



Contact officer: Clare O'Reilly  
Contact phone: 02 9230 3854

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Level 20, 175 Pitt Street  
Sydney NSW 2000  
GPO Box 3648  
Sydney NSW 2001  
tel: (02) 9230 9133  
www.accc.gov.au

Simon Atkinson  
Secretary  
Department of Infrastructure, Transport, Regional Development and Communications  
GPO Box 594  
CANBERRA, ACT, 2601

**Electronically:** [spectrumreform@communications.gov.au](mailto:spectrumreform@communications.gov.au)

Dear Mr Atkinson

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make this submission in response to the *Exposure Draft – Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020* (the Bill).

The ACCC supports the Government's intent to simplify the licensing and allocation process and establish a more flexible and efficient spectrum management regime. We are pleased to see that the Bill addresses some of the ACCC's concerns regarding the previous *Exposure Draft – Radiocommunications Bill 2017* which we considered gave inadequate consideration to competition outcomes in the spectrum management framework.

We consider the proposed amendments in the Bill demonstrate a clear intent to strengthen the treatment of competition in the allocation process, which we believe will promote outcomes that are in the public interest. We provide below some comments on specific provisions which, in our view, would help to achieve those outcomes, in particular that:

- guidance should be provided in the Bill or the explanatory memorandum to enable interpretation of the object provision in a way that encompasses competition consideration;
- the Australian Communications and Media Authority (ACMA) should be given broader discretion to consider all matters relating to competition in administratively allocating apparatus licences;
- in the absence of extending the application of section 50 of the *Competition and Consumer Act 2010* (CCA) to licence renewals, guidance should be provided in the explanatory memorandum accompanying the Bill on the matters that the ACMA may have regard to in applying the public interest test when deciding whether to renew a licence.

These are discussed in detail below.

### **The object of the legislation**

The object provision (section 3) of the Bill puts the promotion of long-term public interest (LTPI) as the overall object of spectrum management and lists three specific aims by which

this overall object could be achieved. Relevantly, paragraph 3(a) state that the LTPI will be promoted by the management of spectrum that facilitates the efficient planning, allocation and use of spectrum.

The provision does not explicitly include promotion of competition as an object or specific aim. However, the explanatory note for the Bill states that the overall object of promoting the LTPI would enable the ACMA to consider other matters such as the competition effects of decisions made when managing spectrum and the merits of providing investment certainty to radiocommunications users in the rollout of infrastructure.<sup>1</sup>

We agree that managing spectrum in a manner that promotes competition will also deliver the LTPI, especially in downstream markets. However, allocation processes that promote competition in downstream markets will also ensure the efficient use of spectrum in those markets. While paragraph 3(a) refers to efficient use, the explanatory note appears to focus on the efficient allocation of spectrum through a process of identifying the highest value. This may be interpreted narrowly as placing more emphasis on the highest value use assessment, rather than efficient use of spectrum in downstream markets.

Identifying the highest value use of spectrum and allocating through auction processes do not in themselves ensure economic efficiency or maximise the public benefit derived from the use of the spectrum. It is also necessary to consider whether the allocation will promote competition. We suggest that the aim set out in paragraph 3(a) be broadened to include efficient use of spectrum *in downstream markets* which would necessitate the consideration of the role of competitive markets in delivering that outcome in order to promote the LTPI. We consider that this clarification could be included in the provision itself, or in the explanatory memorandum accompanying it to guide the interpretation of the object.

### **Allocation limits**

We welcome the inclusion of an explicit requirement on the ACMA to consult the ACCC on allocation limits when determining procedures for issuing spectrum licences and issuing apparatus licences under price-based allocations. We consider this would formalise the current role of the ACCC in providing advice on allocation limits to the person making the decision on such matters and provides certainty and transparency to industry regarding the processes for the application of allocation limits. We understand that the Minister for Communications retains the power to direct the ACMA regarding allocation limits and we envisage that the Minister will continue to seek the ACCC's advice in exercising this power.

While the Bill does not explicitly specify the need for a consultation process when determining allocation limits, our preference is to continue the current approach of consultation and transparency around our advice and reasoning. We consider that this approach has benefited the formulation of our advice, by ensuring a thorough and well-informed analysis of the competition issues and also assisted industry in understanding our reasoning.

We also support the proposed amendments to paragraphs 60(5)(a) and (b) which specifically permit the ACMA to impose allocation limits that apply to total holdings of a party, including holdings under spectrum and apparatus licences. Consistent with the allocation limits that the ACCC recommended to the Minister in regard to the 3.6 GHz band allocation in 2018, we consider that a more holistic approach to allocation limits which takes into account existing holdings, at least in substitutable bands, is more appropriate in addressing potential competition issues. We understand that the proposed provisions are also intended to provide the ACMA with flexibility in determining the form of allocation limits that apply in a

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<sup>1</sup> Explanatory notes to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, p. 11.

specific allocation as different forms of allocation limits may be appropriate depending on the likely competition issues that are present.

### **Competition consideration in administrative allocation of apparatus licence**

Proposed subsection 100(4C) of the Bill explicitly enables the ACMA to have regard to an applicant's existing holdings under spectrum and apparatus licences in administrative allocations of apparatus licences. The explanatory notes state that this is to make clear the ACMA can consider matters such as the impact on competition when deciding whether to issue an apparatus licence.

We support the intent of this proposed provision. However, we consider that the current wording may not enable the ACMA to have regard to all matters that are relevant to the consideration of the competition impact of issuing the apparatus licence. For instance, other than the applicant's existing holdings, the holdings of its competitors would also need to be considered in assessing the effect of issuing the apparatus licence to the applicant. Other factors such as the applicant's intended specific use of the apparatus licence and the relevant markets which may be affected are also relevant to the competition assessment. As such, we consider that the provision could simply be stated as enabling the ACMA to have regard to the impact on competition in a market. This would provide the ACMA with flexibility to take into account all matters relating to that assessment where relevant to an administrative allocation of apparatus licence.

### **Application of section 50 of the *Competition and Consumer Act 2010***

The Bill retains the status quo regarding the application of section 50 of the CCA to spectrum. That is, the ACCC can consider whether a spectrum acquisition would have the effect of, or be likely to have the effect of substantially lessening competition. While the previous Radiocommunications Bill 2017 had proposed that the application of section 50 be extended to licence renewals, this has not been included in the Bill. However, the Bill proposes that the duration of all licences (spectrum and apparatus) be extended to 20 years.

We consider that the change to licence periods elevates the risk of spectrum being locked up in a way that may limit competition in downstream markets and therefore impact the long-term public interest. For this reason, we consider that there is a case for section 50 of the CCA to also apply to renewal of spectrum licences. It is important to note that this would not mean that the ACCC would review all licence renewals but only those that it considers may result in a substantial lessening of competition in a market. This is a threshold test that is well understood by industry and we do not consider that extending the application of section 50 of the CCA to licence renewals would impose significant regulatory burden.

In the absence of the application of section 50 as a competitive safeguard for licence renewals, we consider that the renewal process set out in the spectrum management framework would need to ensure that potential impact on downstream competition is a key consideration in deciding whether to renew a licence. This is discussed below.

### **Renewal process**

We support the proposal to specify a clearer process governing licence renewals. We consider such a process should not only provide sufficient clarity on the prospect and process for licence renewals, but also how a decision on whether a licence would be renewed is made.

We strongly support the proposed approach that there be no presumption of renewal. Given the proposed maximum licence duration of 20 years, one licence renewal could result in a specified amount of spectrum being locked up to a single party for 40 years. Under these circumstances, it is particularly important that the ACMA undertake a detailed assessment

on whether a licence should be renewed, taking into account all relevant matters, including the impact on competition in downstream markets.

To this end, we consider that the proposed licence renewal framework could be improved by providing greater clarity on the matters that the ACMA may take into account in deciding whether to renew a licence, and the process under which the ACMA will make this decision.

The Bill currently provides that unless it is satisfied that it is in the public interest to do so, the ACMA must not renew a licence if the renewal is for a period of 10 years or longer, or if the licence includes a public interest statement. We understand that the ACMA also has a discretion to apply the public interest test when renewing licences for less than 10 years. In addition, the Bill then lists some matters which the ACMA must have regard to and some matters which the ACMA may have regard to in deciding whether to renew a licence.<sup>2</sup>

Our view is that there should be more guidance on the public interest test to provide transparency and certainty over the matters that the ACMA will likely consider when applying this test. This would provide guidance to potential applicants on what to address in applying for renewal of licences and would inform industry and the public more widely on how renewal decisions will be made. The consultation paper notes that the definition of public interest may vary for different parts of the spectrum and that the ACMA may have regard to various matters when applying the public interest tests.<sup>3</sup> To better reflect the Government's intention, we consider the matters referred to in the consultation paper could be included in the explanatory memorandum accompanying the Bill. This would provide some guidance on the relevant matters that the ACMA is likely to consider in applying the public interest test without constraining the ACMA's discretion in determining exactly what matters are relevant in each case. To this end, we recommend that one of the matters that should be mentioned in the explanatory memorandum is the impact of licence renewal on competition in a relevant market. We consider that this would be consistent with the intent of the Government in introducing subsection 100(4C) which explicitly enables the ACMA to consider competition matters when administratively allocating an apparatus licence.

In addition, the consultation paper notes that it is essential that the ACMA has the right information to make these decisions.<sup>4</sup> We consider that the right information should not just include information from the applicant, as other parties, such as those operating in the same market as the applicant, may have relevant information which would inform the ACMA's decision on whether renewing the licence is in the public interest. The Bill provides that a spectrum licence could include a statement prescribing a renewal decision-making period. It is unclear whether the Bill envisages that the ACMA will undertake any public or targeted consultation during this renewal decision-making period, other than seeking information from the applicant. We consider a wider consultation process would be particularly useful in circumstances where there is competing interest for the spectrum held under the licence and where the renewal of the licence is likely to have competition implications in downstream markets. In these circumstances, a wider consultation process will ensure that the ACMA has all relevant information that it needs to make the renewal decision.

In making comments and suggestions on the renewal process, we are conscious that most licence renewals may not give rise to significant competition issues and are done routinely by the ACMA under the existing process. However, our comments are directed at the renewal of licences which would otherwise be allocated via a price-based allocation process under section 60, where allocation limits could potentially apply, specifically licences held by the mobile network operators.

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<sup>2</sup> Subsections 77C(7) and (8) of the Bill.

<sup>3</sup> Consultation paper, p. 13.

<sup>4</sup> Consultation paper, p. 13.

Once again, we appreciate the opportunity to make this submission and would be happy to discuss these matters further.

Yours sincerely

A handwritten signature in blue ink that reads "Rod Sims". The signature is stylized, with the first name "Rod" written in a cursive-like script and the last name "Sims" in a more blocky, sans-serif style.

Rod Sims  
Chair