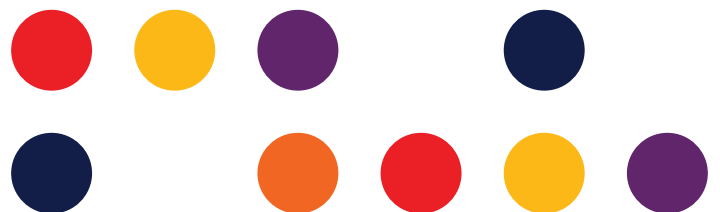


Ministerial Policy Statement – Expiring Spectrum Licences

TPG Telecom submission to Department of
Infrastructure, Transport, Regional
Development, Communications and the Arts

April 2024

Public submission



Submission

TPG Telecom welcomes the opportunity to provide our views on a draft Ministerial Policy Statement (**draft MPS**) issued by the Minister for Communications that the Australian Communications and Media Authority (**ACMA**) must have regard to in making decisions with respect to certain expiring spectrum licences between 2028 and 2032.

TPG Telecom generally supports the policy objectives set out in the draft MPS. However, we suggest the Department consider the following:

1. Elevating the significance of service continuity for Australian consumers and businesses as a Government policy objective.
2. Provide greater clarity with respect to the objective of promoting competition.
3. Consider industry sustainability in key decisions, such as pricing.

To allow for procedural certainty, the MPS should be the sole document setting out Government policy objectives with respect to the expiring spectrum licence process. Currently, the presence of numerous overlapping policy documents increases the potential for procedural error.

Elevate significance of service continuity for Australian consumers and businesses

The draft MPS first includes reference to supporting service continuity for end users, particularly where no alternative service is available. However, the order that the policy objectives are listed do not denote an order of precedence. Without this, the application of the MPS may lead to outcomes that would be contrary to the Government's policies.

TPG Telecom believes service continuity should be prioritised and form the primary and overriding policy objective of the expiring spectrum licence process. This recognises the importance of mobile connectivity in the everyday lives of Australians and as a gateway to essential services such as employment, education and health.

For example, ACMA data shows 97% of Australians used a mobile phone for calls in the 6 months to July 2023.¹ The criticality of mobile connectivity is evident when widespread outages occur, as was the case with the disruption caused by the Optus network outage in November 2023.

While TPG Telecom agrees with supporting service continuity as a policy objective, we query

¹ ACMA, *Communications and media in Australia: How we communicate*, <https://www.acma.gov.au/publications/2023-12/report/communications-and-media-australia-how-we-communicate>.

the inclusion of the qualifier “...particularly where no alternative service is available” in the draft MPS. In our view, there is no genuine alternative to mobile services and certainly none at an equivalent mass scale. Fixed voice services are not a substitute to mobile services given their limited utility and declining importance.

Mobile services also have a vastly wider use case than fixed line data services, including mobile data services and service to a wide range of IoT devices that fixed line services cannot provide. Mobile services are uniquely important for consumers and businesses. This view is reflected in other policy contexts, such as in the development of the Telecommunications Consumer Protections Code. However, the same level of primacy of mobile services is not reflected in the MPS, despite spectrum being a vital input into the supply of mobile services.

Some stakeholders may argue in favour of speculative use cases. It should be recognised there is a significant cost to the Australian public in experimenting with novel and unproven applications. The expiring spectrum bands are not new allocations of spectrum bands. The expiring spectrum bands are all deployed and being used to serve consumers. Any decision by the ACMA to the detriment of existing licence holders would ultimately be at the expense of those customers.

Quality of competition is paramount

The ‘promote competition’ objective of the draft MPS could be strengthened by explicit reference to the need for quality competition, rather than competition for competition’s sake.

Inherent in this objective is acknowledgement that the current state of competition reflects a workable market. Given two stated goals of the draft MPS are service continuity and promoting competition, the failure (or a reduced ability to offer a competitive service) of even one of the existing licence holders would have disastrous impacts and be contrary to the Government’s policy objectives. Therefore, the focus of the expiring spectrum process should be on promoting strong national networks, rather than increasing the risk of a patchwork of fragmented networks with poor coverage.

ACMA position is flawed

The ACMA’s consultation paper claims “[a] lack of available spectrum can similarly prevent new entrants...which could otherwise foster a competitive market”.² However, return on invested capital (**ROIC**) amongst the industry is unsustainably low. Other than Telstra, existing licence holders’ ROIC are below the industry’s weighted average cost of capital. In this context, it is difficult to make a valid investment case to set up a new mobile network in Australia. Indeed, market consolidation would be a more likely outcome, which is the

² ACMA, *Approach to expiring spectrum licences: Consultation paper* (May 2023), p 20.

prevailing trend seen in other developed countries.

In recent years, consumer evidence given in inquiries led by the ACCC³ and Parliament⁴ have highlighted the impact of a lack of real competition in regional areas. Ample evidence was provided in those inquiries by regional consumers that there is no real choice in many regional markets – consumers can only choose Telstra. The consumer issues are self-evident, as consumers who can only choose Telstra are accordingly forced to pay the Telstra price premium.

For example, Telstra currently offers a base mobile plan for \$62 per month with 50 GB of data included. In comparison, Vodafone offers a \$49 per month plan with the same 50 GB of data included and Optus offers a \$49 per month plan with 30GB included.⁵ Comparing these offers, consumers in regional markets, who have no choice other than Telstra, are required to pay a price premium reflecting an additional 27% per month.

Any new market entrant would almost certainly focus on urban areas only, while regional users would remain with one choice of mobile network. The prospect of a new market entrant providing competition where it is most needed is implausible at best. Accordingly, the focus should be on supporting strong competition amongst national carriers, particularly in regional areas, which would better facilitate improved consumer outcomes.

Alternative licence conditions are unlikely to promote competition and will introduce inefficiencies

Promotion of competition through ‘use-it-or-lose-it’ conditions or rollout obligations should be approached with caution. Telstra has a near-unassailable lead in regional network deployment, and its access to backhaul infrastructure and decades of public co-funding to build out its Radio Access Network means that its marginal cost of network expansion is in many cases much lower than Optus or TPG Telecom. As such, alternative licence conditions would place a greater financial burden upon challenger MNOs than Telstra. Such conditions would, without careful consideration, serve only to further entrench Telstra’s near-monopoly in many regional areas.

The draft MPS should also give due regard to how such conditions would impact spectral efficiency. In Australia, there exist several ‘dead zones’ in the 2.3 GHz and 3.4 GHz ranges, where insufficient separation between networks renders tracts of spectrum unusable. The promotion of competition without due regard to spectral efficiency could exacerbate this issue,

³ See submissions to the ACCC, *Regional mobile infrastructure inquiry 2022-23*.

⁴ See submissions to the Standing Committee on Communications and the Arts, *Inquiry into co-investment in multi-carrier regional mobile infrastructure*.

⁵ <https://www.telstra.com.au/mobile-phones/sim-only-plans>; <https://www.optus.com.au/mobile/plans/shop>; <https://www.vodafone.com.au/mobile/sim-only-phone-plans>. Prices do not include any special discounts or promotions.

with MNOs left with smaller, fragmented blocks of spectrum that are insufficient to support a fully functioning 5G network. This will be detrimental to their service quality, and by extension, detrimental to the public.

Promoting competition through appropriate renewal pricing

There remain structural barriers to growth in the mobile market. If the policy objective is to promote quality competition, the focus should be on addressing the structural disadvantages faced by operators through the expiring spectrum licence process. This could be achieved by the draft MPS referring to the need to support a more level playing field, such as in any pricing considerations. Telstra remains the primary recipient of government support for network builds through programs such as the Mobile Blackspot Program. If competition is to be promoted through the expiring spectrum licence process, pricing and other terms of the spectrum licenses could be used to allow challengers to Telstra to compete on a more level playing field.

Consideration of mobile industry sustainability in draft MPS

TPG Telecom agrees with the draft MPS in its call for the ACMA to consider existing investments by licensees, as well as the capacity for prospective licence holders to make the required investment to deploy network infrastructure, in its decisions on licence renewal or allocation.

Although the draft MPS is silent as to pricing, this is a vital aspect of the expiring spectrum licence process. To the extent the Government has views on pricing, these should be expressed as soon as possible. Any delay could be disruptive to the ACMA's exercise of powers and cause uncertainty, particularly as the ACMA intends to consider pricing later this year.

The ACMA's process occurs at a time where the mobile industry is facing significant challenges. On the one hand, Australians are heavily dependent on access to reliable mobile telecommunications. At the same time, operators have needed to invest billions in capital expenditure, including for 5G network upgrades, while revenues remain flat as competition remains robust and consumers have shown limited appetite to pay more for 5G over 4G services, despite the significant increases in download speeds and data consumption. In addition, the network investment cycle for 6G is expected to start in the early 2030s.

The implications of this wider market context for the expiring spectrum licence process are clear. If the licensing process is to reflect the stated policy aims contained within the MPS, it will need to account for the need to maintain a sustainable mobile market.

Research conducted by Analysys Mason for TPG Telecom (attached in **Appendix A**) found that licence renewal is the most efficient outcome. Such a process provides the necessary certainty to operators that they will be able to realise a return on their investment in network

infrastructure. Conversely, non-renewal could leave operators with stranded assets or even network closures and would act as a stark disincentive to any future investment in mobile network infrastructure.

Given this, TPG Telecom recommends the draft MPS expressly refer to consideration of the significant past investment incumbent licence holders have made, along with future investments that will need to be made to use the spectrum and promote a competitive market. This could apply, for instance, in any pricing and payment decisions made by the ACMA.

Analysys Mason reviewed pricing structures from spectrum assignment processes worldwide and concluded that annual licence fees are preferable to lump sum payments in terms of stimulating investment and innovation in mobile networks. Annual fees smooth out cashflows over time, thereby improving network investment prospects. A set annual licence fee is also more likely to align with the aim of promoting sustained investment and innovation, as the prospect of changes to licence fees over time could create uncertainty and act as a disincentive to investment. The annual licence fee should also account for any conditions imposed upon licence holders, such as rollout obligations.

Overlapping policy documents increases potential for error

The MPS will be issued under section 28B of the *Radiocommunications Act 1992*, which empowers the Minister to specify a policy of the Government that is to apply in relation to the ACMA's performance or exercise of any of its spectrum management functions and powers.

The proposed MPS is critical given its compulsory nature, meaning the ACMA must have regard to it in relation to the expiring spectrum licence process. Given this, TPG Telecom believes it should be expressly stated in the MPS that the ACMA should only have regard to the MPS as a reflection of Government policy objectives and disregard all other extraneous or ancillary materials. This approach will provide a degree of predictability in the expiring spectrum licence decision-making process and minimises the risk of procedural error.

At a minimum, the MPS should take precedence over any other materials.

There are currently numerous overlapping documents relevant to the expiring spectrum licence process. This includes:

- 1. *Radiocommunications (Ministerial Policy Statement – 3.4–4.0 GHz) Instrument 2022 dated 1 February 2022***

This instrument specifies the Government's communications policy objectives that apply, and to which the ACMA must have regard, in performing its spectrum management functions and exercising its spectrum management powers in relation to the 3.4-4.0 GHz band. The 3.4-4.0 GHz band is included in the expiring spectrum licence process.

The Minister has stated an intention to repeal this instrument ‘*following the conclusion of the ACMA’s current mid-band allocation processes*’.⁶ However, a date for the conclusion of the ACMA’s mid-band allocation process has not yet been set. This is because the ACMA is still to issue licences in the 3.95 GHz band (regional and metropolitan areas) and the 3.4-3.475 GHz band (‘urban excise’ areas).⁷ The ACMA has stated it plans to issue licences in calendar year 2024, however this is a tentative date. The earliest the *Radiocommunications (Ministerial Policy Statement – 3.4–4.0 GHz) Instrument 2022* can be repealed is therefore 2025.

This timing is far from ideal and is fraught with the risk of procedural error, as the ACMA would legally be required to consider both the MPS and the *Radiocommunications (Ministerial Policy Statement – 3.4–4.0 GHz) Instrument 2022* when it makes crucial decisions about expiring spectrum licences in 2024.

2. ACMA Statement of Expectations dated 7 December 2022

Although the ACMA Statement of Expectations is not a legislative instrument, it sets out the Government’s policy priorities and the ACMA considers these in relation to spectrum allocations. For example, the ACMA’s *Allocation and technical instruments for the 3.4/3.7 GHz bands allocation process: Outcomes paper* refers specifically to the Statement of Expectations.⁸

The letter from the Minister to the ACMA (discussed below) also reiterates the policy priorities outlined in the Statement of Expectations.

3. Letter from the Minister for Communications to the ACMA Chair dated 14 December 2023

This document again is not a legislative instrument. However, the letter contains some of the Minister’s policy objectives for the expiring spectrum licence process. The letter refers to concepts such as the use of alternative licensing conditions, however this is not reflected in the draft MPS. Despite this, the ACMA’s phase 2 paper includes extensive material related to alternative licence conditions.⁹

Although the Minister’s letter is not a direction, an inference could be drawn that,

⁶ Letter from the Minister for Communications to the ACMA Chair dated 14 December 2023.

⁷ See ACMA, *Allocating the 3.4-4.0 GHz band*, <https://www.acma.gov.au/allocating-34-40-ghz-band>.

⁸ ACMA, *Allocation and technical instruments for the 3.4/3.7 GHz bands allocation process: Outcomes paper* (July 2023), p 2.

⁹ See ACMA, *Expiring spectrum licences: stage 2 Information gathering, and views on uses of frequency bands and alternative licence conditions* (March 2024).

absent the letter, the ACMA (i) would not have considered such spectrum licence conditions or (ii) would not have provided such prominence to the use of alternative licence conditions, in circumstances where they have never been applied to mobile spectrum licences in Australia.

The extent to which the policy priorities in the three documents identified above align or do not align with the draft MPS is unclear. The draft MPS also refers to wider Government policy priorities, such as Outcome 17 of the National Agreement on Closing the Gap.

The ACMA's task to balance the priorities set out in the MPS alone is already challenging. The ACMA will also need to overlay its public interest criteria, which in some instances is similar to (but not precisely the same) as the Government's policy objectives. For example, is there a difference between 'enhancing competition' (ACMA public interest criteria) and 'promoting competition' (draft MPS)? The need to additionally consider layers of other policy objectives in additional materials makes this an almost impossible task and raises the possibility of administrative error.

To address these concerns, TPG Telecom recommends the draft MPS is updated such that:

- a) it is a comprehensive and exhaustive reflection of the Government's policy objectives for the purposes of the ACMA's expiring spectrum licences process; and
- b) the ACMA should not have regard to any extraneous or ancillary materials, such as those identified above.