

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
Department of Communications

**Exposure Draft
Radiocommunications Bill
2017**

Public Version

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to provide comments on the exposure draft of the *Radiocommunications Bill 2017* (the Bill).
- 1.2 Optus has consistently argued that the development of a reformed spectrum management framework should be outcomes focused and deliver:
 - (a) the adequate preservation of existing spectrum rights;
 - (b) improved transparency of decision making processes in relation to spectrum allocation and licence renewal; and
 - (c) the removal and reduction of current complexities and costs associated with licensees' engagement with the current spectrum management framework.
- 1.3 Optus has also argued that reform initiatives need to be considered and tested from the perspective of the customers of the processes that are established under the spectrum management framework. Optus supports the key principles of simplicity, flexibility, transparency, certainty and efficiency, identified in the Spectrum Review, as the key principle to underpin reform.
- 1.4 These principles and optimal reform outcomes should continue to be used as the litmus test as the development of the Bill, the Transitional and Consequential Amendments Bill and associated regulatory instruments and policy statements continue to progress.
- 1.5 In summary Optus:
 - (a) considers a broad public interest test replace the proposed 'long-term public interest' as an objective of the Act. A broad public interest test assessment criteria could be used on a case by case basis to determine what waiting should apply to either the short or long term public interest of for example, a specific spectrum allocation decision;
 - (b) suggests the term 'public and community purposes' is replaced with 'public and community services' to avoid confusion over scope;
 - (c) recommends s3(a)(i) be amended to include "*facilitates the efficient and transparent planning, allocation and use of the spectrum...*" as a suitable check without limiting the ACMA's flexibility as spectrum manager;
 - (d) supports a single definition of 'Space Object' under s.16 of the Bill rather than the two definitions currently provided under the Act, and questions whether the current 'Space (Communications with Space Object)' licence can be replicated under a single licensing framework;
 - (e) recommends consultation on the development of Ministerial Policy Statements be mandatory;
 - (f) supports the inclusion of ACMA work programs in the Bill and suggests that the utility of such information for industry will be improved if variations and updates are made in real time, via a streamlined consultation process;
 - (g) is broadly supportive of the proposed Licensing Issue Scheme (LIS) framework, but notes it that in practice it will need to ensure the complexities

currently faced by licensees in engaging with current spectrum allocation processes are not replicated;

- (h) supports the proposal for the ACMA to negotiate licences up to 20 year terms;
- (i) suggests that the setting of licence issue limits under s.36, be amended: to make it mandatory for the ACMA to consult with the ACCC to determine 'licence issue limits'; to require the ACCC to consult with industry on proposed 'licence issue limits'; to make it mandatory for the ACMA to adopt the recommendation of the ACCC;
- (j) rejects the proposal for the Minister to direct the ACMA to offer licence to specified person (s.39 and s.40);
- (k) supports the concerns raised by the Associations with regard to the practical application of requiring notification of the records of third party authorisations and the requirement under s. 45 to for the licence holder to notify every third party of a variation to a relevant licence;
- (l) does not support the ACMA be given the power to revoke a regulatory undertaking without full consultation with and the agreement of the licensee; and is also concerned about the ability of the ACMA to alter a regulatory undertaking once issued;
- (m) would appreciate confirmation that the ACMA is not able to vary a 'designated statement' in a licence that permits the ACMA's to vary a licence without the licensee's agreement;
- (n) retains its support for a first right of refusal for renewal to be included in the Bill and does not consider the renewal provisions will provide licensees with sought after predictability and certainty on renewal status or encourage investment;
- (o) supports the interference management model and suggests that s113 (2) and (5) of the Bill be amended to require the ACMA to investigate a complaint in the first instance prior to considering the option of referring a complaint to alternate dispute resolution process;
- (p) supports the change to introduce the option of civil penalties in addition to criminal penalties;
- (q) strongly believes that the access to spectrum acquired as an outcome of an allocation process, a property right, should be paid for upon licence commencement; and that this principle be incorporated in the Bill;
- (r) considers clarity on proposed transition arrangements for Optus' significant existing spectrum and apparatus licence holdings to the new regime proposed under the Bill to be critical;
- (s) supports the inclusion of a new clause 236 in the Bill, or the relevant supporting tax Acts, to abolish stamp duty on the trading of spectrum licences.

1.6 Optus supports the submission made to this Consultation by the Australian Mobile Telecommunications and Media Authority (AMTA) and Communications Alliance (CA), referred below as 'The Associations'.

Section 2. RADIOCOMMUNICATIONS BILL 2017

Principles to underpin reform

- 2.1 Optus' support for the development of a reformed spectrum management framework has been governed by determining what an optimal reform outcome should deliver. That is:
- (a) the adequate preservation of existing spectrum rights;
 - (b) improving transparency of decision making processes in relation to spectrum allocation and licence renewal; and
 - (c) removing and reducing the complexities of licensees engagement with the current spectrum management framework.
- 2.2 In addition the Spectrum Review¹ highlighted five principles to underpin the development of the proposed reforms: simplicity, flexibility, transparency, certainty and efficiency, are the key principles that should underpin reform.
- 2.3 Optus continues to use the criteria detailed above as the litmus test as the development of the Bill, the Transitional and Consequential Amendments Bill and associated regulatory instruments and policy statements progress.
- 2.4 Examples of where the Bill meets and falls short of meeting these criteria is provided below.

Part 1 – Preliminary

Objects

- 2.5 Optus remains concerned that no suitable justification has been provided as to why the objects of the Act should contain a new test, the 'long term public interest' that excludes any short term considerations, rather than a general public interest test.
- 2.6 It is Optus' strong view that a broad public interest test should replace the proposed 'long-term public interest.' A broad public interest test assessment criteria could be used on a case by case basis to determine what waiting would apply to either the short or long term public interest of for example, a specific spectrum allocation decision.
- 2.7 Optus is also concerned that the term 'community purposes' will have a much broader meaning and application compared to s3(b)(ii) of the *Radiocommunications Act 1992* (the Act) which places "public or community services" in context of defence and public protection and disaster relief (PPDR) type services.
- 2.8 Optus considers that as drafted the term 'public and community services' will risk restricting functioning market-based allocations of spectrum in favour of bespoke allocations to 'community' needs which could mean just about anything for example, mobile coverage in hospitals or train stations.

¹ Spectrum Review Issues Paper, Department of Communications and the Arts, <https://www.communications.gov.au/have-your-say/spectrum-review-issues-paper>

- 2.9 Optus suggests the term ‘public and community purposes’ is replaced with ‘public and community services’ to avoid confusion over scope.
- 2.10 Optus also suggests that the objects of the Act should include a reference to ‘transparency’. That is, the Spectrum Review ² defined transparency as:
- “providing a clear and transparent policy framework and direction, within the bounds of which the ACMA should have broad discretion over the options available to it to manage the spectrum and enable a greater role for users.”*
- 2.11 Given the broad range of discretion the Bill has given to the ACMA, Optus suggests s3(a)(i) be amended to include “facilitates the efficient and **transparent** planning, allocation and use of the spectrum...” as a suitable check without limiting the ACMA’s flexibility as spectrum manager.

Space Objects

- 2.12 Optus supports a single definition of ‘Space Object’ under s.16 of the Bill rather than the two definitions currently provided under the Act.
- 2.13 Optus would appreciate confirmation that the ‘single licensing framework’ will accommodate the provision in a type of licence like the current ‘Space (Communications with Space Object)’ licence where the space object is licensed and there is no need to separately licence each earth station in the designated service area. Optus notes that this type of licence is only available in certain bands where there are no terrestrial services.

Part 2 - Ministerial Policy Statements

- 2.14 Optus understands the intended purpose of Ministerial Policy Statements (MPS) is to guide the ACMA to its functions as a spectrum manager. MPS’s will play a pivotal role in providing certainty to industry on both timing and availability of spectrum - which is a critical policy input for investment decision making processes.
- 2.15 The Bill does not currently require MPS’s to be released in draft form for consultation. Optus considers that it is important from a transparency perspective that an MPS is developed in consultation with industry and the ACMA and recommends this requirement is included in a revised Bill.
- 2.16 Optus notes that in practice, such consultation could be targeted to relevant stakeholders affected by the major initiatives covered by a MPS. Therefore the inclusion of a ‘mandatory’ consultation requirement should not be perceived negatively, but as an important step in the policy development process to ensure the Government is properly informed of industry impacts of proposed policy approaches.

Part 3 – ACMA Work Program

- 2.17 Optus supports the requirement for the ACMA to produce an annual work program in relation to its spectrum management functions on the basis that it will improve certainty, accountability and transparency. As spectrum is a significant regulated business input for Optus, having a clear roadmap of what, when and how spectrum will be allocated is critical.

² Spectrum Review Issues Paper, Department of Communications and the Arts, <https://www.communications.gov.au/have-your-say/spectrum-review-issues-paper>

- 2.18 A gap in previous ACMA work programs has been any requirement for the ACMA to report on its progress against stated intentions, including justifications on why targets hadn't been met. Therefore Optus supports a requirement for the ACMA to self-report on commitments made in the plan. For example, reporting on the previous year could be included in the following year's work program.
- 2.19 To ensure the utility of the work program Optus also suggests that variations be permitted to be made as for example, government policy positions change. Variations should also be subject to a targeted and streamlined form of consultation with industry. These changes will help ensure that the work program remains current and agile and a useful reference document for industry.
- 2.20 Optus also agrees with the suggestion made by the Associations to align the timing of the work program to the fiscal year it relates to. That is, release a draft in June, with a final version released in August of the same year.

Part 4 – Radiofrequency Plans

- 2.21 Optus supports the inclusion of radiofrequency plans in the Bill as they provide certainty as to what purposes spectrum will be used or reserved for.
- 2.22 Optus supports concerns raised by the Associations with regard to:
- (a) the prospect of two or more radiofrequency plans coexisting (section 24(3)) and recommends the Bill be clear that, when a radiofrequency plan is developed, specific steps are taken to ensure that it does not conflict (or overlap) with an existing radiofrequency plan.
 - (b) the exemptions to be granted to the ACMA under s 25(2) of the Bill with respect to complying with a radiofrequency plan in the context of licence renewals or when issuing a licence under section 77 (subdividing). No explanation has been provided as to why the ACMA should be exempt from performing its spectrum management functions in a manner that is consistent with the radiofrequency plan in this context. It is noted that s.25(4) gives the ACMA power to issue licences that are inconsistent with the radiofrequency plan for purposes of national interest or in an emergency.
- 2.23 Optus also supports the harmonisation of Australian radiofrequency plans to international plans, including alignment with WRC processes and timelines.
- 2.24 Optus suggests the concerns raised above, including a discussion on aligning Australian radiofrequency plans with international developments, should be considered as part of the development of transitional arrangements for radiofrequency plans.

Part 6 – Licensing

Issue of licence

- 2.25 The proposed 'licensing issue scheme' (LIS) structure is to give effect to allocation parameters within which the issuing of a new licence will occur. Optus is broadly supportive of the proposed LIS framework that provides the ACMA with the flexibility to adjust licence allocation to changing technology use over time. However it will be important to ensure that in practice, each LIS is as streamlined as possible and removes and reduces the complexities currently faced by licensees in engaging with current spectrum allocation processes.

- 2.26 Optus also queries how consistency of application of a technical framework for a specific band will be maintained under the proposed LIS and notes this as a key issue for discussion as part of the transition process.
- 2.27 Optus supports the proposal for the ACMA and prospective licensee to negotiate up to a 20 year licence terms, providing the flexibility to take into account technology and investment cycles and spectrum planning requirements.
- 2.28 Optus is concerned about the ability for the Minister to direct the ACMA to offer a licence to specified person (s.39 and s.40) on the basis that it creates uncertainty. As argued by the Associations:
- “This direction power when coupled with the Minister’s power under section 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. We are highly attuned to the potential investment risk that such a scenario could create.”*
- 2.29 With regard to the setting of licence issue limits under s.36, Optus recommends the current proposal in the Bill be amended:
- (a) to make it mandatory for the ACMA to consult with the ACCC to determine ‘licence issue limits’;
 - (b) to require the ACCC to consult with industry on proposed ‘licence issue limits’;
 - (c) to make it mandatory for the ACMA to adopt the recommendation of the ACCC.
- 2.30 Optus’ proposed amendments to the setting of licence issue limits will help meet with the key objectives of the reform process, ensuring transparency of decision making process with regard to spectrum allocation.

Third party use

- 2.31 Optus supports the concerns raised by the Associations with regard to the practical application of requiring notification of record of third party authorisations and the requirement under s. 45 to for the licence holder to notify every third party of a variation to the relevant licences.
- 2.32 With regard to s.44 Optus licenses thousands of mobile repeaters which currently do not require notification. The proposed framework under s.44 would drive cost, complexity and significant regulatory burden in tracking and notifying such authorisations.
- 2.33 With regard to s.45, not all variations to a licence are relevant to authorised third parties. It is Optus’ view that a judgement regarding what notifications to third parties are relevant should be left to the relevant licensee to determine.
- 2.34 Optus supports the suggestion by the Association to use the delegation of management rights outlined in Part 17 to confer to a licensee the ability to manage third party authorisations, including licence variations.

Regulatory Undertakings

- 2.35 Optus understands that Regulatory Undertakings are a tool to detail in a licence how the ACMA will issue future licences or make spectrum authorisations in similar parts of allocated spectrum.
- 2.36 Optus is concerned about the practical impact of regulatory undertakings on the property rights of licences in terms of:
- (a) existing licences transitioned to the new regime;
 - (b) new licences issued, managed and renewed under the new regime.
- 2.37 In terms of the transition of existing licences, we are concerned that the form and content of a Regulatory Undertaking may erode the exclusive property rights contained within spectrum licences issued under the current Act.
- 2.38 As the Associations note:
- “If the form of content of a regulatory undertaking is insufficient to address the future risk of erosion by overlay of subsequent licences that prevent the licence holder from properly using the spectrum they have paid for, then 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.”*
- 2.39 Optus does not support the ACMA having the power to revoke a regulatory undertaking without full consultation with and the agreement of the licensee. To give the ACMA the discretion to revoke a regulatory undertaking is inconsistent with the policy principle of certainty.
- 2.40 Optus also has concerns regarding the proposal for the ACMA to have the ability to alter a regulatory undertaking once issued. Optus suggests that the default position be changed so the ACMA does not have the ability to change or revoke a regulatory undertakings, except to the extent expressly set out in the licence. This will make it clearer to all the circumstance in which the licence can be changed as it is all set out in the licence.
- 2.41 Optus does not support the ability for a regulatory undertaking to be revoked. While it is noted that such a decision is reviewable under Part 18, it is Optus’ preference that the Bill restrict the ability to revoke a regulatory undertaking.

Designated statements

- 2.42 Optus understands that designated statements are the ‘tool’ to be used to determine what specific licence conditions will apply to a licence and may include the following categories: third party use; variations; assignment (trading/subdivision); renewal; supplementary circumstances in relation to suspending or cancelling a service.
- 2.43 Optus would appreciate confirmation that the ACMA is not able to vary a ‘designated statement’ in a licence that permits the ACMA’s to vary a licence without the licensee’s agreement.

Renewal

- 2.44 Optus is unclear as to why the proposal enshrine first right of refusal for renewal in the Bill has been rejected.

- 2.45 If the ‘first right of refusal’ is not included in the Bill, Optus is of the view that the current process in the Act at s.82 ‘*Reissue of spectrum licences to the same licensee in the public interest*’ should be retained but streamlined on the basis that it will give licensees more confidence that their licences will be renewed if justifications on public interest grounds can be met.
- 2.46 The proposal for a licence under the Bill to include ‘a right to renew the licence in specified circumstances’ and the examples provided in the ACMA Licensing Support Material to the Bill³ will not provide licensees with sought after predictability or certainty or encourage investment. We understand that the ACMA has raised concerns with the proposed drafting with regard to licence renewal but no further detail has been provided to date for Optus to review or respond to.

Part 9 – Interference Management

- 2.47 Optus supports the proposed interference management framework.
- 2.48 Optus notes that it will be important for the ACMA to consult with industry on the development of the new guidelines it will use to manage the resolution of interference complaints to ensure they are fit for purpose and result in an efficient and least cost approach to resolving interference management issues.
- 2.49 Optus suggests that s113 (2) and (5) of the Bill be amended to require the ACMA to investigate a complaint in the first instance prior to considering the option of referring a complaint to alternate dispute resolution process.

Part 10 - Equipment rules

- 2.50 Optus supports the principle of applying detailed equipment rules in subservient instruments rather than the Act.
- 2.51 Optus also supports the use of the term ‘equipment’ as opposed to ‘device’ to define the scope of the equipment rules, where the definition of the term equipment as “*anything, irrespective of its use or function or the purpose of its design that is capable of radio emission.*” Such a broad definition will help ensure a wide range of devices and equipment, for e.g. LEDs if they cause interference, are captured.
- 2.52 Optus also supports the change to introduce the option of civil penalties in addition to criminal penalties.
- 2.53 Optus notes the Department of Communication and the Arts ‘Introducing equipment rules’⁴ paper mentions the increasing complexities to equipment supply chains since 1992; that equipment rules will be targeted to the point of supply and will be intended to prevent devices entering the market that are likely to cause interference or harm to human health. However detail on the scope and nature of these instruments has not yet been provided.
- 2.54 Optus would appreciate confirmation that the standards to apply under the Bill will be similar to existing equipment standards and rules currently set out by the ACMA. Consultation with industry on any proposed amendments to existing instruments in relation to equipment rules will be important.

³ Department of Communications and the Arts, *Introducing Equipment Rules*, p2

⁴ Ibid

2.55 Also, it is Optus' view that the timing of transition to new equipment rules and standards should only be determined once the quantum of changes from old to new is known, including:

- (a) impact to current and planned devices,
- (b) domestic and international supply chains; and
- (c) a move from class licences to spectrum authorisations.

Part 16 – Spectrum Access Charges

- 2.1 Optus reiterates its concern that the principle of aligning payment timing hasn't been incorporated in the Bill. The accepted convention between Government and industry is that payment of spectrum access charges for spectrum licences acquired at auction is aligned with licence start date.
- 2.2 Optus strongly believes that access charges for spectrum acquired as an outcome of an allocation process, a property right, should be paid for upon licence commencement, and that this principle be stated in the Bill.

Section 3. TRANSITIONAL ARRANGEMENTS

- 3.1 Ensuring clarity on proposed transition arrangements for Optus' significant existing spectrum and apparatus licence holdings to the new regime proposed under the Bill is critical.
- 3.2 It is Optus' understanding that it is now the intention to release an exposure draft of the *Transitional and Consequential Amendments Bill* for consultation prior to introduction of the Bill. Optus welcomes this development and urges the release of this document as a matter of priority to improve industry's confidence in transition arrangements.
- 3.3 The key concern with regard to transition arrangements is that it is not clear at this stage which provisions of the Act will be preserved (or have their effect preserved) for a defined period after the commencement of the Act.⁵
- 3.4 In addition, Optus would appreciate advice on how the Government's commitment to ensuring rights of existing licensees will not be diminished in the transition will be tracked – that is measured and monitored.
- 3.5 As discussed at 2.44-2.46 above Optus does not consider the proposed incentives for spectrum licensees to transition to new regime prior to licence expiry are adequate and considers further work and consultation with industry on this important aspect of the spectrum management framework be undertaken..
- 3.6 Optus strongly supports:
 - (a) the development of a schedule for the transition of apparatus licences, expected to occur over a five year period post Act commencement;
 - (b) a commitment to minimise the cost of transition for industry, including detail on how this will be tracked and monitored; and
 - (c) the proposal that all 'un-allocated spectrum licences' will be put to market prior to the commencement of the main provisions of the Bill, and suggests that a timetable indicating what unallocated spectrum will be allocated and when would be useful.
- 3.7 As noted under Equipment under Part 10 above the timing of transition to new equipment rules and standards should only be determined once the quantum of changes from old to new spectrum management framework is known.

⁵ ACMA. *The licensing system, Supporting material for the Exposure Draft of the Radiocommunications Bill 2017, MAY 2017*, p15

Section 4. OTHER ISSUES

Stamp Duty and Spectrum Trading

- 4.1 Optus strongly supports the proposal by the Associations and Telstra for the inclusion of a new clause 236 in the Bill, or the relevant supporting tax Acts, to abolish stamp duty on the trading of spectrum licences on the basis that:

“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.”

- 4.2 Optus supports the removal of stamp duty from the trading of spectrum licences in NT, Qld and WA to ensure a consistent approach across Australia.

Broadcast Service Bands

- 4.3 Optus retains its view that a comprehensive reform of the spectrum management framework must include broadcasting spectrum.
- 4.4 While it is noted that the Bill as drafted will not accommodate the transition of broadcasting spectrum, Optus suggests that consideration be given to amend the Bill to give the option of such a transition longer term. That is, the current reform opportunity should be used to create an option for a future transition of broadcasting service band spectrum under a new Radiocommunications Act so that all spectrum is managed under one regime.