TELSTRA CORPORATION LIMITED

Radiocommunications Bill 2017

28 July 2017

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EXECUTIVE SUMMARY

We welcome the opportunity to respond to the Department of Communications and the Art's (the Department or DoCA) *consultation package* on the exposure draft of the Radiocommunications Bill 2017 (the Bill) and look forward to continuing to engage with the Department on this important reform proposal.

We believe that many of the proposed reforms will be beneficial to spectrum users, and ultimately consumers, by creating the opportunity for a simpler framework that is more flexible, efficient and responsive in an era of ever increasing technological change. For example:

- The single licensing regime, along with the concept of licence issue schemes, will provide greater flexibility in how licences can be created, issued and managed to meet future requirements.
- Making a wider range of licences tradeable, and as technology neutral as possible, will assist in allowing market forces to move spectrum to higher value uses over time.
- Streamlining the decision making process for several of the routine administrative decision making processes in the current Radiocommunications Act (the Act), such as spectrum reallocations, will also speed up the movement of spectrum to new uses.
- Expanding the maximum term of licences up to 20 years, along with the plans to specify renewal arrangements on licences, will provide greater certainty to encourage investment in spectrum and wireless infrastructure.
- The proposal to more clearly define the Minister's role as one of implementing broad policy settings, along with the introduction of the Ministerial policy statements, will be helpful for providing spectrum users with greater certainty about the longer term arrangements for spectrum management in Australia.
- The new provisions that enable the ACMA to take action directed at suppliers of radiocommunications devices that are liable to cause harmful interference is a positive step towards stemming the tide of illegal radiocommunications devices (such as unauthorised mobile repeaters) that are entering Australia. The introduction of public warning notices will also assist in preventing members of the public being misled into purchasing unauthorised devices.

We have identified a number of opportunities to further improve the proposed framework that we would like to see addressed in this consultation process. These are summarised below.

Increasing certainty

We observe that for many of the mechanisms in the new Bill, the increased flexibility in the new regime comes at the expense of transparency and consultation, which can undermine certainty and potentially create substantial risk for investment by spectrum users. We believe that flexibility and certainty are not mutually exclusive, and both can be achieved through appropriate consultation that does not slow down decisions, and allows for all voices to be heard. For example, we strongly recommend that there should be a requirement to consult when forming Ministerial policy statements.

We are not comfortable about the proposed Ministerial power under section 39 to direct the ACMA to offer licences to specified person(s). It is our view that the ability for the Minister to unilaterally direct the ACMA in this manner will undermine certainty for Australian and foreign investors, and may create

sovereign risk concerns for foreign investors. If such a power is to be retained then it must be restrained so that it can only be exercised under exceptional and specified circumstances.

Another area where greater certainty could be provided is in relation to the new regulatory undertaking concept. While we understand the need for regulatory undertakings as a key mechanism to maintain the exclusive property rights of spectrum holders under the new Bill, we are greatly concerned the ACMA will hold excessive discretionary power to revoke or vary undertakings without consultation.

It is also not yet clear how fundamental processes like the auction of spectrum will be accommodated and processed in the new framework. It is essential these aspects of the framework are tested and proven to be workable before finalising the legislation.

Extend the delegation of management rights to individual licensees

We are broadly supportive of the delegation of management rights which appears to be primarily directed at allowing the ACMA to delegate part of or its entire licensing function to a third party. However, we suggest there is also another important opportunity for the delegation of management rights to be used, which may have been overlooked. We recommend that a minimum set of management rights be ascribed to most licences issued under the new regime. Giving licence holders the ability to authorise other parties to use part or all of the spectrum contained within a licence will further encourage a secondary trading market. We believe such delegation of management rights to licence holders would be a superior mechanism compared to the third party authorisation scheme under the existing legislation and as currently proposed under the new scheme.

Spectrum authorisations require further consideration

We have some reservations about the proposed spectrum authorisations (formerly class licences). Firstly, we see no reason for this separate category, and recommend that licences of this type could simply be another form of licence issue scheme, thereby leveraging the new construct to its fullest potential and avoiding the need for an additional category and the complexity that this introduces. We are also concerned at the broad powers the ACMA will have to issue spectrum authorisations, and that the regulatory undertakings as described in the new Bill may be insufficient to prevent the ACMA from issuing a spectrum authorisation that overlaps an existing licensed holding.

Increasing transparency when applying licence issue limits

There is no explicit requirement in the new Bill for consultation with stakeholders by either the ACMA or the ACCC when they carry out their roles in the determination of licence issue limits. In addition, there is no requirement for either the ACCC or ACMA to publish detailed reasons for the decisions made. This situation is undesirable as it reduces the accountability and transparency of the ACMA and ACCC in making decisions. We recommend that the legislation require the ACMA and ACCC to undertake consultation when making decisions about allocation limits, and publish detailed reasoning to explain the decisions.

Enhancement of licence tenure arrangements

We support the proposal to enable the term of licences to be extended up to a maximum term of 20 years, and for the ACMA to include licence renewal statements on licences. However, we believe that building a presumption of renewal into primary legislation would be an important additional mechanism for giving investors the confidence they need to invest in spectrum assets. Such a presumption would require the ACMA to insert a statement in specific licences about the circumstances under which they

may not be renewed. We also recommend that the proposed legislation should be expanded to provide guidance to the ACMA about the specific circumstances under which a licence may or may not be renewed.

Fully integrating Broadcasting spectrum licensing into the new regime

One of the key recommendations coming out of the Department's Spectrum Review report[1] was integration of all spectrum users into the same framework. In 2015, the Government announced that it would implement the recommendations of the spectrum review, including better integration of the management of public sector and broadcasting spectrum to improve the consistency and integrity of the framework. The Legislative Proposals paper last year outlined how this would be achieved for broadcasting spectrum. However, it appears the earlier proposals have not been fully implemented in the current package as the Broadcast Spectrum consultation paper indicates that access to broadcasting spectrum will still be subject to licensing under the Broadcasting Services Act.

The Broadcast Spectrum consultation paper does not explain the reasons for not fully integrating the broadcasting spectrum into the general spectrum management framework. As explained in our submission on the Broadcasting Spectrum consultation paper, we believe full integration is desirable as it creates the opportunity and incentives for broadcasting spectrum to be used most efficiently over time, consistent with the community's highest value use of the spectrum, and priced in a competitively neutral manner which does not differentiate between broadcasters and other users. If it is not possible to achieve full integration of the broadcasting spectrum in the initial implementation, then we recommend there should be a legislative requirement to revisit this matter again a short period after the commencement of the new regime, perhaps at the time when the annual broadcasting licensing fees are next reviewed.

[1] Department of Communications, *Spectrum Review*, March 2015, https://www.communications.gov.au/publications/spectrum-review-report

01 Introduction

We welcome the opportunity to respond to the Department's *consultation package* and to continue engaging with the Department on these important reform proposals. We commend the Department and the ACMA for their work in preparing the extensive set of information contained in the consultation package.

We are providing separate submission documents for each of the five consultations (exposure draft, transitional arrangements, pricing, broadcast spectrum and government held spectrum), and this document contains our submission on the exposure draft for the new Bill. We note that the other consultations forming part of the consultation package may lead to further updates to the exposure draft of the new Bill, and we look forward to having further opportunity to comment on the updated exposure draft before the new Bill is tabled in Parliament.

The remainder of this document is structured as follows:

- Section 02 of this document contains introductory comments that set out the high-level themes in our response to the new Bill, in order to provide some insight and background to our responses in section 03.
- Section 03 then sets out our views on each part of the new Bill in sequence.
- Finally, in section 04 we lend our support to the proposition put forward by the Australian Mobile Telecommunications Association (AMTA) and Communications Alliance in their submission calling for the abolition of State and Territory based stamp duty on licence trades.

02 Key issues

In order to continue providing the new and innovative services that our customers demand (as well as meeting growing demand for our existing services), we need access to spectrum in a manner that is flexible and responsive to the dynamic technology and social environment in which we operate. Development of a more flexible and responsive framework for spectrum management will allow us to better meet our customers' needs, and will allow other industry participants to better meet the needs of their customers too.

Australia has a long history of being at the forefront of innovation in the mobile industry, both domestically and globally. A world class spectrum framework is required to enable Australia to maintain its global leadership position and continue to be a competitive economy on the global stage.

However, the current licensing regime in Australia is overly complex, rigid and slow. A simpler, more responsive and more flexible spectrum management framework is necessary to promote the efficient allocation and use of spectrum, and to meet the needs of spectrum users in the twenty first century. Use of spectrum will continue to develop in new and, perhaps, unexpected ways, and Australia needs to be ready and able to embrace new developments as they arise.

2.1. A simpler framework

We endorse the move towards a simpler licensing framework which enables spectrum to move to alternative uses more rapidly and with less administrative cost. We support the streamlining of licensing processes by removing the requirement for the Minister to be involved in related decision-making. We also support the consolidation of licences into a single framework, and suggest that the additional complication of the separate category of spectrum authorisations is unnecessary and could readily be achieved through a licence issue scheme.

2.2. A principles based regime

We support a new regime in which licensing decisions are determined by the ACMA in accordance with a set of pre-defined principles. So we welcome the introduction of Ministerial policy statements as a mechanism for government to provide clear guidance to all spectrum users on strategic directions for future spectrum allocations. We also welcome the proposals that remove Ministerial interventions and decisions from routine ACMA spectrum processes as this will reduce administrative overhead and bureaucratic red tape to make the process more agile and efficient.

However, we are not comfortable with the new section 39 that gives the Minister power to order the ACMA to issue a licence to a person of the Minister's choosing. The ability for the Minister to unilaterally direct the ACMA in this manner could undermine certainty and commercial returns for Australian investors, and may create sovereign risk concerns for foreign investors. If this power is to be retained then we believes it needs to be limited to certain exceptional and specified circumstances.

We are also concerned that some discretionary powers may be exercised without being subject to a mandatory consultation obligation. For example, we believe there should be consultation in the creation and issuing of Ministerial policy statements.

2.3. Maintenance of property rights

Spectrum property rights must not be diminished, either under the new regime or during the transition to the new regime. Many Australian businesses have paid billions of dollars for some of these rights, and

we have some concerns that the proposed 'regulatory undertakings' may not be an appropriate or adequate mechanism to maintain these rights. Of greatest concern is the ability of the ACMA to revoke or vary regulatory undertakings unilaterally and without consultation.

2.4. A level playing field for all spectrum users – including broadcasters

We consider that a unified framework which does not discriminate between broadcasters and other users will best enable the opportunity for all spectrum to be moved to its highest value use.

In 2015, the Government announced that it would implement the recommendations of the spectrum review[2], including better integration of the management of public sector and broadcasting spectrum to improve the consistency and integrity of the framework. However, it appears this will not be achieved as in the current package as the Broadcast Spectrum consultation paper indicates that access to broadcasting spectrum will still be subject to licensing under the Broadcasting Services Act.

The Broadcast Spectrum consultation paper does not explain the reasons for not fully integrating the broadcasting spectrum into the general spectrum management framework. As explained in our submission on the Broadcasting Spectrum consultation paper, we believe full integration is desirable as it creates the opportunity and incentives for broadcasting spectrum to be used most efficiently over time, consistent with the community's highest value use of the spectrum, and priced in a competitively neutral manner which does not differentiate between broadcasters and other users. If it is not possible to achieve full integration of the broadcasting spectrum in the initial implementation, then we recommend there should be a legislative requirement to revisit this matter again a short period after the commencement of the new regime, perhaps at the time when the annual broadcasting licensing fees are next reviewed.

2.5. Enhanced licence tenure

To best promote investment in our mobile networks and other wireless network infrastructure, we are seeking improved tenure for our licences, including increased certainty about the process and conditions for renewing licences, and extended tenure for licences that are currently renewed annually under the existing apparatus licensing regime. We support the proposal to enable all licences to have a maximum term of up to 20 years. In addition, we strongly recommend there should be a presumption of renewal for all licence holders contained in primary legislation, but we note that this is not contemplated in the current drafting of the Bill.

2.6. Increased flexibility to manage our spectrum holdings

To promote efficiency and agility, we are seeking increased ability to authorise and manage the use of devices within our spectrum holdings. In this light, we are pleased to see the introduction of the delegation of management rights by the ACMA. This is a positive step towards enabling holders of spectrum to more effectively and flexibly manage their spectrum holdings, including the option of sub-licensing holdings. We think the latter would help facilitate secondary market trading and spectrum sharing arrangements, including the re-allocation and trading of spectrum with incumbency rights (such as the incumbent licensee arrangements that are currently being considered by the ACMA for the reallocation of the 3.6 GHz spectrum).

[2] Department of Communications, *Spectrum Review*, March 2015, https://www.communications.gov.au/publications/spectrum-review-report

We are also seeking increased flexibility for introducing new technologies and services, through a technology neutral approach to licensing, and we recommend that the single licensing framework proposed in the new Bill be made as generic and universal as possible.

2.7. Increased use of market forces

We encourage greater use of market pricing mechanisms to move spectrum to its highest value use. We support the proposals to streamline and promote the use of auction processes in licensing spectrum, and recommend that all licences issued over-the-counter be migrated over time to pricing based on opportunity cost.

We are seeking a new licensing framework that makes licences attractive for trading, including straightforward arrangements for third party use, being able to amalgamate and subdivide licences in the frequency, geographic and time domains, and being able to sell licences with incumbent use rights. While some of these capabilities are contained within the new Bill (for example, the subdivision of licences), some are not (for example, the amalgamation of licences). We suggest that the delegation of management rights and sub-licensing would be a simpler and more effective approach to enabling third party use than carrying over the existing third party authorisation mechanism to the new regime.

2.8. Transparency in applying competition safeguards

It has been our longstanding position that restrictions on the spectrum that may be acquired by a particular person would be better managed by application of section 50 of the *Competition and Consumer Act 2010* (**CCA**) rather than by determination of *ex ante* limits.

However, we also recognise that determination of "licence issue limits" under the new Bill has a long history in Australian regulation and is likely to be retained. As such, the approach to determination of the "licence issue limits" by the responsible regulators should be as rigorous, transparent and efficient as possible. We support the proposals in the draft legislation on this matter, but recommend that they be expanded to require the ACMA and ACCC to consult with affected parties when making decisions about allocation limits, and publish detailed reasoning to explain the decisions.

2.9. Assurance about business continuity

Finally, it is imperative that there is business continuity during the transition phase to the new regime. It is essential that the transitional arrangements enable business as usual (BAU) activities to continue, including the timely auction of new spectrum allocations to support the business plans of all commercial spectrum users. We have been concerned that the ACMA will need to reprioritise resources to prepare for and implement the new framework, while also maintaining BAU activities through the transition. However we are pleased to see the ACMA establishing a new division to implement the transition, which should assist to manage the contention between transition and BAU activities.

03 Comments on the exposure draft

In this section of our response, we outline our specific comments on each part of the exposure draft of the new Bill.

3.1. Part 1 – Preliminary

We welcome the steps taken to simplify the objects of the new Bill in the exposure draft, but believe there is room for further improvement. The object should be clearly articulated and well understood by all stakeholders because it will play a crucial role in the implementation of the new Bill. It will serve as a guiding principle for the Minister, in setting broad policy guidance under the proposed Ministerial policy statements, for the ACMA in making decisions and exercising its powers under the new Bill, and as a primary aid to further interpretation and implementation of the remaining provisions of the new Bill.

3.1.1. Section 3(a)

Consistent with previous comments[3], we have concerns about potentially unintended consequences arising from changes to the language used in subsection 3(a) of the current Act. In particular, we appreciate the Department is trying to make it clear that when assessing matters under the new Bill, it is important to look at the "long term" aspects of decision-making and not, for example, immediate revenue outcomes that may result from particular spectrum releases or decisions around auction rules or price floors. We agree with that sentiment (and have previously made submissions about this in the context of spectrum renewal processes under the current legislation).

However, we are concerned that the current wording around the "*promotion…long-term public interest derived from the use of…in a manner that…facilitates…*" is a significant change from the language used in the current legislation. We think it is confusing in the context of the telecommunications industry where promotion of the "long-term interests of end users" or LTIE is one of the objects of the Telecommunications Act[4] and is used as the test for declaration of services,[5] and raises more questions than it answers. For example, by using similar but different language key questions arise about whether there has been a deliberate decision to move away from a LTIE-type test, for example:

- Is the Department trying to make a distinction between "long-term public interest derived from the use" and "long-term interest of end users"? If so, what is it?
- Is the Department expecting that any of the relevant legislative and judicial interpretations of a LTIE test would apply?

We are also concerned about the interplay between the use of "public interest" in the objects and its use elsewhere in the new Bill (for example, if the ACMA issues a licence inconsistent with a radiofrequency plan for public interest reasons).

Finally, while long term thinking is undoubtedly important in spectrum management, it is not necessarily clear in all cases what the long term uses of a spectrum band will be, and the ACMA and the

[3] See Telstra Corporation Limited, *Submission in response to the Legislative Proposals Consultation Paper –Radiocommunications Bill 2016*, paragraph 2.1.
[4] Section 3(1)(a) of the *Telecommunications Act 1997*.
[5] See s152AL(3) of the *Competition and Consumer Act 2010*.

Department still need the ability to make flexible decisions that may have more short term benefits in mind (particularly in encouraging new and innovative uses of spectrum).

We think these potentially unintended consequences could be avoided by maintaining a simple object that is similar to object 3(a) of the current Act and that any concerns about decisions being influenced by potential short term revenues could be addressed in other ways, including explicitly in the explanatory memorandum, and in Ministerial policy statements (if necessary).

3.1.2. Section 3(b)

The purpose of the second object "*(b) to establish an efficient system for the regulation of equipment*" is not clear to us. It does not appear to add any value over (a) except that it seeks an efficient system, and this should be the case for all aspects of the new framework. Further, an efficient system is a means to an end and not an outcome. The focus of the objects should be on high level outcomes. Without further explanation we think this second object does not add any value and should be removed.

3.1.3. Section 5 Definitions

We suggest that the definition of "measurement transmission" could be improved for clarity, by adopting the following slightly revised text:

> ***measurement transmission*** *means a radio emission for purposes connected with making a measurement of the propagation characteristics or other qualities of radio emissions.*

We note that the definition of "radio emission" applies to emissions less than 420 THz. However, visible light ranges from around 400 THz to 790 THz and infrared is below 400 THz. We assume the intention is not to contemplate regulating infrared and visible light spectrum. We observe that the ITU Radio Regulations only cover spectrum to 3 THz. Therefore we question the rationale for the 420 THz upper limit.

As we will discuss in more detail in paragraph 3.7.1 the use of the term "spectrum authorisation" defined in section 5 is likely to be confusing as authorisation is a term that is also used in a more general way in relation to the permission to access or use spectrum.

We also recommend that the term "substantial interference" which is used in the new Bill in conjunction with the terms, "substantial disruption" and "substantial disturbance",[6] may benefit from specific definition. We suggest it be qualified to clarify that "substantial interference" only occurs when there is harm to or material impact upon the victim radiocommunications service. While this impact may be implicit in the association between the three terms, "substantial interference", "substantial disruption" and "substantial disturbance", we consider that making the need for a harmful impact clear would help to avoid misinterpretation.

3.2. Part 2 – Ministerial policy statements

We welcome the proposal to remove the Minister from several of the existing administrative decision making processes in the current Act, and to more clearly define the Minister's role to be one of implementing broad policy settings. We believe Ministerial policy statements should focus on establishing longer term spectrum management policies.

[6] New Bill, s114.

We are concerned however, that Ministerial policy statements will be notifiable instruments and not be disallowable legislative instruments. This means there is no requirement for any Parliamentary scrutiny or oversight of these policy statements and no commitment for the Minister to engage with industry on the content of policy statements or the areas of priority. We consider this unusual for instruments of this type, and would like more context on why the ACMA considers it inappropriate for a Ministerial policy statement to be a legislative instrument.

Unlike some other instruments made under the new Bill, Ministerial policy statements are (or have the potential to be) political as well as operational instruments, and can have a highly legislative character. This and the wide scope of the Ministerial statement power creates a heightened need for Parliamentary scrutiny that may not apply to other types of legislative instruments – particularly those that have a solely administrative or functional purpose.

Other examples of Ministerial policy statements that we are aware of are either legislative instruments, or subject to disallowance. We consider Parliamentary scrutiny of Ministerial decisions to be an important check on the broad policy power to be granted under the new Bill.

The success of the new Bill in delivering a more agile, transparent and accountable decision making process will depend on the detail of the implementation, and we would like to see more detail about how the proposed Ministerial policy statements will be implemented in practice. We consider the following matters will be important to the success of the new Bill:

- The legislation should clearly define the scope of the Minister's power to make Ministerial policy statements, setting out what can and cannot be covered.
- A consultation process is an important way for industry to engage with the policy statements ahead of their issue. We believe that the new Bill should have specific consultation requirements for Ministerial policy statements, and reliance should not be solely placed on the consultation requirements under the *Legislation Act 2003* (**Legislation Act**) or on regulatory best practice. The Legislation Act does not require consultation on notifiable instruments, and for legislative instruments merely requires that the Minister be satisfied that consultation has occurred as appropriate and reasonably practicable. It does not give further detail on who should be consulted. The new Bill should expressly require the Minister to develop Ministerial policy statements in consultation with the ACMA and industry and consult with affected parties before finalising a Ministerial policy statement. This consultation requirement should apply regardless of whether the policy statement is a notifiable instrument or a legislative instrument – our understanding is that there is no legislative bar on requiring consultation on notifiable instruments. Notifiable instruments are a recent development and there are not a large number of examples of how they operate, but for example, section 303FR of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* requires consultation before a notifiable instrument is passed.
- Ministerial policy statements should be legislative instruments, and should be disallowable under the Legislation Act so that a level of Parliamentary scrutiny is ensured. Similar policy statements in other legislation (for example, in the *International Air Services Commission Act 1992* (**IASCA**), the *Airspace Act 2007,* and the *Public Governance, Performance and Accountability Act 2013*) are either legislative instruments, or the IASCA states that policy statements are disallowable. We also believe the new Bill should specify a periodic time frame for the review of Ministerial policy statements, e.g., every 5 years. We would like more context on why the ACMA considers it inappropriate for a Ministerial policy statement to be a legislative instrument. The category of notifiable instrument was introduced for instruments that are not appropriately called legislative

instruments and are largely administrative in character.[7] A ministerial policy statement has the potential to be highly legislative in character, so in our view it is inappropriate for it to not be a legislative instrument.

- We would expect that there would still be merits review or judicial review avenues if the ACMA has not given adequate regard to Ministerial policy statements, and that the ACMA would be transparent about how it has been guided by the Ministerial policy statement in performing its functions on a decision by decision basis, in addition to the requirement to report annually to the Minister.

3.3. Part 3 – the ACMA's work program

We believe it is critically important that the ACMA be accountable for delivering on its work program and sees the introduction of an annual spectrum work plan as an opportunity to increase transparency and accountability. We are pleased to see the period of the annual work plan covering no less than 5 financial years, and we agree that neither the ACMA's work program, nor a variation to a work program should be legislative instruments.

We note that the new Bill permits the ACMA to vary a work program, so long as the variation is "of a minor nature". However the new Bill does not elaborate upon what would constitute a variation that is of a "minor nature". We propose that the term "minor nature" should be clarified in the explanatory memorandum. Specifically, we are of the view that removal or deletion of activities from a work plan, or the addition of new activities to a work plan are not of a minor nature. Similarly, extension of the completion date for an activity by more than 3 months or by more than 20% of the original duration (whichever is the greater) is not a variation of a minor nature.

We also propose that clarification should be added to state that variations of a minor nature do not require consultation under section 22.

It is important that the work plan, consultation and any amendments arising from the consultation be completed in sufficient time to allow the work plan to be published prior to the commencement of the financial year it addresses. The ACMA currently issues draft versions of its five year spectrum outlook (**FYSO**) for consultation roughly 3 or 4 months into a financial year (around September or October), with responses often dragging out into the new calendar year. In the case of the 2016-20 FYSO, we are yet to see a post-consultation update.

Finally, we would like to see self-reporting measures introduced to ensure the ACMA is accountable for delivering on its work program. These measures should be introduced into the annual work plan, where the ACMA should report on its delivery against the milestones from the previous year's annual work plan. We acknowledge that the ACMA produces an annual report for government, however, due to the length of the annual report and breadth of the ACMA's accountabilities, we do not think the annual report is a suitable place to report on progress against activities in the annual work plan.

3.4. Part 4 – Radiofrequency plans

We welcome the proposal to consolidate the previous "spectrum plans" and "frequency band plans" into the single construct of "radiofrequency plans", and we support the proposal in subsection 24(9) of the new Bill that the radiofrequency plan be a non-disallowable legislative instrument. However, we have a number of concerns about the drafting for radiofrequency plans, including the potential for multiple plans

[7] Explanatory Memorandum, *Acts and Instruments (Framework Reform) Bill 2014 (Cth),* p 29.

to overlap, the absence of consultation on plans beyond Legislation Act requirements, and some aspects of the compliance regime. We set these out below.

The proposed drafting in the new Bill permits two or more radiofrequency plans to coexist[8] subject to the condition that a radiofrequency plan must not be inconsistent with another radiofrequency plan[9]. However the new Bill does not elaborate upon what would constitute an "inconsistency" between radiofrequency plans. For example, if two different radiofrequency plans covered the same spectrum range, would that be considered an "inconsistency", or would an "inconsistency" only arise if the allocation or prioritisation of uses for that band are misaligned?

In any event, we propose that two different radiofrequency plans should not be able to deal with the same spectrum, and hence there should be a statutory constraint to prevent this possibility.

We also submit that a mechanism should be included to ensure that when any radiofrequency plan is being developed, specific steps are taken to ensure it does not conflict with any existing radiofrequency plan. Further, in the event that two radiofrequency plans are inconsistent or do conflict with each other, there should be a mechanism in place to determine which of the plans apply in the area of conflict (e.g., precedence), along with procedures for correcting a plan where appropriate.

Historically, when radiofrequency plans have been prepared, a draft is issued for comment and a consultation occurs. We have found the consultation to be very valuable, and have found and reported errors in the plan in the past. We note that, as a legislative instrument, the plan is subject to consultation under the *Legislation Act*. However, we would prefer the consultation process to be embedded into in the new Bill (similar to section 33 of the current Act) to provide certainty about the nature and scope of the consultation.

We are unclear on some aspects of the drafting in section 25 concerning compliance with a radiofrequency plan. Subsection 25(2)(a) states that in the case of a licence renewal, the ACMA is exempted from the compliance obligation to perform its spectrum management functions in a manner that is consistent with a radiofrequency plan. Similarly, subsection 25(2)(b) exempts the ACMA from complying with the obligation when issuing a licence under section 77 (subdividing). It is not clear to us why there is an exemption in either case, and we are concerned at the prospect of the ACMA acting in a manner that is not consistent with a radiofrequency plan in either scenario, unless it is to protect the existing rights of a licence holder which may have been consistent with a previous radiofrequency plan.

Subsection 25(4)(a) relates to events of "*international, national or regional significance*", but there appears to be no definition for these events. These events should be defined, at least by way of objective criteria for what might constitute such an event, and it would be helpful to have example(s) included in the explanatory memorandum for the new Bill.

We support the drafting in subsections 25(5) and 25(6) which limits the duration of a licence that is issued for the scenarios listed in subsection 25(4) and that is inconsistent with an existing radiofrequency plan. These are the special case scenarios of events of international, national or regional significance, defence and international relations, the work of Australian police forces and criminal investigation agencies, and a broad "public interest" catch-all category. However, our view is that unless there are national security or legitimate confidentiality reasons that prevent consultation, it is important that such exceptional cases are subject to prior consultation by the ACMA. Further, in all cases where the ACMA

[8] New Bill s24(3).
[9] New Bill s24(8).

issues a licence that is inconsistent with a radiofrequency plan we suggest there should be an obligation for the ACMA to publish details and reasons, though such information may be redacted to the extent necessary if necessary for national security or confidentiality reasons. The publication of the background to such licence issues will assist with predictability for those applicants seeking an offer of such a licence, particularly in the broad "event" and "public interest" categories.

Further, we note that the exceptional cases listed in subsection 25(4) do not include licences issued for scientific testing. We anticipate that licences issued for scientific testing purposes will frequently sit outside the radiofrequency plan. Furthermore, for some scientific testing programs the amount of time required will be longer than the maximum of one year permitted in subsections 25(5) and 25(6). Therefore, we suggest that a separate exception to inconsistency with the radiofrequency plan should be created for the case of scientific testing. The drafting should permit maximum durations consistent with scientific apparatus licences that the ACMA has issued to date under the current Act.

We note the commentary in the Information Paper that the ACMA will continue to use administrative tools such as Radiocommunications Assignment and Licensing Instructions (RALIs) and embargoes.[10] We would find it helpful, and therefore request that the DoCA provide a list of all the administrative tools it has in mind for the ACMA to continue to use. We acknowledge that these measures were created by the ACMA as a more nimble approach in a rapidly changing technological environment, and indeed the ACMA should be applauded for its creativity in continuing to manage the spectrum environment under legislation that is 25 years old. However, the impact on industry stakeholders of the use of these tools, and embargoes in particular, is potentially significant. If these tools are to be retained by the ACMA, we urge that they be incorporated into the legislative framework rather than continuing their status as administrative creations of the ACMA. We are concerned that if these tools are not incorporated into the legislative framework, there is insufficient oversight and predictability in respect of the use of these tools by the ACMA, which renders them liable to legal challenge in circumstances where a stakeholder's rights have been adversely affected. The fact that such a challenge has not yet been experienced by the ACMA should not provide comfort that their use will be immune from challenge in the future: to the contrary, in an increasingly congested spectrum environment it is problematic for administrative tools to exist in the eye of the regulator alone, without any specific legislative authority. As we have noted in paragraph 3.6.2.2 of our comments on Part 6 of the new Bill, we also recommend that spectrum reserved under the embargo power should be the subject of regular review, e.g. every 12 months, to determine whether the relevant embargoes should continue in force.

3.5. Part 5 – Operation of radiocommunications devices

In our response to Part 5 of the new Bill, we outline all of the proposed changes to Part 3.1 of the current Act, and outline our concern or support as appropriate.

We also observe that the drafting addressing operation of devices by individuals who do not hold a certificate of proficiency in section 28 introduces the concept of a "class of radiocommunications devices" without guidance as to what a class of radiocommunications devices means. We address this point at paragraph 3.8.1 of our submission.

[10] Information Paper p12.

3.5.1. Changes introduced in the new Bill

We note that the new Bill's Part 5 provisions address substantially the same matters as Part 3.1 of the current Act, but with some important changes. As only some of these changes are noted in the Department's Information Paper, we set them out below along with our response in each case:

a. Scope: The narrowing of the scope of these provisions from the wide category of "devices" in the current Act to only cover "radiocommunications transmitters" in the new Bill. The effect of this is to exclude transmitters other than radiocommunications transmitters,[11] "receivers",[12] and "any other thing any use or function of which is capable of being interfered with by radio emission".[13]

   We support these simplifications and the narrowing of the scope of the unauthorised operation and unlawful possession prohibitions to radiocommunications transmitters, since they would be the only kind of "equipment" or "radiocommunications device"[14] which mandatorily requires a licence or spectrum authorisation to be operated under the new Act. We agree that the distinction between the newly created broad category of "equipment" and the more narrowly defined category of "radiocommunications devices" is now clearer, the benefit of which can be seen in the new Part 5 provisions.

b. Civil penalties: Addition of civil penalties for unauthorised operation and unlawful possession of radiocommunications transmitters, whereas under the current Act only criminal penalties are applicable.

   We support this change on the basis that it is consistent with the range of enforcement options available to other regulators and will enable enforcement that is appropriately graduated to the severity of the offence committed and the damage or risk that offence causes to the community.

c. Reasonable excuse defence: removal of the "reasonable excuse" defence.[15]

   We support this change on the basis that the ACMA will make use of the graduated enforcement mechanisms to apply an appropriate enforcement action to contraventions which arise from a person unknowingly engaging in unauthorised operation of a radiocommunications transmitter (for example, by the ACMA issuing an infringement notice or accepting an enforceable undertaking). Additionally, the Part 20 exemptions carve out legitimate circumstances for possessing or operating a radiocommunications transmitter which would otherwise be prohibited.

d. Emergency operation exemption: removal of "emergency operation" exemption[16] from prohibitions on unauthorised operation and unlawful possession.

   We support this change for the same reason as set out above in respect of the deletion of "reasonable excuse" defence. We believe that in the vast majority of cases where

[11] Current Act s9(1)(b)
[12] Current Act s9(1)(c)
[13] Current Act s9(1)(d)
[14] See definition of "radiocommunications device" in new Bill s7(1)
[15] Current Act s46(2) and s47(2).
[16] Current Act s49.

radiocommunications transmitters are being operated to deal with an emergency situation, they will either be duly licensed to an emergency services organisation or benefit from the exemption for defence, law enforcement and emergency personnel in Part 20 of the new Bill.[17] Further, we note that an emergency conduct defence is still available for interference offences under the new Bill.[18]

e. Corporate responsibility: introduction of the "corporate responsibility" rule from the Regulatory Powers Act, i.e., a corporation is responsible for the acts of its employees / agents.

We are comfortable with this change as it is in line with the principles of vicarious liability (i.e., an employer is responsible for its employees' acts if those acts are within the scope of the employment).

f. Penalties: reduction in penalty unit amount for criminal offences from 1,500 penalty units to 300 penalty units where the offender is not an individual.

We support this reduction, on the basis that while the offences of unauthorised operation and unlawful possession should be subject to enforcement action and penalties, serious harm to the community only occurs if substantial interference is caused, and the latter is subject to up to 1,000 penalty units[19] – with there likely to be multiple contraventions and a penalty of up to the aggregate maximum for each contravention of the same provision in the most egregious cases.

Therefore, we agree that the right balance has been set for the relative penalties in respect of the technical offences and, separately, the harm they may cause to the community.

g. Definition of when a transmitter can be "operated": deletion in subsection 29(3) of the new Bill of the detailed list of indicia of when a radiocommunications transmitter is considered to be capable of being "operated" (in the context of "possession for the purpose of operating the transmitter"), which is contained in subsections 48(1)(a)-(f) of the current Act. The new Bill's criterion is simply that the radiocommunications transmitter "can be operated"[20] and it is subsequently clarified that this includes whether it can be operated immediately or after the taking of one more steps such as connection of the transmitter to a power supply.[21]

We agree with this simplification, particularly since some of the indicia in the current Act such as references to "external switches" and "dials"[22] are antiquated and do not reflect the digital and online interfaces used to operate many modern transmitters.

h. Failure to have a certificate: a civil penalty provision has been introduced for failure to have a certificate of proficiency when required to operate a "radiocommunications device".

[17] New Bill s223.
[18] New Bill s114(7).
[19] New Bill s114(1).
[20] New Bill s29(3)(b).
[21] New Bill s29(4).
[22] Current Act s48(1)(e).

We are comfortable with the introduction of a civil penalty provision for failure to have a certificate of proficiency in respect of the operation of radiocommunications transmitters, but we do not consider it necessary for the provision to cover the operation of radiocommunications devices. Section 28 of the new Bill is the only provision in Part 5 which uses the term "radiocommunications devices" (incorporating both transmitters and receivers[23]), rather than the narrower category of "radiocommunications transmitter". We understand this is due to the certificates of proficiency themselves being issued in respect of operation of "radiocommunications devices" in Part 8 Division 2 of the new Bill. We question whether it is necessary for certificates of proficiency to cover operation of receivers in their scope, as applying the same logic that has been adopted by the drafters of the new Bill in respect of the licensing requirement, only transmitters need be covered since receivers have no potential to cause interference.[24] (We note that the reason for a receiver suffering interference may equally be that the receiver is performing poorly, for example by failing to adequately filter transmissions in accordance with applicable technical standards.) If certificates of proficiency only covered the operation of transmitters within a particular device, then Part 5 could be further simplified to only refer to "radiocommunications transmitters" throughout. This would also enable simplification of the title of Part 5 so that it would refer only to operation of radiocommunications transmitters (not "devices"). We encourage the Department to eliminate use of overbroad scope in provisions wherever possible, as many of the red tape complexities of the current Act are caused by its sprawling and overlapping defined terms and scope of provisions.

i. Civil proceedings relief: the "civil proceedings" relief available to a spectrum licensee under section 50 of the current Act is widened to provide a right of action to all licensees under the single licensing approach in the new Bill. In other words, possible plaintiffs will also include those licensees presently holding apparatus licences.[25]

We agree that those licensees who currently hold apparatus licensees, should also be entitled to relief under the civil proceedings provision. However, we consider that the scope of the provision should be further extended to enable pre-emptive action (e.g., an application for an injunction) to prevent a person from causing interference. Accordingly, we propose that subsection 30(1)(a)(c) be amended to include "or is likely to cause interference" as follows:

> "(c) the operation causes interference, or is likely to cause interference, to radiocommunications carried on by another person (the plaintiff) under a licence;"
>
> [*addition underlined*]

We note that we have repeatedly expressed concern that Part 3.1 of the current Act, along with its other offence provisions, is lacking by only prohibiting unauthorised operation and unlawful possession of radiocommunications devices but not expressly prohibiting supply of devices (often from offshore) to consumers which are then operated unlawfully in Australia.[26] A good example is the longstanding problem of supply to Australian consumers of illegal mobile repeaters by offshore vendors. We observe that in the new Bill, the place where such supply is addressed is in Part 10, the Equipment provisions,

[23] Definition of "radiocommunications device" in new Bill s7(1).
[24] Information Paper p13.
[25] New bill s30.
[26] See e.g. Attachment A of the Telstra submission in response to the Legislative Proposals Consultation Paper – Radiocommunications Bill 2016.

and hence there is no need to deal with this aspect in Part 5, which is confined to operation of radiocommunications transmitters and possession for the purpose of operation. We are comfortable with this approach provided that the Equipment provisions do in fact enable the ACMA to appropriately target supply of transmitters which are not legal for use in Australia without consent of the licensee of the spectrum space in which the transmitter will operate. Please see our comments in this regard at paragraph 3.10.1.1.

3.6. Part 6 – Licences

The centrepiece of the new Bill is the proposed single licensing scheme, which contains the most significant changes from the existing legislation. Of utmost concern to us is maintaining the protection of exclusive property rights afforded under the existing legislation as well as having a clear and transparent process for future allocations. In the paragraphs below, we offer our commentary on many of the sections in this part of the new Bill, primarily with the goal of maintaining these existing rights, as well as improving the new Bill where we believe it can be improved.

We would like to see a further draft of Part 6 in future rounds of consultations given the breadth of our commentary below and the importance of licensing to transition. It will be critical to understand how all of the various elements move together – an important part of valuing spectrum is understanding the rights that licensees and others have over the spectrum.

3.6.1. Simplified outline (section 31)

We suggest that the fourth bullet point referring to “conditions” should be expanded to briefly list the kinds of conditions that can be imposed in a licence. While the simplified outlines may not contain any operative provisions they do have value for lay people reviewing the legislation. The current Act is read by engineers as much as by lawyers, and the kinds of licence conditions that may exist are an important consideration for licensees and their employees.

3.6.2. Issue of licences (section 33)

3.6.2.1. The time period between issue and coming into force of licences

Under the proposed subsection 33(4) there is no limit on how far in advance of its commencement date the issue date of a licence may be. Our experience has been that the ACMA can propose to issue licences a long time (up to two years) prior to their date of coming into force, with the agenda of obtaining payment from licensees well before they can actually make use of the licence. The purpose appears to be the bringing forward in time of government revenue collection. This significantly disadvantages licensees who are unable to make use of the relevant spectrum in our businesses in order to begin to earn a return on our investment. For this reason, we believe the time period between issue and commencement of the licence should be specified to be a maximum of one year in subsection 25(4).

3.6.2.2. Excluding embargoes from the licensing provisions

As we have noted in paragraph 3.4, we consider the exclusion of the embargo power which the ACMA has created under the current Act to be undesirable. We suggest section 33 of the new Bill should state that a licence cannot be issued if an embargo is in force that prevents the issue of a licence in the relevant frequency band and geographic location. As previously explained, we regard the embargo power as a powerful one that has consequences for the rights of numerous industry stakeholders as well as the overall public benefit. While we understand that the embargo approach was created by the

ACMA as an administrative tool to deal with a gap in the current Act, we think the new legislation is an opportunity to formalise the embargo power. Spectrum reserved under the embargo power should also be subject to a process of regular review, e.g. every 12 months, to determine whether the relevant embargoes should continue in force.

Further to our view on embargoes, we note that section 66 of the new Bill provides for a temporary suspension to facilitate "refarming", as explained in the Information Paper.[27] We regard this as being very similar in purpose and effect to the embargo power and do not see why the former is covered by a provision in the new Bill while the latter is excluded. We consider that embargoes should similarly be addressed in the plenary legislation.

3.6.2.3. Licence term of maximum of 20 years

We continue to advocate that licence terms be uncapped and that the 'perpetual licence'[28] or presumption of renewal[29] approach in other jurisdictions be adopted. However, the increase of the proposed maximum licence term to 20 years in subsection 33(6) of the new Bill is a welcome improvement on the current maximum terms of 15 years for spectrum licences and 5 years for apparatus licences. Increasing the maximum term is helpful for promoting investment certainty.

We note the ACMA has advised it will be making a priority of issuing new long duration "spectrum-space licences" for any case where spectrum licensing would have been appropriate under the current Act.[30] We assume that by "long duration" the ACMA means the maximum term of 20 years, for a licence that is used in a similar way to spectrum licences at present. Our view is that, additionally, there are some existing apparatus licences which should be provided with longer terms than what is provided for under the current regime. Examples are apparatus licences involving significant long term investment in infrastructure, such as PMTS Class B licences used to provide mobile services, licences for microwave backhaul links, etc. There is no reason why licences of this kind should not have terms of at least 10 years, and potentially as long as 20 years.

3.6.3. Licence issue schemes (sections 34 and 35)

We note the ACMA has flagged its intention to determine at least two licence issue schemes, the first to be a price-based scheme reflecting what is currently done for most spectrum licences, and the second to be an administrative "over-the-counter" scheme similar to the approach adopted for apparatus licences at present where supply exceeds demand.[31] Therefore, while at the plenary legislation level there is to be a single licence category, we note that at the regulatory authority level there will be at least two separate schemes which will be largely analogous to the existing distinction between the mechanisms for issue of spectrum licences and apparatus licences respectively. (This ignores spectrum authorisations, which arguably could also be structured as a licence issue scheme and not held separate as currently proposed.)

We note that the phrase "spectrum-space licence" is coined in the ACMA's Licensing System Paper,[32] but is not referenced in the new Bill. We understand a "spectrum-space licence" to be akin to our existing spectrum licences, albeit to be issued under a licence issue scheme. We would appreciate

[27] Information Paper, p18.
[28] See eg 4G licences in the 800 and 2.6GHz bands in the United Kingdom.
[29] See eg licences in Canada and the United States.
[30] ACMA, Licensing System Paper, p23.
[31] ACMA, Licensing System Paper, p10.
[32] Ibid.

confirmation that the "spectrum-space licence" is the intended successor to existing spectrum licences in terms of conferral of exclusive property rights.

We are concerned that the process for conducting auctions under a licence issue scheme has not yet been described by the DoCA in any detail. The conduct of auctions is of crucial importance to the workability of the new licensing system and industry's confidence in it. We consider that the process for conducting auctions within the context of the relevant licence issue schemes should be prepared as a matter of priority by the ACMA, and presented at the earliest opportunity for industry review and consultation.

We understand the rationale for the ACMA determining licence issue schemes instead of the current distinct approaches to allocation and issue of apparatus and spectrum licences respectively which are hard-wired into the current Act. We agree that this provides the ACMA with far greater flexibility, and that there is benefit in the simplification of the licence allocation and issue process. However, we are concerned about the risk of a proliferation of licence issue schemes especially if the distinctions between the types of licences under each scheme are not significant. In that scenario, there is risk of the creation of a bespoke licence issue scheme to suit a particular favoured person or a sprawl of overlapping licence issue schemes developing. The latter scenario would result in potential unfairness to similar licensees in different licence issue schemes, and may cause aspirant licensees to "shop" between schemes. This would be contrary to the principle of consistency stressed by the Department in its Information Paper.[33]

To reduce the risk of unnecessary proliferation of licence issue schemes we believe there should be a safeguard put in place in the new Bill to require the ACMA in determining each new licence issue scheme, to provide reasons why an already existing licence issue scheme would not be appropriate for issue of the contemplated licences. This is particularly the case since licence issue schemes determined under section 34 are proposed to not be subject to disallowance.[34]

We observe that the new Bill does not contemplate the ability to vary a licence issue scheme, and consistent with reducing the risk of unnecessary proliferation of licence issue schemes, we propose that the ability to vary a licence issue scheme may be a more prudent option compared to creating a new scheme. Variations to a licence issue scheme should be by legislative instrument to ensure that they undergo consultation, as required under the Legislation Act.

We suggest that subsection 34(10) should further clarify the permitted scope and limitations of licence issue schemes. We assume that licence issue schemes could:

- apply to a specified frequency band or to an enumerated list of bands or to all bands;
- apply to only a certain group of persons or to all persons; or
- apply for a certain period of time or indefinitely until a replacement licence issue scheme is determined.

We also suggest the inclusion of a basic mechanism for regular review of licence issues schemes be created, as well as for termination of a licence issue scheme.

We understand the intent of the wording in subsection 34(6), but suggest on the current drafting it is vague and circular – a power for the ACMA to confer itself further powers in a licence issue scheme

[33] Information Paper, p6.
[34] New Bill, s34(11).

leaves the potential for the ACMA to expand a licence issue scheme beyond its initial purpose. We suggest that an appropriate alternative wording for subsection 34(6) could read:

> *(6) A licence issue scheme may make provision in relation to a matter by conferring a power on the ACMA to make a decision in order to give effect to the licence issue scheme.*

Subsection 34(7) has the potential to overlap with the delegations powers in Part 17 of the new Bill, given that on the current drafting the power to make and implement a licence issue scheme is delegable in its entirety. As with subsection 34(6) the current scope of the power that might be conferred under subsection 34(7) is vague. The ACMA should consider whether the conferral of a power on an accredited person under subsection 34(7) is already covered by the power to delegate powers under a licence issue scheme in Part 17. If not, the purpose of subsection 34(7) should be made clearer on the drafting.

As we have described in more detail in Table 3 in paragraph 3.17.1.3 in relation to Part 17 of the new Bill, we are concerned about the ability of the ACMA to delegate the power to make a licence issue scheme to other parties. Our view is that licence issue schemes, being schemes of general application and applying across a large number of licences, are important instruments for the ACMA to manage and control. Administration of spectrum within the confines of an existing licence issue scheme is a more appropriate power to be delegated by the ACMA.

We support the inclusion of section 35 of the new Bill which requires that a certain specified class of licences may only be issued by way of a particular licence issue scheme. We consider this limitation will provide some level of confidence to persons who compete in price-based allocations for licences in the specified class that similar licences will not be issued in a different and more favourable way. However, we are unclear on whether this also restricts the proposed Ministerial power to direct the ACMA to offer a licence to a specified person under section 39. If the Minister can use the direction power in section 39 to circumvent the licence issue scheme to the benefit of a particular person, then the comfort provided by section 35 is significantly reduced. (See commentary in paragraph 3.6.5 below in this regard.)

3.6.4. Licence issue limits (sections 36-38)

Our longstanding position on restrictions on the aggregate of the parts of the spectrum that may be used by a particular person, the "allocation limits" or "competition limits" under the current Act,[35] is that these would be best managed by application of section 50 of the CCA rather than by determination of *ex ante* limits.[36] However, we recognise that determination of what is to be known as "licence issue limits" under the new Bill has a longstanding history in Australian regulation and is likely to be retained. Our main concern is that the approach to determination of the "licence issue limits" by the responsible regulators be as rigorous, transparent and efficient as possible.

[35] Current Act, s60(5).
[36] See: 1) Telstra's submission dated 12 April 2002 in response to the Productivity Commission's draft report on the Radiocommunications Act, s2 http://www.pc.gov.au/inquiries/completed/radiocommunication/submissions/dr323/subdr323.pdf; 2) letter from Iain Little of Telstra to Michael Cosgrave of the ACCC dated 17 April 2015 concerning the "Proposed spectrum reallocation for 1800 MHz in regional Australia", pp2-3 https://www.accc.gov.au/system/files/Telstra%20Submission_1.pdf.

3.6.4.1. Minister's role

We prefer the approach proposed under the new Bill, namely that the ACMA will determine the licence issue limits[37] following consultation with the ACCC,[38] to the existing approach where the Minister may seek advice from the ACCC and direct the ACMA in regard to any licence issue limit.[39] This provides for a more streamlined approach to issuing licences and without the risk of political interference. Our view is that the determination of licence issue limits should be entirely managed in the new Bill under the proposed provisions, and that the application of section 14 of the *Australian Communications and Media Authority Act 2005 (Cth)* (**ACMA Act**) should be expressly excluded.

3.6.4.2. Need for express provisions addressing transparency of consultation process

We are concerned that there is no explicit requirement in the new Bill for consultation with stakeholders by either the ACMA or the ACCC when they carry out their roles in the determination of licence issue limits. In recent auction processes, the ACCC has publicly sought input on the advice it should provide on proposed auction limits,[40] and we think this should be a mandatory obligation. To the extent that the ACMA considers matters distinct from those which the ACCC examines, for example technical aspects of allocation, the ACMA should also be obliged to seek input from industry participants and the public in a transparent process. We do not consider that relying on general obligations to consult on legislative instruments is sufficient in the context of auction limits as these require a detailed and comprehensive consultation process that should be set out in the new Bill.

The process pertaining to the ACCC and the ACMA should include a requirement that detailed reasons are published for the decisions made. We are concerned that in the recent residual 700MHz auction process the Department only published a summary of the ACCC's advice to the Minister on competition limits.[41] This is undesirable as it limits understanding of the competition rationale for the licence issue limits that have been determined, and is relevant to future assessments.

3.6.4.3. Scope of licence issue limits

The new Bill appears to widen the scope of licence issue limits, as compared to allocation limits in the current Act, in the following important ways:

- the licence issue limit may endure well beyond the auction period and extend to secondary market trades (see comments in paragraph 3.6.4.4);[42] and
- the licence issue limit may be expressed to be subject to suspensive or resolute conditions.[43]

We recognise that these provisions enable for more nuanced application of licence issue limits, and to that extent we support the addition of these provisions. However, as with the scope for indefinite duration of licence issue limits we are concerned about conditions being set which may not eventuate for

[37] New Bill, s36(1).
[38] New Bill, s37.
[39] Current Act, s60(10).
[40] See, for example, ACCC, "Spectrum competition limits", 1 April 2015 (concerning the 1800MHz regional spectrum auction), https://www.accc.gov.au/regulated-infrastructure/communications/spectrum-competition-limits/request-for-advice.
[41] Department, "ACCC advice on allocation limits for the auction of unsold 700 MHz spectrum—executive summary", 14 December 2016, https://www.communications.gov.au/publications/accc-advice-allocation-limits-auction-unsold-700-mhz-spectrum-executive-summary.
[42] New Bill, s36(4).
[43] New Bill, s36(6) and (7).

a prolonged period of time. Once again, we suggest that there be a mandatory review of the conditions attached to any licence issue limit which continue to be in force after four years to determine whether they should continue beyond the five-year mark – this is important for valuation of the spectrum.

3.6.4.4. Exclusion of CCA section 50 powers of ACCC and duration of the exclusion

We note that subsection 97(2) of the new Bill appears to exclude the application of section 50 of the CCA if a licence issue limit has been determined for the relevant part of the spectrum. We support the notion that if licence issue limits have been determined on an *ex ante* basis then any person who is ultimately issued a licence in the relevant part of the spectrum should be accorded "safe harbour" from the *ex post* application of section 50. This is beneficial for investor participation in market-based spectrum allocation.

We note that unless the relevant licence issue limit has a condition under subsection 36(4) which sets a date of expiry, then the exclusion of section 50 of the CCA will continue indefinitely and additionally will not only benefit a person who successfully bid for a licence in an auction or other market process, but also any person who is subsequently issued with a licence in the relevant part of the spectrum and is not thereby in breach of the licence issue scheme. The reasoning behind this approach appears to be that the licence issue limits should not be circumvented by subsequent secondary trading.

However, while licence issue limits applying to secondary trading may be justifiable in the short term, we are concerned about licence issue limits enduring for an indefinite period and the inflexibility and confusion this may cause. This is especially the case where "spectrum space licences" may have 20 year terms during which technology may change significantly. We suggest that all licence issue limits which endure for more than four years must be scheduled for a mandatory review before their fifth anniversary to determine if they should continue, using the same consultation mechanism by which the limits were initially determined.[44]

3.6.4.5. Opportunity for removal of existing 'population reach' component of licence issue limit

We note that the new Bill retains the ability of a licence issue limit to apply in relation to a specified population reach.[45] This component has never been used in any allocation limit determined under the current Act and would be very difficult to implement with any certainty. Instead, geographic boundaries can act as a proxy for population and have the benefit of certainty. It is notable that the example provided after subsection 36(3) of the new Bill uses limits based on a specified part of the spectrum and geographic area, but not a population reach component. We suggest that the opportunity should be taken in the new Bill to delete the population reach component, which we consider unworkable and redundant since other components can achieve the same objective with greater certainty.

3.6.4.6. Concern about application of licence issue limits to overlapping licences issued for the same part of the spectrum

The advent of the single licence approach enables the issue of multiple licences for the same part of the spectrum,[46] unless this is precluded by a regulatory undertaking in respect of the first-issued licence. A

[44] This would be in accordance with the new Bill, s37.
[45] New Bill, s36(3)(c).
[46] New Bill, s46(3).

consequence is that licence issue limits may no longer be able to be determined on the premise that use of each part of the spectrum is exclusive of use by another person. This means that licence issue limits may need to take into account the prospect of multiple users of the same part of the spectrum or 'densification', which would potentially require an increase in the maximum amount of spectrum which any one user should be permitted, relative to a conventional issue limit that relies on exclusive use rights. In our comments in response to Question 14 of the Transition Paper (see also paragraph 3.6.8.1 below) we propose that the template text of regulatory undertakings for transitioning existing spectrum licences be included in the transitional legislation. If such regulatory undertakings for replacement 'spectrum space' licences excluded the subsequent issue of overlapping licences without consent of the licensee, this would provide greater confidence that the licence issue limits need not be revised upwards to allow for reuse of the same part of the spectrum by multiple licensees.

3.6.5. Proposed Ministerial power to direct ACMA to offer licence to specified person (sections 39 and 40)

We regard the proposal in section 39 of the new Bill that the Minister should enjoy a power to direct the ACMA to offer a licence to specified person, to be undesirable from the perspective of investment certainty. This direction power when coupled with the Minister's power under subsection 194(2)(d) to set the spectrum access charge, amounts to a power for the Minister to choose a favoured person and issue to that person a licence for a term of up to twenty years, at a price far below that of the market-determined value of the licence. Such a power is inconsistent with the objects of the new Bill, particularly the efficient allocation of the spectrum which relies upon transparent market-based mechanisms. The exercise of such a power by the Minister would directly undermine market-based allocation of spectrum, and would likely harm the overall public benefit derived from the use of spectrum. This is because allocation under this power will be by the subjective selection of the Minister instead of on the basis of objective opportunity cost pricing. The introduction of such an express Ministerial power reverses the reforms toward market-based spectrum allocation introduced by the current Act and is a retrograde step.

An existing licensee which has invested hundreds of millions or even billions of dollars in spectrum licences in a competitive auction process, would face continued uncertainty as to whether its business case dependent on that investment would be undermined by a subsequent Ministerial handout of a similar licence to a favoured person. The Australian mobile market is among the most competitive in the world at present, with significant consumer benefit flowing from the level of competition even prior to the announced entry of a fourth mobile network operator.[47] One reason for this level of competition is that foreign telecommunications providers are able to directly own and control Australian carrier licensees, and indeed two of the three current mobile network operators are foreign owned and controlled. While Telstra is by law majority Australian-owned and controlled,[48] many foreign investors own Telstra shares

[47] See: 1) Section 1 of Telstra's Response to the ACCC's Discussion Paper on the declaration of a wholesale domestic mobile roaming service https://www.accc.gov.au/system/files/Telstra%20main%20submission1_0.PDF; 2) Section 2 of Telstra's response to the ACCC's Draft Decision in the domestic mobile roaming declaration inquiry https://www.accc.gov.au/system/files/Telstra%20main%20submission_3.pdf; 3) TPG investor update on mobile market entry https://www.tpg.com.au/about/pdfs/TPG_700MHz_Spectrum%20Acquisition_Investor_Presentation.pdf

[48] Foreign ownership in Telstra is restricted by Pt 2A Div 4 of the *Telstra Corporation Act* 1991 (Cth). The maximum foreign ownership limits are 35 per cent in total by all foreigners and a limit of 5 per cent applicable to each foreign person. Divisions 8 and 9 prescribe additional rules: central management and control of Telstra must ordinarily be exercised within Australia; Telstra must ensure that it maintains a substantial business and operational presence in Australia, and must remain incorporated in Australia; and Telstra's chairperson must be an Australian citizen, as must be a majority of its directors.

amounting to billions of dollars of equity. The prospect of exercise of the direction power by the Minister under section 39 of the new Bill may create sovereign risk concerns for all these foreign investors.

It is arguable that a Ministerial power of direction of the nature of the proposed section 39 of the new Bill is in breach of Australia's World Trade Organisation commitments in its schedule attached to the Fourth Protocol to the General Agreement on Trade in Services (GATS).[49] Specifically, Article 5 of the Reference Paper requires that,

> "*The decisions of and the procedures used by regulators shall be impartial with respect to all market participants*."

Specifically in regard to spectrum allocation, Article 6 of the Reference Paper states, in part,

> "*Any procedures for the allocation and use of scarce resources, including frequencies, … will be carried out in an objective, timely, transparent and non-discriminatory manner*."

These provisions have been duplicated and their scope extended in almost all of Australia's bilateral trade agreements. For example, in the Singapore Australia Free Trade Agreement, there are provisions on transparency,[50] regulatory fairness to all parties,[51] and non-discriminatory allocation of spectrum.[52] Creation of a new right of direct Ministerial intervention in the allocation of spectrum is contrary to the intent of these trade commitments, and both such a provision itself and any exercise of it is at risk of challenge under these trade agreements.

Moreover, we note that while such a direct allocation power does not exist under the current Act, the Minister can and has in the past directed the ACMA to take into account government policy in its allocation of spectrum. This was the case in the Minister's 2014 direction to the ACMA in regard to making available apparatus licences which could be used by NBN Co in the 3.5 GHz band.[53] It is therefore unclear why it is now thought necessary to create a direct allocation power for the Minister over and above what the Minister has already. It would be far preferable that any such exercise of power by the Minister should, at the very least, be carried out with express reference to existing and known government policy, and that the ACMA's regulatory independence should be preserved to the maximum extent possible. Whether the Minister has gone beyond power in issuing a particular direction effectively forcing the ACMA to make an allocation to a particular person would then become a matter for the parties affected, and perhaps for the courts to determine.

Last, the addition of this particular Ministerial power into the new Bill is inconsistent with the proposed intent expressed in the Information Paper that the Minister is to be removed from operational decisions[54] - the Minister can set a policy in a Ministerial policy statement, but should leave the implementation to the ACMA. Here, the Minister would be stepping directly into the shoes of the ACMA in determining which person should be eligible for allocation of a licence, leaving the ACMA to play the role of functionary in performing the Minister's operational instruction. This brings into question the

[49] WTO Negotiating Group on Basic Telecommunications, Reference Paper (24 April 1996), https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm .See WTO, World Trade Organization: Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services) (1997) 36 ILM 354, 367.
[50] Singapore Australia Free Trade Agreement (SAFTA), Ch 10, Art 4 http://dfat.gov.au/trade/agreements/safta/official-documents/Documents/SAFTA-chapter-10.pdf.
[51] SAFTA, Art 5.2
[52] SAFTA, Art 12.
[53] *Australian Communications and Media Authority (3.5 GHz frequency band) Direction 2014*, https://www.legislation.gov.au/Details/F2014L01399.
[54] Information Paper, p7.

credibility of the claimed intent for the proposed provision, particularly given that Ministerial directions relating to a specific person cannot be disallowed even where they are legislative instruments.[55]

Should the drafters decide to retain the proposed section 39 in the next iteration of the new Bill (which we strongly oppose), we consider it is vital that the following strict boundaries be drawn:

- The exercise of the power must be permitted by one or more existing Ministerial policy statements issued under section 18, and may not be inconsistent with any Ministerial policy statement that has been so issued.
- A limitation should be added to section 35 in regard to licence issues schemes similar to subsections 25(3) and 38(3), that is the Minister should not exercise the power of direction in section 39 in a manner that is inconsistent with a licence issue scheme.
- The person to whom the ACMA has given the written offer under subsection 39(3)(a) must elect to either accept or reject the offer within 14 calendar days from the date of the offer. This deadline is necessary in order to limit, as far as possible, the considerable commercial uncertainty that all other licensees will face while such an offer remains at large.
- A licence issued under subsection 39(3) must come into force within six months of the date of the Minister's direction. This is to ensure that the Minister cannot defer commencement until a date upon which a new government or a new Minister is in place, as that would amplify further the negative impact of such an intervention.
- The justification, reasoning or advice the Minister has relied upon for directing a licence to be issued under section 39 and the spectrum access charge to be applied under subsection 194(2)(d), must be published as part of the direction.
- A licence issued in consequence of a direction under section 39 may not be sold, traded, amalgamated, subdivided or otherwise dealt with by the licensee, and these restrictions should be designated in the licence. The beneficiary of such a licence should not be able to reap windfall profits from that licence or enjoy the same flexible licence conditions available to licensees who have acquired their licences through legitimate market-based mechanisms.
- The direction should be subject to mandatory review by the Minister every four years with a specific caveat included in the licence that it may be subject to resumption should the Minister determine that the reasons for initial issue of the licence no longer apply.
- The requirements of section 40 should be expanded to require that if the Minister proposes to give a Ministerial direction under section 39, the ACMA must:
    - review all technical regulatory instruments and relevant licences and spectrum authorisations made under the then-current legislation to ensure that the proposed licence issue will be consistent with those instruments;
    - conduct a public review in which the ACMA carries out an independent assessment of the consistency with the new Bill's objects of the proposed licence issue directed by the Minister; and

[55] *Legislation (Exemptions and Other Matters) Regulation 2015 (Cth)*, r 9(2)

- publish its findings on both previous points prior to the Minister proceeding with the making of the direction.

3.6.6. Third party use (Division 3 sections 41 to 45)

In the current regime licensees are permitted to authorise a third party (being a person other than the ACMA as licensor and the licensee) to operate a radiocommunications device under the relevant licence. This power is contained in two provisions in the existing legislation:

- for spectrum licensees, section 68 of the current Act; and
- for apparatus licensees, section 114 of the current Act.

We believe that Telstra is one of the most frequent users of these rights: we maintain a simple template form of agreement to enable such third party authorisations to be issued rapidly. In the past, we have issued authorisations to a diverse range of third parties including an airline, the Royal Flying Doctor Service, a rail operator, a resources company, other licensees requiring temporary spectrum access, and a leading technology company for the testing of a high altitude platform system, amongst others. Moreover, many thousands of 'smart' mobile repeaters are currently in operation by our customers in accordance with third party authorisations issued by Telstra. We therefore consider that we have considerable practical experience in the use of third party authorisations. We have provided detailed input in the past to the ACMA and government on third party authorisations, for example the study into spectrum trading by the Department in 2012.[56]

3.6.6.1. Third party authorisation regulatory burden is being substantially increased by new Bill and will cause consumer detriment

At present third party authorisations are overwhelmingly issued by spectrum licensees, not apparatus licensees. One reason for this prevalence is that spectrum licences typically enable a 'spectrum space' in which licensees are able to identify available spectrum (in frequency, geographic and temporal parameters) that can be used without interfering with the licensee's existing operations. This is far less likely with apparatus licences where a specific device at a specific location has been licensed at a particular maximum power level, and it is unlikely that the apparatus could continue to operate if a third party was accorded use of the same rights. Therefore, it is predominantly section 68 of the current Act which is relied upon. This is an important point for the drafters of the new Bill to appreciate, because third party authorisations under section 68 of the current Act attract a significantly lower regulatory burden than those made under section 114 (used for apparatus licences), as set out in Table 1 below. Note that for the purpose of this table we have excluded apparatus licences used for broadcasting purposes.

[56] The Department of Broadband, Communications and the Digital Economy commissioned Plum Consulting and Network Strategies to conduct a study on spectrum trading in Australia, in 2012, for which Telstra provided comments. The report produced by the consultants was not published by the Department.

Table 1: Regulatory obligations of licensee providing third party authorisation under current Act (excl. broadcasting uses) and which of these obligations has been imported into new Bill

Obligation	Spectrum licensee granting authorisation	Apparatus licensee granting authorisation	In new Bill?
Must include a condition in authorisation that third party must comply with rules made by ACMA about the way in which licensees may authorise third parties	No current rules in force – previous rules revoked in March 2011[57]	No	No
Must notify third party of its obligations under the Act particularly registration requirements under Part 3.5, and about ACMA rules (see above)	No longer any ACMA rules therefore no requirement to notify those rules to the third party.	No	No
Need to check whether third party had same kind of licence in the past which was suspended or cancelled	No	Yes[58]	No
Must keep records of authorisations, in form of copy of authorisation and for a period after authorisation ends	No	Yes[59]	Yes[60]
Must notify authorised persons of relevant matters affecting the licensee (e.g. revocation / surrender / cancellation of licence) – strict liability offence	No	Yes[61]	Yes[62]
ACMA may exclude certain categories / classes of persons from third party authorisation	No	Yes, by legislative instrument[63]	Yes, in licence [64]

It can be seen from Table 1 that the new Bill will impose significantly greater regulatory obligations on spectrum space licensees than are currently applicable to authorisations that have been issued under section 68 of the current Act.

[57] *Radiocommunications (Third Party Use – Spectrum Licence) Rules Revocation 2011 (Cth)*, https://www.legislation.gov.au/Details/F2011L00558
[58] Current Act s114(3)
[59] Current Act s117
[60] New Bill s44
[61] Current Act s118
[62] New Bill s45
[63] Current Act s115
[64] New Bill s43

Unfortunately, in combining the third party authorisation provisions for both spectrum licences and apparatus licences in Part 6 Division 3 of the new Bill, the drafters have imposed new regulatory compliance obligations on the vast majority of third party authorisations – because, as explained, most third party authorisations at present are issued under spectrum licences. Imposing new and more complex regulatory obligations is the opposite of what the new Bill is supposed to achieve.

Most worrying is the new section 44 which requires onerous record keeping. As noted we have authorised many thousands of our customers to use the transmitter functionality in 'smart' mobile repeaters under section 68 of the current Act. We are required to comply with certain record-keeping rules in the relevant regulation for the supply of an 'eligible radiocommunications device'.[65] However, those rules relate to identification of the device and the person who will use it. There is no requirement under section 68 of the current Act to retain a copy of every single third party authorisation. If this requirement was introduced it would cause new and high compliance costs for Telstra and the other Australian distributor(s) of 'smart' repeaters which we have agreed our customers may safely use.

Equally onerous is the requirement to notify every authorised third party of any variation to the relevant licence.[66] Variations to spectrum licences have occurred quite frequently in recent years, and some variations are of a highly technical nature and have no relevance whatsoever for authorised third parties. Recently a variation to one of our spectrum licences was made in order to manage an issue that had arisen with software used by the ACMA to register base station transmitters. It is unnecessary red tape that such a variation should be advised to third parties authorised to use that spectrum licence by Telstra, especially when there are many thousands of third parties (using our Telstra Mobile Smart Antenna) who would have to be notified. That is why under the current section 68 provision, sensibly no such notice is required.

Given the concerns set out above, we urge that the provisions of Division 3 be extensively revised so that, at most, there is no detriment to licensees relative to the current position regarding third party authorisation for existing spectrum licensees. This could be achieved by removing all of the complex and detailed compliance obligations in sections 44 and 45, which run for three pages, and instead having these matters dealt with (if required) in the particular licence issue schemes for which such prescriptive regulation is appropriate (if any).

3.6.6.2. Redundant provisions on what licences may include, and what must be notified to third parties

We question whether section 42 is duplicative, in effect, of subsection 41(2)(a); and similarly whether section 43 is duplicative of subsection 41(2)(b). We suggest these provisions be consolidated.

Similarly, there is considerable repetition in section 45 of the notice obligations of the licensee and the penalties (the latter are identical in each case). There is opportunity for consolidation of these provisions to remove unnecessary repetition and simplify the text of the section.

3.6.6.3. Disqualified persons and third party authorisations

We have considered the situation where a person seeking a third party authorisation has been determined by the ACMA to be a disqualified person under section 70 of the new Bill (whether as an individual or if the person's executive officer has been disqualified), and specifically whether that person

[65] Current Act, s301; *Radiocommunications Amendment (Cellular Mobile Repeaters Supply—Specified Particulars) Regulation 2013 (Cth)*.
[66] New Bill, s45(1)(a).

should be allowed to receive a third party authorisation. In our view, third party authorisations are a commercial matter for the licensee, since the licensee bears the risk of licence breaches by the authorised person. It is within the licensee's discretion to include a provision in the third party authorisation agreement that requires a warranty from the third party that no such notice of disqualification has been received, and also to require notice if disqualification occurs during the term of the third party authorisation agreement. Such notice could trigger a right of revocation in the agreement. Our view is that this can be dealt with commercially, including by the licensee exercising due diligence in reviewing the Register of Disqualified Persons periodically, and we do not believe there is need for the addition of a specific prohibition or notice requirement in the new Bill.

3.6.6.4. Third party authorisation is duplicative of management rights: need it be retained at all?

We question why third party authorisations need to be retained at all in the new Bill, if management rights are to be introduced under Part 17. Third party authorisation is substantially similar to clothing a licensee with management rights – both enable the licensee to make available the use of its spectrum to a third party, in a form of "sub-lease" of rights. Unfortunately for many years the third party authorisation mechanism was hobbled by uncommercial rules made by the ACMA under subsection 68(3) of the current Act[67] which required authorisations to be revocable at will by the licensee.[68] Worse, the rules required that the revocation not be capable of being challenged in legal proceedings.[69] Any person seeking an authorisation was forced to accept the risk that the spectrum upon which that person was relying, could be taken away at any time. These rules were finally revoked six years ago[70] when the ACMA recognised that they made third party authorisation highly undesirable for persons seeking certainty of access to spectrum. However, even following the revocation of the rules, third party authorisations have not typically been used between peer licensees (such as mobile network operators) to enable the use of otherwise unused spectrum.

Part of the difficulty is that in a peer situation the licensee remains liable for all licence infractions and will therefore seek to obtain an uncapped indemnity from the third party, and the third party is usually reluctant to provide this. We have experience in the difficulty of negotiating commercial terms from the process to defragment the 1800MHz band in 2012-2013, which required reciprocal authorisations to be issued between the mobile carriers for short periods of time. Even in that context of authorisations for only a few days, persons to be authorised understandably were reluctant to indemnify the licensee on an uncapped basis. On the other hand, licensees have been reluctant to agree any indemnity cap when they have no control over the use of the spectrum in the hands of the third party but remained liable for any interference that the third party may cause.[71] While under the new Bill it appears that the authorised person, rather than the licensee, will be liable for any breach of a licence condition, it will remain the licensee which may suffer suspension or cancellation in consequence of a licence contravention by the authorised third party.[72]

Our view is that it is difficult to justify retaining two largely similar schemes for delegation of the right to use spectrum, especially when the outcome is similar but the regulatory obligations on the primary

[67] *Radiocommunications (Third Party Use – Spectrum Licence) Rules 2000 (No.2)*, https://www.legislation.gov.au/Details/F2005B00272/24e2de06-53ca-4e5e-87c7-8f6c081233de
[68] Ibid, r4.
[69] Ibid, r5.
[70] *Radiocommunications (Third Party Use – Spectrum Licence) Rules Revocation 2011*, https://www.legislation.gov.au/Details/F2011L00558.
[71] New Bill, s52(1)(b).
[72] New Bill, ss64(1)(b)(ii) and 67(1)(b)(ii).

licensee are significantly different. We suggest that third party authorisation should not be retained in the new legislation, but instead its functional equivalent of management rights should enable a licensee to grant to a third party the right to use its licensed spectrum. For this purpose a standard grant of a minimum form of management rights should be included in every licence issued, unless stated otherwise in the licence terms. We have made further comments on this proposed approach in the entry in Table 3 relating to section 99 of the new Bill at paragraph 3.17.1.3 of our submission below.

Consolidating third party use of spectrum under the management rights approach would accord with the policy principles of the Spectrum Review, particularly simplification of the framework and enabling greater flexibility for licensees to make use of their spectrum. It would enable our industry to move away from the existing third party authorisation concept which has a troubled history and, in the apparatus licensing context, continued onerous record keeping and notice obligations upon the licensee which do not incentivise its use. It would also avoid confusion with the terminology of "spectrum authorisation" under Part 7 of the new Bill, which is the new term proposed to replace class licensing but is a very different concept. We do not see any good reason for carrying the existing third party authorisation concept into the new regime when there is a better construct available in the form of management rights.

3.6.7. Conditions of licences etc. (Division 4)

3.6.7.1. Retention of distinction between spectrum and apparatus licensing

We note that while the draft plenary legislation amalgamates the existing spectrum licences and apparatus licences into a single licence category, at the subordinate level of licence conditions there is a bifurcation into alternative conditions reflective of the current apparatus licence and spectrum licence constructs, in subsection 46(1)(b) of the new Bill. The alternatives are either:

- an area-based condition reflecting the current spectrum licence construct (subsection 46(1)(b)(i); or
- a specified location reflecting the current apparatus licence construct (subsection 46(1)(b)(ii).

As noted in our comments on the proposed licence issue schemes in paragraph 3.6.3 above, we recognise that moving the distinction between apparatus licences and spectrum licences down to the level of licence conditions, rather than as distinct separated categories under the plenary legislation, will provide the ACMA with greater flexibility in its licensing function. We agree that there are some simplification benefits in not having distinct regulatory schemes for each of apparatus and spectrum licences as in the current legislation. However, our reading of the new Bill is that to a large extent and for practical purposes the current categories of apparatus and spectrum licences will continue, at a delegated level determined by the ACMA. On one hand this represents an evolution of the current radiocommunications regulatory arrangements and will enable easier transition. On the other hand, in considering the costs and benefits of a significant rewriting of the legislation, it does raise the question of whether the same outcome could be accomplished by judicious amendment of the existing legislation. We think this evaluation of options for reform ought to have been directly addressed by the Department in its Information Paper, and we consider that it must be addressed in the draft explanatory memorandum to the next iteration of the new Bill.

3.6.7.2. Forced sharing of spectrum and dilution of existing rights of licensees

A very significant change from the current Act, as noted in the Information Paper, is the ability to overlay licences on one another in the same part of the spectrum.[73] We recognise that in an increasingly

[73] New Bill, ss46(3) and (4).

congested spectrum environment the regulator must have regard to opportunities for sharing of spectrum. However, we are very concerned that the consequence may be erosion of the exclusive rights associated with "spectrum-space licences", which was a world-leading concept introduced in Australian regulation by the current Act and has enabled the strong investment in facilities-based mobile competition.

We note that existing licensees will be able to retain their existing licences together with the rights embodied in them, however we are concerned that transition may be forced upon licensees at some point upon threat of non-renewal of licences. We are also concerned any future "spectrum-space licences" will not provide the same level of certainty of exclusive rights which encourage investment in infrastructure. We understand that the regulatory undertaking concept is intended to protect the first-in-time licensee from subsequent encroachment, but we are concerned that there is no express reference in subsections 46(3) and (4) to the bar against overlay of new licences over existing licences, that may exist in a regulatory undertaking. We strongly urge that the following provision be added as a new subsection 46(5):

> *(5) Despite subsections (3)(a), (4)(a)(i) and 4(b), a condition referred to in subsection 1(a) must not specify a part of the spectrum that is the same as, or overlaps, a part that is specified in a corresponding condition of another licence, if to do so would be inconsistent with a regulatory undertaking included in a licence in accordance with section 53.*

We further note that any specified conditions determined by the ACMA under section 50, also need to be made expressly subject to pre-existing regulatory undertakings. A legislative instrument should not be capable of deeming a licence condition which is inconsistent with a pre-existing regulatory undertaking unless consent is obtained from the licensee in whose licence the regulatory undertaking appears.

We note that a new licence may also be overlaid upon a part of the spectrum which is the subject of a spectrum authorisation. We note that while existing class licences do not confer protection from interference, most rely upon spectrum that has been allocated for the relevant class licensed devices so that anticipated interference in the "commons" spectrum is confined to similar types of devices. This, in turn, means that the technical parameters of the relevant devices can be designed to cope with only that kind of anticipated interference. The introduction of entirely different and unanticipated devices by virtue of a newly issued licence, overlaying a spectrum authorisation, may cause havoc with the devices relying upon that spectrum authorisation. Our customers rely upon class licences at present for services such as using their devices to receive mobile network services in the 900MHz band, and Wi-Fi in their homes and in public areas. We are concerned that new licences may be overlaid upon these spectrum authorisations, causing disruption of service, without any obligation in section 46 for the ACMA to consult on such a proposed licence issue. We strongly urge that the following provision be added as a new subsection 46(6):

> *(6) Before issuing a licence to which subsections 46(3)(b) or 46(4)(a)(ii) apply, the ACMA must:*
>
> *(a) publish on the ACMA's website a notice:*
>
> *(i) setting out the proposed licence and the extent to which it is the same as or overlaps a part that is specified in a condition of a spectrum authorisation; and*
>
> *(ii) inviting any person operating a radiocommunications transmitter under that spectrum authorisation to make submissions to the ACMA about the proposed licence on or before the day specified in the notice; and*

(b) consider any submissions received on or before the day specified in the notice under paragraph (a).

The day specified under subsection (6)(a)(ii) must be at least 14 days after the day on which the notice was published.

Our proposal at paragraph 3.13 about the use of industry-developed instruments for making spectrum authorisations may also assist in allaying concerns about the interaction between licences and spectrum authorisations in the same space.

3.6.7.3. "Leasing" of spectrum?

The Information Paper suggests that the ability to overlay licences in the same part of the spectrum under subsections 46(3) and 46(4) of the new Bill will also facilitate "leasing" of spectrum.[74] We are unclear what is meant by the term "leasing" – is the intention to refer to management rights? If so, we agree that this could be the consequence of delegating the licensing power under management rights; however, we consider that it would then be vital that licensees are themselves vested with management rights (see our comments in Table 3 at paragraph 3.17.1.3 below). This is because licensees with "spare" spectrum are good candidates to be "lessors" of spectrum while at the same time ensuring there is no substantial interference with their primary licence use.

3.6.7.4. Need for single view of applicable licence conditions

One of the longstanding concerns with the current Act is the proliferation of obligations on licensees from multiple sources, including the Act, the licence terms, and various instruments made by the ACMA. The consequence is that licensees face a significant burden in ascertaining their compliance obligations. We are concerned that this problem will continue under the new Bill. We note that under section 50 the ACMA will continue to be able to deem conditions to be applicable to specified licences, and hence those conditions will not be visible on the face of the licence. We recognise that there are efficiency benefits to this approach but we submit that, beyond merely proposing a new Bill, the Department and the ACMA need to also propose an information technology solution that will enable licensees to have a clear view of the entirety of their obligations under a licence.

We submit that it should be possible for every licensee (and anybody else with a relevant interest – e.g., potential transferees of a licence) to access an aggregated list of the conditions applicable to a particular licence on the ACMA website, which will include both the conditions specified in the licence under sections 46-49 and 51 of the new Bill and any deemed conditions under section 50. Potential sources of changes to licence conditions include section 57 (the ACMA can vary conditions, presumably by determination); subsection 77(3) (conditions of a new licence resulting from subdivision can be different from the existing licence); and section 87 (the ACMA can vary conditions in an existing licence to account for resumption of part of that licence). It would be very helpful to be able to see as part of the web-based "single view" the licence conditions prior and after, and when these changes became effective.

Further, we think that this web-based "single view" needs to also be available to an applicant for a licence, to understand what the applicable licence obligations would be and particularly whether an existing regulatory undertaking affects the potential issue of a licence which the applicant is seeking.

[74] Information Paper, p16.

We propose that this web-based "single view" should be recognised in the new Bill and be regarded as rebuttably presumptive of the licensee's obligations under a licence in the event of any claim of a licence breach. Licensees (and anyone else with a relevant interest) should be able to access a time and date-stamped statement of their licence conditions that is automatically generated by accessing the ACMA's website.

3.6.7.5. Aligning licence conditions of unused spectrum fragments with pre-existing licences

The ACMA notes in its Licence System Paper that,

> "[to] facilitate spectrum trading and interference management, and to ensure consistent treatment of all licences in the band, any future arrangements for available spectrum in spectrum-licensed bands should as far as possible be consistent with those of surrounding spectrum licences that are already issued. The ACMA will seek to ensure, as far as is feasible and appropriate, that all such available spectrum has been put to market prior to commencement of the main provisions of the Bill."[75]

We support the ACMA's goal of ensuring that prior to the main provisions of the new legislation coming into force, all currently vacant fragments of spectrum within otherwise assigned bands need to be issued. However, there needs to be some provision made for the prospect that this goal is not fully accomplished. In that case, any remaining spectrum fragments should be able to align with the characteristics of adjoining spectrum licences when sold. See also our comments on Question 17 in our response to the Transition Paper.

3.6.8. Division 5 - regulatory undertakings

We consider that the proposed regulatory undertaking to be provided by the ACMA in the "first licence" is at the heart of the preservation of the exclusive property rights in spectrum licences for which existing licensees have paid billions of dollars, if existing licensees transition their licences to the new system. The ability to procure similar exclusive property rights in the future, in the form of regulatory undertakings contained in newly issued licences, will determine the price which purchasers of "spectrum-space licences" will be prepared to pay. In the event that the form of regulatory undertaking on offer is insufficient to address the risk of erosion of rights by overlay of subsequent licences that disturb the ability to properly use the spectrum, a person seeking spectrum will either discount the value of the spectrum on offer to reflect the risk or will abandon their proposed investment altogether. The importance of getting the regulatory undertakings provisions in the new Bill right cannot be overstated.

3.6.8.1. Content of regulatory undertaking

Unfortunately, the consultation materials do not include an example of the anticipated text of a regulatory undertaking. We submit that, at minimum, there should be template text prepared for the regulatory undertakings that will be included in the successor licence to existing spectrum licences following their transition. This text should be included as part of the transitional legislation, which should deem its inclusion in all successor licences to spectrum licences following elective licence transition. We set out more detail in this regard in our comments on the Transition Paper at Question 14.

[75] ACMA Licensing System Paper, p16.

We believe that regulatory undertakings should be expressed in their text as a commitment by the ACMA to the relevant licensee.

We seek clarification as to whether a regulatory undertaking may include a limit on the number of subsequent licences that may be issued which have a relevant connection with the part of the spectrum, or may include similar provisions that set a maximum tolerance limit e.g. on cumulative transmitter emission power in the part or geographic proximity of transmitters.

3.6.8.2. Adequacy of the "specified steps" examples in subsection 53(4) of the new Bill

We are concerned that the examples of "specified steps" set out in subsection 53(4) appear to provide inadequate protection for a licensee in respect of which a regulatory undertaking has been provided.

In regard to the consultation obligation in subsection 53(4)(a) of the new Bill, we support the need for consultation with the holder of the first licence who would be affected in the event that any subsequent licence is issued which may erode the first licensee's existing use of its licence. However, mere consultation is insufficient. In order to accord protection to the holder of the first licence by means of a regulatory undertaking it is necessary that:

- consent be obtained from the holder of the first licence if anything inconsistent with the regulatory undertaking is being proposed (and this is also suggested in the Information Paper, albeit for high value licences only[76]); and
- the ACMA should be bound by the outcome of the consultation - in other words the ACMA should be constrained from carrying out a subsequent action which reverses the outcome of the consultation.

In regard to the assessment obligation in subsection 53(4)(b) of the new Bill, we seek greater clarity on the following aspects:

- currently the powers under section 53 are delegable in their entirety by the ACMA, including powers relating to assessment – is this workable in the context of delegations, or should this power only sit with the ACMA?
- is the assessment carried out subject to an obligation to consult?
- is the outcome of the assessment subject to review on the merits?
- if the assessment is carried out by a person other than the ACMA, the ACMA must be bound by the outcome.

3.6.8.3. Backward compatibility of regulatory undertakings

The effect of a regulatory undertaking is clear going forward; it binds any subsequent licensee which is provided with access to the same part of the spectrum. However, it is not clear what happens if the licensee which is first in time is not provided with a regulatory undertaking but a subsequent licensee is provided with a regulatory undertaking. It is possible to hypothesise this scenario if a subsequent licensee for technical reasons is regarded as the last possible licensee in respect of a particular part of

[76] Information paper, p17.

the spectrum. For example, it may be determined that addition of any further overlapping licences will cause the noise floor to rise to a tipping point affecting all licensees sharing the spectrum, and hence a regulatory undertaking may be given that no further licences with a relevant connection to the part of the spectrum will be issued. In this scenario, do the benefits of the regulatory undertaking automatically vest in prior licensees as well? We recommend that this issue of backward compatibility be addressed in the drafting.

3.6.8.4. Requirements for a "relevant connection" to exist

We understand sections 53 and 54 have been drafted to comprehensively capture the situations in which a relevant connection may exist, and therefore be addressed in a regulatory undertaking. However, we consider the current drafting is duplicative, and suggests the following changes could reduce the length and complexity of these sections.

Subsections 53(3)(a)-(f) could be consolidated into a single subsection 53(3)(a) as follows:

> *(a) an undertaking to the effect that, before the ACMA issues another licence under subsection 33(1) or (2) or 39(3) a part or all of which that has a relevant connection with:*
>
> *(i) a specified part of the spectrum; and*
>
> *(ii) a specified area,*
>
> *the ACMA will ensure that any or all of the following will occur:*
>
> *(iii) specified steps have been taken;*
>
> *(iv) while both the first licence and the other licence are in force, the conditions included in the other licence will comply with the requirements specified in the undertaking; and*
>
> *(v) while both the first licence and the other licence are in force, the designated statements included in the other licence will comply with the requirements specified in the undertaking.*

Subsections 53(3)(g) to (h) could be consolidated into a single subsection 53(3)(b) as follows:

> *(b) an undertaking to the effect that, before the ACMA makes a spectrum authorisation a part or all of which that has a relevant connection with:*
>
> *(i) a specified part of the spectrum; and*
>
> *(ii) a specified area,*
>
> *the ACMA will ensure that any or both of the following will occur:*
>
> *(iii) specified steps have been taken; and*
>
> *(iv) while both the first licence and the spectrum authorisation are in force the conditions of the spectrum authorisation will comply with the requirements specified in the undertaking.*

We also consider that there should be flexibility for the ACMA to give regulatory undertakings outside the scope of the existing drafting – such undertakings are likely to be of crucial importance in giving existing licensees, particularly spectrum licensees, comfort that their licences will be protected following transition to the new Bill. We suggest a new subsection 53(3)(c) be added as follows:

> *(c) an undertaking to the effect that, before the ACMA takes an action or makes a decision in relation to the first licence, the ACMA will ensure that either or both of the following will occur:*
>
> *(i) specified steps have been taken; and*
>
> *(ii) the action taken or decision made by the ACMA will comply with the requirements specified in the undertaking.*

Subsections 53(5) and (6) could be consolidated by introducing a concept of adjacency that incorporates both spectrum and geography, as follows:

Add a new definition:

> *adjacent:*
>
> *(a) in relation to a part of the spectrum (**first part**), means a part of the spectrum contiguous with the first part; and*
>
> *(b) in relation to an area (**first area**), means an area that shares at least one common boundary with the first area.*

Delete subsection 53(6) and replace existing subsection 53(5) with the below drafting:

> *(5) A part of the spectrum or an area must not be specified in a regulatory undertaking unless it:*
>
> *(a) is the same as the part or area specified in the first licence; or*
>
> *(b) overlaps with the part or area specified in the first licence; or*
>
> *(c) is adjacent to the part or area specified in the first licence.*

Subsections 54(1) and 54(2) could be consolidated as follows:

> *(1) For the purposes of this Act, a part or the whole of a licence has a **relevant connection** with:*
>
> *(a) a part of the spectrum specified in the undertaking; and*
>
> *(b) an area specified in the undertaking;*
>
> *if:*
>
> *(c) the licence authorises the operation of radiocommunications transmitters in a part of the spectrum that:*
>
> *(i) is the same as the part of the spectrum specified in the undertaking; or*

(ii) is included in the part of the spectrum specified in the undertaking; and

(d) so far as the licence authorises the operation of radiocommunications transmitters in the part of the spectrum first mentioned in paragraph (c) – the licence authorises the operation of radiocommunications transmitters in an area that:

(i) is the same as the area specified in the undertaking; or

(ii) is included in the area specified in the undertaking.

3.6.8.5. Obligation on ACMA to comply with regulatory undertaking

We strongly support the requirement set out in section 55 of the new Bill for the ACMA to be bound by the regulatory undertakings it has given in licences. We are concerned that the new Bill does not specify any consequences should the ACMA fail to comply with a regulatory undertaking. Our view is that any act of the ACMA that is in breach of a regulatory undertaking should be deemed void from its outset by the new Bill.

On the other hand, we suggest that a licensee ought to be able to waive either specific aspects or the entirety of a regulatory undertaking given by the ACMA in its favour. The reason why this is desirable is that if a licensee is seeking issue of a licence that would be denied due to a regulatory undertaking in another licence of the same licensee, it should be for the licensee to make the election on whether the regulatory undertaking should be applied.

3.6.8.6. Exception enabling issue of licence in breach of regulatory undertaking

We recognise that the exceptional cases in section 56 of the new Bill may justify the issue of a licence in breach of a regulatory undertaking. However, our view is that it is undesirable for regulatory undertakings to be overridden by the ACMA without any checks and balances on its exercise of this power. We suggest that there be a baseline requirement that the ACMA should endeavour to comply with the regulatory undertaking to the extent practicable, rather than the regulatory undertaking simply not applying as the current drafting suggests. Further, if a regulatory undertaking contained in a licence will not apply due to reliance on section 56 of the new Bill, then the affected first licence holder should be notified prior to issue of the subsequent licence. The notice should set out the nature of the anticipated breach of the regulatory undertaking so that the affected licensee can plan how it will manage the consequences. The notice can be made subject to confidentiality and security restrictions if need be.

3.6.9. Varying licences (Division 6)

The power of the ACMA to vary licences has been significantly increased compared to the current Act, however the Information Paper fails to call out these changes.[77]

First, we are concerned that subsections 57(1)(g) and (h) of the new Bill appears to give the ACMA the power to vary or revoke any regulatory undertaking given in the licence. This can be done without warning, reason, prior consultation or licensee consent. This undermines the purpose of the regulatory undertaking concept, which is to provide investment certainty to licensees that their rights in a licence will not be undermined by the issue of subsequent licences permitting interference to be caused to the first

[77] The Information Paper at p17 represents that the power of variation is continuation of the *status quo* under the current Act.

licensee. We note that the ACMA's variation and revocation power may be restricted in a statement in the licence itself, however this is insufficient comfort since we have no guarantee that such a statement would be included in licences in which regulatory undertakings are provided. It is also questionable whether it is appropriate as a matter of good regulatory practice to confer on the ACMA a power to make a regulatory instrument (a licence) that restricts, in a binding and irrevocable manner, a power the ACMA (or its successors in title) might otherwise have (i.e., the power to vary a regulatory undertaking). A better approach could be to allow the ACMA a power to include a statement in a regulatory undertaking (or in the licence) that the regulatory undertaking *is* variable at the ACMA's discretion – and absent that statement, the regulatory undertaking is not variable except by the licensee's consent. The ACMA could then include these statements as a matter of course except in cases where the regulatory undertaking is not intended to be variable at the ACMA's discretion. This would also make it clearer to a licensee bidding for a licence with a regulatory undertaking attached what the value of that regulatory undertaking is.

Our view is that a regulatory undertaking should only be capable of variation or revocation with the express consent of the licensee, and that this is a matter for the plenary legislation. We do not see any reason why the restriction on the ACMA subsequently varying or revoking a regulatory undertaking should be addressed in the licence rather than in the legislation. We can think of no hypothetical case where such a restriction could be justifiably excluded from a licence, and hence this should be a matter for plenary legislation. This would be consistent with the requirement in section 55 of the new Bill for the ACMA to comply with a regulatory undertaking that is included in a licence. The ACMA should not be able to circumvent that statutory obligation by revoking or varying the relevant regulatory undertaking.

Second, while certain licence conditions can only be varied or revoked with the consent of the licensee under the new Bill[78], the relevant protected conditions have been reduced compared to the "core conditions" for spectrum licences in the current Act. Table 2 below sets out these changes.

Table 2: Changes to variability and revocability of core conditions

Current Act core condition – s66(1)	New Bill – equivalent of core condition	Can it be varied or revoked unilaterally by the ACMA under current Act?	Can it be varied unilaterally by ACMA under new Bill?	Can it be revoked unilaterally by ACMA under new Bill?
(a) part of the spectrum in which operation of Radcomms devices authorised	Yes - s46(1)(a)	No – s72, s73[79]	Yes – s57(1)(c)	No – s57(1)(b)
(b) maximum permitted radio emission outside the part	No	No – s72, s73	Not applicable – no longer a core condition	Not applicable - no longer a core condition
(c) area within which operation of Radcomms devices authorised	Yes – s46(1)(b)	No – s72, s73	Yes – s57(1)(c)	No – s57(1)(b)

[78] New Bill, ss57(1)(b) and (c).
[79] Variation and revocation only with written agreement of licensee (current Act s72 and s73).

Current Act core condition – s66(1)	New Bill – equivalent of core condition	Can it be varied or revoked unilaterally by the ACMA under current Act?	Can it be varied unilaterally by ACMA under new Bill?	Can it be revoked unilaterally by ACMA under new Bill?
(d) maximum permitted radio emission outside the area	No	No – s72, s73	Not applicable – no longer a core condition	Not applicable – no longer a core condition

It can be seen from Table 2 that:

- The ACMA may not be able to unilaterally *revoke* licence conditions setting out the parameters of the part of the spectrum in which the licensee is authorised to operate radiocommunications devices without consent of the licensee, but it will be permitted to unilaterally *vary* those conditions. This could include reducing the spectrum space comprising the part of the spectrum or diminishing the geographic area in which radiocommunications devices are authorised. We regard this power of the ACMA to dilute rights under licences without consent as being highly undesirable. It reduces investment certainty and no justification has been provided for the ACMA to have such draconian unilateral powers. We urge that subsection 57(1)(c) should duplicate subsection 57(1)(d) by excluding from its scope for variation the conditions covered by sections 46 to 50. This would reinstate the spectrum space and the geographic area components as core conditions which cannot be varied unilaterally by the ACMA.

- The maximum permitted radio emission core conditions have been eliminated altogether in the new Bill. We consider this to be a serious omission, and query whether it is a drafting oversight. The ability to make use of a licence is dependent on there being known emission limits. Defining emission limits at the boundaries of a spectrum licence space is also fundamental for promoting a technology neutral approach to licensing where the user may deploy any technology as long as the boundary conditions are observed. Access to spectrum includes the technical parameters with which that spectrum can be used. A licensee cannot easily reverse a sunk investment in significant equipment deployment designed to operate under particular emission limits. If the emission limits contained in a licence are unilaterally wound down by the ACMA this could cause shutdown of an entire network or require very costly retuning. We urge that maximum permitted radio emission values be reinstated as a licence condition under section 46 of the new Bill, and further that this condition only be capable of being varied or revoked by the ACMA with the consent of the licensee.

Last, we are concerned about the power of ACMA to unilaterally vary and revoke designated statements in licences, especially a statement regarding renewal rights. (See also paragraph 3.6.10.2 below.) Our view is that a designated statement should only be subject to variation or revocation with the licensee's consent, as designated statements set out key parameters around a licensee's rights to use and deal with their licence, and therefore directly impact the value of the licence.

Designated statements may set out the following, all of which we view as essential aspects of the licence:

- A statement that third party use cannot be authorised, and statements restricting or limiting rights of third party use (sections 42 and 43);
- Restrictions and limitations on the ACMA's power to vary licences (section 58);
- Statements concerning renewal rights (section 59);
- Statements concerning supplementary circumstances in which a licence may be suspended or cancelled (sections 66 and 69);
- Restrictions on subdividing licences (sections 78 and 79); and
- Restrictions on assignment of licences (sections 81 and 82)]

3.6.10. Renewing licences (Division 7)

3.6.10.1. Need for legislated presumption of renewal

We note that certainty around the renewal of licences has been left to the Minister's discretion through policy statements and for determination by the ACMA in the content of licences. We are of the view that the new Bill should state a presumption of renewal applicable to all licences as the default position. We recognise that there may be circumstances in which renewal would not be made available for particular licences, however those instances can be addressed by a statement in the licence rebutting the presumption of renewal contained in the legislation and setting out the reasons.

We also note that the ACMA in its paper on the licensing system suggests that its "initial disposition" is to provide holders of long-duration licences as much predictability as possible about the licence renewal process. However, the ACMA wishes to reserve to itself "a sufficient degree of flexibility to optimise spectrum access arrangements in the band in light of new information".[80] This reinforces our concern that renewal will continue to be a discretionary decision of the regulator and/or the Minister (acting through policy statements or under the general power in section 14 of the ACMA Act), perpetuating the command-and-control spectrum management approach and repeating the difficult and longwinded negotiation process which occurred under the current Act on licence renewal. It is unfortunate that no recognition is accorded to the ability of licensees to manage technology transitions themselves, as all the Australian mobile network operators have done through several generations of technology since 1992. Licensees have additionally been successful in working together to defragment the 1800MHz band to enable the creation of larger bandwidth carriers, enabling transition in the band to 4G technology. We seek a guaranteed right of renewal for licensees on the basis of criteria that are capable of being fulfilled with certainty, so that no residual discretion is left with the ACMA to refuse renewal other than for non-payment of the spectrum access charge.

3.6.10.2. Statement in licence providing for renewal should not be subject to unilateral variation and revocation by ACMA

As noted in paragraph 3.6.9, we are very concerned with the provisions in the new Bill which enable the ACMA to unilaterally vary and revoke a statement in a licence containing renewal rights, without warning, reason, prior consultation or consent.[81] Our view is that this proposed unilateral variation power

[80] ACMA Licensing System Paper, p12.
[81] New Bill, section 57(d) and (e).

undermines any certainty which a licensee might obtain from a statement in the licence setting out a right to renew the licence.[82] We strongly urge that the legislation should contain a restriction that any such variation or revocation should only be possible with the consent of the licensee.

3.6.10.3. The kinds of "specified circumstances" that would enable renewal

We are concerned that the "specified circumstances" under which a licensee would have a right to renewal are not elaborated upon in any manner in the new Bill, not even by way of a non-binding example noted in the text. Instead, and disconcertingly, the new Bill elaborates on circumstances in which renewal rights can be disregarded by the ACMA, in subsection 61(5). The drafting appears to be tilted towards maintaining discretion for the ACMA in respect of renewal of licences and against a firm right of renewal being accorded to licensees. We consider this to be an unbalanced approach which will discourage investment, especially in transitioning to new network technologies which may develop towards the end of a licence term.

We suggest that the following circumstances could be specified as examples in section 59 of when a licensee would have a right to renewal of a licence:

- There is no restriction imposed by Australia's international obligations that would preclude renewal;
- The incumbent licensee can demonstrate substantial investment and long term prior use on a significant scale of the licensed spectrum;
- The licence is used to supply essential public services and those services could not easily be provided by another licensee;
- Failure to renew the licence would have detrimental impact on competition in a particular market;
- The licensee's use of the licensed spectrum involves infrastructure that is not easily replicable – meaning there is no value in opening the spectrum to another user;
- Renewal is consistent with a Ministerial policy statement, ACMA's work program or other documents governing licence renewal;
- The ACMA has concluded after a public consultation that the licence should be renewed; and/or
- The ACMA has a deadline to inform the licensee that renewal will not occur, and that deadline has passed

3.6.10.4. The methodology for renewal spectrum access charge should be included wherever possible

Our view is that it should be possible to anticipate the methodology that will be used to calculate the spectrum access charge to be applied for renewal, and it is undesirable to leave this entirely to the discretion of the ACMA (i.e., on a case-by-case basis). We recommend that one or more methodologies that have been developed by the ACMA in consultation with industry should be referenced as permissible methodologies for calculating the renewal price. Methodologies may include: benchmarking against local and international prices; extrapolating historical prices; or an optimal deprival valuation (i.e., the cost of substituting base station density for spectrum). Using one of these methodologies also ensures that where the renewal charge differs from the current spectrum access charge, solid reasoning

[82] New Bill, section 59(1)(a).

for increase or reduction in the charge is available, thereby increasing transparency and accountability in decision making.

3.6.10.5. Renewal opportunity should be notified by ACMA to licensee

Should there be a statement in the licence providing a right of renewal with the renewal application period set out, we submit that the ACMA should be required by section 59 of the new Bill to use reasonable endeavours to provide notice to the licensee in good time prior to commencement of that period. This could be achieved by a simple automated software function which the ACMA could manage. Notice could be given to the contact email address in the ACMA's records for the relevant licence, and evidence of receipt of notice would not need to be collected, however this "reasonable endeavours" measure would likely avoid unintentional mishaps where licensees fail to apply for renewal, resulting in public detriment.

3.6.10.6. Carry-through of regulatory undertaking and conditions to renewed licence

We note that the regulatory undertaking contained in a licence is likely to be of significant commercial value to the licensee, and hence the licensee's expectation will be that upon renewal the regulatory undertaking will be retained in the licence unless amendments are agreed by the licensee. Further, our understanding is that all of the licence conditions will be carried through upon renewal, or that at the least those licence conditions which cannot be varied or revoked unilaterally by the ACMA, will be carried through to the new licence. We seek confirmation that this will be the case, and we suggest that this be made clear in the drafting of section 62 of the new Bill. We suggest the following could be added as a new subsection 62(3) to make this clear:

> *(3) Unless the existing licence includes a statement covered by subsection 59(4) to the contrary, to the extent consistent with this Act as in force at the time of renewal a new licence issued under subsections 61(1) or 61(3) must be issued:*
>
> *(a) on the same conditions; and*
>
> *(b) with the same designated statements (if any); and*
>
> *(c) with the same regulatory undertakings (if any);*
>
> *as the existing licence.*

3.6.10.7. Criteria for setting the duration of a renewed licence

In the new Bill there are no specific criteria included for the determination of either the initial term of the licence[83] or the subsequent term upon renewal,[84] other than that neither may exceed 20 years. The ACMA has in its paper on the licence issue system provided some initial thoughts on how it would determine appropriate licence tenure.[85] The Department has indicated in its Information Paper that the licence issue process is likely to be one of the topics of the initial Ministerial policy statements. We suggest that this Ministerial policy statement also should provide clear criteria for the ACMA to determine

[83] New Bill, s33(6).
[84] New Bill, s63(4).
[85] ACMA Licensing System Paper, p12.

licence duration both for the initial term and upon renewal. This will promote consistency of the overall licence scheme and equity between licensees holding similar licences.

3.6.11. Suspending and cancelling licences (Divisions 8 and 9)

3.6.11.1. Suspension power in case of third party authorisations

As noted in paragraph 3.6.6.4 we doubt the ongoing utility of the third party authorisation construct and would much prefer that management rights be vested in licensees with the same functional outcome. However, should the drafters insist on retaining the third party construct then we strongly urge that the continuing commercial impediments to its use be addressed. One major impediment is the liability of the licensee for actions of the authorised third party, as exemplified in the risk of licence suspension in circumstances where the authorised third party contravenes a condition of the licence.[86] There is very little incentive for a licensee to provide authorisation to third parties given this risk, especially since:

- a start-up third party wanting to do something innovative with the spectrum is unlikely to have the funds to be relied upon for a full indemnity for suspension of the licence;
- a peer user of the spectrum, such as another mobile network operator, will always seek to cap any indemnity it provides as the authorised third party thereby leaving the licensee exposed for any loss above that indemnity; and
- while it may be possible to obtain insurance for the anticipated loss should the licence be suspended, this will be a costly and onerous process that parties will be reluctant to undertake.

We submit that the drafters should either delete subsection 64(1)(b)(ii) – i.e., the ACMA should not be able to suspend a licence due to a contravention by an authorised third party – or that there should be automatic lapsing of the ACMA licence suspension as soon as the licence holder has either indefinitely suspended or terminated the agreement for authorisation of the third party that contravened the licence, or should the authorisation agreement be indefinitely suspended or terminated by the licensee prior to the earmarked suspension date in the consultation notice issued by the ACMA then the licence suspension process immediately lapses. It will then be for licensees to ensure that their third party authorisation agreements include a right of immediate indefinite suspension or termination if the ACMA issues a consultation notice under section 65 of the new Bill.

3.6.11.2. Cancellation power in case of third party authorisations

Our concerns regarding the risk to the licensee of cancellation due to the actions of an authorised third party under subsection 67(1)(b)(ii) of the new Bill, are identical to those in respect of suspension discussed in paragraph 3.6.11.1 above. We submit that if a licensee receives a consultation notice from the ACMA under subsection 68(1) of the new Bill and the licensee can provide evidence to the ACMA that it has terminated the relevant third party authorisation agreement prior to the earmarked cancellation date, then the licence cancellation process should immediately lapse.

3.6.11.3. "Supplementary circumstances" in which licence may be suspended

The Department's Information Paper notes that the "supplementary circumstances" under section 66 of the new Bill for which a suspension may be issued where the licensee has not engaged in any wrongdoing, includes facilitation of spectrum re-farming.[87] We are concerned that this right might be

[86] New Bill, s67(1)(b)(ii).
[87] Information Paper, p18.

expressed in very broad terms in licences and that the consultation requirements set out in section 65 of the new Bill are not applicable to the "supplementary circumstances" suspension in section 66. We submit that the consultation obligation in subsection 65(1) should be expanded to refer to suspensions under both subsection 64(1) and section 66.

We reiterate the point we made in paragraph 3.6.2.2 above, namely that it is inconsistent to regard embargoes as an administrative tool which need not be referenced in the plenary legislation while at the same time providing in the legislation for suspension to facilitate "re-farming". Embargoes are also intended to enable repurposing of an existing use of spectrum, and their denial of spectrum access is similar in effect to a temporary suspension.

3.6.11.4. Disqualified persons

We support the addition of the disqualification process in the new Bill. Additional to the measures proposed we suggest that an individual who is the subject of three or more successive and separate determinations under subsections 70(1) or (2) of the new Bill should be subject to disqualification for a period of up to 10 years upon issue of the third determination (and not a maximum of 2 years as contemplated in subsection 70(5)(b)).

3.6.12. Surrender of licences (Division 10)

In the event of partial surrender of a licence we consider that prior to determination by the ACMA of its opinion under subsection 75(2) of the new Bill, the ACMA should be obliged to consult with the licensee on the matters set out in subsections (i) to (iii), i.e., licence conditions, regulatory undertakings and designated statements that will apply in the continuing licence. This is a prerequisite for licensees to engage in a surrender conversation, as the effect of surrender of a portion of the licence should not result in diminution of the licensee's rights to the continuing portion of the licence. We suggest that a new subsection 75(3) be added as follows:

> *(3) Before making any variation under subsection (2), the ACMA must consult the holder of the licence the part of which will be surrendered, and the holder of any other licence that may be affected by the ACMA's decision to vary the licence the part of which will be surrendered.*

Further, we recommend that additional to the incentive payment contemplated in section 76 of the new Bill, there should be an automatic statutory right to a refund of any unused portion of a licence that is surrendered (whether in terms of time remaining in the licence term or prorated to spectrum space being surrendered in a partial process). The ACMA may be entitled to payment for its administrative costs for managing the surrender however beyond that amount we consider that refunding spectrum access charges would encourage licensees to return spectrum instead of holding it. Any incentive payment should be above and beyond this refund amount.

3.6.13. Subdivision of licences – Division 11

We support the addition of an ability to subdivide licences in the new Bill; however, we are concerned that the "cost" for the licensee may be diminution of its rights under its licence conditions, designated statements and regulatory undertakings in the existing licence. The test applied to how the ACMA transitions these aspects of the licence into the new subdivided licences is merely that any changes

should be, "[i]n order to give effect to the subdivision …"[88] There could be many such ways to give effect to the subdivision, and therefore the test does not set an appropriate benchmark for the ACMA in determining the content of the new licences. Our view is that the better approach is that the new licences should by default inherit all aspects of the prior licence including conditions, designated statements and regulatory undertakings, unless carrying these aspects through to the new licences is inconsistent with subdivision or the licensee waives this right in part or whole.

Further, we recommend that subsection 77(7) allow for the possibility that the new subdivided licences may commence at different times even though the prior licence has been revoked. There may be good reason for allowing such a pause in commencement, for example to facilitate equipment retuning or conclusion of commercial arrangements for sale of one of the subdivided licences. We do not think the possibility should be ruled out in the legislation.

Last, we note that while subdivision has been introduced by the new Bill, there is no corresponding ability to amalgamate two current licences into a subsequent merged licence. We understand from the Department that it considers the ability to amalgamate to be part of the variation rights under the Bill; however, the express inclusion of the subdivision right creates a level of ambiguity about whether the amalgamation right in fact exists. We urge the Department to clarify that the right exists and avoid the risk of a dispute in future about whether the ACMA has the right to amalgamate a licence. Our preference is for the right to be included as a new provision in the new Bill. Alternatively, the explanatory memorandum for the new Bill should explain that licence variations are intended to cover amalgamations (with the licensees' consent).

We consider that this approach to amalgamation would be similar to subdivision, and that this may be a useful option for the ACMA and licensees to have in their toolkit. These provisions should be capable of enabling merging of licences with different dimensions of frequency, geography and time.

3.6.14. Assignment and dealing with licences (Divisions 12 and 13)

We seek clarification on the "special circumstances" in which the ACMA would permit the assignment of a licence to a disqualified person under subsection 80(3) of the new Bill.

We suggest that subsection 83(2) which sets out circumstances in which a licence may not be dealt with, be augmented with a provision similar to subsection 80(2)(c) barring the involvement of a disqualified person. Our view is that a disqualified person should not have any association with radiocommunications licensing in any way during the period of the disqualification.

3.6.15. Resumption of licences (Division 14)

We note that section 87 prescribes that resumption will take effect:

- in the case of resumption of a licence in whole, on the day specified in the resumption notice or if no such day is specified then at the end of the day on which the notice is given;[89] but
- if only part of the licence is resumed, then that part when the Register is updated.[90]

[88] New Bill, ss77(4), (5) and (6).
[89] New Bill, s87(1).
[90] New Bill, s87(2).

We suggest that for consistency in both cases the resumed licence should only cease once the Register has been updated, and that notice should be given by the ACMA to the licensee to confirm the change in the Register within 24 hours after it has been updated. We note that the Information Paper says that in respect of assignments changes in the status of licences should only become effective once reflected in the Register in order to ensure public confidence in the Register,[91] so this should also hold true in respect of resumption in our view.

In the case of part resumptions, we reiterate our concern regarding carry-through of licence conditions, statements and regulatory undertakings to the surviving licence terms, which we expressed in respect of subdivision in paragraph 3.6.13 above. Our view that the test should not be entirely discretionary for the ACMA to vary the licence "in the way that in its opinion best gives effect to the resumption". We consider that the better approach is that the surviving licence should by default inherit all aspects of the prior licence including conditions, designated statements and regulatory undertakings, unless carrying these aspects through to the surviving licence is inconsistent with resumption or the licensee waives this right in part or whole. We are concerned that if this default approach is not set into the new Bill, the power of partial resumption could be used as a mechanism by the ACMA to amend the content of the licence and particularly any regulatory undertaking in the licence. We consider that licensees should enjoy the benefit of certainty that in the event of partial resumption (which is likely to be unwelcome to the licensee) there should not be a secondary impact of dilution of rights in the residual licence.

3.6.16. The Register (Division 15)

We consider that the power available to the ACMA to deregister a device under subsection 92(5)(d) of the new Bill should only be exercisable following the ACMA providing notice to the licensee of its intention to do so.

3.6.17. Miscellaneous (Division 16)

We note that subsections 97(2) and (3) of the new Bill exclude the ACCC's powers under the merger and acquisition review provisions of the Competition and Consumer Act to consider the issue of licences, if such licences are issued under cover of a licence issue limit. As noted in paragraph 3.6.4 above we are concerned about licence issue limits enduring for an indefinite period and the inflexibility this may cause. This is especially the case where 'spectrum space' licences may have 20 year terms during which technology may change significantly. We suggest that all licence issue limits which endure for more than four years should be subject to a mandatory review before their fifth anniversary to determine if they should continue, using the same consultation mechanism by which the limits were initially determined.[92]

3.7. Part 7 – Spectrum authorisations

In our response to Part 7, we outline our concerns in relation to spectrum authorisations. Our primary concern is the potential for spectrum authorisations to overlap licensed spectrum, thereby eroding the rights afforded to the licensee. We also suggest that terminology may need to be refined in the event that third party authorisations are retained in the new Bill.

[91] Information Paper, p19.
[92] This would be in accordance with the new Bill, s37.

3.7.1. Simplified outline (section 98)

We suggest that if (contrary to our submission under paragraph 3.6.6.4 above) the concept of a third party authorisation is retained in the new Bill, either the terminology of "spectrum authorisation", or "authorisation" under Part 6 should be changed. The use of the word "authorisation" in two separate contexts is confusing for readers of the new Bill and people who might benefit from either type of authorisation. We suggest use of the term "general use determination" or "spectrums common determination" or similar to describe a spectrum authorisation is one potential method would reduce the potential for confusion between spectrum authorisations, and third party authorisations (if the concept of third party authorisations is retained).

3.7.2. Spectrum authorisations and conditions of spectrum authorisations (sections 99 and 100)

3.7.2.1. Spectrum authorisations should not overlap with licensed space

We consider the conditions in proposed subsection 100(2) to be appropriate examples of conditions that could be imposed on a spectrum authorisation. However, we are concerned about the conditions described in proposed subsections 100(3) and 100(4), particularly in relation to licences under the new Bill that are similar to spectrum licences under the current Act (i.e., spectrum space licences). As we have stated previously[93], the proposal to allow spectrum authorisations in already licensed space introduces risk and uncertainty for licensees who may have invested significant capital to secure their rights over a scarce resource. Introducing a mechanism under which the regulator could grant authorisations eroding those rights could lead to a reduction in value and utility of the resource to the licensee.

We consider that the appropriate mechanism for managing authorisations in space already licensed under the proposed Part 6 in most cases will be delegated management rights granted as part of the licence. Existing licensees are likely to be best placed to assess the appropriateness of spectrum authorisations in their licensed space, and allowing for this management would reduce regulatory uncertainty about the value of the licence. On this basis, the default position should be that a spectrum authorisation cannot be issued where it will overlap existing licensed spectrum, without consultation and detailed consideration of the interference potential of the spectrum authorisation. This matches the approach taken in section 138 of the current Act in relation to spectrum licensed space. Since the new Bill abolishes the legislative distinction between spectrum licensed and apparatus licensed spectrum, this default position should apply generally to all licences, with exceptions for "apparatus" licensed space dealt with in relevant licence issue schemes and specific licence conditions / designated statements.

We suggest that proposed subsections 100(3)(b), 100(4)(a)(ii) and 100(4)(b) be removed from the new Bill, and a new subsection 100(5) be introduced which replicates the requirements of section 138 of the current Act. Section 138 states that before issuing a class licence in spectrum licensed space, the ACMA must:

- consider the potential for unacceptable levels of interference caused by issuing the spectrum authorisation;
- consider whether the issue of the spectrum authorisation is in the public interest; and

[93] Telstra Corporation Limited, *Submission in response to the Legislative Proposals Consultation Paper –Radiocommunications Bill 2016*, paragraph 2.6.

- consult with affected licensees and other affected parties before issuing a spectrum authorisation.

We suggest the following drafting of new subsections 100(5) and 100(6) would achieve this purpose:

> *(5) Before issuing a spectrum authorisation in which the part of the spectrum and area specified in a condition referred to under subsection (2) is the same as, or overlaps, or is adjacent to, a part and area that is specified in a condition of a licence referred to in subsection 46(1)(a), the ACMA must:*
>
> *(a) consider the potential for unacceptable levels of interference caused by issuing the spectrum authorisation;*
>
> *(b) consider whether the issue of the spectrum authorisation is consistent with the objects of this Act stated in section 3; and*
>
> *(c) consult with affected licensees and other affected parties before issuing a spectrum authorisation.*
>
> *(6) A licence may include a statement that the ACMA may issue a spectrum authorisation in a part of the spectrum and area that is the same as, or overlaps, or is adjacent to, a part and area that is specified in a condition of that licence, without following the process in subsection (5).*

This approach suggests consultation and consideration of affected licensees is the default position before issuing spectrum authorisations, but provides the ACMA flexibility to issue licences that do not require consultation or consideration before a spectrum authorisation is issued in the same space. The statement referenced in subsection 100(6) should be considered a designated statement under the new Bill.

We note that the drafting suggested above incorporates use of the term “adjacent” which we have suggested at paragraph 3.6.8.4 above could have a meaning that relates both to spectrum and geography.

We also consider that industry may have a role in consulting on and developing spectrum authorisations that could apply to entire bands – for example, mobile operators may be best placed to collaboratively develop and propose to the ACMA a spectrum authorisation that would apply across the mobile bands to authorise use of mobile repeater technology. This position is outlined in more detail in paragraph 3.13 of our submission on Part 13 of the new Bill.

3.8. Part 8 – Certified operators

We welcome the continuation of certified operators (previously qualified operators under the current Act) and the processes for certification contained in the new Bill. We believe that certificates of proficiency will lead to greater compliance with licence conditions and lower levels of interference, although we caution against inadvertent introduction of unnecessary administrative burdens or device-centric requirements into the legislation. We also suggest that the classes of radiocommunications devices need to be defined, possibly in the explanatory memorandum.

3.8.1. Part 8 Division 1—Introduction

The proposed certification rules introduce the concept of specified classes of radiocommunications devices such that the certificates of proficiency will only apply to select classes, rather than to all

radiocommunications devices. However, we observe that there is no guidance as to what a class of radiocommunications devices means or to which classes the certification will apply. We recommend that all classes be defined and that the classes for which certification is a prerequisite be clearly identified. We propose that this could be done in the explanatory memorandum.

As we noted earlier at paragraph 3.5.1 (h), we also recommend that certificates of proficiency are only relevant to the operation of transmitting devices (for the purpose of managing interference) and consistent with this, we recommend that this Part can be narrowed to make reference to a specified class of radiocommunications transmitting devices.

Furthermore, since the new legislation is intended to be less device-centric and more about spectrum access, there needs to be provision for operator certification to be associated with licences which authorise access to spectrum.

3.8.2. Part 8 Division 2—Certificates of proficiency

We support the proposed ability for the ACMA to delegate its power under section 108 to issue certificates. We observe that under proposed subsection 108(3), the delegate is not entitled to make a final decision refusing to issue a certificate of proficiency. We suggest that a less burdensome approach would be to allow for the delegate to make a final decision, but with the decision being reviewable through a dispute resolution process involving the ACMA. This would avoid the ACMA having to be involved in all decisions where a delegate decides not to issue a certificate, noting that many of these may not be controversial.

3.9. Part 9 – Interference management

We welcome the substantial reform of the dispute resolution process contained in Part 9 of the new Bill, and we support the majority of the construct. In our response to Division 2, we identify a few areas where greater clarity could be achieved and in Division 3 we outline our support or concern regarding the changes relative to the current Act. In Division 4 we express our concerns related to the broad use of the term “interference” and finally in Division 5 we reiterate our position that interference can arise from poor performance of the victim receiver itself, and as such, powers of inspectors need to extend to all radiocommunications devices.

3.9.1. Part 9 Division 2 – Resolution of interference complaints

3.9.1.1. General comments on the new dispute resolution process

We welcome the substantial reform of the dispute resolution process contained in the new Bill. We have previously been advised by the ACMA that the conciliation process in Part 4.3 of the current Act has only ever been used on one occasion. This suggests that the existing process does not work to resolve interference complaints. We support the streamlining of the dispute resolution provisions and the proposal that the detail be entrusted to the ACMA to develop in the form of non-binding guidelines under section 112 of the new Bill. This approach enables the ACMA to test approaches and amend them if, as with the current conciliation process, they prove to be unattractive to parties in an interference dispute. This is the level of flexibility we believe is necessary in an increasingly congested spectrum environment where interference disputes are likely to become more common and may also manifest in unexpected ways.

3.9.1.2. Definition of "complainant"

Section 111 provides that an interference complaint is a complaint made by the "holder of a licence", who is defined as "the complainant". However, section 113 provides that the section applies if "a person" makes an interference complaint, and defines that person as "the complainant". The two provisions seem, therefore, to be inconsistent: in section 111 the making of a complaint is limited to a licence holder whereas in section 113 it appears that any person can make a complaint, and not only a licence holder. The effect of a wider scope of persons who can be the complainant would be to extend the opportunity to make a complaint, for example to persons operating radiocommunications devices under spectrum authorisations. It seems that the intention was to confine the arrangements in Part 9 Division 2 to complaints made by licence holders but for certainty we request that sections 111 and 113 be made consistent in this regard.

3.9.1.3. Scope of conduct captured

We note that Part 9, Division 3 prohibits conduct that "*will result, or is likely to result, in interference*", whereas section 111 specifies conduct that "*has caused, is causing, or is likely to cause interference*". We propose that section 111 be amended so as to also capture conduct which results in, but does not directly cause, interference, consistent with the Division 3 approach. Our rationale is that given that an interference complaint for the purpose of Division 2 is dealt with by a dispute resolution process and not any punitive sanction, the net should be cast as widely as possible in enabling such complaints to be brought to the attention of the ACMA.

Our proposed amendment to subsection 111(1)(a) to give effect to this proposal is as follows:

> *"For the purposes of this Act, an **interference complaint** is a complaint made by the holder of a licence (the **complainant**) to the effect that:*
>
> > *(a) one or more other persons have engaged, are engaging, or propose to engage, in conduct that has ~~caused, is causing or is likely to cause~~ resulted in, is resulting in, or is likely to result in: …"*

[*strike-out indicates deletion; underline indicates addition*]

3.9.1.4. Removal of offence provision for adverse action against employees / prospective employees

We note that one change in the new Bill which the Information Paper does not mention, is the deletion of the offence provision in section 216 of the current Act, under which it is an offence for a person to take adverse action against an employee or prospective employee for initiating or cooperating in a conciliation process. We are comfortable with this on the basis that the civil penalty provisions under the *Fair Work Act 2009* (Cth) provide recourse for individuals affected by such conduct; it is not necessary to have an offence provision.

3.9.1.5. Responsibility of the ACMA after investigation and/or referral to alternative dispute resolution

We note that in some cases interference disputes arise between two licensees each of which is compliant with its licence terms. Licence technical frameworks seek to minimise the likelihood that a fully compliant licensee could cause interference to another licensee, but cannot completely exclude this possibility. In such an instance we would look to the ACMA to help facilitate agreement between the

licensees including referral to alternative dispute resolution if appropriate. We consider that the approach set out in section 113 will enable the ACMA to manage such disputes in an appropriate manner. However, what is lacking in Part 9 Division 2 is a mechanism for the ACMA to learn from these types of disputes where two compliant licensees are involved. We submit that the ACMA should take responsibility for making adjustments and correcting any anomalies in the licensing framework that it learns about through such disputes. We propose that this obligation should be added as a new section 113A:

"113A ACMA must take steps to prevent future complaints

(1) This section applies if the ACMA has investigated a complaint of interference, disruption or disturbance under subsection 113(2) or referred a complaint to alternative dispute resolution under subsection 113(3).

(2) The ACMA must determine whether there is appropriate action that it could take to prevent a future occurrence of the interference, disruption or disturbance which was the subject of the complaint.

(3) Prior to making its determination in subsection (2), the ACMA may consult with persons who were, or could in the future be, affected by the interference, disruption or disturbance which was the subject of the complaint.

(4) In making the determination under subsection (2) or carrying out the consultation under subsection (3), the ACMA must adhere to any confidentiality regime governing information disclosed during an alternative dispute resolution process under subsection 113(3)."

Last, we note the commitment in the Information Paper to maintaining the ACMA's primacy in managing interference and enforcement.[94] We reiterate our view expressed in prior submissions that this is a key regulatory function of the ACMA which must allocate appropriate resources to carrying it out.

3.9.2. Part 9 Division 3 – causing interference

3.9.2.1. Our response to specific changes from the current Act

This Division of the new Bill will replace Part 4.2 of the current Act. We note the following aspects are to be amended by the new Bill:

a) Offences: The way in which the offences are framed in respect of knowledge of the offender regarding the likely harm has been changed in the new Bill. In the current Act, determination of the occurrence of an offence depends on the knowledge of the relevant person as to whether the interference the person is causing, is likely to have the relevant harmful impact.[95] However, the "knowledge" test in the current Act includes constructive or imputed knowledge,[96] hence it is not a purely subjective test. In the new Bill, there is no reference to a person's knowledge of the likely harmful impact of the relevant interference the person is causing.

[94] Information Paper p22.
[95] Current Act, ss192, 193(1), 194.
[96] Current Act, s200.

Our view is that the change is beneficial in simplifying the evidentiary burden in the prosecution of interference offences, by adopting a more objectively-based test regarding whether the conduct results, or is likely to result, in interference causing harm. We recognise that there may be little substantive difference in the case of a person who is experienced and knowledgeable in radiocommunications (because under the current Act that person would be imputed with knowledge of the likely harmful outcome). But, the removal of the "knowledge" test does appear to narrow the ground somewhat for perpetrators of harmful interference to claim a defence of ignorance.

b) Transmission of false information or transmission of information likely to cause an explosion: The offences of transmission of false information[97] and transmission likely to cause explosion,[98] have been deleted.

We note that there is already sufficient coverage of this kind of conduct under the *Criminal Code Act 1995* (Cth) in respect of making a false statement to a Commonwealth authority, and under the various State Crimes Acts in respect of creating a false belief, and hence the offences are redundant.

Both offences are concerned with the content of the transmission rather than the fact that the transmission is being made:

- the offence of transmission of false information requires particular content to be conveyed in the radiocommunication transmission; and
- the offence of transmission likely to cause explosion requires there to be an explosive device or flammable item of some kind in place, and the signal or message being communicated by the transmission then causing the explosion. (It is possible that a mere radiocommunication transmission at a particular frequency might act to cause the explosion, but such direct causative conduct is already addressed by the *Criminal Code.*)

Both existing offences have been a poor fit with the predominantly technical regulatory content of the current Act and we agree that they should not be retained in the new legislation.

c) Civil penalties: The addition of a civil penalty enforcement option for the ACMA, for conduct causing substantial interference.[99]

We support the introduction of civil penalties for conduct causing substantial interference. In the current Act there are two levels of offence, namely reckless causation of interference[100] and the more serious offence where the perpetrator knows the conduct is likely to endanger the safety of another person or cause another person substantial loss or damage.[101] Nonetheless, the ability of the ACMA to prosecute even the lower degree offence of reckless conduct is limited by the stringency of the evidentiary burden which the Director of Public Prosecutions must discharge. The new civil penalty provisions enable the ACMA to appropriately calibrate its enforcement to

[97] Current Act, s198.
[98] Current Act, s199.
[99] New Bill, s114(3). References to causing substantial interference should be taken to include the other types of harm, namely "substantial disruption" and "substantial interference".
[100] Current Act, s197.
[101] Current Act, s194.

the nature of the conduct, especially for first offenders, situations where the interference harm is limited due to a rapid ACMA response, or cases where the conduct may be unwitting.

d) No offence for offshore substantial interference: It appears that while the offence of transmitting television and radio programs from outside Australia (i.e. "pirate broadcasting") has been retained, the related offence of causing substantial interference by radiocommunications from transmitters located offshore, has not been retained.[102] We did not find any explanation for this omission in the accompanying materials to the new Bill.

We are unsure as to why the offence set out in subsection 195(1)(b) of the current Act has been omitted. Is it because the drafters believe that the new provision in subsection 114(1) would in any event cover such extraterritorial conduct which causes substantial interference to radiocommunications in Australia? If so, we are unclear why a specific provision has been retained in subsections 114(2) and (4) to deal with extraterritorial "pirate broadcasting", given that such broadcasting would be unlicensed and therefore subject to prosecution under the Broadcasting Services Act. This appears to be an unnecessary "belts and braces" offence included to address particular broadcast licensee sensitivities. Our view is that should there be call for a special provision to deal with extraterritorial operation of transmitters, then the same logic should apply to offshore transmitters which cause substantial interference.

We understand that there have been few if any instances of pirate broadcasting from offshore that have been prosecuted in Australia since the current Act was introduced in 1992. This suggests that it may be unnecessary to retain such a bespoke provision to deal with pirate broadcasting by offshore transmitters, particularly in the era of digital streaming when thousands of audio and video content options are available to the public using applications on their devices.

e) Written exception to allow interference: The exception for obtaining the ACMA's written permission which is in the current Act,[103] has been retained in the new Bill but has been expanded from only applying to cases where the substantial interference is caused to emergency services, police and other medical providers / first responders, and transmissions from foreign vessels/aircraft/space objects in the current Act, to apply more widely in the new Bill to all the interference offences.[104]

We support the extension of flexibility to the ACMA to provide written permission in appropriate cases where there is justification to nonetheless allow operation of the transmitters even though there exists a risk that substantial interference may be caused. However, we believe that the expansion of the availability of written permission to the full range of interference situations requires an increased level of transparency by the ACMA when it grants such permission. We submit that the ACMA should be required to provide public notice on its website of all such cases of granting written permission under subsection 114(5)(a) and the issue of a direction under subsection 114(5)(b), as soon as reasonably possible following grant of the written permission. Further, the ACMA should consult on criteria for the grant of such permission and should maintain a register of prior permissions so that any person interested in seeking such permission is able to understand the typical circumstances in which permission may be granted. These transparency obligations will encourage consistency and predictability in the ACMA's

[102] Current Act, s195 and new Bill, s114(2).
[103] Current Act, ss193(1) and 195(1).
[104] New Bill, s114(5).

approach to granting written permission under subsection 114(5) and more generally accords with best regulatory practice.[105]

3.9.2.2. Interference notwithstanding compliance by the operator of the transmitter with licence obligations

The new Bill prohibits a person from engaging in conduct that is likely to cause substantial interference, disruption or disturbance to radiocommunications, whether or not the operation resulting in the interference was done in compliance with licence conditions.[106] Although the ACMA can grant permission or issue a direction authorising such conduct, there is still a risk that as drafted, a licensee could be compliant with all of the conditions of its licence, but still cause substantial interference to radiocommunications (for example if there is an unanticipated technical incompatibility).

We point out that interference is not necessarily caused solely by transmitters, but additionally can be the result of poor performance of the victim receiver itself, for example due to failure in selectivity, blocking and filtering functionality. Interference caused to a receiver which has design or performance shortcomings is not necessarily attributable to the transmitter causing the interference, and resolution may only be achievable by replacement or repair of the affected receiver. Maintaining adequate receiver performance standards is important to minimising harmful interference. We propose that the ACMA also needs to be able to direct "non-licensees" who may be operating a deficient receiver (e.g., UHF TV receivers that are susceptible to 700 MHz mobile emissions) in the event that they are experiencing interference caused by a licensed transmitter operating correctly and in accordance with the licence conditions. We address this further at paragraph 3.9.3.

Our view is that there should be a safe harbour applicable where the interference is caused despite compliance with a licence condition – for example, the ACMA could be deemed to have granted permission in these circumstances. Any ongoing issue could then be addressed via the interference management process in Division 2 and a direction by the ACMA.

We propose that a further subsection be included in section 114 as follows:

> *(10) Subsections (1), (2), (3) and (4) do not apply if the person engaged in the conduct, or used the transmitter, in accordance with the conditions of a licence issued under Part 6.*

3.9.2.3. Intentional interference with use of spectrum authorisations

Our initial understanding of the provisions in Division 3 dealing with interference is that they cover conduct that will result, or is likely to result, in substantial interference with the use of a spectrum authorisation for radiocommunications. We recognise that spectrum authorisations do not confer any interference protection; however, we are concerned about conduct which intentionally interferes with the use of spectrum authorisations. A recent example in the United States has been intentional steering of Wi-Fi traffic by hotel operators and conference venues away from low-cost and free Wi-Fi hotspots and towards their own higher cost Wi-Fi hotspots.[107] Our view is that such conduct should be an offence or at least subject to civil penalties. The Telstra Air® network is Australia's largest Wi-Fi network, and our

[105] The *Australian Government Guide to Regulation* recommends full consultation as the default approach for decision-making, with transparency and public accountability of decision-making cited as the most important priorities (see pages 41-42).
[106] New Bill s114(3).
[107] See Thomas Claburn, "Marriott Pays $600,000 for Jamming WiFi Hotspots", *Information Week*, 4 October 2014, http://www.informationweek.com/mobile/mobile-devices/marriott-pays-$600000-for-jamming-wifi-hotspots/d/d-id/1316354

customers enjoy free Wi-Fi data at over 1 million Telstra Air® hotspots across Australia. There are numerous other low-cost and free Wi-Fi networks in Australia providing valuable services to the public including municipal networks. The objects of the Act include the management of spectrum in a manner that facilitates the use of the spectrum for public and community purposes.[108] If there is doubt as to whether intentional interference with the use of a spectrum authorisation is covered by the proposed interference provisions in Part 9, we strongly urge that a specific provision be added to address this.

3.9.3. Part 9 Division 4 – Directions to licensees

We are concerned that the ACMA's power to direct licensees in section 116 of the new Bill need only be, "*for the purpose of avoiding, minimising or reducing interference to radiocommunications*". This falls significantly short of the minimum requirement that there be "substantial interference" (emphasis added) in the civil penalty and offence provisions of Division 3. We note that "interference" is pervasive in the radiocommunications environment, with most radiocommunications transmissions having to contend with some level of interference or a "noise floor". It is only harmful interference which has a material impact on radiocommunications services that is of concern to licensees, not any interference. We are concerned that the ACMA is being given extensive direction powers in respect of licensees, which could extend to complete shutdown of the licensee's network indefinitely, on the basis of a trigger which may be a trivial level of interference. These extensive powers can be delegated to the individual judgment of an inspector under section 118 and are backed by the threat of criminal proceedings in respect of a strict liability offence in section 117. We submit that this goes too far and is a disproportionate consequence for what may be a relatively trivial issue. Proportionality has been identified as important to best practice regulation.[109]

We strongly urge that the trigger for the directions power under section 116 be, at the very least, substantial interference, or else the ACMA's directions may be disproportionate to the mischief they seek to address. We propose that the directions power be similarly limited to the inspection powers of inspectors under Part 9 Division 5, so that action taken is no greater than is necessary to minimise interference.

We also strongly urge that a direction made under section 116 be included as a reviewable decision under section 209 of the new Bill. It is best practice to allow for independent review of directions in circumstances where the consequences arising from the direction could be considerable and far-reaching. As outlined above, the direction power enables the ACMA (in cases of interference) to shut down a licensee's network indefinitely which would have a considerable impact. Allowance for independent review of a direction is even more crucial if our submission to limit section 116 to substantial interference is not accepted.

Last, as noted in paragraph 3.9.2.2 above, it is incorrect to presume that interference is always the fault of the person operating the transmitter. It is possible that the victim receiver may be operating inadequately due to inconsistency with applicable minimum technical standards. The current drafting of section 116 appears to only contemplate directions in respect of transmitters. This may leave a gap where the better solution is to fix problems with the receiver.

[108] New Bill, s3(a)(ii).
[109] See for example the *Australian Government Guide to Regulation* p36, which states that the effort and expense of regulation should be proportionate to the problem it is trying to solve.

3.9.4. Part 9 Division 5 - Powers of inspectors in emergencies

As noted in paragraph 3.9.2.2, we are concerned that there is a presumption contained in section 119 that it is always a transmitter which is the cause of interference, when it is quite possible that the victim receiver is suffering from poor design or degraded performance. The power of inspectors under subsection 119(e) to take action should extend to adjusting receivers as well, or else inspectors will have only a part of their necessary toolkit in an emergency situation.

3.10. Part 10 – Equipment

Part 10 of the new Bill contains the rules on equipment (including supply chain and importation), the use of protected symbols, bans on certain types of equipment and rules for the recall of equipment. The majority of our commentary for Part 10 centres on the equipment rules contained in Division 2. We are satisfied with the drafting in relation to protected symbols (Division 3) and offer no commentary on this division. We then outline reasons for our support for the drafting on bans on equipment (Division 4), and on the recall of equipment (Division 5).

3.10.1.1. Part 10 Division 2 – Equipment rules

We welcome the provisions in the new Bill that enable equipment rules to target the supply chain for devices which are not legal for use in Australia. The focus of the offence provisions in the current Act is on the conduct of end users of devices, for example in causing interference such as when a person operates a mobile repeater for which no authorisation has been granted by the relevant spectrum licensee. As we have noted in previous submissions to the ACMA and the Department,[110] often the end user is an unwitting offender. The real mischief lies with the offshore vendors of such devices who misappropriate Australian mobile network operators' intellectual property (such as our brands and logos), and make misleading and deceptive claims to Australian consumers that the devices they are selling are legal for use in Australia. However, the current Act makes it difficult for the ACMA to target such supply.[111] In the absence of legislative reform the ACMA has been forced to rely on workarounds such as reliance on the section 301 "eligible radiocommunications device" provision,[112] which although covering supply is an awkward fit for mass-market consumer devices.

We support the provisions of the new Bill that enable the ACMA to take action directed at suppliers of radiocommunications devices that are liable to cause harmful interference. This includes devices that are not authorised by a licensed carrier. In particular, subsections 121(3)(g) and 124(3)(b) of the new Bill make it clear that equipment rules may impose obligations or prohibitions in respect of the supply of equipment, and subsection 124(4) enables the prohibition of supply (or offering to supply) under the equipment rules unless the supplier satisfies particular conditions. We propose that the ACMA commences preparation of the initial equipment rules and stakeholder engagement as soon as possible so that the ACMA can make these equipment rules immediately after the new legislation comes into force.

[110] See Telstra submission to the ACMA in response to the consultation, *Cellular Mobile Repeaters – a Proposed Regulatory Approach*, 21 October 2011; letter from Telstra to the Department, "Cellular mobile repeaters – proposed changes to Radiocommunications Regulations" 3 May 2013; Telstra submission to the Department of Communications Spectrum Review - Potential Reform Directions, 4 December 2014, Attachment 1; and Telstra submission in response to the *Legislative Proposals Consultation Paper – Radiocommunications Bill 2016*, 13 May 2016, Attachment A.

[111] The ACMA discusses the difficulty of targeting supply in its paper *Equipment rules – supporting material for the Exposure Draft of the Radiocommunications Bill 2017* (p3).

[112] See *Radiocommunications Amendment (Cellular Mobile Repeaters Supply— Specified Particulars) Regulation 2013 (Cth)*.

While the specific equipment rules remain to be developed and made by the ACMA, our understanding is that these provisions would enable the ACMA to effectively create "blacklists" and "whitelists" of devices and make that information known to the public. For example, if the ACMA made an equipment rule that only permitted the supply of mobile repeater devices which a carrier licensee providing public mobile telecommunications services (i.e. a mobile network operator) has agreed may be used in its spectrum space, then the list of those devices would become the "whitelist". On the other hand, if a device was being sold to the public without such authorisation, then the ACMA could take civil penalty enforcement action (an option not available under the current Act) and put the vendor on the "blacklist" so that the public can determine whether a device is legitimate. Provisions such as subsection 124(5) dealing with representations made on websites also update the ACMA's powers to modern conditions where supply chains often are direct from the offshore vendor to the public rather than traversing intermediaries such as importers and local distributors.[113]

We acknowledge the ACMA's point in its consultation paper that the current Act's section 301 "eligible radiocommunications device" scheme is being retained in the new Bill.[114] However, as noted by the ACMA the section 301 scheme has only ever been used once, to manage supply of mobile repeaters, and even in that case its use was a last resort due to perceived inability to obtain necessary amendments to the current Act in a timely manner. The use of the section 301 scheme for mobile repeaters is an awkward fit with cumbersome regulatory obligations. We recognise and appreciate that the ACMA was forced into this position in order to address the scourge of illegal repeaters flooding into the Australian market by 2013. However, we suggest that, as soon as the new Bill comes into force and appropriate equipment rules are made:

- the management of supply of mobile repeaters be subject to the much better suited equipment rules approach; and
- the existing section 301 scheme for mobile repeaters be terminated.

We have no objection to the retention of the ability to make arrangements for supply to only those persons authorised to operate the relevant transmitters; however, we consider that the one-to-one authorisation requirement is not an appropriate mechanism to deal with mass market products such as mobile repeaters. We also believe that using an ACMA-issued spectrum authorisation to enable the operation of mobile repeaters is inappropriate given the illegal devices are relatively high power devices and there is a risk of offshore vendors claiming the shelter of the spectrum authorisation when their devices are not compliant. (Noting that the offshore vendors already misrepresent that are compliant on their websites, despite being advised by the ACMA that they are violating the current Act.) Only the licensees of the relevant spectrum space, i.e. the mobile network operators, should be able to authorise the use of such devices, and this can be facilitated by an appropriate use of the equipment rules provisions. Our preference, as noted in our response covering section 99 contained in Table 3 in paragraph 3.17.1.3, is that licensees be enabled to issue spectrum authorisations within their own "spectrum space licences" as a form of delegated management rights under Part 17. However, if this is not possible, then we suggest that there be a mechanism created for bulk third party authorisation for mass consumer devices under Part 6 Division 3, with the removal of record keeping obligations (particularly given these devices would be the subject of equipment rules).

We look forward to the early development of draft equipment rules, so industry can provide more in depth comment on their content. We believe the equipment rules provide a valuable opportunity to align

[113] See *Equipment rules – supporting material for the Exposure Draft of the Radiocommunications Bill 2017*
[114] ACMA *Equipment Rules* Supporting Material, p6. In the new Bill, the equivalent of the current s301 is the new s121(3)(g).

compliance obligations, particularly in respect of electromagnetic energy (**EME**). For example, both the International Commission on Non-Ionizing Radiation Protection (**ICNIRP**) and the Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**) are currently reviewing their EME standards. In that regard, it would be beneficial to know whether the ACMA intends to incorporate revised standards into the equipment rules and, if timing does not align, whether the ACMA will review the equipment rules when relevant standards are revised. In addition it would beneficial to understand how the ACMA will use the equipment rules to resolve inconsistences in compliance obligations between international and Australian standards and domestic inconsistences such as the ACMA requirement to assess EME at base stations on a single transmitter basis as opposed to the ARPANSA requirement of cumulative assessment. We further welcome the ability under the new Bill to delegate certain functions under the equipment rules to accredited persons.[115] We envisage that this may, for example, enable industry representative bodies such as the Australian Mobile Telecommunications Association and Communications Alliance to play a role in implementation of the equipment rules.

We welcome the private right of action for damages under the new Bill in respect of contraventions of section 134 (supply in contravention of an interim ban) and section 140 (supply in contravention of a permanent ban). However, we suggest the private right of action should also arise in respect of contraventions of the equipment rules made under section 125.

We also propose that the rights available to private parties should include the right to make an application to the Federal Court for declaratory relief and injunctions. We suggest that the private right of action under Part 10 be condensed into one provision, which mirrors that provided in section 30 of the act. We propose the following drafting:

Civil action

(1) If:

*(a) a person (the **claimant**) suffers loss or damage, or is likely to suffer loss or damage, because of conduct engaged in by another person; and*

(b) the conduct contravened any of sections 125, 134. 140 or 146(2);

the claimant may apply to the Federal Court for relief (an injunction, an order directing the defendant to do a specified act, damages or some other relief) against:

(c) that other person; or

(d) any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

(3) A reference in this section to a person involved in the contravention is a reference to a person who has:

(a) aided, abetted, counselled or procured the contravention; or

[115] New Bill, s127.

(b) induced the contravention, whether through threats or promises or otherwise; or

(c) been in any way (directly or indirectly) knowingly concerned in or a party to the contravention; or

(d) conspired with others to effect the contravention.

3.10.1.2. Part 10 Division 4 – Bans on equipment

We note the expansion of options available to the ACMA to deal with what are currently known as "prohibited devices"[116] such as mobile jammers,[117] and that in the future will be equipment that is the subject of permanent bans and interim bans. We support the new Bill's approach of graduating the ACMA's response on the basis of its level of certainty regarding the harm which the relevant equipment may cause:

- where the ACMA has reasonable grounds to believe the adverse effect may be caused, it can impose an interim ban;[118] and
- if the ACMA becomes satisfied that the adverse effect will occur, it can impose a permanent ban.[119]

3.10.1.3. Part 10 Division 5 – Recall of equipment

We are broadly supportive of the recall powers available to the ACMA in Division 5. The ability to recall equipment is an important part of the ACMA's ability to deal with equipment that causes interference or other harm. We note that the recall powers operate similarly to the Ministerial recall powers under the Australian Consumer Law.

For devices that are also "consumer goods" under the Australian Consumer Law (**ACL**) (e.g. mobile phones) there is the potential that the ACMA's powers could overlap with the ACL recall powers (e.g. where there is a risk of injury). To the extent that there is overlap between these powers, the ACMA will need to coordinate with the ACCC and the responsible Minister to identify which recall powers will apply.

3.11. Part 11 – Emergency orders

We observe that the "emergency orders" contained in the new Bill replace "restrictive orders" of the current Act. While to some extent, the emergency orders duplicate the obligations on carriers and carriage service providers under section 313 of the *Telecommunications Act 1997 (Cth)* in relation to matters of national interest, we support the inclusion of the emergency order provisions in the new Bill both for operators of radiocommunications devices who are not carriers or carriage service providers, and for emergency matters that are outside the national interest (for example, bushfires or floods).

However, we observe that the defences for not complying with an emergency order in section 227(2) of the current Act have been removed from the new Bill without any explanation in the accompanying materials. We would be interested to understand the rationale behind the removal of the "reasonable excuse" defences. An emergency order under section 153 of the new Bill may prohibit the operation of transmitters which are duly licensed. This is a very different scenario to sections 27 and 29 of the new Bill which deal with unlicensed operation. Whereas we do not see any reason to retain the "reasonable

[116] Current Act, Pt 4.1 Div 8.
[117] *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011 (Cth).*
[118] New Bill, s131.
[119] New Bill, s136.

excuse" defence if the operation of a transmitter is unlicensed (for the reasons we have explained in paragraph 3.5.1 above), the position is different when a person suddenly is no longer allowed to operate a transmitter because of the issue of an emergency order. We note that our employees are often amongst the first to enter an area which is experiencing an emergency situation, (for example in the aftermath of a bushfire or flooding), and that lines of communication are often under pressure at such times. We would wish to ensure that employees acting in good faith to support our customers are accorded the existing statutory defences if their conduct inadvertently breaches an emergency order.

3.12. Part 12 - Accreditation

We observe that Part 12 is largely unchanged from Part 5.4 in the current Act. We note that in the current Act, subsections 231(5) and 263(2) outline the function(s) that accredited persons may perform; namely, issuing certificates. The exposure draft does not specify the function(s) that accredited persons may perform, and we suggest this detail should be included (possibly in an explanatory memorandum to the new Bill) to clarify the scope of an accredited person. We recognise that this would go well beyond the issue of certificates, which was the particular function contemplated in the current Act in the context of Frequency Assignment Certificates and interference impact certificates.

We agree that the success of the existing accreditation scheme has been a signature and world-leading achievement of the current legislation, and on the strength of this success we support a wider range of activity being done by suitably accredited persons. Nonetheless, it would be preferable to specify functions that accredited persons can perform instead of remaining silent on the matter.

3.13. Part 13 – Industry codes

We support the concept of industry codes as these may prove to be a more flexible and efficient tool for managing certain aspects of the radiocommunications environment, e.g., aspects of technical coordination between users where industry is in the best position to identify suitable measures and arrangements.

We consider that the ACMA should take a wide view of what is possible to accomplish using industry codes and similar mechanisms. As such, the terminology of "industry code" is perhaps unnecessarily restrictive. For example, the ACMA should consider whether an industry code could provide for industry to draft spectrum authorisations that are subsequently endorsed by the ACMA. This could work, for example, where all licensees in a particular band have a common interest in authorising the use of particular devices – mobile repeaters in bands allocated for mobile purposes are a good example. In this case, using an industry developed instrument that is then endorsed and given force by the ACMA under Part 7 could be a useful way of involving licensees in spectrum authorisation decisions that affect them, beyond mere consultation but without delegating the power to make a spectrum authorisation (which is a legislative instrument) to a private party. See also our comments on spectrum authorisations under paragraphs 3.7.2.1 and 3.17.1.3.

We submit that subsection 168(2) should simply refer to non-compliance with the criteria in section 167 as being a reason for revoking a code, rather than repeating much of section 167.

In order for codes to be useful, they will need to be able to be approved and updated in a timely fashion. It would be helpful to make the ACMA decision making time bound by requiring a decision, or specific reasons why additional time is required to make the decision, to be provided to the responsible industry body within a defined period of time (for example, 1 month).

If the ACMA is to approve codes then provision also needs to be made for non-compliance with certain codes to be escalated to the ACMA for enforcement, in situations where it would be unreasonable to expect the industry body to enforce the non-compliance.

3.14. Part 14 – Information gathering powers

We are broadly comfortable with the introduction of the information-gathering powers in the new Bill on the basis that they will be used by the ACMA to monitor compliance with the Bill and equipment rules. However, we have the following comments in respect of the scope of the power.

We are concerned with the broad scope of the power under subsection 170(1)(a)(ii), which currently extends to any information which is relevant to the operation of the Act or equipment rules relating to interference. This provision would capture a wide range of business records held by any entity operating this space, a large proportion of which would be irrelevant to the ACMA's functions under the new Bill.

Our preferred position is that (in addition to the health and safety grounds in Part 14), the trigger for the information gathering powers should be where the ACMA believes on reasonable grounds that information or a document is relevant to a contravention, or suspected contravention, of the Act or of the equipment rules. We propose that subsection 170(1)(a)(ii) be amended as follows (our proposed deletions in strikethrough and insertions in underline):

> *(ii) the information or document is relevant to a contravention, or suspected contravention, the operation of this Act or the equipment rules, so far as this Act or the equipment rules relate to interference with radiocommunications; or*

In the alternative, we strongly urge that at a minimum, the information gathering powers only be triggered where there is substantial interference to radiocommunications. As currently drafted, the information-gathering powers under the new Bill can apply in respect of any interference with radiocommunications.[120] As set out in our comments on Part 9, this goes too far – most radiocommunications transmissions must contend with some level of interference, and this "noise floor" should not be the ACMA's concern.

Our suggested alternative amendment to subsection 170(1)(a)(ii) is set out below:

> *(ii) the information or document is relevant to the operation of this Act or the equipment rules, so far as this Act or the equipment rules relate to substantial interference with radiocommunications; or*

We suggest that the scope of the power be extended in respect of subsections 170(b) and (c) to include radiocommunications receivers. As we noted in paragraph 3.9.2.2, there is a presumption contained in section 119 of the new Bill that it is always a transmitter which is the cause of interference, when it is quite possible that the victim receiver is suffering from poor design or degraded performance. As such, we recommend that the ACMA's information gathering powers be extended to cover receivers to enable comprehensive investigations to be conducted.

[120] New Bill, s170(1)(a)(ii).

3.15. Part 15 – Enforcement

We are broadly supportive of the provisions outlined in Part 15 of the new Bill, although we outline a few additional improvements in relation to the provisions for issuing infringement notices, the incorporation of the provisions of Regulatory Powers Act and the powers of inspectors. We applaud the introduction of public warning notices as we expect they will assist in preventing members of the public being misled into purchasing unauthorised mobile repeaters from unscrupulous offshore vendors.

3.15.1. Graduated enforcement regime

We support the introduction of the graduated enforcement mechanisms, which will enable the ACMA to apply a proportionate enforcement action to contravening conduct depending on the contravention and circumstances.

In respect of the list of provisions for which an infringement notice may be issued, we suggest one additional provision should be added, section 140 (supply, offer to supply, possession or operation in contravention of a permanent ban). We agree that these are serious offences that typically should be addressed by civil penalties. However, our experience is that there are occasional cases where members of the public may not be aware of a permanent ban and offer such an item for sale using online classifieds or eBay as a one-off. We have seen other cases where members of the public start a small home-based business selling electronic devices online, and once again may be unaware of that the devices are subject to a permanent ban. In these cases we think an appropriate response would be an infringement notice, as a rapid and effective deterrent.

3.15.2. Incorporation of the Regulatory Powers Act

We agree with the incorporation of the provisions of Regulatory Powers Act and the objective to align the powers and functions of ACMA with the powers of other regulators. The ability to use the wide range of enforcement mechanisms set out in the Regulatory Powers Act provides the ACMA with a tailored and graduated enforcement toolkit, with allowance for appropriate checks and balances in respect of the investigative powers.

We have the following concerns in connection with the incorporation by reference of the Regulatory Powers Act:

- The current Act permits inspectors searching premises under a warrant to seize items that are not connected to the offence specified in the warrant, but are connected to another offence under the Act.[121] The Regulatory Powers Act contains a similar power for inspectors to seize items that are connected to "related provisions" – but the related provisions must be called out in the triggering Act.[122] The new Bill does not appear to have called out any "related provisions" – the effect is that an inspector would not be able to seize an item that they suspect is connected to an offence other than the one specified in the warrant. We assume this is a drafting oversight – we would expect inspectors to be able to exercise ancillary powers, particularly as the current Act provides for it. We propose that section 182 of the new Bill be amended (with drafting similar to the *Biosecurity Act 2015 (Cth)*[123]) to state that all offences and civil penalty provisions under the new Bill, as well as *Crimes Act 1914 (Cth)* or Criminal Code provisions relating to the new Bill, are "related provisions".

[121] Current Act, section 273.
[122] *Regulatory Powers Act 2014 (Cth)*, ss52(2) and 40.
[123] *Biosecurity Act 2015 (Cth)*, s484(2)(a).

- The current Act contains a power for inspectors to make emergency searches and seizures (i.e., without a warrant) if the circumstances are of sufficient seriousness and urgency.[124] The Regulatory Powers Act does not contain an equivalent provision; nor has this provision been carried over to the new Bill. We suggest that the provision be included in the new Bill.
- Under the new Bill, the Chair of the ACMA may delegate its powers under Parts 5 and 6 of the Regulatory Powers Act to an SES employee who is a member of staff of the ACMA.[125] "SES" is a well-understood term, but it is not defined in the new Bill or the Regulatory Powers Act. We propose incorporating the definition of "SES employee" in section 34 of the *Public Service Act 1999*.

3.15.3. Powers of inspectors

As set out in paragraph 3.6.6.4 above in relation to Part 6 of the new Bill, we propose retiring the third party authorisation scheme and instead enabling management rights to the licensee to perform a similar function; or, if the third party authorisation scheme is retained, that there should be provisions added that enable "bulk" authorisations for mass-market devices (such as mobile repeaters) that a licensee can issue alongside individual authorisations.

Accordingly, we also propose amending subsection 185(1)(b) of the new Bill under which inspectors have the power to require that a licensee or an authorised third party show a record of an authorisation. This power only contemplates one-to-one third party authorisations on a bespoke basis and does not accord with our proposal for mass-market device authorisations. If adopted in its current form, this would impose a very significant red tape burden on mobile operators who authorise customers to use "smart" repeaters such as the Telstra Mobile Smart Antenna in their homes. Individual agreements would need to be individually signed by a Telstra representative and each customer, and be retained by both. In the case of newly released portable "smart" repeater technology, copies of the authorisations would need to be carried in the long-haul trucks, caravans and campervans in which they are typically used. This is entirely unnecessary given that the terms of each authorisation is identical across the entire customer base. We propose either removing subsection 185(1)(b) – in the event third party authorisations are not carried into the new legislation – or amending it to cover mass-market authorisations should the Department choose to retain the third party authorisation approach. We think that in the latter scenario, an efficient and sensible solution would be for the licensee granting the "bulk" authorisation to make available a copy on its website for easy reference.

3.15.3.1. Powers of inspectors regarding receivers

We reiterate our concern expressed in paragraph 3.9.2.2 that the new Bill is focused overwhelmingly on transmitters and does not enable regulatory remedies in respect of poorly designed or defective receivers. We consider that the powers of inspectors under section 184, for example, should include the ability to direct a person to operate a receiver. This may be appropriate where an interference issue has arisen and the licensee operating the transmitter is being blamed (and this may be the subject of media attention), however the inspector suspects that in fact a fault in the receiver is to blame.

[124] Current Act, s275.
[125] New Bill, ss178(6) and 182(6).

3.15.4. Public warning notices – section 189

We welcome the introduction of a public warning notice mechanism, given the prevalence of offshore vendors that are advertising and supplying unauthorised mobile repeaters via websites which contain:

- misrepresentations that the mobile repeaters are authorised devices; and
- unauthorised reproductions of Australian mobile network operators' branding, registered trade-marks and other intellectual property.

A clear public warning from the ACMA regarding vendors who are "repeat offenders" (of advertising and supplying unauthorised mobile repeaters) would assist in preventing members of the public being misled into purchasing unauthorised mobile repeaters. Early successes in this area could serve as a useful basis for dealing with other problematic devices that are sold into Australia by unscrupulous offshore vendors.

3.16. Part 16 – Spectrum access charges

We are concerned that a spectrum access charge determination under the proposed section 193 will not be a legislative instrument, and therefore not subject to mandatory consultation. We consider that consultation on spectrum access charges should be required under the new Bill (as occurs under the current Act).

We question whether section 194 is necessary, given the wide scope of Ministerial policy statements and the desire to remove the Minister from the day-to-day decision making under the new Bill. To the extent that the Minister needs to direct the ACMA on spectrum access charges, our view is that this could be accomplished through Ministerial policy statements.

See also our comments on delegation of spectrum access charges in paragraph 3.17.1.3.

We consider that subsections 195(2) and (3) are potentially unnecessary given the wide scope of subsection 195(1).

3.17. Part 17 – Delegation

We are broadly supportive of the ACMA having the ability to delegate certain spectrum management functions to third parties. However, we hold strong reservations about the breadth of functions the ACMA could potentially delegate under the proposed new Bill, as we outline below.

3.17.1. Introduction (Division 1)

3.17.1.1. The purpose of delegation powers should be critically evaluated

We are broadly supportive of the ACMA having the ability to delegate certain spectrum management functions to third parties. The benefits of delegation of licensing functions are particularly evident in the case of "spectrum space licences" (i.e. the equivalent of spectrum licences under the current Act, as described in the ACMA information paper). As stated in paragraph 3.6.6.4 of our submission on Part 6 (Licensing) the ability to "sub-licence" within a spectrum space has significant advantages over the third party authorisation approach under the current Act. The concept of granting delegated management rights over spectrum space has been successfully implemented in other jurisdictions, for example in New Zealand.

However, as we stated in our submissions on the Legislative Proposals consultation paper, we have concerns about the ACMA being given complete discretion to delegate its spectrum management functions. Our view is that a number of licensing functions and associated powers must be retained by the ACMA and should not be delegated. We have outlined some particular concerns under relevant headings below.

On a more general level we submit that the scope and purpose of Part 17 as a whole should be re-evaluated. Currently it appears that Part 17 is primarily directed at allowing the ACMA to delegate its entire licensing function to a third party – essentially creating one or more parallel regulators on spectrum. This does not match with our understanding of how management rights are effectively used overseas, and we are concerned about the risk that parallel regulators may have questionable incentives and qualifications for managing spectrum space. We also understand from our discussions with the Department that these powers are not earmarked for immediate implementation but rather as a facility for the longer term future. Our view is that an approach specifically intended to allow the ACMA to delegate its licensing functions to a licensee in relation to that licensee's licensed spectrum (and potentially adjacent vacant spectrum), is a more immediately useful and appropriate delegations regime. We have previously explained the need for such a delegations power for licensees to manage their spectrum space, as well as the immediate utility of such an approach.[126] We are concerned that, instead, the delegations approach in Part 17 appears to be designed for some distant future scenario. We strongly urge the Department to consider how Part 17 may be recast to be of immediate benefit to existing licensees, and in particular to enable licensees to actively manage sub-licensing within their own spectrum instead of continuing with the flawed third party authorisation approach. It is in the context of that general observation that we make more specific submissions below.

3.17.1.2. ACMA powers to issue legislative instruments should not be delegated

Telstra views the ability for the ACMA to delegate a power to make a legislative instrument (for example under subsections 34(1), 47(2), 50(1), 99(1)-(3) and 193(1)-(3)) as the clearest example of overreach in terms of what the ACMA can delegate under the new Bill. We do not consider it appropriate for the function of making a legislative instrument to be delegated to a private entity. Given the essential legislative character of legislative instruments, and (in the case of instruments that are not disallowable) the limited Parliamentary oversight, the making of legislative instruments is a power that should only be exercised by the ACMA. Our view is consistent with the approach taken to the ACMA's delegation powers under the ACMA Act, which expressly prevents delegation of the making of legislative instruments. [127]

Delegation of power to make legislative instruments has the potential to undermine the ACMA's key role in ensuring that spectrum is overall managed efficiently and fairly, and in Telstra's view is inconsistent with best regulatory practice relating to delegations. In certain contexts such a delegation may also be an impermissible delegation of the entirety of the ACMA's regulatory functions, legislative power and discretions to another party, rather than merely the delegation of decision making of an administrative character (which is a more commonly accepted and uncontroversial form of delegation).[128] Therefore, we submit that powers to make legislative instruments should be carved out of the scope of section 199.

[126] Telstra Corporation Limited, *Submission in response to the Legislative Proposals Consultation Paper –Radiocommunications Bill 2016*, paragraph 2.6.
[127] ACMA Act, s53(1).
[128] See *Daniford Ltd v Smith* (1985) 155 CLR 342, 357-358 (Wilson J).

The application of this submission to particular sections listed in section 199 is addressed in Table 3 below.

3.17.1.3. Proposed limitations on ACMA's rights to delegate

Table 3 below sets out our submissions on each of the powers that may be delegated by the ACMA under section 199 of the new Bill.

Table 3: Powers able to be delegated by the ACMA

Delegable power	Comments
Section 33 (Issue of licences)	We agree that the power to issue licences is a key power that should be delegable under the new Bill. The reference to section 33 in section 199 should be to subsections 33(1) and 33(2) only, as subsections 33(3)-(6) are not functions or powers of the ACMA, but limitations on the powers in subsections 33(1) and 33(2) (that would apply to the ACMA's delegate when exercising a power to issue a licence). The interaction of spectrum access charges collected under subsection 33(3) with rights for a delegate to be paid for exercising licensing functions will need to be considered carefully and addressed in delegation rules and management rights agreements.
Section 34 (Licence issue schemes)	Our view is that the powers under this section should not be delegable by the ACMA. A licence issue scheme is a non-disallowable legislative instrument, and for the reasons given above at paragraph 3.17.1.2 we consider that the power to issue a legislative instrument should not be delegable. Further, it is our understanding is that the purpose of a licence issue scheme is to set the high level boundaries on the types of licences that can be issued in a particular band or bands, and how those licences may be issued. As such, licence issue schemes are important components of the ACMA's overall spectrum management function. This means that it will be of crucial importance that any delegate exercising a delegated licensing function will be required to comply with any relevant licence issue schemes (rather than setting their own schemes). As we have stated at paragraph 3.6.3 of our submissions on Part 6 (Licensing) a proliferation of a large number of licence issue schemes is an undesirable result from the perspective of simplicity, transparency and clarity in spectrum management. Delegation of powers to set allocation methodologies also has the potential to undermine the ability of the ACMA to properly value spectrum and ensure its allocation to the highest value use.
Section 46 (Conditions of licences – access to spectrum)	Section 46 does not set out any powers or functions of the ACMA – it establishes mandatory features of licences issued under section 33. Our view is that section 46 should not be listed in section 199.

Delegable power	Comments
Section 47 (Conditions about the registration of radiocommunications transmitters)	For the reasons given in paragraph 3.17.1.2 above, because the power under subsection 47(2) is a power to make a legislative instrument, it should not be delegable by the ACMA. The remainder of section 47 does not confer any powers or functions on the ACMA, so on that basis our view is that it should not be listed in section 199. To the extent that a delegate requires an ability to list transmitters that are authorised under a licence, this is dealt with by section 47(2) and could be further addressed in relevant delegation rules made by the ACMA.
Section 48 (Conditions about payment of charges)	Section 48 does not confer any functions or powers on the ACMA, and so should not be listed in section 199.
Section 49 (Conditions about disqualified persons)	We do not agree with the proposal to allow a delegate to exercise the ACMA's power under section 49(2) to allow a disqualified person to be an office holder in a corporate licensee, and suggest the reference to section 49 should be removed from section 199. Based on the end of section 199 (which precludes delegation of the ACMA's power to give consent under subsection 49(1)), we consider the reference to section 49 has been included in section 199 in error. Disqualification is an important enforcement mechanism that the ACMA possesses, and disqualified persons should not have the option to seek out private band managers who they believe will provide a more favourable decision than the ACMA on their rights to hold office in a licensee. We think this is distinguishable from the situation where a disqualified person is seeking a third party authorisation (see discussion in paragraph 3.6.6.3) because that is an entirely private commercial agreement, whereas in the case of delegation a regulatory power is being exercised to confer a licence.
Section 50 (Conditions determined by the ACMA)	For the reasons given in paragraph 3.17.1.2 above, because the powers under section 50 are powers to make a legislative instrument, they should not be delegable by the ACMA. Our understanding is that conditions determined under section 50 are intended to apply generally to all licences, or broad classes of licences. Therefore, they are not appropriate to delegate in the context of private band management or other delegated functions, as they relate to the ACMA's overall management of spectrum licensing. To the extent a particular delegate needs a right to create additional licensing conditions, this could be specifically addressed by delegation of the power under section 51.
Section 51 (Other conditions of licences)	We understand the need to delegate this function to a person exercising delegated licensing functions. However, care will need to be taken when setting delegation rules to provide greater detail on the bounds of this power as applied to a delegate (as opposed to the ACMA). Otherwise delegation

Delegable power	Comments
	of section 51 powers risks giving too wide a discretion to a delegate to impose conditions on a licence.
Section 53 (Regulatory undertakings may be included in licences)	Our view is that the proposal to delegate an authority to give a regulatory undertaking should reconsidered by the ACMA. We understand the need for a delegate exercising a licensing power to have the ability to give undertakings to licensees about how their licence will be dealt with, which would have a similar effect to a regulatory undertaking. However, as discussed in paragraph 3.6.8 of our submission, a regulatory undertaking is likely to be a key element of determining the overall value of a spectrum licence. The regulatory undertaking is intended as an instrument binding on (and conferring a cause of action against) the *ACMA*. Allowing a delegate to give a regulatory undertaking could work in one of two possible ways, neither of which is desirable: 1) the regulatory undertaking is only binding on the delegate – which significantly diminishes its value to a licensee (as compared to having an undertaking from the ACMA); or 2) the delegate is given an authority to bind the ACMA by giving a regulatory undertaking – which involves significant risk to the ACMA, and is arguably not permissible under administrative law applying to delegations In our view, the more appropriate way to deal with regulatory undertakings where a delegate is given a power to issue licences would be as follows: 1) any regulatory undertakings that are applicable to licences issued under the delegated power are set by the ACMA in the licence issue scheme, delegation rules or relevant management rights agreement, and are binding on both the ACMA and on the delegate; 2) if a delegate is given licensing powers in their own spectrum space, they are entitled to act contrary to a regulatory undertaking that is given to them under their own licence; and 3) the delegation rules or relevant management rights agreement allow a delegate to give further undertakings in licences that have the same character as regulatory undertakings, but that are not inconsistent with the new Bill, and are not binding on the ACMA.
Section 57 (Varying licences)	We consider the powers under subsection 57(1) to be appropriate powers delegated by the ACMA, but subject to our comments on section 57 made in paragraph 3.6.9 of our submission on Part 6 (Licensing).
Section 61 (Renewal of licences)	We agree the power to renew a licence is a power that should be delegable under Part 17. However, the power to conduct the assessment required under subsection 61(5)(a), (b) or (d) should not be delegable by the ACMA. A delegate should be required to consult the ACMA before exercising a power to refuse a renewal.

Delegable power	Comments
	We also note our comments at paragraph 3.6.10 of our submission on Part 6 (Licensing) about renewal generally. We suggest caution in allowing much discretion for delegates around renewal – it may be that renewal of licences could be dealt with in licence issue schemes, delegation rules and the relevant management rights agreement without requiring the delegate to exercise any discretion in relation to renewals.
Subsections 64(2) and 64(4) (Suspending licences), and Subsection 67(2) (Cancelling licences)	We would urge caution around delegation of this power. Some supplementary circumstances allowing for a suspension or cancellation may require an assessment that could only be made by the ACMA. Such circumstances would need to be identified and carved out from any delegation, either in the delegation rules or the management rights agreement.
Subsection 74(2) (Surrender of licences)	We agree that a delegate should be allowed to accept a surrender of a licence. However, the delegate should be required to consult the ACMA before accepting a surrender of a licence, to ensure there are not any unintended effects on spectrum management as a result of accepting the spectrum surrender. The question of what happens to any now-vacant spectrum resulting from a surrender would need to be addressed in the delegation rules or relevant management rights agreement.
Subsection 75(2) (Effect of surrender)	The decision to be made by the ACMA under subsection 75(2)(b) in our view is an appropriate power to be delegated. However, the scope of the discretion to vary a licence under subsection 75(2)(b) may need to be constrained in the delegation rules when it is being exercised by a delegate, to ensure delegates make decisions consistent with the ACMA's approach to licence variations. It may be appropriate to require a delegate to seek the ACMA's advice on certain variations.
Subsection 77(1)	We consider this power is appropriate to delegate, subject to appropriate delegation rules being in place to specify when a delegate cannot allow a licence to be subdivided.
Section 86	We consider this power is appropriate to delegate, as it is simply enacting a direction from the Minister.
Sections 90 – 92 (Register of Radiocommunications Licences)	Our view is that it is of critical importance that there be only a single Register of Radiocommunications Licences, and that the information on the register is consistent and complete. Therefore, we urge caution before delegating any power to maintain the Register of Radiocommunications Licences. We understand there may be benefits to the ACMA in outsourcing IT and management functions in relation to the register, but the ACMA should consider whether the issue of outsourcing responsibility for maintaining the Register of Radiocommunications Licences should be addressed separately in the new Bill, rather than as a right of delegation.

Delegable power	Comments
Sections 99, 100 (Spectrum authorisations)	Since a spectrum authorisation is a legislative instrument, for the reasons given above at paragraph 3.17.1.2 we consider that the power to make a spectrum authorisation should not be delegable. We submit that given the wide scope of spectrum authorisations and (on the current drafting) their potential to overlap with licensed spectrum, it is not appropriate for a person other than the ACMA to have a power to make spectrum authorisations. We propose that licensees should have some rights to issue licences or authorisations with similar effect to a spectrum authorisation in *their own licensed spectrum space only*, but the ACMA should give further consideration to how this could be achieved without giving a person a power to make a spectrum authorisation. It is likely that the combination of a licence issue scheme, delegation rules and management rights agreement would be sufficient to give licensees this flexibility in their own licensed space, without delegating any power under section 99. As we have proposed at paragraph 3.13 above, industry-developed instruments (e.g., industry codes), subsequently endorsed and given effect by the ACMA, may be a useful mechanism to allow industry to consult on and prepare spectrum authorisations that apply across an entire band (i.e. outside any one licensee's licensed space).
Section 113 (ACMA may assist in resolution of interference complaints)	We would like some more context on why the ACMA considers it necessary for this power to be delegable. Our view is that the ability to set interference complaint guidelines, and the ability to refer disputes to alternative dispute resolution, is likely sufficient to enable the ACMA to empower licensees to resolve their own disputes. Subsection 113(2) appears aimed at giving the ACMA a residual authority to investigate interference disputes if so requested. We do not consider this an appropriate power to delegate. If necessary, the interference complaint guidelines could allow licensees to refer technical aspects of interference complaints to accredited persons, rather than directly to the ACMA. But those people should not have a power to actually make a finding in relation to the dispute.
Section 116	This power is not appropriate to delegate. We have expressed concerns about the breadth of this power in paragraph 3.9.3 of our submission on Part 9 – these concerns would only be exacerbated if a private entity were able to give a direction, particularly given the threat of criminal proceedings for failure to comply. Based on the power also being expressly delegable to an inspector,[129] we consider that it has been included here in error.
Section 193	This power is not appropriate to delegate without significant constraints being placed on delegates as to how they can set the value of spectrum. The right of a delegate to receive payment from licensees should be dealt

[129] New Bill, s118.

Delegable power	Comments
	with under a management rights agreement. Care should also be taken to clarify how section 197 applies to recovery of a spectrum access charge by an eligible Australian corporation (if this is permitted) – in particular, whether the debt remains one owed to the Commonwealth, or if it is owed to the eligible Australian corporation.
A function or power of the ACMA to specify a period, a day, a part of the spectrum, an area, a location, any other matter or thing, or a designated statement, in a licence.	We consider that the "any other matter or thing" is too vague as a category and should be removed from this list. Subsections 199(b) and (c)[130] should make it clear that they only apply to the extent not specifically addressed in subsection 199(a). Our previous comments have identified some powers that may overlap with this list that we consider should not be delegable.
A function or power of the ACMA under the Register Rules	See our comments above in relation to the Register. Our view is that the Register Rules should make it clear whether a particular Register function is delegable, otherwise it should be assumed to not be delegable.

3.17.2. Delegation (Divisions 2 and 3)

3.17.2.1. The ACMA should be required to consult before making a delegation and on the delegation rules

Delegation of the ACMA's general licensing functions or powers has the potential to impact on a wide range of licensees and potential licensees. Section 200 should make it clear that the ACMA must consult with affected parties before making a delegation under section 199. This will reduce the risk of a delegation having unintended adverse effects on other licensees or on spectrum management generally.

The delegation rules could set out circumstances in which consultation is not required before making a delegation (e.g., for standard delegation rights given in licences or otherwise). However, this is on the premise that the delegation rules themselves (and any substantive amendments to them) are the subject of a proper consultation. It is also possible that a licence issue scheme will set out default delegation rights for particular licences, in which case the consultation on that licence issue scheme would be sufficient consultation for the purposes of those delegations.

3.17.2.2. The ACMA should be able to give a delegation through a designated statement in a licence

It is currently not explicit in the new Bill that the ACMA could delegate particular licensing powers and functions to a licensee through a statement in that licensee's licence. We consider this should be made clear, as a statement that certain delegation rights apply to a licence would in many cases be the most

[130] We note that the section numbering in the current draft is incorrect (subsection 199(a) is used twice) – we assume this will be fixed in the next draft of the new Bill. Our reference to subsections 199(b) and (c) are to the "corrected" provisions – i.e., section 199(b) is the ACMA's power to specify certain matters in a licence, and subsection 199(c) is the power to include designated statements.

straightforward way to give a delegation – particularly in "spectrum space licences" where management rights would go to the core value of the licence.

Such a designated statement could provide that a licensee has a delegated authority to grant sub-licences within their licensed part and area (including, if necessary, in adjacent vacant spectrum), subject to the conditions of the licence, other designated statements, the relevant regulatory undertaking, the relevant licence issue scheme, and the delegation rules and any applicable management rights agreement.

3.17.2.3. Further matters to be considered by the ACMA before making a delegation

We are concerned about the inclusion of just one mandatory factor for the ACMA to consider when determining whether to delegate a function or power. We suggest the inclusion of the following factors in section 200(3):

- whether delegation would be consistent with other parts of the new Bill or instruments made under the new Bill – e.g. objects, Ministerial policy statements, the ACMA's work program, or RF plans;
- whether it is appropriate for the ACMA to delegate the particular power to that entity (e.g. delegation of the power to make a legislative instrument);
- whether delegation would result in a conflict of interest;
- the impact of a delegation on competition;
- the impact on the licences affected by the delegation; and
- whether the delegation rules are sufficient to accommodate the delegation, or whether they need to be modified to enable the delegation to take place.

3.17.2.4. ACMA delegation of a power should not abrogate the ACMA's exercise of that power

We are concerned that under subsection 200(5) the ACMA may, when delegating a power under Part 17 (other than the power to make a legislative instrument), abrogate its ability to exercise that power.[131] The Information Paper contemplates the ACMA being able to revoke any delegation arrangement if it is not satisfied with the delegate's performance, but this is subject to contractual arrangements which may prevent the ACMA from exercising its powers. While we understand that there are benefits to providing delegates with a level of certainty, we do not think it appropriate for ACMA to entirely relinquish its ability to exercise its powers.

We strongly urge that Part 17 be amended to ensure the ACMA's ability to exercise any delegated powers is retained. If the ACMA's concern is around certainty for delegates, it could take an alternative approach - for example, the delegation rules could set out the circumstances in which the ACMA will exercise a delegated power in place of the delegate.

[131] New Bill, s200(5).

3.17.2.5. Sub-delegation by eligible corporation

We are comfortable in principle with a delegate being able to sub-delegate its functions to one of its directors or employees in accordance with legislative rules. The legislative rules should ensure that any employee to whom a sub-delegation is made must be suitably senior (e.g. in management).

3.17.2.6. Corporations with delegated powers to be treated as a body corporate established for a public purpose

We would like further clarity from the Department on the intent of this provision. In particular:

- The ACMA Act allows the ACMA to share resources with bodies established for a public purpose under Commonwealth law.[132] We would like to understand whether this provision is intended to permit the ACMA to share resources with a delegate.
- There are several laws which contain consequences for entities established for a public purpose under a law of the Commonwealth, including work health and safety legislation,[133] FOI legislation, and various law enforcement provisions.[134] We seek further clarity on which of these provisions it intends a delegate to be subject to, and to what extent.

3.17.3. Management rights agreement (Division 4)

3.17.3.1. A licensee should be able to be deemed to comply with management rights agreements by a designated statement in the licence

As described above at paragraph 3.17.2.2, we consider that a delegation should be able to be effected by a designated statement in a licence. That same designated statement should also be able to deem a licensee to have agreed to a particular form of management rights agreement with the ACMA. This would be particularly important if licences are auctioned with accompanying management rights – as the management rights agreement in that case would need to be identical in substance for each licence, otherwise the value of the spectrum would be different for different licensees.

3.18. Part 18 – Review of decisions

We support the continued review rights for decisions of the ACMA under the new Bill and propose additional provisions for which the review rights should apply.

The internal and external review function is crucial for the just administration of executive power under the new Bill where the decision-maker has broad discretionary power and/or where a decision would have a material effect on an entity's commercial or business activities.

We support the decisions listed as reviewable in Part 18, and strongly suggest that the following direction should be included in the list:

- a direction to a licensee for the purpose of avoiding, minimising or reducing interference to radiocommunications under section 116;

[132] ACMA Act, s55.
[133] *Work Health and Safety Act 2011 (Cth)*.
[134] See e.g., *Australian Crime Commission Act 2002 (Cth)*.

3.19. Part 19 – Provisions extending the concept of radiocommunications

We are satisfied with the drafting of Part 19, and offer no further commentary.

3.20. Part 20 – Exemptions

Generally these sections replicate the current Act. We note that the proposed section 223 has replaced the list of organisations in section 27 of the current Act with a general category of "designated crime or corruption body". We are interested to know the extent to which this category is intended to extend to operators of prisons, and in particular, private operators of prisons. Such entities may need the benefits of exemptions for the purposes of operating mobile jammers. It may be that such exemptions will be clarified in legislative instruments issued under the proposed section 9 – industry should be consulted on the form of such instruments to ensure they appropriately cover prison operators.

In line with our submissions on Commonwealth Held Spectrum, we welcome attempts to provide more transparency around government spectrum holdings and the use of spectrum. We currently have limited visibility on the use of exemptions under the current Act by government, and would be interested to understand (to the extent possible) how these exemptions are used. The department and the ACMA should consider ways in which they can keep track of and report on the use of these exemptions under the new Bill, to ensure that future planning can take account of these uses.

3.21. Part 21 – Miscellaneous

These sections are generally consistent with the current Act. We have comments on some of the specific provisions, as set out below.

3.21.1. Computerised decision-making

We are broadly supportive of the introduction of this provision, and note it is drafted almost identically to the recent amendments to veterans' affairs legislation.[135] We support the ACMA maintaining control of any arrangement for the automation of decisions, and would expect that the ACMA would oversee and regularly review any automated decision-making process to ensure that it is operating as intended.

We have the following specific comments:

- We are concerned about the breadth of subsection 227(1)(c), which allows for the automation of anything related to the making of a decision or exercise of a power. In particular, we are concerned that this section would permit automation of a substantive decision even if the ACMA has only authorised the automation of a procedural step (for example, the giving of a notice) connected to the decision – this is how the provision has been stated to work in other legislation.[136] If this is the intent, it would be an overreach – the automation of "related" functions should not extend to substantive decision-making without express authority.

- We seek further clarity on the types of decisions that the Department and the ACMA intend to automate under this section. Automation of decisions is logical where a decision is made or implemented according to a formula or algorithm (for example, allocation of spectrum by

[135] *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act 2017 (Cth)*.
[136] See the explanatory memorandum under the veterans' affairs legislation.

auction), but the ACMA should not automate decisions where the decision requires a high level of discretion.

- Under subsection 227(3) of the new Bill, the ACMA may substitute an automated decision if satisfied that the initial decision is incorrect. We would like to understand the intent of this section – does it only cover scenarios where there is a programming or application error, or does it extend to decisions that are consistent with the program but that the ACMA considers to be otherwise inconsistent with the new Bill or policy?

- If an automated decision is substituted, we would expect that the substituted decision would be reviewable in the same way as the initial decision. We suggest the following amendment (consistent with the veterans' affairs legislation amendments) as subsection 227(4) of the new Bill:

  (4) Subsection (3) does not limit Part 18 (about reconsideration and review of decisions).

3.21.2. Legislative rules

We have commented elsewhere in the submission on the substantive provisions that may be set out in the legislative rules.

We have the following comments on the legislative rules:

- We support the rules being legislative instruments subject to disallowance – they are made by the Minister so should be subject to strong Parliamentary oversight.
- The rules do not deal exclusively with administrative or procedural matters – for example, they may specify objectives for the equipment rules in addition to those set out in the new Bill.[137] If the objects of the equipment rules (or objectives set out elsewhere in the Bill) change, it would be more appropriate to amend the objects in the Bill directly.

[137] New Bill, s121(3)(h).

04 Stamp Duty

We recommend that the Government makes it a priority, as part of the overall spectrum reform process, to strongly encourage the State/Territory jurisdictions to implement their commitment to abolish stamp duty on trades of spectrum licences.

We note that the joint AMTA / Communications Alliance submission covers this concern in more detail, but in summary, we have concerns about the application of stamp duty to trades of spectrum licences. While the majority of States and Territories no longer apply stamp duty to trades of spectrum licences, several jurisdictions continue to apply this significant impost. This continued imposition is a disincentive to spectrum trading, especially in respect of national spectrum licences where there is doubt as to the appropriate methodology for application of stamp duty to only certain geographical portions of the licence. These disincentives run contrary to the stated intent in the Department's Information Paper to enable greater market-based activity in respect of spectrum.

The abolition of the remaining State and Territory stamp duties on trading in spectrum licences can be accomplished by Commonwealth legislation, and we strongly urge that this be done in the new Radiocommunications Act. We recommend the following drafting of a new section 236 in Part 21 of the Bill (before the section titled "legislative rules"):

> *"No stamp duty or other tax is payable under a law of a State or a Territory in respect of, or in connection with, any licence, authorisation, permission, accreditation or certificate that is required under this Act in order to operate radiocommunications devices."*

Further details outlining the background to the concerns and the States and Territories where stamp duty is collected, and justification for the use of a legislative solution can be found in the AMTA / Communications Alliance submission.