SPECTRUM REVIEW

Submission to the Department of Communications and the Arts

July 2017

Contents

Introduction

Vodafone Hutchison Australia (**VHA**) welcomes the opportunity to provide feedback on:

- the Department of Communications and the Arts' (**DoCA**) 'Radiocommunications Bill 2017: a platform for the future' information paper (**Information Paper**);
- the exposure draft of the Radiocommunications Bill 2017 (**Bill**);
- the DoCA 'A proposed approach to transition from the 1992 Act to the Radiocommunications Bill' information paper (**Transitional Paper**); and
- the DoCA 'Broadcasting Spectrum' information paper (**Broadcasting Paper**).

VHA supports reform of the spectrum management framework. The existing framework is complex and administratively burdensome and should be modernised in order to maximise the public benefit to be derived from the efficient allocation and use of this valuable resource.

Executive Summary

Part A – Radiocommunications Bill 2017

Rapidly developing wireless and mobile communications technologies and consumers' increasing appetite for data rich applications are driving significantly increased demand for spectrum and structural changes at an industry level. As a result, reform of the spectrum management framework is very much needed and also time critical.

VHA strongly supports reforms that will lead to greater simplicity, flexibility and certainty for spectrum users. It also agrees with the conclusions of the DoCA's *Spectrum Review: Final Report*[1] (**Final Report**) that a spectrum management framework that reflects these objectives is likely to produce efficient outcomes in terms of the allocation, management and use of spectrum and that promoting secondary trading and a move away from rigid processes should be key elements of the reforms.

The Bill goes a significant way to achieving these objectives and streamlining a range of processes, along with the inclusion of a broader, more flexible range of enforcement remedies, all of which are positive developments. However, VHA has concerns that a number of aspects of the Bill could reduce the benefits realised by reform for spectrum users and the Australian public more broadly. For example:

- The objects of the Bill should more explicitly reflect the importance of the promotion of competition and ***economic*** efficiency.

[1] Department of Communications and the Arts, *Spectrum Review: Final Report* (March 2015), 4 < https://www.communications.gov.au/publications/spectrum-review-report>

- A move away from prescriptive legislative processes to broad decision-making powers for the Australian Communications and Media Authority (**ACMA**) has the potential to deliver a truly flexible and efficient spectrum management framework. However, unless the ACMA is positively required to promote the objectives of simplicity, flexibility, certainty and efficiency in exercising its powers there is a real risk that the limitations and inefficiencies of the current regime will simply be replicated over time. VHA therefore seeks to have key exercises of the ACMA's powers (especially those relating to licences, licence conditions and secondary trading) subject to appropriate defined decision-making criteria.
- The Bill imports from other contexts a number of new concepts (such as designated statements and regulatory undertakings) which VHA considers add significant, additional complexity to the spectrum management regime, often with limited benefit.
- The ACMA's broad powers to suspend, cancel, resume and (to a lesser extent) vary spectrum licences may undermine the certainty which the spectrum management framework intends to promote, and will reduce incentives for efficient investment and innovation.
- Effective interference management arrangements are a key element in providing certainty to spectrum users. Accordingly, the ACMA should have a positive obligation to investigate and respond to complaints. This is not the case under the current version of the Bill.
- Effective review mechanisms will ultimately promote consistent, sound decision-making. However, under the current version of the Bill some decisions which are currently reviewable may not be in future. In addition, with respect to some other decisions, the ACMA appears to be given the ability to determine whether they will be reviewable or not, which substantially undermines the review mechanisms. VHA submits these review mechanisms should therefore be strengthened.

Accordingly, VHA has proposed some limited but important changes to the Bill which it considers will be relatively straight forward to implement. A summary of VHA's recommended changes to the Bill is set out in **Annexure A**.

Given the extensive nature of the proposed reforms, VHA has confined its submission to the issues it considers to be of greatest importance. These are:

1. Whether the Bill will achieve the stated intended objectives of the reform process;

2. Whether the objects of the Bill ensure a consistent principles-based approach;

3. Whether the role of the Minister and Ministerial policy statements helps or hinders the objectives of the reform process and the key principles of reform;

4. The role of the Annual Work Program;

5. The role of Radiofrequency Plans;

6. The Single licencing framework;

7. Spectrum authorisations;

8. Interference management;

9. Equipment rules;

10. Approaches to Enforcement;

11. Spectrum access charges; and

12. Review of decisions.

Part B - Transitional Arrangements

VHA agrees with DoCA that a transitional framework should be simple, transparent and predictable, with minimal disruption to business activities and clearly articulated rights and obligations for users during the transition period. In addition, VHA strongly supports a transitional framework that is timely and allows the intended benefits of reform to be realised as quickly as possible.

Given that the effectiveness of the transitional arrangements will very much depend upon the detail of the Transitional and Consequential Bill (**T&C Bill**) it will be essential that further consultation on a draft of the T&C Bill is undertaken. VHA submits that the T&C Bill should:

- prescribe mandatory timeframes in which transition must occur;
- protect rights accrued under the current legislation (for example, rights to seek merits reviews); and
- to the extent existing spectrum licences are to be treated as having been made under the new legislation, ensure this does not result in an erosion of rights under those licences (for example, because they are more readily subject to variation, cancellation or resumption).

Part C – Broadcasting spectrum

VHA supports the proposal to bring broadcasting spectrum into the same planning framework that is applicable to all other radio spectrum. This will bring greater consistency in spectrum planning across all users of radio spectrum. This is an important step. However, it is necessary to extend this consistency beyond spectrum planning, to other aspects of spectrum management such as pricing, allocation etc. as soon as practicable.

A consistent approach to spectrum management is the most effective means of ensuring our scarce and valuable spectrum resources deliver the highest value to Australia both now and in the future. This is particularly important when the broadcasting industry is undergoing a significant structural transformation under which an increasing amount of "broadcasting" content is being delivered over fixed and mobile networks as streaming or "over the top" services.

Consistent with this approach, VHA submits:

- there is no reason to apply special criteria in planning for broadcasting uses of spectrum;
- there is no need to retain designated broadcasting service bands and greater sharing of spectrum used by broadcasters should be encouraged;
- it is appropriate that technical specifications are moved from licence area plans to the conditions of radiofrequency licences; and
- the existing statutory guarantees for incumbent broadcasters to have access to spectrum are unnecessary and should be phased out.

Part A – Radiocommunications Bill 2017

1 Will the Bill achieve the intended objectives of reform?

Rapidly developing wireless and mobile communications technologies and consumers' increasing appetite for data rich applications are driving significantly increased demand for spectrum and associated increases in the value it generates within the Australian economy. The commercialisation of 5G technology by 2020 and increased take up of internet of things applications will generate additional growth in demand for spectrum in coming years. Given these pressures, a "business as usual" approach to spectrum management is likely to produce sub-optimal outcomes for spectrum users and the Australian public.

VHA supports reform of the existing spectrum management framework because it is complex, inflexible and administratively cumbersome. Given the challenges currently associated with spectrum management and the imperative to maximise the efficiency in spectrum use and allocation, the existing regime is arguably no longer fit for purpose.

VHA strongly supports the conclusions of the Final Report that reform to the spectrum management framework must:

- **simplify** the arrangements;
- improve **flexibility**;
- provide **certainty** for spectrum users; and
- facilitate **efficient** allocation, use and management of spectrum.[2]

A simple, flexible and certain spectrum management regime is arguably the most effective way of achieving efficiency by ensuring that spectrum will transition efficiently to its highest value use with minimal need for regulatory intervention.

The Bill represents a shift towards these objectives in many respects. For example, by eliminating the distinction between spectrum and apparatus licences and removing unnecessary procedural requirements, the Bill creates the potential for a much less rigid overall spectrum management framework. In addition, the introduction of a broader range of enforcement tools including public warning

[2] Department of Communications and the Arts, *Spectrum Review: Final Report* (March 2015), 7-9 < https://www.communications.gov.au/publications/spectrum-review-report>

notices, infringement notices and enforceable undertakings is likely to enable the ACMA to foster a culture of compliance in a proactive and efficient manner.

Even so, VHA is concerned there is a significant risk that the Bill as currently drafted will not fully achieve its objectives for the reasons set out below.

Certain aspects of the Bill are unduly complex

The Bill introduces unnecessary complexity into the spectrum management framework in two key ways.

First, it introduces a number of new concepts with a range of potential unintended consequences. For example, the Bill effectively creates four sub-categories of licence conditions, namely, ordinary licence conditions set out in the licence, licence conditions imposed via a legislative instrument, designated statements, and regulatory undertakings.

There is limited guidance about how these conditions are intended to interact. In addition, there is no clear path for review of licence conditions imposed via a legislative instrument and it is uncertain how designated statements and regulatory undertakings that are expressed to bind the ACMA would be enforced.

Second, the Bill provides for the Minister and the ACMA to issue a number of new kinds of instruments such as Ministerial Policy Statements (**MPSs**), Radiofrequency Plans and Licence Issue Schemes (**LISs**). The powers to make these instruments are broad enough to permit the issuing of multiple, overlapping instruments. This is likely to present challenges for spectrum users in terms of the potential proliferation of rules and obligations and raise difficult questions about how inconsistencies are to be resolved.

To minimise unnecessary complexity, VHA seeks:

- the removal of licence conditions imposed via legislative instrument;
- strengthening the rights granted to spectrum users under licences to eliminate the need for regulatory undertakings;
- greater clarity about how designated statements that bind the ACMA are to be enforced; and
- greater clarity in the Bill about how overlapping instruments will interact.

Granting the ACMA broad decision-making powers alone will not ensure a flexible framework overall

A truly flexible spectrum management framework that enables spectrum to transition to its highest value use with minimal involvement from the ACMA, is arguably one of the most effective ways to ensure efficient allocation and use of spectrum. In addition, it is the best way to facilitate the adoption of efficiency enhancing new technologies without the need for the ACMA to 'pick winners'.

The Bill is expressed to represent a move away from legislating prescriptive detailed processes,[3] to a more principles-based approach to regulation. While the Bill grants the ACMA broad powers to determine rules, processes and conditions associated with the spectrum management framework, this could enable the move to a more flexible system, but does not necessarily translate into overall flexibility of the spectrum management framework. What is lacking is a set of overarching principles that reflect the stated objectives of reform to guide the exercise of those powers.

There are a range of different ways in which this can be achieved. For example:

- a statement of regulatory policy similar to section 4 of the *Broadcasting Services Act 1992* (Cth) (**BSA**);
- the requirement for the ACMA to have regard to certain mandatory considerations in performing its functions like under section 22 of the BSA;[4] or
- the requirement for the regulator to be satisfied a decision will achieve certain specified outcomes in the same way that the Australian Competition and Consumer Commission (**ACCC**) needs to be satisfied that declaration of a service will promote the long-term interests of end-users (Part XIC, *Competition and Consumer Act 2010* (Cth) (**CCA**)).

The absence of clearly articulated decision-making principles in the Bill creates a real risk that, over time, many of the unnecessary restrictions and inefficiencies that characterise the current regime will be replicated, preventing the potential benefits of reform from being fully realised.

It is critical that this outcome is avoided.

VHA recommends that key ACMA decision-making powers (including its planning and licensing powers and the power to issue spectrum issue limits) should be guided by decision-making principles. For example, in exercising its powers to impose conditions on, vary, suspend or cancel licences under Part 6 of the Bill, the ACMA should be required to have regard to the desirability of minimising restrictions upon the use of spectrum, ensuring certainty for stakeholders and avoiding complex, administratively onerous processes.

The Bill separately provides for the ACMA to impose a range of restrictions upon licensees in terms of third party authorisations and secondary trading of spectrum. This reverses the default position under the current legislation where, in most instances, this can be done without ACMA approval. This has the

[3] Information Paper, page 5.
[4] Section 22 sets out the considerations that the ACMA is to have regard to in making certain determinations or clarifications, and giving certain opinions, in relation to broadcasting services.

potential to create significant rigidity in the system which appears to be at odds with the desire to move to a more flexible system.

In this context, VHA seeks changes to the Bill:

- to ensure key exercises of the ACMA's decision-making power, including planning powers, powers with respect to licences under Part 6 and the imposition of licence issue limits are guided by appropriate decision-making principles; and
- removing the provisions expressly granting the ACMA power to impose conditions on licences which restrict third party authorisations, assignment and otherwise dealing with licences.

Significant aspects of the Bill are uncertain

Certainty of spectrum users' rights, including certainty about the term and conditions of licences and the ability to operate authorised equipment without interference, is critical to driving efficient investment and innovation.

VHA is concerned that there are three key aspects of the Bill that undermine certainty for spectrum users.

First, under the Bill the ACMA has broad powers to suspend, cancel and resume licences including where no breach of a licence has occurred. This ultimately creates uncertainty for spectrum users about the term for which rights under a licence may be enjoyed because a number of key protections for licence holders will no longer apply.

Second, effective avenues of review give stakeholders comfort that decision-making powers will be exercised soundly and in accordance with law, especially when rights worth hundreds of millions or billions of dollars are concerned. Under the Bill, a number of decisions that should be subject to merits review are not subject to review. Most unusually, the ACMA is accorded a broad discretion to determine which aspects of its decision-making will be reviewable via the making of a range of rules and instruments. It is highly unusual for an administrative law decision-maker to be afforded the discretion as to whether its decisions will or will not be subject to merits review. Even the most reasonable decision-maker will have a natural incentive to minimise scrutiny and appeal of its decisions. VHA considers that creating the opportunity for a decision-maker to choose to avoid scrutiny and review in this way is inappropriate.

Third, under the Bill there is no positive obligation on the ACMA to investigate and respond to complaints about interference. VHA considers interference management and enforcement to be a core function of the ACMA and that this should be made more explicit in the Bill. Interference management is the essential corollary of certainty of rights for spectrum holders. Ensuring that there are strong obligations for the ACMA to respond to concerns and complaints regarding interference management is therefore critical and would promote effective interference management arrangements and provide greater certainty to spectrum users.

Accordingly, VHA seeks the following further changes to the Bill:

- the ACMA's powers to suspend, cancel and resume licences must be subject to the key protections for licence holders that exist under the current regime;
- clear paths for the review of decisions must be identified where appropriate and the legislation, not the ACMA, should determine which decisions are reviewable on the merits; and
- the ACMA must be required to investigate complaints into interference and advise the complainant of their findings.

Implementation issues

While the ACMA has expressed an intention to prepare issues papers, undertake consultations and hold stakeholder forums on a wide range of issues, VHA is concerned there is no legislative requirement to do so. Consultation is critical as Australia implements a new regime and introduces a range of new and untested instruments. VHA is encouraged by the ACMA's statements that it will engage in stakeholder consultation on the implementation of the Bill. Such processes are essential for the establishment of a spectrum management framework that is workable, understood by industry and best promotes the intention behind the spectrum reforms. These intentions should be reflected with clear requirements in the legislation.

In addition, the Bill places significant responsibility on the ACMA to design, implement and manage the new spectrum arrangements. These processes will be undertaken simultaneously with a number of other significant "business as usual" projects including planning to facilitate the commercialisation of 5G technologies. For the ACMA to consult and prepare the necessary suite of instruments, guidelines and other documents, it will need to be appropriately resourced for this substantial increase in workload. Unless these additional resourcing requirements are met, it is unlikely that the proposed reforms will be implemented in a timely or effective way.

2 Objects of the Bill

According to the basic rules of statutory interpretation, an Act is be interpreted in such a way as to give effect to its purpose or object.[5] The objects of a statute provide over-arching guidance as to how powers afforded by legislation are to be exercised, as well as how to resolve uncertainties and ambiguities.

It is therefore essential that the objects of the Bill (section 3) are precisely framed to capture the range of purposes and intended outcomes that underlie the spectrum reforms.

[5] *Carr v The State of Western Australia* [2007] HCA 47, 5; *NBN Co Limited v Pipe Networks Pty Limited* [2015] NSWSC 475, 55.

VHA acknowledges the potential benefits of replacing the current legislative arrangements with modern, principles-based legislation that streamlines the ACMA's functions including licensing and spectrum allocation. However, it must be recognised that this approach will likely result in the objects clause taking on greater significance at least in the early days when the interpretation of key facets of the legislation is being clarified.

In this context, VHA is comfortable with the proposed simplification of the objects clause, subject to two qualifications:

- the current drafting of the objects clause in the Bill should be amended to reflect VHA's proposed drafting below; and
- the ACMA must be required to have regard to certain decision-making principles in performing its functions and exercising power under key provisions of the Bill (as discussed throughout this submission).

The objects of the Bill should provide a clear set of overarching policy objectives and reflect the importance of promoting competition, innovation and efficient investment.[6] Accordingly, VHA proposes the following changes to the objects of the Bill (section 3):

> *The objects of this Act are:*
>
> *a) to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that:*
>
> *(i) facilitates the economically efficient planning~~,~~ and allocation ~~and use~~ of the spectrum; and*
>
> *(ii) where relevant, promotes competition in downstream markets; and*
>
> *(iii) facilitates the use of the spectrum for defence, public and community purposes; and*
>
> *(iv) supports the communications policy objectives of the Commonwealth Government; and*
>
> b) *to establish an efficient system for the regulation of equipment.*

The proposed changes reflect that the objects should primarily be concerned with 'economic' efficiency to encourage the ACMA to focus on facilitating the transition of spectrum to its highest value use. Under the existing framework, changes of use often require substantial regulatory intervention, but ideally this should be achieved with minimal ACMA involvement. As noted above, VHA considers that spectrum

[6] ACMA Review, pages 10 and 58 (22 May 2017) < https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report>. The ACMA Review recommended that these principles be included in the *ACMA Act 2005* (Cth). VHA submits that it would be equally appropriate for these principles to also be included in the Bill.

holders, rather than the ACMA, are often better placed to make decisions about how spectrum holdings can be utilised most efficiently.

The inclusion of the concept of 'promoting competition in downstream markets' is intended to ensure that competition policy is given appropriate weight in the spectrum management framework.

Alternative approach

The objects clause proposed above will be sufficient if DoCA adopts VHA's recommended inclusion of decision-making principles or statutory criteria to guide the ACMA's exercise of discretion on key issues (discussed throughout this submission). However, if decision-making principles are not included in the Bill as VHA recommends, a general objects clause (of the kind currently proposed) will not provide sufficiently specific guidance to the ACMA on the performance of its functions and exercise of its powers. Accordingly, if DoCA chooses not to adopt VHA's submissions in relation to decision-making principles, a more precise objects clause will be required.

VHA does not accept that the inclusion of multiple objectives (if clear and precise) is difficult to give effect to or confusing as suggested in the Information Paper.[7] It is not uncommon for legislation to contain a number of, at times competing, objects and there is clear case law setting out how these are to be weighed up.[8]

3 Role of the Minister and Ministerial policy statements

In principle, there may be efficiency benefits associated with eliminating some of the more prescriptive decision-making powers of the Minister under the current legislation and relying on general powers of direction (such as section 14 of the *Australian Communications and Media Act 2005* (Cth) (**ACMA Act**)) in conjunction with MPSs as proposed under the Bill.

MPSs have the potential to be a useful tool with respect to spectrum management. However, there remains a level of uncertainty about the kinds of matters these instruments will cover and the purpose they are intended to serve. Given that the MPSs have the capacity to touch on all of the ACMA's spectrum management functions and powers, VHA considers it is critical that stakeholders be consulted prior to an MPS being issued. The Information Paper contemplates that consultation will occur with respect to any

[7] Information Paper, page 10.
[8] *Carr v The State of Western Australia* [2007] HCA 47, 5; *East Australian Pipeline Pty Ltd v Australian and Competition Consumer Commission* [2007] HCA 44, 48-49; *Telstra Corporation Ltd v ACCC and Another* [2008] FCA 1758.

MPSs before they are finalised. However, VHA considers that it this should be incorporated as a statutory prerequisite to the making of an MPS under the Bill.

Given the Bill empowers the Minister to issue multiple MPSs, it would be helpful to have greater clarity about how they will interact with each other and the hierarchy of the range of other instruments provided for in the Bill, such as Ministerial directions and radiofrequency spectrum plans.

While DoCA's information paper entitled 'Enhancing Ministerial Guidance to the Regulator' states that the ACMA is required to summarise how regard has been given to MPSs in its Annual Report, such a requirement is not expressly provided for in the Bill or the ACMA Act.[9] VHA considers that there would be merit to expressly including a statutory requirement to do so.

4 Annual Work Program

VHA supports the proposed requirement for the ACMA to prepare and publish an annual work program in relation to its spectrum management activities. The preparation and publication of a work program will provide stakeholders with much needed transparency about the ACMA's priorities on a more regular basis than the current five-year spectrum outlook.

It is hoped that this greater transparency will encourage effective and efficient management of spectrum going forward. Even if it does not prevent the kinds of delays that have occurred in the past from time to time, this transparency measure may at least enable the cost of the significant underutilisation of spectrum that can result and its impact upon consumers and the economy to be measured more accurately. For example in 2011, to facilitate the transition of 1800MHz spectrum to use in regional 4G network deployments, the ACMA put a large portion of that spectrum under embargo. The spectrum subsequently remained substantially unused in many major regional centres and other areas for more than 5 years until the ACMA auctioned it in February 2016. This substantially delayed the rollout of 4G services in these areas.

VHA agrees with the statement in the Information Paper that the ACMA should report on its progress against its current work program in its Annual Report. However, there is no statutory requirement in the Bill or the ACMA Act for this to occur. Accordingly, to ensure that the intention of DoCA as expressed in the Information Paper is given effect, VHA submits that either the Bill or the ACMA Act should be amended.

The proposed consultation on the ACMA's annual work program before it is finalised is also of significant value. However, a minimum 14 day timeframe for consultation on a draft work program will be inadequate to enable stakeholders to properly consider it and to provide meaningful submissions. While VHA

[9] Department of Communications and the Arts, *Enhancing Ministerial Guidance to the Regulatory,* page 2.

understands the need for the ACMA's work program to be finalised in a timely manner, a minimum period of 28 days in which to lodge submissions would be more reasonable given the importance of the plan.

5 Radiofrequency plans

Planning can be a useful tool in facilitating international harmonisation and the availability of suitable devices, as well as ensuring community, emergency services and defence needs are met.

While these functions are important, it is also critical that radiofrequency plans do not unduly constrain the flexibility of the broader spectrum management framework. VHA would like to see a move away from industry-based spectrum planning which sets aside spectrum bands for one, or a small number, of narrowly-defined uses.

The prescriptive approach historically taken to band plans and other planning instruments under the current arrangements can be a significant impediment to the development of, or investment in, new efficiency enhancing technologies.

VHA supports the proposal to consolidate a number of the ACMA's discrete planning powers into a single power to make radiofrequency plans. This approach has the potential to streamline planning and make the ACMA's processes more efficient. However, given the significant discretion the Bill accords the ACMA as to the number and content of radiofrequency plans, there is a real risk that some of these benefits may not materialise, or materialise in a sub-optimal manner. This is likely to be the case unless the exercise of that discretion is guided by the principle that radiofrequency plans must accord spectrum users as much flexibility as is reasonably practicable. VHA submits that this principle should be reflected in Part 4 of the Bill, specifically, a new section 24A should be included as follows:

> *In determining a radiofrequency plan under section 24, the ACMA is to promote the objects of this Act and minimise restrictions on use of spectrum to the extent reasonably practicable.*

6 Single Licencing Framework

The single licensing framework is perhaps the most important element of the reform package. Significant efficiency dividends can be achieved by simplifying licence conditions and the processes for issuing licences, as well as facilitating strong secondary markets for spectrum. However, VHA is concerned that the lack of legislative principles guiding the exercise of the ACMA's discretion and the potential erosion of certainty in terms of the rights accorded by licences may all combine to limit the benefits of the proposed Bill.

Broadly, the licensing framework should provide as much certainty as possible for licence holders and only impose restrictions on the use of spectrum holdings to the extent they are reasonably necessary to prevent interference with the rights of others.

VHA is concerned that there are a number of aspects of the licensing framework in Part 6 of the Bill which raise significant questions about whether it is fit for purpose.

6.1 Decision-making principles

For the reasons outlined above and to ensure the anticipated benefits of reform are realised, the reform objectives of simplicity, flexibility, certainty and efficiency should be reflected in a set of decision-making principles that apply to the performance of the ACMA's functions and exercise of its powers under Part 6 of the Bill. Accordingly, the following new section 31A should be added to Part 6:

In performing its functions and exercising its powers under this Part 6, the ACMA is to promote the objects of this Act and have regard to the following principles:

(1) restrictions upon the:

(a) use of;

(b) authorisation of a third party to use;

(c) subdivision of;

(d) assignment of; or

(e) dealing with,

licensed spectrum should only be imposed to the extent reasonably necessary or desirable to support the expected use of the spectrum, prevent interference, ensure public safety or protect the rights of other licence holders or persons operating under spectrum authorisations or other licences;

(2) the process for issuing licences and the conditions to which licences are subject should be as simple and transparent as is reasonably practicable;

(3) as far as is reasonably practicable, licence holders should have certainty with respect to the term for which a licence will operate, and the conditions to which it is subject, to promote economically efficient investment.

In addition, to the extent that the DoCA does not accept VHA's proposed amendments to the objects section (as discussed above), the 'promotion of competition' objective should be included in the new section 31A as a mandatory consideration.

6.2 Issuing licences

VHA is broadly supportive of a move towards a more streamlined process for the issuing of licences which removes the need for Ministerial involvement in the routine processes associated with allocation and re-allocation.

However, the drafting of the relevant provisions of the Bill appears to contemplate the promulgation of multiple, discrete LISs which may ultimately increase in the complexity of (or at least not simplify) the arrangements for issuing licences.

As a general principle, VHA considers that standardised processes for allocating licences should apply across the board. It may be reasonable to treat different kinds of spectrum differently; for example, applying market based mechanisms for high demand spectrum and 'over the counter' processes for frequencies or areas where there is less contention. However, issuing LISs on an ad hoc basis for different parts of the spectrum as the need arises is likely to result in unnecessary uncertainty and complexity.

The desirability of generally applicable allocation processes is tacitly acknowledged in both the Information Paper and the ACMA's paper *The licensing system – Supporting material for the Exposure Draft of the Radiocommunications Bill 2017*.[10] However, there is nothing in the relevant provisions of the Bill that would require the ACMA to have regard to this principle. Indeed, the empowering provision, section 34, refers to making a LIS for '***an*** auction process; ***a*** tender process; ***a*** pre-determined price process; ***a*** negotiated price process; ***an*** application process'. This tends to suggest that separate LISs will be made each time a new group of licences are to be issued.

This kind of approach may well simply replicate existing, unwieldy processes.

Sections 34 and 35 of the Bill provide the ACMA with relatively unconstrained powers to issue LISs. Depending on how the ACMA exercises its LIS-making power, the reforms could result in *increased* complexity and unpredictability in the licence issuing process. For example, by increasing the number of rules which an applicant must navigate, as well as the possibility of conflicting or inconsistent LISs being in operation.

VHA understands that given LISs are legislative instruments the ACMA will be obliged under the *Legislation Act 2003* (Cth) (**Legislation Act**) to consider whether it would be appropriate to undertake

[10] ACMA, *The licensing system – Supporting material for the Exposure Draft of the Radiocommunications Bill 2017* (May 2017).

public consultation on a proposed LIS. VHA considers public consultation is an important step in the process for determining LISs.

VHA is separately concerned about the proposed general power for the ACMA to issue a licence upon the written application by a person and the associated lack of transparency. Unlike LISs, which are to be made public, the Bill does not require the ACMA to publish rules and processes relating to individual applications for licences. To promote consistency and transparency, DoCA should amend section 33 to prevent a licence being issued if it would be inconsistent with a LIS. This would not prevent the ACMA from providing for an 'over the counter' LIS for less contended spectrum.

6.3 Licence issue limits

Proposed section 36 empowers the ACMA to determine licence issue limits and section 37 requires the ACMA to be satisfied that it has undertaken any consultation with the ACCC that is appropriate and reasonably practical before doing so.

This is preferable to the current arrangements under the *Radiocommunications Act 1992* (Cth) (**Radcomms Act 1992**), whereby the ACMA may only determine a competition limit if directed to do so by the Minister. However, there is a significant amount of uncertainty associated with this process under the Bill as currently drafted. For example, it is unclear:

- what matters the ACMA should consider in determining whether to make a licence issue limit;
- in what circumstances the ACCC will be consulted in relation to a licence issue limit;
- whether the ACCC is required to prepare a recommendation if consulted;
- whether the ACMA is obliged to have regard to any recommendation of the ACCC in setting a licence issue limit;
- what criteria either the ACCC or the ACMA are to apply when considering licence issue limits; and
- whether the ACCC recommendation is required to be published and/or whether the ACCC recommendation and/or the ACMA decision regarding licence issue limits are reviewable.

Each of these issues is considered in more detail below.

Matters the ACMA should consider

Clearly a person's existing spectrum holdings will be relevant to the question of whether to determine a licence issue limit. However it may be appropriate for the ACMA to consider a range of other matters such as the person's position in related markets and any vertical integration etc. Accordingly, it would be desirable for section 36 to include a new subsection (2A) that provides:

In deciding whether to determine a licence issue limit, the ACMA must have regard to any matters it considers relevant, including but not limited to, a person's existing spectrum holdings in the relevant part of the spectrum and/or other, similar parts of the spectrum.

When should the ACCC be consulted?

Licence issue limits are fundamentally directed at preventing monopolisation of an essential input into a range of upstream and downstream services. As the regulator with the responsibility for enforcement of the CCA, the ACCC will generally be well placed to assess the likely competitive impacts of spectrum allocation.

In this context, whenever the ACMA proposes to allocate spectrum by way of a market based mechanism, it should be required to pro-actively consider both whether a licence issue limit may be appropriate ***and*** to consult with the ACCC on the issue. In contrast, as currently drafted, the Bill imposes no general obligation upon the ACMA to turn its mind to whether a licence issue limit may be appropriate and consultation with ACCC is merely an option for the ACMA in determining a licence issue limit.

VHA is of the view that the ACMA should be required to consult with the ACCC on the determination of a licence issue limit and the ACCC should be obliged to provide the ACMA with a recommendation within a specified timeframe. The ACMA should then be obliged to have regard to the ACCC's recommendation, even if it is not bound by it.

VHA understands that given licence issue limits are legislative instruments the ACMA will be obliged under the Legislation Act to consider whether it would be appropriate to undertake public consultation about whether licence issue limits should be imposed. VHA considers public consultation is an important step in the process for determining licence issue limits.

What criteria should be applied?

VHA has already emphasised the need for the ACMA to consider the promotion of competition in its decision-making in section 2 of this submission.

Section 36 of the Bill empowers the ACMA to determine licence issue limits, but leaves open the question of the basis upon which the ACMA is to make its decision.

There are several established tests which are applied in other contexts under the CCA to assess competitive impacts. They are:

- the 'substantial lessening of competition' or 'SLC' test which is directed at whether a merger is likely to result in a substantial lessening of competition;

- the 'long term interests of end-users' or 'LTIE' test which focuses upon whether declaring a carriage service will promote competition and efficient investment as well as a range of other matters; and
- the 'promotion of competition' test which considers whether declaration of a service provided using significant infrastructure will promote competition in downstream markets (one of a number of declaration criteria).[11]

To facilitate consistency and increase transparency in the ACMA's decision-making, the Bill should require the ACMA to make an assessment of whether a licence issue limit is necessary or desirable based on a statutorily defined set of criteria. In this context, criteria which are concerned with the promotion of competition would be more appropriate than the SLC test and more consistent with the objects of the Bill overall. VHA considers that a modified version of the LTIE test or possibly, its promotion of competition limb, would be most suitable.

Specifically, a new section 37A should be included in the Bill as follows:

> *(1) The ACMA must determine a licence issue limit under section 36, if it is satisfied that the licence issue limit will promote the long-term public interest in the use of spectrum.*
>
> *(2) In preparing a response to consultation by the ACMA under section 37, the ACCC must indicate whether it is satisfied that a licence issue limit will promote the long-term public interest in the use of spectrum.*
>
> *(3) In determining whether a licence issue limit will promote the long-term public interest in the use of spectrum, the ACMA and the ACCC must have regard to the following objectives:*
>
> *(a) the objective of promoting competition in upstream and downstream markets; and*
>
> *(b) the objective of promoting the economically efficient use of spectrum and the economically efficient investment in infrastructure to exploit spectrum and supply services in upstream and downstream markets.*

[11] *Competition and Consumer Act 2010* (Cth), ss 50, Parts IIIA and XIC.

While different limits might apply to different operators, it may be also useful to require the ACMA to prepare standard-form guidelines on the approach it will take to determining licence issue limits and to consulting with stakeholders prior to making a decision about whether to impose one.

Application of section 50 of the CCA

As currently drafted, the Bill would enable the ACMA to impose licence issue limits without consulting the ACCC in some circumstances. Even if the ACCC is consulted, the ACMA would not be required to follow its recommendation. In this context it may not be appropriate to exclude ACCC review for all acquisitions of spectrum that are subject to a licence issue limit as contemplated by section 97 of the Bill.

6.4 Conditions of licences

The Bill effectively creates four categories of licence condition (ordinary licence conditions, conditions specified in legislative instruments, designated statements and regulatory undertakings). This is substantially more complex than the current arrangements under the Radcomms Act 1992.

Designated statements and regulatory undertakings are dealt with separately below.

In addition, specifying some licence conditions via inclusion in the licence itself (sections 46-49 and 51 of the Bill) and others in legislative instruments (section 50) may have unintended consequences.

Specifically, as set out in more detail in section 6.9 on licence variations below, it is unclear how the power to make an instrument under section 50 of the Bill, the implied power to revoke or vary that instrument under section 33 of the *Acts Interpretation Act 1901* (Cth) (**AIA**) and the restrictions upon ***varying a licence under section 57*** by varying or revoking ***conditions covered by section 50*** are intended to be reconciled. In addition, unlike the current arrangements which provide for merits review of any imposition of licence conditions the Bill creates a set of licence conditions for which there is no clear path for review. This issue is discussed in more detail in section 11 on review of decisions below.

For these reasons, section 50 should be deleted from the Bill.

Finally, VHA submits it is essential that the exercise of the ACMA's broad discretion to impose various kinds of licence conditions under Part 6, is guided by a set of decision-making principles such as those outlined in section 6.1 above. Otherwise, there is a real risk that the reform objectives of simplicity, flexibility, certainty and efficiency will not be realised, or only partially realised.

6.5 Designated statements

The Information Paper indicates that, in addition to ordinary licence conditions, constraints on a licence are able to be expressed through designated statements, which may set out restrictions or limitations upon either the licensee or the ACMA with respect to a range of matters including third party use, variations, assignment, renewal, suspension or cancellation.

This approach imports a significant degree of complexity and uncertainty, including in terms of how designated statements and ordinary licence conditions are intended to interact.

It is not clear to VHA why it is necessary to distinguish between limits on how a licensee deals with a licence and limits on how it uses spectrum in this way.[12] For example, there does not appear to be any distinction between ordinary licence conditions and designated statements with respect to enforcement.

To the extent the Bill contemplates imposing obligations on the ACMA by way of designated statements, real questions remain about how a failure to comply with a designated statement could be enforced against the ACMA (as a licence is not a contract). For example, it is not clear that a failure by the ACMA to comply with a designated statement would give rise to a right to judicial review under either the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) or the *Judiciary Act 1903* (Cth).

If DoCA is minded to retain the concept of designated statements, VHA submits that it must at the very least include provisions in the Bill that expressly require the ACMA to comply with designated statements that apply to it and enable licence holders to seek review of decisions that are inconsistent with a designated statement.

VHA's concerns regarding specific kinds of designated statements, especially in relation to third party use, assignment, dealing with licences and variation are dealt with separately below.

6.6 Regulatory undertakings

The comments above about the unnecessary complexity introduced into the licensing regime by designated statements and the uncertainty with respect to enforcement of obligations imposed on the ACMA under a licence apply equally to the concept of regulatory undertakings.

Regulatory undertakings appear to have been introduced into the Bill for the purpose of providing certainty for licensees with respect to their ongoing rights under the licence. However, this mechanism would be unnecessary if the licensing regime provided adequate protection for existing rights of licence holders in the first instance.

As currently drafted, the Bill (specifically sections 32 and 33) does not sufficiently protect existing licence holders from the issue of subsequent, overlapping licences (as well as overlapping spectrum authorisations including primary rights of use) and which are inconsistent with the exercise of their rights. This uncertainty will arguably destroy or reduce the potential value of access to spectrum and discourage investment. VHA acknowledges that there are Ultra Wide Band technologies that are capable of scanning a wide range of radiofrequencies to identify unused spectrum to transmit on and that the ACMA may wish

[12] This is the distinction drawn between designated statements and licence conditions in the Information Paper (p 13).

to facilitate the use of this technology going forward. However, it is entirely appropriate that the users of this technology are required to reach commercial agreements with existing licensees whose interests may be affected. Accordingly, VHA proposes the following amendment to section 32 of the Bill:

> (1) *Without limiting the rights of a licensee under section 41, ~~A~~ a licence authorises~~:~~*
>
> *~~(a) the licensee; and~~*
>
> *~~(b) any person authorised by the licensee under section 41;~~*
>
> *to operate ~~a~~ radiocommunications devices exclusively:*
>
> *(a) in the part or parts of the spectrum; and*
>
> *(b) location or area,*
>
> *specified in the licence in accordance with the licence.*

In addition, section 33 should be amended to include a new subsection 3A as follows:

> *(3A) The ACMA must not issue a licence to a person under subsection (1) or (2) if the rights granted under the licence would be inconsistent with the exercise of rights by a licensee under an existing licence.*

If DoCA does not adopt VHA's proposal to remove regulatory undertakings from the Bill altogether, VHA submits that it must at the very least include provisions in the Bill that expressly require the ACMA to comply with regulatory undertakings and enable licence holders to seek review of decisions that are inconsistent with them.

6.7 Third party use, assigning and dealing with licences and subdivision

VHA considers that facilitating secondary trading of spectrum rights is a critical mechanism for ensuring the economically efficient use of spectrum going forward. This is because, in managing their businesses, spectrum users have an incentive not to engage in practices which see them bear unnecessary costs associated with underutilised spectrum holdings. Given the right regulatory settings, these commercial imperatives will drive the movement of spectrum to its highest value use more quickly and efficiently than according broad discretion to the regulator in terms of planning and allocation.

The Information Paper presents the provisions of the Bill dealing with third party use and assigning and dealing with licences as a continuation of the arrangements under the Radcomms Act 1992 with some streamlining by removing the requirement for ACMA approval for the transfer of apparatus licences.[13] However, unlike the current legislation, the Bill expressly contemplates that a range of restrictions may be imposed upon licence holders in terms of authorising third party use, assignment and dealing with licences.

By way of example, the third party use provisions (Division 3 of Part 6 of the Bill) provide for the inclusion of designated statements in a licence to:

- prohibit a licensee authorising one or more persons to operate devices under the licence (section 42); or
- impose restrictions upon a licensee's right to authorise third party use (section 43).

There are equivalent provisions dealing with assignment (sections 81 and 82) and dealing with a licence (sections 84 and 85).

VHA is concerned that these provisions effectively reverse the presumption under the Radcomms Act 1992 that, with the exception of transfers of apparatus licences, licensees are broadly free to commercially deal with the rights associated with their licences as they see fit. This is particularly so, given that on its face, the ACMA's discretion to impose such restrictions is relatively unconstrained.

Given that under any authorisation a third party will remain subject to the terms of the licence (section 41(1)), as will an assignee (section 80), the circumstances in which authorisations, assignments or other arrangements should be prevented is very limited. Accordingly, VHA questions the need for the designated statement provisions in sections 42, 43, 81, 82, 84 and 85 and submits that at the very least the ACMA should be required to have regard to the decision-making criteria set out in section 6.1 above in deciding to exercise its powers under those sections.

The use of spectrum authorisation agreements is a highly effective means of putting unutilised spectrum to use. VHA is a strong advocate effective spectrum authorisation arrangements that avoid imposing unnecessary transaction costs. VHA has entered in spectrum authorisation agreements to facilitate use of spectrum by specialist providers for niche telecommunications purposes in remote locations (e.g., mining). These arrangements should be encouraged. In VHA's experience the feasibility of the agreements will be undermined by even a small increase in transaction costs.

VHA strongly supports the inclusion of a process for subdividing licences and considers that this is likely to be a useful tool in avoiding the underutilisation of spectrum. However, our comments on the inclusion

[13] Information Paper, page 19.

of restrictions upon the way in which a licence can be dealt with using designated statements above, apply equally to sections 78 and 79 of the Bill.

6.8 Licence duration and renewal rights

VHA supports the increase in licence duration of 20 years. This provides licence holders with greater confidence to invest and optimise use of this valuable asset.

VHA considers it is essential that renewal rights should be clearly specified in each licence as well as a well-defined timeframe for negotiation of the renewal. It is also important that licences indicate the degree to which the terms of the renewed licence will be the same as the current licence. As a result, VHA supports the measures in section 59(1) in the Bill, which require a licence to stipulate whether a licence holder has a right to renew and the period in which a licence holder may apply for renewal. However, there may be some benefit to incorporating some more detailed requirements.

The inclusion of such terms will help users of spectrum in planning and investment decisions by providing them with greater confidence about their long-term ability to use particular spectrum.

6.9 Varying licences

The Bill contemplates broad powers for the ACMA to vary licences, including a general power to include additional conditions. However, section 57 of the Bill broadly mirrors the protection of core conditions under the current regime.[14] These core conditions include conditions specifying the part or parts of the spectrum and area or location in which operation of radiocommunications devices is authorised under the licence.[15]

If the exercise of the ACMA's powers under section 57 of the Bill are subject to the decision-making principles set out in section 6.1 of this submission above, VHA is broadly comfortable with the proposed approach subject to one qualification.

As currently drafted, there is significant uncertainty about how the power to make an instrument under section 50 of the Bill, the implied power to revoke or vary that instrument under section 33 of the AIA and the restrictions upon ***varying a licence*** by varying or revoking ***conditions covered by section 50*** under section 57 of the Bill are intended to operate together, specifically:

[14] Radcomms Act 1992, s 73.
[15] Radcomms Act 1992, s 66(1)(a) and (c).

- Would sections 57(1)(b) and (c) operate to prevent the ACMA from varying or revoking a legislative instrument made under section 50 for so long as it continued to apply to any current licence?
- Would the variation of a legislative instrument made under section 50 of the Bill vary the obligations that apply to a licensee because a variation of a legislative instrument is not a variation of **the licence**, which would otherwise be restricted by sections 57(1)(b) and (c)?

VHA submits that for the reasons set out in section 6.4 on licence conditions above, the best way of resolving this uncertainty is to delete section 50 and simply rely on the licence condition making powers set out in sections 44-49 and 51.

6.10 Suspension and cancellation

VHA welcomes the inclusion of the mandatory consultation processes provided for by sections 65 and 68 and the requirement that the ACMA must have regard to any submissions made by the relevant licensee before suspending or cancelling a licence. VHA agrees with the position expressed in the Information Paper that this will promote procedural fairness.[16]

However, VHA has concerns about the ACMA's broad power to suspend or cancel a licence in 'supplementary circumstances'. 'Supplementary circumstances' is broadly defined to mean circumstances other than the breach of a condition of a licence. VHA has significant concerns regarding this approach as it creates fundamental uncertainty about the nature and duration of the rights of licence holders. As a general principle, a licence should only be suspended or cancelled for a material breach of its conditions or applicable legislation.

In addition, as the Bill is currently drafted, the ACMA may cancel or suspend a licence on 14 days' notice. This timeframe may be inadequate in circumstances where a licence holder is required to rectify non-compliant equipment or mitigate interference.

Finally, a licence should only be cancelled after a minimum suspension period during which the licence holder has failed to rectify the relevant breach or circumstance within the specified period.

6.11 Surrender

VHA supports the proposal to empower the ACMA to make a payment as an incentive to surrender a licence or part of a licence. VHA agrees with the position expressed in the Information Paper that this will assist with the re-farming of spectrum and that it will also promote the efficient use of spectrum by

[16] Information Paper, page 18.

encouraging holders of underutilised spectrum to relinquish their rights in return for an agreed amount of compensation.

6.12 Resumption

The resumption of licences by the ACMA should be a last resort and only occur in limited circumstances. This is because broad powers of resumption significantly undermine certainty in terms of the spectrum management framework as a whole and the rights of spectrum holders in particular. This in turn is likely to destroy or reduce the value of rights granted under licences and discourage investment.

VHA does not object to the new requirement that the ACMA must obtain written approval from the Minister before it can resume a licence or part of a licence. However, it is concerned by the breadth of the ACMA / Minister's discretion to resume licences which arises from the lack of any statutory criteria to guide their decision-making.

As the Bill presently stands, aside from obtaining the approval of the Minister, the ACMA is only required to follow:

- any procedures relating to the resumption of licences or parts of licences;
- any procedures relating to determining compensation payable; or
- the rate of interest to be applied,

which it has *itself* determined under section 88.

This presents two key difficulties. First, the ACMA is not obliged to determine any procedures under section 88 in which case its discretion to resume licences would be on its face relatively unconstrained. Secondly, even if the ACMA were to develop such procedures, it has a broad discretion as to what they would be.

While the intention of this drafting may be to enable the ACMA to streamline the requirements and processes currently provided for in the Schedule to the Radcomms Act 1992, there is no certainty that the ACMA will do so; nor is there any certainty that any of the procedures it does make will retain key protections that exist under the current legislation.

Important protections afforded to licence holders under the Radcomms Act 1992, include:

- The ACMA must publish a pre-acquisition declaration in the Commonwealth Gazette which includes a statement of its reasons for resumption. The making of the pre-acquisition declaration is subject to merits review.
- Where a resumption notice does not specify the day on which resumption is to occur, it will occur 14 days later (the Bill proposes that in those circumstances resumption will take effect at the "end of the day on which the notice is given").

- Compensation for resumption is for the market value of the licence and any loss, injury or damage suffered, or expense incurred, because of the resumption.[17]

VHA submits that these protections must not be removed as part of the reform package. Accordingly, the Bill should be amended to address these concerns.

In addition, VHA is also concerned by the removal a licence holder's ability, in certain circumstances, to apply to the Federal Court to determine the amount of compensation to which they are entitled. Resumption of a licence or part of a licence has the potential to have significant adverse impacts on the business of a licensee and warrants transparency and appropriate avenues of review.

While VHA acknowledges that the ACMA may be required to consult on the making of a legislative instrument setting out resumption procedures under section 17 of the Legislation Act, this process offers insufficient protection of the rights of licence holders.

7 Spectrum authorisations

VHA supports the concept of a spectrum authorisation regime but considers that the Bill should be amended to provide greater clarity about how Part 7 is to operate. While the Information Paper provides some detail as to the rationale for the regime and how spectrum authorisations differ from licences, this is not reflected in the text of the Bill.

There is arguably a lack of clarity about whether Part 7 of the Bill is intended to require those who wish to benefit from a spectrum authorisation to apply to the ACMA for approval to operate a radiocommunications transmitter of a specified kind or for a specified purpose (or both) or whether any person is automatically authorised to do such things merely be complying with the conditions specified in the authorisation. We understand the second meaning is intended, but the drafting should be clarified to remove doubt.

VHA considers that it would be preferable for the spectrum authorisation regime to reflect the second approach. This is because this approach is far less cumbersome for the ACMA and affected individuals operating the types of devices referred to in the Information Paper.[18]

This approach also more closely aligns with the objectives of the Bill to promote economically efficient allocation of spectrum and facilitate public use.

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[17] Radcomms Act, Schedule 1, Part 1, sections 2(b) and 4 and Part 2, section 1.
[18] Information Paper, page 20.

In order to ensure that the approach supported by VHA is clear on the face of Part 7, VHA recommends that all references to "*any person*" in sections 99(1), (2) and (3) be replaced with "*any class of persons*".

8 Interference Management

The proposed spectrum licensing regime will only be effective if spectrum holders are able to enforce the rights granted under a particular licence. The impact of interference is not benign, for example, an unexpected inability to make calls can have serious economic, social and public safety consequences for consumers. For these reasons, VHA considers that interference management and enforcement are a core function of the ACMA.

Under the Bill as currently drafted, if the ACMA receives an interference complaint from a spectrum holder, it is not obliged to investigate and/or respond to the complaint. Rather, the ACMA may choose to investigate a complaint and decide whether to inform the complainant of the outcome.

VHA has previously made interference complaints to the ACMA under the current regime for which it has received no response. VHA strongly recommends that the ACMA be obligated to investigate and respond to all interference complaints it receives from spectrum holders under section 113 of the Bill.

VHA considers that it is appropriate that the ACMA be granted the power to issue directions to resolve interference issues as contemplated by section 116 of the Bill. There is a strong public interest in ensuring that interference is resolved in a timely and efficient manner by the ACMA where possible.

Where instances of interference are more complex and require discussions between the parties, VHA supports the use of alternative dispute resolution to seek resolve an interference in the first instance. Action in the Federal Court by a spectrum holder to prevent interference is likely to be time consuming and costly. However, it should be available as an option in circumstances where a satisfactory resolution is not reached by the parties via alternative dispute resolution.

9 Equipment rules

VHA recognises that setting technical safeguards is an important tool for minimising interference and ensuring that devices do not adversely affect health and safety. In recent years VHA has experienced a significant increase in the number and instances of devices causing interference with its equipment, especially in the 900 MHz band. Typically, the interference is caused by equipment that is not authorised for use in Australia. In setting the equipment rules, VHA supports measures to preserve the fundamental elements of the Radcomms Act 1992 while allowing greater flexibility for new equipment to be used in Australia so long as it complies with interference standards and health and safety requirements.

Part 10 of the Bill provides the ACMA with a broad discretion to impose interim bans, or permanent bans, on equipment. Given the purpose of such bans is fundamentally to avoid interference and prevent risks

to health and safety, there may arguably be a benefit to limiting the ACMA's powers to these circumstances.

The Bill also grants the ACMA a broad power to recall equipment. This includes the right to recall equipment likely to adversely affect health or safety, designed to have an adverse effect on radio communications or which is the subject of a permanent ban. VHA accepts that it is appropriate for the ACMA to issue a recall notice in these circumstances. However, a recall notice, interim ban or permanent ban could each have a significant impact on the services provided by a licence holder where the equipment is already deployed or being deployed. In this context, VHA considers that in making equipment rules, the ACMA should be required to seek to minimise any disruption to the services provided by licence holders. In addition, where practicable, licence holders should be provided a reasonable period of time to replace equipment which is the subject of a ban or recall (if such equipment is already deployed).

10 Enforcement

VHA broadly welcomes the proposed reforms in terms of enforcement. VHA's experience with the existing enforcement framework is generally positive, however, the limited options available to the ACMA have meant that enforcement with respect to Radcomms Act 1992 non-compliance can be reactive, cumbersome and impose unnecessary regulatory burdens on licence holders.

In principle, VHA supports the greater flexibility afforded under the Bill and the introduction of a graduated set of enforcement options for the ACMA. Tools such as public warning notices, infringement notices and enforceable undertakings have the capacity foster industry compliance without imposing undue financial or administrative burdens. This is a similar model to enforcement regime used by other regulators such as the ACCC.

However, VHA cautions ACMA on the use of enforceable undertakings as a means of imposing additional conditions on a licence holder. Any enforceable undertaking should be limited to the corrective measures required to be taken by a licence holder to achieve compliance in respect of a particular licence. VHA does not support a regime whereby enforceable undertakings are used as a means to impose additional or highly prescriptive conditions on a licence holders.

11 Spectrum access charges

VHA considers that the Bill should provide for greater alignment between the times when spectrum access charges are payable and when access to the spectrum is granted.

In the past, the ACMA has required payment for licences to be made upfront, at points in time which vary greatly in advance of licenses being issued. At times this has been up to 18 months prior to the relevant licence being issued. This approach to payment tends to create a mismatch for spectrum users between payment and the cash flow generated from spectrum use and can act as a significant financial impost on

spectrum users. VHA considers it imperative that these two time horizons align as closely as possible in order to ensure that future spectrum acquisitions are not discouraged. In addition, more flexible payment arrangements should be accommodated, indeed promoted, in the Bill – the unsold 700 MHz enabled an annual instalment option, which contributed to it delivering a highly successful outcome.

In order to reduce the risk of a mismatch between payment and cash-flows occurring, VHA recommends that section 193(1) be amended as follows:

> *(1) The ACMA may, by written instrument, make determinations:*
>
> *(a) fixing spectrum access charges payable for issuing licences; ~~and~~*
>
> *(b) specifying the times when spectrum access charges are payable~~.~~, having regard to when the licensee has access to the unencumbered spectrum without interference; or*
>
> *(c) to allow payment of spectrum access charges upfront as a lump-sum or on a deferred basis for various tenures in instalments with appropriate interest rates.*

12 Review of decisions

Appropriate rights of review are essential to maintaining the integrity of the spectrum management framework and the confidence of spectrum users. In addition, they promote sound, consistent regulatory decision-making by enhancing regulatory accountability. An important dimension of that accountability is merits review. VHA supports the continued availability of merits review in relation to key ACMA decisions. However, VHA is concerned that the right to review certain decisions under the Radcomms Act 1992 will not be carried through to the new regime and that new decisions which should be subject to that same right of review may not be.

Licence conditions to be determined by legislative instrument

As discussed in section 6.3, section 50 of the proposed Bill empowers the ACMA to specify licence conditions by way of legislative instrument. Unlike ordinary licence conditions which are included in a licence, VHA is concerned that there is no clear path for licence holders to seek review of the ACMA's imposition of licence conditions via legislative instruments. This is particularly so given the potential for these conditions to have a significant impact on the rights of licence holders.

The determination of licence conditions under section 50 is not expressed to be subject to merits review under section 209 of the Bill. This is perhaps not surprising given that an exercise of the decision-making power under section 50 is likely to be of a legislative, rather than administrative, character. This may also preclude review under the ADJR Act.

This results in a sub-optimal position, whereby the ACMA has a broad power to impose conditions which could have a significant impact on licence holders and its decisions may not be subject to review.

This highlights an additional difficulty with the inclusion of section 50 in the Bill and further supports VHA's submission above that the provision should be deleted.

Equipment rules, Register rules and resumption procedures

Under the current regime, rules relating to equipment, the Register of Radiocommunications Licences (**Register**) and the procedures to be applied in relation to licence resumption are set out in the Radcomms Act 1992. However, the Bill adopts a principles-based approach, empowering the ACMA to make these rules itself. Under this approach, an exercise of the ACMA's rule making powers are typically not reviewable (although a decision made under the rules may be). In some cases, the ACMA is granted a broad discretion to avoid scrutiny because it determines which decisions will be reviewable.

In contrast, the Radcomms Act 1992 provides:

- a right to review certain decisions relating to permits, supply of non-standard devices and certain use of transmitters.[19]
- that a number of ACMA decisions relating to including, updating and correcting information in the Register are subject to a right of review. This covers the refusals by the ACMA to include details of a radiocommunications transmitter under section 145 and correct the Register under section 153.

To the extent that these rules are reviewable under the Radcomms Act 1992, they should continue to be reviewable under the new regime.

In relation to equipment rules, VHA is concerned that the Bill proposes that a decision under the equipment rules is only reviewable if the equipment rules, as determined by the ACMA, so provide.[20] The ability for the ACMA to avoid scrutiny in this way is sub-optimal. To provide greater accountability, VHA recommends that the phrase "*where the equipment rules provide that the decision is a reviewable decision for the purposes of this Act*" be deleted from item 23 in section 209 of the Bill.

In relation to Register rules, VHA is concerned by the proposal in the Bill that only decisions made "under the Register rules" to change, or refuse to correct, information in the Register are reviewable.[21] This qualification reduces the certainty of the right to review as the Register rules are yet to be determined and the ACMA has a wide discretion as to what they will be. Accordingly, VHA considers that the words "*under*

[19] See Radcomms Act, section 285(p)-(t).
[20] Bill, section 209, item 23.
[21] Bill, section 209, items 18 and 19.

the Register rules" should be deleted from items 18 and 19 in section 209 of the Bill. This would give licence holders the right to review any change to, or refusal to correct, information in the Register.

In relation to the procedures regarding licence resumption, whilst they are not reviewable under the Radcomms Act 1992, VHA considers that the significance for the licensee of the ACMA resuming a licence warrants a direct right of review not only of the decision to resume a licence, but also the procedures for doing so and compensation payable.

Directions to licensees

The Bill would empower the ACMA to give directions to licence holders in relation to installation, maintenance or operation of radiocommunications transmitters for the purposes of avoiding, minimising or reducing interference.[22] This power is broad and does not require that the direction actually achieve its intended purpose. For example, the ACMA may issue a direction which it believes will avoid or reduce interference, even if, in actual fact, it will not.

Given the breadth of this power and that non-compliance with such a direction is a strict liability offence that could attract a penalty, VHA considers that licence holders should be able to seek review of such direction. This is broadly consistent with the position under section 212 of the Radcomms Act 1992 (which similarly relates to preventing and minimising interference and provides for review).

Licence issue limits

VHA submits that a decision by the ACMA to determine (or refuse to determine) licence issue limits under section 36 of the Bill should be subject to review under the proposed Part 18 given the uncertainty associated with this process under the Bill (as discussed above in section 6.3) and the potential significant consequences of a person being subject to a licence issue limit.

Investigation of interference complaints

In the event that DoCA does not adopt VHA's recommendation that the ACMA be obligated to investigate and respond to all interference complaints from spectrum holders, VHA submits that a decision by the ACMA not to investigate and/or respond to a complaint should be subject to review. VHA considers that the ACMA should be engaged in the resolution of interference complaints, yet primarily in a responsive capacity. If the ACMA is not obligated to respond to all interference complaints from spectrum holders, it should at least be held accountable for its decisions not to do so.

[22] Bill, section 116.

Part B – Transitional Arrangements

Part B contains VHA's response to the proposed approach to transition set out in the Transitional Paper, including its response to certain questions raised in that paper.[23]

VHA agrees with DoCA that a transitional framework should be simple, transparent and predictable, with minimal disruption to business activities and clearly articulated rights and obligations for users during the transition period. In addition, VHA strongly supports a transitional framework which promotes timeliness to allow the intended benefits of reform to be realised as quickly as possible.

VHA notes that there is currently only high level commentary on what transitional arrangements will apply. The Transitional Paper states that further industry and stakeholder feedback will be used to develop the Transitional and Consequential Bill (**T&C Bill**) and that more detailed information on timing and process for transition will depend on administrative and other actions taken by the ACMA. VHA submits that consultation on the T&C Bill (prior to it being introduced to Parliament) is a critical step in the process of designing and implementing the transitional regime. VHA reserves its final view on the proposed approach to transition until a draft of the T&C Bill becomes available, as key details of the transitional arrangements are yet to be developed or require clarification.

VHA looks forward to continued engagement with DoCA and the ACMA on the development of transitional arrangements from the Radcomms Act 1992 to the Bill.

1 Proposed Approach

VHA supports a hybrid approach to transition as advocated in the Transitional Paper. A hybrid "staged" transition is pragmatic and sensible and will allow certain arrangements enabled under the Bill to commence immediately while other elements can be phased in at the appropriate time. However, as described below, VHA is concerned that adoption of a hybrid transition without defined transitional timeframes for the different phases of transition will delay the realisation of the potential benefits of reform.

Question 1 What are the major issues to be addressed in designing transitional arrangements?

[23] VHA has elected to respond to certain (but not all) of the questions posed in the Transitional Paper. For ease of reference however, we have maintained the same numbering as the questions posed in the Transitional Paper.

The lack of specified timeframes for different phases of transition is a major issue to be considered and addressed in designing transitional arrangements.

VHA recognises the potential benefits of reform, including the creation of a single licensing system with rationalised licence categories, increased licence duration and streamlined processes with greater reliance on market mechanisms. VHA strongly supports a timely transition so that these benefits can be realised as quickly as possible. While VHA accepts that it is not practicable for all elements under the new Bill to be implemented on commencement, the lack of sunset dates for existing arrangements to be transitioned creates bias towards maintaining the status quo and disincentivises a timely transition.

Significant work will be required to design, implement and transition to the new framework. The new Bill does not prescribe how outcomes are to be realised and accords the ACMA with a high degree of discretion and responsibility to undertake this task. As mentioned in 'Part A – Radiocommunications Bill 2017' of this submission, this discretion and responsibility is not accompanied by sufficient parameters for accountability and clear principles to guide the exercise of the ACMA's discretion have not been articulated. VHA is concerned that this deficiency extends to the proposed approach to transitional arrangements.

The Transitional Paper contemplates that the ACMA will undertake significant stakeholder consultation as it develops, designs and settles its approach and that full transition will most likely take a number of years. However there is no mention of holding the ACMA to any form of deadline in designing, implementing and transitioning to the new framework. This creates uncertainty for spectrum users which counteracts the objects of spectrum reform. It also makes it less likely that the benefits of reform will be achieved promptly as there is no legislative imperative for the ACMA to act in a timely manner.

VHA requests that transitional timeframes be hard-coded in the T&C Bill so that the ACMA will be held to a timeline. In particular, there should be clearly defined transitional timeframes (rather than indicative timeframes) for when existing licensing arrangements must be transitioned to the replacement framework. These defined transitional timeframes should only be able to be extended if certain pre-determined criteria is met, such as obtaining Ministerial consent. This will hold the ACMA accountable and incentivise the ACMA to pull resources and act quickly while there is still industry engagement and regulatory / legislative momentum for spectrum reform.

Question 3 Are there other measures that would reduce complexity during transition?

VHA strongly supports a simple, transparent and practical transition that articulates clear rules for spectrum users. VHA cautions against the need to over-complicate the transition process. Administrative and legislative processes and instruments should be simplified and minimised to the extent possible to facilitate a speedy transition.

2 Proposed Implementation

Question 4 Should the ARSP be revised at commencement, or should it be considered 'to be made' under the new arrangements/Bill?

VHA submits that the ARSP should be considered to have been made under the new Bill so that existing licensees have certainty and predictability that the ARSP will remain in place at the time of commencement of the Bill.

Question 6 How should the transition to equipment rules occur? Should equipment rules start at commencement or should they be staged over time? Why?

VHA submits that the new equipment rules should commence on the same day as the main provisions of the Bill to avoid unnecessary administrative or financial burden on suppliers and provide certainty and consistency for all users. VHA supports the ACMA's proposed transitional arrangements for the equipment rules[24], namely:

- Equipment already labelled in accordance with the Radcomms Act 1992 will not need to be re-assessed for compliance with the new equipment rules.
- Equipment not already labelled when the equipment rules commence will need to be labelled in accordance with the new equipment rules.
- Equipment that is operated in accordance with an applicable section 162 standard that applied to the equipment at the time of import or manufacture, will be taken to comply with the provisions of the equipment rules requiring compliance with relevant technical standards or other requirements.

Question 7 Are there other elements of the new legislation that should start at commencement?

VHA supports the Government's proposal that the following elements should operate from commencement:

- compliance and enforcement provisions (including penalties)
- inspector appointments
- accredited persons arrangements

[24] ACMA, *Equipment Rules - Supporting material for the Exposure Draft of the Radiocommunications Bill 2017* (May 2017), pp 9 and 10.

- register Rules

In addition, VHA submits that the "Review of decisions" provisions should come into force on commencement provided, however, rights of review that arise under the Radcomms Act 1992 prior to its repeal should be protected under the transitional arrangements. Unless there are compelling reasons otherwise, VHA would also expect that provisions dealing with MPSs and the ACMA's Annual Work Program will come into force on commencement.

Above all, the transitional arrangements should contain measures to ensure a smooth transition from the existing regime to the new regime. For example, any contraventions of the Radcomms Act 1992 should be able to be dealt with by the new legislative regime.

3 Licensing

Question 9 When should the work program for transition be available? What criteria should be used to determine which licences should transition when and in what order?

VHA agrees with the Government that the ACMA should develop a clear transition work program to enable existing licensees to predict how and when any changes may affect them. To facilitate certainty and enable VHA to update its own business processes and operations, VHA would like the work program to be available as soon as practicable following consultation with stakeholders. In addition to timeliness and a requirement for the ACMA to consult, VHA stresses the importance of a well-considered, practical, user-friendly transition work program with a clearly articulated approach to transition rather than abstract principles.

In addition to licence types and/or bands, VHA considers that ease of transition should be used to determine when, and in which order, licences should transition. For instance, VHA has a mixture of point-to-point and PMTS Class B licences and would expect point-to-point licences to transition earlier as these are simpler with less pricing issues to work through.

Question 10 Is 12 months notification for licence transition sufficient?

VHA questions the use of across the board notification periods for all types of licence transition. Notification periods should be determined on a case by case basis depending on whether there has been a change in policy and whether there is any detrimental impact on licensees in the relevant licence class. VHA would like to stress that the introduction of the Bill should not automatically be regarded as an impetus for wholesale change in spectrum policy – in some categories of licences (e.g. class licences), ACMA is merely replacing the old system with a new one on the same or substantially similar conditions. In those instances, there should not be a detrimental impact on users that necessitates a long 12 month notification period. In other categories such as spectrum licences (which are accorded the greatest degree

of certainty under the existing regime), the ACMA has foreshadowed a change of policy and appropriate notification periods should apply depending on the nature and extent of the change in policy.

3.1 Class Licences

Question 11 Should class licences become spectrum authorisations at commencement? Why/why not?

Subject to VHA's submissions in Part A of this document that the Radiocommunications Bill should be amended to provide greater clarity about how 'Part 7 - Spectrum Authorisations' is to operate, VHA submits that all class licences (including those that are linked to spectrum or apparatus licences) should become spectrum authorisations at commencement of the main provisions of the Bill. Both the Government and the ACMA have flagged that spectrum authorisations will be subject to similar conditions to the existing class licences. In addition, class licences are small in number (there are only 13 existing class licences), there is no application process, all users are subject to the same licence conditions and there is no perceived detrimental impact to users if the transition became effective at commencement. All these factors make transition to spectrum authorisations at commencement relatively easy to implement.

Question 12 Are there any existing class licences that should not transition to spectrum authorisations upon commencement because of interdependencies with existing apparatus licences?

The ACMA has indicated that a staged approach to transition class licences to spectrum authorisations is more desirable. The ACMA differentiates between class licences that are not associated with spectrum or apparatus licences (which can easily be replaced with spectrum authorisations) and class licences that are so linked (which may transition further down the track to align with those licences)[25].

VHA's initial position is that the ACMA should be able to accommodate any interdependencies between class licences and existing apparatus or spectrum licences in the actual terms of the spectrum authorisations if required, rather than preventing such class licences from transitioning to spectrum authorisations on commencement.

3.2 Spectrum Licences

VHA agrees with the Government and the ACMA[26] that spectrum licences should continue until expiry unless the particular licensee agrees (at its discretion) to transition earlier. As noted in the Transitional

[25] ACMA, *The licensing system - Supporting material for the Exposure Draft of the Radiocommunications Bill 2017* (May 2017), p 18.
[26] ACMA, *The licensing system - Supporting material for the Exposure Draft of the Radiocommunications Bill 2017* (May 2017), p 16.

Paper, the vast majority of existing spectrum licences (including VHA's spectrum licences) were recently re-issued - licensees who have recently paid significant licence fees and have many years left to run on their spectrum licences are unlikely to be looking to amend or transition their spectrum licences.

Question 14 If deemed to be a licence under the new Act, are there any elements of an existing spectrum licence that would be adversely affected?

The Transitional Paper states that the T&C Bill will not specify renewal rights for existing spectrum licences. As highlighted in section 6.8 of 'Part A – Radiocommunications Bill 2017' of this submission, VHA considers it essential that renewal rights should be clearly specified in each licence issued under the new framework. VHA submits that renewal processes should also be built into the transitional arrangements for existing spectrum licences.

While there is no presumption of re-issue, the existing legislative framework nevertheless contemplates a process for the renewal of spectrum licences. VHA makes use of these renewal processes to ensure continued access to spectrum so that it is able to deliver mobile network services to Australians. Like other stakeholders, continued access to spectrum is fundamental to the services and products we provide. If existing spectrum licences are simply deemed to be issued under the new Act without the protection of any corresponding renewal rights in the T&C Bill, existing spectrum licence holders will lose access to all renewal processes (which were otherwise available under the old regime) and be pushed into a legal limbo. Without a contemplated renewal process, existing licence holders' certainty to continue to deliver services and maintain access to spectrum is diminished. The inclusion of renewal rights for existing spectrum licences would also incentivise earlier transition of spectrum licences.

VHA is also concerned that the grandfathering of existing spectrum licences without adequate transitional measures has potential to erode certainty as to the rights of spectrum licence holders. If existing spectrum licences are deemed to be issued under the new Bill, this suggests that such licences will be subject to the variation, resumption, suspension, cancellation etc. provisions under the new Bill. VHA is concerned this has the potential to create uncertainty as to the rights of spectrum licence holders during the transitional period. To mitigate this risk, VHA recommends that relevant protections should be clearly articulated in the transitional arrangements and measures should be included in the T&C Bill to ensure that current spectrum licences are subject to appropriate regulatory undertakings (if this concept is retained) or other protections to ensure the value of their investment is not eroded.

3.3 Apparatus licences

The ACMA has indicated it is considering using 'replacement windows' for the transition of apparatus licences based on grouping which could be done by licence category, band or a combination of both. The ACMA has further flagged that it intends all apparatus licences would be replaced by licences under the new system within 5 years of commencement of the main provisions of the Bill.

VHA supports the notion of 'replacement windows' to stagger transition of apparatus licence types given the size and complexity of the apparatus licensing scheme. However, VHA believes that all apparatus licences should be replaced within 3 (and not 5) years of commencement of the Bill, and that this sunset date should be expressly built into the T&C Bill for the reasons set out in Question 1 above. To that end, VHA suggests that the indicative timelines set out in Table 1 and Table 2 of the Transitional Paper should be compressed so that:

- All class licences should be transitioned at commencement.
- All apparatus licences should be transitioned within 3 years (and not 5 years). The order by which licence types should be transferred should be subject to further industry consultation, however the timeline should be compressed.
- Spectrum licences should transition as and when they expire (or on the relevant licensee's agreement to move to the new licence).

Question 16 What is the appropriate duration of licence replacement windows?

VHA currently holds 2660 apparatus licences, the majority of which are issued for a renewable 12 month period. VHA is supportive of 12 month 'replacement windows' for those types of licences. However, some of VHA's apparatus licences (namely PTS 1800 licences in the 2100 MHz band) are renewed for longer periods of up to 5 years. VHA accepts that these licences may need to be transitioned prior to their expiry but submits that appropriate protections should be included in the T&C Bill to ensure such existing apparatus licences are grandfathered and the rights of licence holders are not diminished.

Question 17 Do you have any other comments regarding transitional arrangements?

As mentioned above, timeliness is a key concern. If the existing framework is allowed to subsist well into the new regime following commencement of the Bill, it would create regulatory and legal complexity that undermines the intent of the reforms and leads to uncertainty for licensees and prospective licence holders.

In addition, a prolonged gap between commencement of the Bill and full transition to the new framework should be minimised as this could lead to a "dead-zone" that may deter innovations and investment in new uses of spectrum. While there is significant discussion on transitioning to the new system, there has been no mention of how new uses are appropriately catered for and encouraged in the interim. VHA would like to seek clarification from DoCA and the ACMA as to how they intend to manage this so that adequate provision is made for the highest value use of spectrum before, during and after implementation of the new framework.

Part C – Broadcasting Spectrum

Part C contains VHA's response to the proposed approach to broadcasting spectrum set out in the Broadcasting Paper, including its response to the proposals and questions raised in that paper.

Proposal 1 Remove the BSB[27] concept and Ministerial designations of BSBs and devolve responsibility for spectrum designations and high-level planning decisions to the ACMA. Ministerial policy statements will be introduced to guide the ACMA.

Question 1 Do you consider this change in approach to spectrum planning will have any practical implications?

VHA supports the proposal to bring broadcasting spectrum into the same planning framework that is applicable to all other radio spectrum. This will bring greater consistency in ***spectrum planning*** across all users of radio spectrum. This is an important step. However, it is necessary to extend this consistency beyond ***spectrum planning***, to other aspects of spectrum management such as pricing, allocation etc. as soon as practicable. A consistent approach to spectrum management is the most effective means of ensuring our scarce and valuable spectrum resources deliver the highest value to Australia both now and in the future.

VHA welcomes the proposal to allow greater autonomy to the ACMA in performing its spectrum planning function under Radiocommunications Act (Part 4 of the Bill) by removing the Broadcasting Services Band ("BSB") concept and Ministerial designations of BSBs. Devolving responsibility for high-level planning decisions to the ACMA is appropriate. As a specialised sectoral Regulator with requisite technical expertise, the ACMA is best placed to fulfil the objectives of spectrum planning in a holistic manner.

VHA notes that the MPSs introduced under the Radiocommunications Act, will provide policy guidance to the ACMA with respect to spectrum for broadcasting services as well, in a non-binding yet formal and transparent manner. VHA considers stakeholder consultation in formulation of the MPSs as crucial to the success of these reforms. In addition, VHA refers to section 3 of 'Part A – Radiocommunications Bill 2017' of this submission more broadly above.

Proposal 2 In planning spectrum for use by national, commercial and community broadcasters and HPONs, the ACMA will have regard to the objects and the planning criteria similar to the current section 23 of the Broadcasting Services Act.

[27] Broadcasting Services band ("BSB")

VHA does not support Proposal 2. VHA considers it problematic for special and extraordinary consideration to be given to additional criteria for specific uses of spectrum, such as broadcasting, outside the objects and general planning provisions of the Radiocommunications Act. As such, section 23 of the BSA should not be replicated in the Bill. To the extent the Minister believes such criteria might be useful, these should be reflected in the MPSs.

Proposal 3 Licence area plans and television licence area plans will be combined and simplified. Simplified licence area plans will define the geographic scope of licence areas and set out the number and category of services that will be available in those areas. They will not include technical specifications, which will instead be included as conditions of individual radiocommunications licences.

Proposal 4 Change terminology of broadcasting licences from broadcasting services band to 'licences for the provision of broadcasting services planned in a licence area plan'. These will be known as LAP planned licences.

VHA does not foresee any drawbacks of consolidating the existing radio LAPS and TLAPS into a general LAP category as stated in Proposal 3. Rather it would present significant benefits from uniform license area planning for radio and TV broadcasting services which will deal with the number of players and types of services in each licence area. Further, the proposed removal of reference to 'technical specifications' of services in section 26 of BSA-1992, implying that LAPS will no longer need to determine the technical specifications of broadcasting services, will ensure that any differences in technical specifications of different categories of radio and TV broadcasting services gets addressed through appropriate conditions of each broadcaster's individual radiocommunications licence. This will enable a smooth aggregation of two types of LAPS into a single category. VHA expects the ACMA to undertake public consultations on the formulation of the LAPs.

VHA supports Proposal 4 to change the terminology of broadcasting licences from 'BSB' to 'LAP planned licences'.

Questions 2, 3 and 4

No comments.

Proposal 5 Reforms will maintain the linkage between licences under the Broadcasting Services Act and access to licences under the Radiocommunications Bill for incumbents.

VHA understands that under the new framework broadcasting services will continue to be licensed under the BSA – 1992 through formulation of a general LAP (for both TV and radio) and access to spectrum shall be under the Radiocommunications Act. Planning of broadcasting spectrum shall be integrated into the general radiofrequency planning under the Radiocommunications Act; and the concept of BSBs shall be done away with. The LAP would not deal with technical specifications of spectrum / services, which would

find place in the spectrum licenses to be granted under the Radiocommunications Act. VHA supports the above approach.

The consultation paper further proposes that the current statutory guarantee to access spectrum will be retained for incumbent commercial, community and national broadcasters. VHA is of the view that the linkage between BSA – 1992 and Radiocommunications Act for broadcasting service license and broadcasting spectrum license respectively is an integral component of the current arrangement for provision of these services. However access to spectrum should not be guaranteed to broadcasters any more than it is available to other users (communications, navigation, etc.) Access to spectrum should be on the same principles for all users. Further, the existing allocations of spectrum to commercial, community and national broadcasters should remain valid only for the unexpired duration of their respective licenses.

It is emphasized that to improve the consistency and integrity of the overall spectrum management framework, it is essential that Broadcasters be brought into the same processes of spectrum allocation, pricing and licensing as other users of radiofrequency spectrum.

Proposal 6 to 8

Question 5

No comments.

Proposal 9 Incorporate greater flexibility into the new framework to allow for trading and sharing of spectrum.

VHA supports this proposal. It is desirable that the spectrum management framework is designed to promote flexibility for spectrum to move freely between its potential uses, to attain its most productive use. One of the methods to achieve this flexibility is to enable trading and sharing of spectrum. Spectrum sharing and trading will enable economically efficient allocations by allowing the re-purposing of spectrum through the devices of the market. To encourage spectrum sharing and trading, it is essential to remove entry and exit barriers from the market. In this regard, some of the measures are –

- licensee rights to spectrum (license conditions) should not hinder sharing or trading;
- spectrum licenses embody service & technology neutrality;
- no transactional fee/tax is imposed on spectrum sharing or trading; and
- limiting the need for regulatory involvement in sharing or trading activities – there should be no dilatory approval / clearance processes and any requirement for "regulatory approval" should be replaced with an "intimation only" requirement irrespective of the prospective use of the spectrum (i.e. whether or not it is continued to be used for broadcasting purposes).

Another method to bring flexibility into the framework is to permit broadcasters to allow authorised use of their spectrum to third parties. Such third party authorisation for spectrum use could be for broadcasting or non-broadcasting purpose.

ANNEXURE A – SUMMARY OF RECOMMENDED CHANGES IN PART A

Radiocommunications Bill 2017	Recommended change
Part 1 – Preliminary	
Amend section 3	*The objects of this Act are:* *a) to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that:* *(i) facilitates the economically efficient planning~~,~~ and allocation ~~and use~~ of the spectrum; and* *(ii) where relevant, promotes competition in downstream markets; and* *(iii) facilitates the use of the spectrum for defence, public and community purposes; and* *(iv) supports the communications policy objectives of the Commonwealth Government; and* *b) to establish an efficient system for the regulation of equipment.* ▪ In the alternative, if DoCA does not accept VHA's submissions regarding the inclusion of specific decision-making principles to apply to the ACMA, more precise objects will be required.
Part 2 – Ministerial policy statements	
Sections 17 - 19	▪ The Bill should contain a requirement for stakeholders to be consulted prior to an MPS being issued. ▪ The Bill should clarify how multiple MPSs are to interact with each other and the range of other instruments provided for in the Bill. ▪ The ACMA should be required to summarise how it has had regard to MPSs in its Annual Report.
Part 3 – ACMA's work program	

Sections 20 - 22	▪ The Bill should contain a requirement that the ACMA report on its progress against its current work program in its Annual Report. ▪ Stakeholders should have a 28 day (rather than 14 day) minimum period in which to lodge submissions on the ACMA's annual work program.
Part 4 – Radiofrequency plans	
New section 24A	*In determining a radiofrequency plan under section 24, the ACMA is to promote the objects of this Act and minimise restrictions on use of spectrum to the extent reasonably practicable.*
Part 6 - Licences	
New section 31A	*In performing its functions and exercising its powers under this Part 6, the ACMA is to promote the objects of this Act and have regard to the following principles:* *(1) restrictions upon the:* *(a) use of;* *(b) authorisation of a third party to use;* *(c) subdivision of;* *(d) assignment of; or* *(e) dealing with,* *licensed spectrum should only be imposed to the extent reasonably necessary or desirable to support the expected use of the spectrum, prevent interference, ensure public safety or protect the rights of other licence holders or persons operating under spectrum authorisations or other licences;* *(2) the process for issuing licences and the conditions to which licences are subject should be as simple and transparent as is reasonably practicable; and*

	(3) as far as is reasonably practicable, licence holders should have certainty with respect to the term for which a licence will operate, and the conditions to which it is subject, to promote economically efficient investment.
Amend section 32(1)	*(1) Without limiting the rights of a licensee under section 41, ~~A~~ a licence authorises~~:~~* *~~(a) the licensee; and~~* *~~(b) any person authorised by the licensee under section 41;~~* *to operate ~~a~~ radiocommunications devices exclusively:* *(a) in the part or parts of the spectrum; and* *(b) location or area,* *specified in the licence in accordance with the licence.*
Amend section 33 to include new subsection 3A	*(3A) The ACMA must not issue a licence to a person under subsection (1) or (2) if the rights granted under the licence would be inconsistent with the exercise of rights by a licensee under an existing licence.*
Amend section 33	▪ Amend to prevent a licence being issued if it would be inconsistent with a licence issue scheme.
Amend section 36 to include new subsection 2A	*In deciding whether to determine a licence issue limit, the ACMA must have regard to any matters it considers relevant, including but not limited to, a person's existing spectrum holdings in the relevant part of the spectrum or other, similar parts of the spectrum.*
Amend section 37	▪ Amend to require the ACMA to: > prepare guidelines on the approach it will take to consulting with stakeholders and determining licence issue limits; > consider whether a licence issue limit is appropriate in every instance where it is proposing to allocate a licence using a market-based mechanism (in considering whether a licence issue limit is required it should be obliged to consult with the ACCC).

	> have regard to the ACCC's recommendation where one is made.
New section 37A	*(1) The ACMA must determine a licence issue limit under section 36, if it is satisfied that the licence issue limit will promote the long-term public interest in the use of spectrum.* *(2) In preparing a response to consultation by the ACMA under section 37, the ACCC must indicate whether it is satisfied that a licence issue limit will promote the long-term public interest in the use of spectrum.* *(3) In determining whether a licence issue limit will promote the long-term public interest in the use of spectrum, the ACMA and the ACCC must have regard to the following objectives:* *(a) the objective of promoting competition in upstream and downstream markets; and* *(b) the objective of promoting the economically efficient use of spectrum and the economically efficient investment in infrastructure to exploit spectrum and supply services in upstream and downstream markets.*
Division 3 – Third party use	▪ Sections 42 and 43 of the Bill should be deleted.
Division 4 – Conditions of licences etc.	▪ Section 50 should be deleted from the Bill.
Division 8 – Suspending licences	▪ Section 64(2) should be deleted so that a licence can only be suspended for a material breach of its conditions or applicable legislation, rather than in "supplementary circumstances". ▪ The notice that the ACMA is required to give before suspending a licence should be longer than 14 days where there is no imminent risk to health or safety or material interference with the rights of other licence holders.

Division 9 – Cancelling licences	▪ Section 67(2) should be deleted so that a licence can only be cancelled for a material breach of its conditions or applicable legislation, rather than in "supplementary circumstances". ▪ The notice that the ACMA is required to give before cancelling a licence should be longer than 14 days. ▪ A licence should only be cancelled after a minimum suspension period during which the licence holder has failed to rectify the relevant breach or circumstance within the specified period.
Division 11 – Subdivision of licences etc.	▪ Sections 78 and 79 of the Bill should be deleted.
Division 12 – Assignment of licences etc.	▪ Sections 81 and 82 of the Bill should be deleted.
Division 13 – Dealing with licences etc.	▪ Sections 84 and 85 of the Bill should be deleted.
Division 14 – Resumption of licences	▪ The Bill should be amended to include the protections in the Radcomms Act 1992 as follows: > the ACMA is required to publish a pre-acquisition declaration in the Commonwealth Gazette which includes a statement of its reasons for resumption.; > the pre-acquisition declaration is subject to merits review; > where a resumption notice does not specify the day on which resumption is to occur, it will occur 14 days later; > compensation for resumption shall be for the market value of the licence and any loss, injury or damage suffered, or expense incurred, because of the resumption; and > ability, in certain circumstances, to apply to the Federal Court to determine the amount of compensation to which they are entitled.
Division 16 – Miscellaneous	▪ Section 97 should be amended to ensure the ACCC has the ability to review transactions under section 50 where it has not been consulted on a licence issue limit or where the ACMA has not followed its recommended actions.
Part 7 – Spectrum authorisations	

Amend section 91	▪ References to "*any person*" in sections 99(1), (2) and (3) should be replaced with "*any class of persons*".
Part 9 – Interference management	
Amend section 113	▪ Section 113 be amended to require the ACMA to investigate and respond to all interference complaints it receives from spectrum holders.
Part 15 – Enforcement	
Amend section 113	▪ The power of the ACMA to impose interim or permanent bans should be limited to circumstances where they are necessary to avoid interference and prevent risks to health and safety. ▪ In making equipment rules, the ACMA should be required to seek to minimise any disruption to the services provided by licence holders. ▪ Where practicable, licence holders should be provided a reasonable period of time to repair or replace equipment which is the subject of a ban or recall (if such equipment is already deployed).
Part 16 – Spectrum access charges	
Amend section 193(1)	*(1) The ACMA may, by written instrument, make determinations:* *a) fixing spectrum access charges payable for issuing licences; ~~and~~* *b) specifying the times when spectrum access charges are payable, having regard to when the licensee has access to the unencumbered spectrum without interference; or* *c) to allow payment of spectrum access charges upfront as a lump-sum or on a deferred basis for various tenures in instalments with appropriate interest rates.*
Part 18– Review of decisions	
Section 209	▪ Phrase "*where the equipment rules provide that the decision is a reviewable decision for the purposes of this Act*" be deleted from item 23 in section 209 of the Bill.

	▪ Phrase "*under the Register rules*" should be deleted from items 18 and 19 of section 209 in the Bill. ▪ Section 209 of the Bill should be amended to include a right to review any: > procedures made by the ACMA under section 88; > direction given by the ACMA under section 116; > licence issue limits made under section 36; and > in the event that the ACMA is not obligated to investigate and respond to all interference complaints from spectrum holders (as preferred by VHA), a decision by the ACMA not to investigate and/or respond to a complaint.