans, grandfathering of existing licences and early reviews of the new arrangements. However, Telstra believes the principle about certainty also requires the review to consider:
  - the maintenance and further development of clearly defined property rights for licensees;
  - greater certainty of procedures in the spectrum management framework (and the minimisation of sudden or unexpected changes in policy or strategic direction); and
  - greater certainty of undisturbed use through adequate interference management and enforcement procedures.

## 4. Potential reform proposals

Telstra is broadly supportive of most of the eleven reform proposals put forward in the Paper, subject to the comments set out below.

### 4.1. Proposal 1 - Implement a clear and simplified policy accountability

#### *Policy statements*

Telstra welcomes the Department's proposal to introduce an over-arching policy framework to facilitate a clear and transparent approach to the spectrum policy-making decision process.

Telstra recognises that policy statements on spectrum will need to be withdrawn or updated from time to time. All policy statements should include indications of when they are likely to be reviewed or updated and the criteria for their review, as well as the circumstances under which the policy may be expected to be withdrawn (where known). It is also important that the Department clearly communicates to stakeholders the reasoning and rationale behind any policy withdrawal or update when it occurs.

While Telstra notes that the Spectrum Outlook prepared annually by the ACMA provides industry with some insight into the ACMA's work programs and operational activities, it would be beneficial if the Department led the development of a whole of government and economy spectrum policy similar to the Spectrum Strategy prepared by the Department for Culture Media and Sport in the United Kingdom.

#### *Direction powers*

Telstra welcomes the Department's efforts to develop a clearer delineation between the Department and Minister as policy developer, and the ACMA as the implementer of those policies. However, while the Paper mentions that Ministerial intervention would be on an exception basis, it is not clear from the Paper what additional Ministerial directional powers are intended. Further transparency on the scope of any proposed additional directional powers, and opportunity for industry to consider them, is required in order to give proper feedback on this proposal.

#### *Annual work programs*

It would be beneficial to industry if the ACMA's work program was required to include details of the extent of the resources allocated to its various work programs. Publication of this information would be helpful to:

- advise the industry of the likelihood of any delays in the completion of the work program; and

- provide industry stakeholders with the opportunity to assist with some of the work programs through the provision of support, cooperation and self-regulation initiatives.

Telstra also believes that it is important that adequate opportunity is provided for industry to provide input on the prioritisation of the various projects within the annual work program.

#### 4.2. Proposal 2 - Establish a single licensing framework

Telstra welcomes and supports the Department's proposal to develop a single licensing framework. However, Telstra wishes to emphasise that such a framework must not diminish existing licensees' rights.

##### *De facto licence categories*

The true benefit of a new single licensing framework will be in the operation of the regime. After moving to a single licensing framework, it will be important that the ACMA adopts a flexible approach to the development of licences based on the legislated licence parameters and does not simply replicate the three existing licence categories under the new framework.

##### *Application across all spectrum users*

If a single licensing framework is to be adopted, Telstra assumes that the intention would be for this to apply both to spectrum users under the Radiocommunications Act 1992 (Cth) (**Radiocommunications Act**) and spectrum users under the Broadcasting Services Act 1992 (Cth) (**BSA**). That is, there would be a merging of the two existing spectrum planning regimes and, to the extent applicable, a rationalising of the broadcasting services licensing regime under the BSA within the new single licensing framework.

##### *Licence tenure*

Telstra believes the review should consider the merits of increasing the maximum licence tenure beyond 15 years. Bearing in mind the intended flexibility of a single licence framework, Telstra suggests it would be beneficial if there was no legislative cap on licence tenures and instead as a matter of policy there was the option to permit licence tenures to be 20 years or longer on occasions where the circumstances justify it, albeit in practice that many licences may continue to have a much shorter duration. A number of other jurisdictions, including the United Kingdom, Ireland, Germany and Finland have maximum licence tenures of 20 years<sup>3</sup>, and Telstra understands that some licences in the United States can effectively be held in perpetuity.

##### *Renewals*

Telstra welcomes the proposal for a presumption of licence renewal and the specification of the grounds for non-renewal. So far as those grounds relate to licence breaches, Telstra suggests that appropriate materiality thresholds be applied so that licences are not subject to non-renewal due to minor or immaterial breaches.

#### 4.3. Proposal 3 – More flexible allocation and reallocation processes

Telstra supports the Department's proposal to provide the ACMA with greater flexibility to determine the most appropriate allocation process and method without Ministerial oversight. However, Telstra is concerned that the sharing (or duplication) of these powers between the Minister and the ACMA, by allowing Ministerial intervention in the ACMA's determinations, runs the risk of blurring the differing responsibilities of the ACMA on the one hand, and the Department and Minister on the other. While policy decisions do properly rest with the Minister, those policies should be objectives-based, with the Department and Minister deferring to the ACMA to determine how those policies should be implemented at the allocation and licensing level - other than in exceptional

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<sup>3</sup> Radio Spectrum Management (December 2012), *Spectrum Management in Other Jurisdictions*, available at <http://www.rsm.govt.nz/cms/policy-and-planning/spectrum-policy-overview/archived-policy-and-planning/review-of-radio-spectrum-policy-in-new-zealand/report/appendix-spectrum-management-in-other-jurisdictions#Finland> as at 24 November 2014; Lemay-Yates Associates Inc (October 2006), *A Discussion of Spectrum Licence Conditions and the Impacts on New Entrants*, pg 6, available at [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapi/DGTP-002-07-quebecor-Study.pdf/\\$FILE/DGTP-002-07-quebecor-Study.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapi/DGTP-002-07-quebecor-Study.pdf/$FILE/DGTP-002-07-quebecor-Study.pdf) as at 24 November 2014.

circumstances where there is a need for Ministerial intervention to ensure a particular policy outcome is achieved.

Accordingly, Telstra suggests that the process of developing the ACMA's annual work program be used to align its proposed allocation activities with the Department and Minister's policy objectives on an annual basis to reduce the likelihood of Ministerial intervention (or direction) being required.

#### **4.4. Proposal 4 – Establish a more transparent and flexible approach for spectrum pricing to promote efficient use and re-use of spectrum**

Telstra supports the adoption of market-based pricing mechanisms as the primary approach to pricing spectrum. If Ministerial price-setting powers are to remain, they should be limited to non-market pricing scenarios where appropriate reasons have been identified. To support this outcome, Telstra believes the new framework needs to state a strong preference for market-based mechanisms while also clearly defining the exceptional circumstances in which Ministerial price-setting may occur.

Ministerial price setting runs the risk of prices being set too high or low and resulting in inefficient outcomes. Further, any such intervention must be undertaken in a transparent and informed manner and not used to favour particular spectrum users or for the application of indirect taxation. For these reasons, Telstra believes Ministerial price-setting should only be used selectively and on an exceptions-basis. Alternative mechanisms such as opportunity cost pricing are preferable to Ministerial price-setting in situations where competitive market-based pricing mechanisms are not appropriate.

In the interests of greater transparency and increased accountability, Telstra also thinks it would be helpful to introduce a requirement for the ACMA to regularly publish and seek feedback on a breakdown of its costing calculations for the administrative components of spectrum pricing.

#### **4.5. Proposal 5 – Structuring payment schedules for licences**

Telstra notes that it will be important for the current treatment of spectrum licenses under Australian taxation laws to be preserved in any reform of payment schedules. The existing taxation laws currently explicitly treat spectrum licence fees as capital expenditure.

#### **4.6. Proposal 6 – The ACMA to take an open data approach to substantially improve the range, availability and quality of information provided to support an efficient spectrum market**

Telstra agrees that there are efficiencies to be gained from transparency of information in the spectrum market but has reservations about any proposal to provide the ACMA with a potentially broad information gathering power. It is not clear from the Paper what is being proposed around the breadth of this power. Telstra believes the introduction of a broad power would likely add to licensees' compliance cost burdens and so encourages the Department to consult with industry on the thinking behind this reform proposal. In particular:

- it is not clear from the Paper what the benefits of the proposed power are or how the costs of its administration are justified for the ACMA and industry; and
- such costs must be weighed against the benefits and any alternative solutions considered.

If an information gathering power is to be introduced, the procedures attached to the power must ensure requests for information do not create overly burdensome compliance obligations on recipients of requests, especially in light of the Government's red tape reform initiatives. In keeping with the findings of the recent Competition Review Panel Draft Report,<sup>4</sup> Telstra suggests that any such information gathering power should at a minimum:

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<sup>4</sup> Commonwealth of Australia (September 2014), *Competition Policy Review Draft Report*, pg 53, available at <http://competitionpolicyreview.gov.au/> as at 18 November 2014

- require the ACMA to frame its requests for information as narrowly as possible; and
- only oblige recipients of notices to undertake a “reasonable” search of the records under their possession and control (accounting for the size of those records and the costs of retrieving archived documents).

The obligation to disclose information must also be subject to adequate guarantees to ensure the maintenance of commercial confidentiality.

#### **4.7. Proposal 7 – Payment of compensation for resuming all or part of a licence**

Telstra supports this proposal as an appropriate addition to the existing regime in the Schedule to the Radiocommunications Act. Telstra understands the proposal is for the level of compensation, and possibly the methodology for calculating compensation, to be identified in a parameter on the relevant licence.

Telstra suggests that the availability of compensation should be the default licensing position for all licence types. Compensation should only be withheld in special circumstances where, for example, a party requires access to spectrum, and it is acknowledged that reallocation is likely to occur within the licence tenure, but the party nonetheless requires access in the interim period.

The current regime allows for consideration of the market value of a licence and a licensee’s “loss, injury or damage suffered, or expense reasonably incurred, as a direct, natural and reasonable consequence of the resumption.”<sup>5</sup> Telstra suggests the Department consider including other heads of compensation such as financial advantages incidental to the holding of the licence or the effect on the valuation of a licensee’s other spectrum holdings resulting from the resumption. Equivalent concepts are included in the calculation of compensation under the Lands Acquisition Act 1989.<sup>6</sup>

Unlike the existing provision which has rarely (if ever) been used, it is important that the proposed compensation regime is used in practice to promote resumptions where doing so serves Australia’s broader economic interests while ensuring affected licensees are duly compensated in all appropriate circumstances.

#### **4.8. Proposal 8 – Facilitate greater user involvement in spectrum management**

As suggested in its previous submission to the Department on the Terms of Reference for the Spectrum Review,<sup>7</sup> Telstra welcomes the proposal to facilitate greater user involvement in spectrum management. Telstra is open in principle to further outsourcing or delegation of the ACMA’s functions where cost-benefit analyses can demonstrate a clear overall benefit to stakeholders. However, more detail about the Department’s thinking is required before Telstra can make a proper judgment on this matter.

Telstra is of the view that some functions are not appropriate for devolving. For example, Telstra considers that it would be difficult and/or inappropriate to transfer aspects of the ACMA’s compliance and enforcement-related functions to private sector entities.

On the other hand, Telstra notes that the delegation of certain aspects of spectrum certain planning and licence assignment functions may be beneficial for the coordination of spectrum use amongst the resources, utility and transport sectors, as well as police and emergency services agencies.

Any broader transfer of spectrum management responsibilities should be approached cautiously. In particular, Telstra would be concerned if there is a risk that licensees could end up being subject to “hostile” private band managers

Lastly, Telstra suggests that consideration should be given to the potential for industry codes and guidelines to be used as a more cost effective and flexible alternative approach to regulation, in a similar manner to the way that such codes and guidelines are used in the telecommunications regulatory framework.

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<sup>5</sup> Clause 1(1)(b), Part 2, Schedule to the Radiocommunications Act

<sup>6</sup> See subsection 55(2)

<sup>7</sup> Above note 2, pg 6

#### 4.9. Proposal 9 - Develop more principles-based device supply regulation

##### *General comments*

Telstra is generally of the view that the scope of regulation should be no greater than necessary to achieve discrete outcomes. This approach is also consistent with the government's red tape reduction agenda. Nonetheless, as explained below for Proposals 9 and 10, Telstra believes there is a need to expand and strengthen some of the technical compliance and enforcement measures under the Radiocommunications Act.

Telstra is broadly supportive of the proposal to develop more principles-based device supply regulations. However, Telstra has the following comments and suggestions about this proposal:

- **The ACMA's role in enforcement should remain paramount.** In reforming the device supply regulations, the ACMA's responsibility for enforcing the regulations and preventing the use of interference-causing devices must not be diminished.
- **Compliance must not be diminished.** In moving to a more principles-based regime, the level of compliance by licensees should not fall but rather should increase while at the same time enabling spectrum users to comply with the technical regulations in a more efficient and cost-effective manner.
- **Timely review of the electromagnetic compatibility (EMC) regime.** As part of this reform proposal, Telstra suggests the EMC regime be reviewed to consider whether it remains suitable for ensuring the compliance of devices supplied in Australia with established electromagnetic compatibility requirements and standards. There is a rapidly increasing proliferation of non-radiocommunications devices which are potential sources of electromagnetic interference, e.g., LED lighting systems and solar panels. There is a growing need to ensure that these devices are not only themselves inherently compliant, but also that manner of their installation and ultimate use does result in electromagnetic interference to licensed services.
- **Limited use for civil actions.** Telstra notes the Department's proposal to extend the civil proceedings right under section 50 of the Radiocommunications Act to all licence types as a way of assisting in the management of interference. However, Telstra's view is that this will be of limited use unless it is also extended to taking action against importers, distributors and retailers of non-standard devices and devices ultimately intended for use by unlicensed end-users. Expanding section 50 in this way would also be in keeping with the Department's proposal to broaden the concepts of supply in the device supply regulation (discussed below).

##### *Expanding the scope and simplifying the application of the prohibition against the supply of devices to unlicensed persons*

Telstra welcomes the Department's proposal to broaden the concepts of supply to expand the device supply regulation (under section 301 of the Radiocommunications Act) to all persons in the supply chain.

Telstra has in recent years become very concerned about the proliferation of illegal mobile repeaters and has suggested a series of practical measures to the ACMA to combat this increasing problem.<sup>8</sup> Telstra has experienced numerous incidents of disruption to its mobile network caused by the illegal use of repeaters and jammers. These incidents result in Telstra's mobile customers receiving a degraded service along with the risk that they are unable to make calls to the emergency call service (63% of emergency calls are now made from mobile phones).<sup>9</sup>

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<sup>8</sup> Telstra Corporation Limited (October 2011), *Cellular Mobile Repeaters – A Proposed Regulatory Approach*, pg 10-11, available at <http://www.acma.gov.au/theACMA/ifc-312011-cellular-mobile-repeaters-a-proposed-regulatory-approach> as at 25 November 2014.

<sup>9</sup> ACMA (May 2013), *New rules for locating mobile calls to Triple Zero*, available at <http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Emergency-call-service/new-rules-for-locating-mobile-calls-to-triple-zero> as at 2 December 2014.

Attachment 1 sets out several reforms to section 301 of the Radiocommunications Act which Telstra believes will assist to further stem the manufacturing and import of devices such as crude mobile repeaters and mobile and GPS jammers, and their sale to unlicensed persons in Australia. Telstra urges the Department to implement these reforms as quickly as possible, noting that they are unlikely to be controversial, are relatively straightforward to implement, and are independent of the more substantial reforms contemplated in the review.

It also remains of vital importance that the ACMA be adequately resourced to take action to enforce the device supply regulations.

#### *Further amendments to the technical offence provisions*

Telstra is also concerned that there is a need to broaden the scope of a number of other aspects of the existing legislation to properly tackle the import, sale and use of mobile repeaters, GPS jammers and other interference-causing devices in Australia. Improving the effectiveness of the technical offence provisions will lead to less interference with Telstra's network and an improvement in customer experience. To help achieve this outcome Telstra suggests the following reforms be made to Chapter 4 of the Radiocommunications Act:

- **Prohibitions on the supply and possession of non-standard devices.** The prohibited conduct under these offences (in Division 2 of Part 4.1 of the Radiocommunications Act) must be carried out with knowledge, which may be imputed (under section 161) having regard to the abilities and experience of the offender. However, these offences would be more effective if they were subject to a lower standard of recklessness rather than knowledge, meaning the prohibitions could still be breached if the party in question has some awareness that their use or possession may not be permitted by law and nonetheless elects not to refrain from doing so. Recklessness could also be imputed in a similar way to how knowledge is currently imputed. This should incentivise greater care and due diligence by manufacturers and suppliers of devices.
- **Prohibitions on the causing of interference to certain communications.** Similarly, the offences in Part 4.2 of the Radiocommunications Act about the causing of interference with certain communications could adopt a lower standard of recklessness (rather than knowledge).
- **Providing licensees with an avenue for direct action.** As discussed above, licensees are currently only able to take action against operators of devices where the use is not in accordance with a licence and that operation is causing interference with the licensee's own radiocommunications – there is no ability to initiate action for breaches of other offences, such as section 301 or the offences in Chapter 4 of the Radiocommunications Act. The ACMA is constrained by limited resources to prioritise the most egregious cases of interference and large scale supply of interfering devices. Accordingly, in keeping with the Department's proposal to facilitate greater user involvement in spectrum management (Proposal 8), Telstra suggests that licensees themselves be given the right to take civil action for breaches of section 301 where they suffer or are likely to suffer unlawful interference as a consequence of the supply of the devices. This approach would require detailed consultation to determine its potential efficacy, given the time and cost associated with civil action as compared with existing enforcement powers bestowed on the ACMA under the Act. The first avenue of enforcement should always be the ACMA's enforcement powers, particularly for egregious cases of interference where public safety may be at risk.

#### **4.10. Proposal 10 – Improve regulation by extending the suite of enforcement measures available to the ACMA**

Telstra supports the proposal to extend the suite of enforcement measures available to the ACMA. However Telstra has the following concerns:

- **Civil penalties must be a frontline measure.** In introducing a civil penalties regime to effectively combat the interference to services used by customers, it is important

that the regime be able to be used swiftly and not be relegated to being used only as a last resort in an escalating enforcement procedure. In order to be effective, and to act as an appropriate deterrent, the ACMA needs to be vigorous in both the investigation and prosecution of civil offences. An effective and duly enforced civil penalties regime applying to the interference-related offences under the Radiocommunications Act will foster increased compliance and improve the quality of the services Telstra delivers to its customers.

- **Delineation of regulatory responsibilities.** Where the ACMA's regulatory obligations overlap with other regulators, such as the ACCC, there needs to be a clear delineation of responsibilities to ensure the ACMA is discharging all of its enforcement obligations and no enforcement gaps emerge as a result of regulators simultaneously deferring responsibilities to each other. Telstra believes it is important for the regulatory framework to be clear that the ACMA has primary responsibility for spectrum regulation and associated areas - for example, the regulation of unsafe electromagnetic devices and the regulation of the sale or promotion of interference-causing devices, even where it may also involve matters within the ACCC's jurisdiction (such as misleading advertising of such devices) so that impacted licensees are not left in limbo between the two regulatory agencies. The ACMA should be properly resourced to carry out this primary responsibility.
- **Infringement notices should apply to a broader range of offences:** Infringement notices are a powerful enforcement tool, which the ACMA should have at its disposal for a broad range of interference-related offences. These powers would enable the ACMA to issue penalties for clear contraventions, without the time and cost of instituting court proceedings. The ACCC has an infringement notice power and does exercise it.<sup>10</sup> In Telstra's view it is even more appropriate for the ACMA to have a similar power in this area, where offences are clear (for example, operating prohibited devices, interference caused by illegal mobile repeaters and supplying devices to unlicensed persons). Given this and to ensure that infringement notices act as a strong deterrence, consideration should be given to making the penalties imposed by the ACMA on unlisted corporations and individuals higher than those currently available to the ACCC<sup>11</sup> given the scale of harm a single unlicensed device can have on other radiocommunications services..
- **Other enforcement powers:** In addition to introducing a civil penalties and infringement notice regime, consideration should be given to providing the ACMA with other similar powers to the ACCC so that the ACMA is better equipped to manage compliance and interference issues to protect the quality of service experienced by customers and other spectrum users. For example the ACMA should be able to seek court orders including:
  - injunctions restraining current or future conduct, or requiring respondents to take certain action;
  - orders requiring respondents to publish notices about their conduct and to disclose relevant information to others (for example, to their customers);
  - findings of fact that show contraventions so that damages may be recovered by consumers and businesses affected by the conduct;
  - orders to achieve financial redress for consumers or businesses harmed by the conduct;
  - various non-punitive orders, including community service or probation orders (which may include orders for implementing a compliance or an education and

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<sup>10</sup> ACCC (June 2013), *iinet pays \$102,000 infringement notice for Naked DSL bus advertisement*, available at <https://www.accc.gov.au/media-release/iinet-pays-102000-infringement-notice-for-naked-dsl-bus-advertisement> as at 1 December 2014.

<sup>11</sup> Being \$2,040 for an unlisted corporation or individual and \$102,000 for a listed corporation.

training program); and

- disqualification orders (preventing individuals from managing a corporation for a set period of time).

Telstra also understands that the ACMA's data gathering powers under the Radiocommunications Act to investigate interference or non-compliance matters are somewhat limited compared to similar provisions under the Telecommunications Act. Telstra recommends that consideration be given to strengthening these powers.

- **Transparency and deterrence:** It will also be important that actions taken under the new enforcement regime are made available publically to act as a general deterrent. In this respect, the ACCC maintains a number of online public registers, such as the infringement notices register, which could also be adopted by the ACMA in its enforcement proceedings.
- **Adequate resourcing of enforcement activities.** The ACMA needs to allocate greater resources to its compliance activities which are not currently resourced to properly cover the vastness of Australia, or provide assistance to licensed spectrum users within adequate timeframes. For Telstra this results in it incurring significant costs in carrying out its own investigations into interference issues (for example, from illegal mobile repeaters) in the majority of cases, with the ACMA's assistance typically only being invoked in cases of egregious interference where the cooperation of unlicensed users cannot be gained despite concerted effort by Telstra.

#### **4.11. Proposal 11 – The ACMA to continually review options for allocating spectrum to alternative/higher value uses and to ensure that barriers to achieving this are reviewed and removed where appropriate**

Telstra supports this proposal and notes that it is critical that the ACMA takes further steps to maintain a flexible approach to spectrum planning in order to foster the development and adoption of innovative radiocommunications technologies in Australia. Telstra suggests that there needs to be a clear process for proposing to and discussing with the ACMA new ideas and emerging trends in the radiocommunications context, for example opportunities for better use of government spectrum, and the prioritisation of work programs required to facilitate the emergence of new services such as air-to-ground terrestrial services.

## **5. Additional proposals**

While Telstra is generally supportive of most of the reform proposals, Telstra believes (as noted previously)<sup>12</sup> that the appropriateness and effectiveness of the fundamental building blocks of the existing regulatory framework need to be considered to fully review the appropriateness and effectiveness of the framework as a whole.

This level of review will be an important and necessary part of further developing many of the proposed reforms, such as a single licensing framework. The Department may wish to consider the example of the New Zealand Ministry of Business, Innovation and Employment's eighty-question discussion document concerning its review of the Radiocommunications Act 1989 (NZ) which sought stakeholders' views on a wide range of specific issues covering the basic building blocks of the Act and the framework as a whole.<sup>13</sup>

A fundamental review of the existing regulatory framework should also extend to reviewing other relevant legislation which relate to or interact with the Radiocommunications Act, e.g., parts of the BSA and Australian Communications and Media Authority Act 2005 (Cth).

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<sup>12</sup> Above note 7, pg 4

<sup>13</sup> New Zealand Ministry of Business, Innovation & Employment (July 2014), *Review of the Radiocommunications Act 1989: Discussion Document* available at <http://www.rsm.govt.nz/cms/policy-and-planning/consultation/review-of-the-radiocommunications-act-1989> as at 27 November 2014.

## 6. Reform timeframes

### 6.1. Single licensing framework

As is discussed further in Part 7 below, Telstra is of the view that a progressive and consultative approach must be taken in implementing a single licensing framework, given the likely impact it will have on spectrum users with large and complex licence portfolios.

### 6.2. Licence re-issue process and technical regulations

As Telstra noted in its previous submission to the Department<sup>14</sup>, Telstra is of the view that the following are urgent reforms which could be achieved in the short term:

- **Restricting the proliferation of unlawfully interfering devices.** The reforms discussed above in paragraph 4.9 about the supply of non-standard devices and the supply of devices to unlicensed persons are reforms that can (and should) be prioritised given the ongoing impact that the increasing supply and use of mobile repeaters, GPS jammers and other interference-causing devices is having on Telstra and other spectrum users, including the potential risk to public safety.
- **Licence re-issue process.** Although related to the implementation of a single licensing regime, Telstra considers that in the interim a statutory presumption of renewal for spectrum and apparatus licences could be introduced relatively quickly and would deliver immediate benefits to all users of spectrum and apparatus licences by creating greater certainty.

## 7. Transitional arrangements

Proper transitional arrangements must be developed together with all significant reforms in order to ensure that spectrum users are able to transition to new regulatory mechanisms without disruption and in a cost-effective manner. Timely reform should not come at a disproportionate cost to spectrum users.

While Telstra supports the introduction of a single licensing regime, given the size and complexity of Telstra's and other spectrum users' licence portfolios, it is important that the Department:

- continues to consult with spectrum users on the development of this framework; and
- plans adequate transitional arrangements which adopt sensible timeframes throughout the process to ensure the framework can be progressively implemented without disruption and in a cost effective manner.

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<sup>14</sup> As above, note 7 pg 9

## Attachment 1 – Amendments to section 301 of the Radiocommunications Act

Telstra suggests the following amendments be made to section 301 of the Radiocommunications Act:

- Section 301 should be extended to prohibit the supply of such devices to any person where the intended end-user is (or is likely to be) an unlicensed person. This would capture sales by manufacturers or wholesalers and sales by wholesalers to retailers, or any sale between two parties in the supply chain. At the moment, the legislation only prohibits the supply of certain devices to an unlicensed “person intending to operate the device”.

In extending section 301 in this way, similar exceptions to those in Division 5 of Part 4.1 of the Radiocommunications Act (addressing non-standard devices) could be adopted to prevent the offence applying prematurely. In order to ensure all parties in the supply chain are incentivised to take reasonable steps to ensure the devices they manufacture or sell are not ultimately used by unlicensed persons, the section should provide that where it is found devices are being acquired by unlicensed users, the onus is on the manufacturers, wholesalers and retailers to provide evidence about the preventative steps they have taken - such as evidence about the existence, monitoring and enforcement of downstream contractual use restrictions in their supply arrangements.

- The current requirement under section 301(1) that the end-user buying the “eligible radiocommunications device” be required to provide evidence to the supplier that he or she is authorised to operate the device, inappropriately positions the supplier as the party which should police compliance. In fact, the current proliferation of unlicensed mobile repeater devices is due to unscrupulous offshore vendors that have no concern for end-users’ compliance with Australia’s radiocommunications licensing regime. These vendors routinely publish false Australian physical addresses on their websites and make unauthorised use of mobile carriers’ trademarks to claim their devices are suitable for use in Australia.

Telstra suggests that section 301 be augmented by enabling a spectrum licensee to provide a general authorisation to end users to operate specifically identified devices in its licensed spectrum. The general authorisation would confer compliance with the “eligible radiocommunications device” restriction, for the specific devices which the spectrum licensee authorises. The ability to provide a general authorisation would eliminate the need for end users of mobile carriers to be individually authorised under section 68 of the Radiocommunications Act to operate approved “smart” repeaters. It would also enable a reduction of the record-keeping requirements for this category of carrier-approved devices, eliminating unnecessary red tape. This approach could be immediately introduced under the current framework but would be easily incorporated into a single licence framework in the future.

- Powers should be introduced into the Radiocommunications Act to provide the ACMA with a clear mandate to publically identify those manufacturers, distributors and retailers that manufacture or deal with compliant “eligible radiocommunications devices” as defined in Section 301 (such as smart repeaters approved by mobile network operators) and those which do not. Inclusion of a supplier on the ACMA’s approved list would be upon application and would be subject to consultation with the relevant spectrum licensees in which the devices are intended to operate. This approach would assist the public to identify which devices are legal and which suppliers are legitimate.