

Submission to Department of  
Communications and the Arts

*Radiocommunications Bill  
2017: a platform for the future*

July 2017

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## Executive Summary

The NSW Telco Authority (the Authority) leads the delivery of NSW government operational communications, providing services to NSW government agencies and other entities that deliver frontline public services, including law enforcement and emergency service organisations, transport agencies and electricity suppliers. Fundamental to the delivery of these operational communication services is access to radiofrequency spectrum of a suitable type and quantum.

The Authority reiterates its support for the drafting of a new Radiocommunications Bill (draft Bill), as stated in the Authority's written submissions in response to the *Spectrum reform legislative proposals consultation (the 2016 Consultation)* dated 20 May 2016. The Authority is pleased to have examined the draft Bill and supports the policy intent of simplifying the spectrum regulatory framework, creating a simpler and more flexible licensing system and ensuring a consistent and transparent use of spectrum has been maintained.

Notwithstanding these objectives, the Authority is concerned that the proposed Bill may not ensure that the special position of State government agencies and the services they provide for public safety, emergency services and community benefit are sufficiently recognised and prioritised. The Authority submits that operational communications and a requirement for the underpinning resource (spectrum) remains as critical today as it did when the original Act was passed. On this basis, the Authority's concern is that the proposed Bill and its ancillary instruments ensure that the existing rights afforded to State government agencies under the current radiocommunications regulatory framework continue, especially where those rights relate to the ability of law enforcement and emergency services organisations to carry out their functions and purposes in the public interest.

The Authority, in drafting its written submission in response to the draft Bill, relied upon the Exposure Draft of the Bill, the Information Paper titled *Radiocommunications Bill 2017: a platform for the future* (May 2017), a series of subject papers released by ACMA and the information session held in the Sydney offices of the Australian Communications and Media Authority on 7 June 2017.

## Summary of NSW Telco Authority position and recommendations

### 1. Objects and Preliminary Matters

Public benefit of spectrum for emergency services, national security and law enforcement:

1. That the objects of the Bill include the adequate allocation of spectrum to “law enforcement and emergency services”, separate to “public and community services”.

Defence and domestic law enforcement and emergency services:

2. That State and Territory law enforcement agencies and emergency services retain an equivalent status to defence, as is this case under the current Act, with the objective of adequate allocation of spectrum.
3. That the objectives of the Bill and provisions support the notion of adequate provision of spectrum allocation to continue assisting the State and Territory law enforcement agencies and emergency services in responding to, and protecting the community during times of, domestic incidents, disasters and other significant events.

“Adequate” v “Efficient” allocation of spectrum:

4. That ACMA provides a definition or clearer policy intent for the “efficient”, as opposed to the “adequate”, allocation of spectrum.
5. That ACMA takes into account the crucial public safety requirements for the operational use of technology such as the narrowband Land Mobile Radio networks and broadband networks in the planning and allocation of spectrum.
6. That planning allocation of spectrum continuously factors in other future technology advancements and operational capabilities such as Public Safety Mobile Broadband (PSMB).

### 2. Definitions

7. That clarification is provided as to whether it is intended that section 9 of the draft Bill excludes State and Territory Police, noting that there is a further requirement that ACMA, by legislative instrument, makes a determination as to proposed “crime/corruption bodies” falling within the scope of s9 of the draft Bill.
8. If the answer to (7) is no, then references to State and Territory police should be inserted into section 9 so as to reference State and Territory police on the one hand and designated crime/corruption bodies on the other.
9. If the answer to (7) is yes, then section 9 should be redrafted from its current form, so that the criteria contained within the section does not capture State and Territory Police and that these continue to be expressed separately in all other relevant provisions within the draft Bill.
10. That a similar provision to section 9 be drafted to cover designated emergency service bodies.

### **3. Operation of Radiocommunications Devices**

#### Unauthorised operation of radiocommunications transmitters:

11. That section 27 be examined to include an offence for unauthorised use and without the knowledge of licence holders or spectrum authorisation holders.

### **4. Licences**

#### Issue of licences:

12. That under the proposed section 33 of the draft Bill, a provision be inserted to allow for ACMA to issue a licence to a body where it is determined that specific bodies being issued such a licence is of higher priority public importance, and includes, as part of the issuing of the licence, the adequate allocation of spectrum based on the proposed licensees' core functions i.e. public safety and emergency responsiveness; or
13. That under the proposed section 39 of the draft Bill, a provision be inserted that provides power to the Minister to go beyond a direction to ACMA to provide "a written offer to issue...a licence" to an applicant, to further empower the direction to include the issuing of a licence to a body whose core functions operate for public safety and emergency responses, provided that the proposed bodies operate under a law of the Commonwealth, State or Territory, and that adequate spectrum is allocated; or
14. That an amendment be made to the proposed section 9 of the draft Bill "designated crime/corruption bodies" to ensure it captures all law enforcement bodies, such as state and territory police. Furthermore, a similar provision to section 9 should be considered creating a definition for "emergency service bodies", and express in Division 3 that section 9 bodies and emergency services are to be issued licences with the provision of adequate allocation of spectrum.

#### Licensing of spectrum

15. That, at a minimum, the draft Bill and other regulatory arrangements:
  - a. Maintain current spectrum allocation for the HGS;
  - b. Maintain any associated management arrangements for the HGS; and
  - c. Include an express right for the government to be allocated suitable spectrum to meet current and future operational requirements.

#### Licence and spectrum charges:

16. Under section 193, that ACMA take into consideration matters of public importance and bodies whose services are a matter of public interest, such as law enforcement agencies and emergency services. This should expressly include the matters provided as examples for ministerial directions in s 194(2)(a), (b) and (c) regarding specified classes of public or community services, and should specify law enforcement and emergency services separately in accordance with

recommendations (1) and (2) above.

17. That ACMA, upon making a determination based on public importance and public interest under s193 (as recommended in (16)), ensures that previous levels of charges are taken into consideration if a licence was previously held.
18. That the same provisions in recommendations (1) and (2) above concerning specific reference to law enforcement and emergency services, apply to ministerial directions under section 194 of the proposed Bill.
19. That licence fee exemptions granted under the current system should be retained for the licence holders under the proposed new system.

Reviewing licences:

20. That the draft Bill includes an express requirement for ACMA to ensure adequate allocation of spectrum to law enforcement and emergency services upon licence renewal.
21. In relation to section 59(1) of the proposed Bill, that a provision is inserted providing for an automatic right of licence renewal for law enforcement agencies and emergency services.
22. That reference is made to Harmonised Government Spectrum (HGS) and a simplified licence renewal process for HGS used by law enforcement and emergency services.

**5. Resumption of Licences**

Compensation

23. That a licensee, the subject of a resumption determination, should have provision to submit, or negotiate in good faith, an appropriate level of compensation.
24. That the amount of compensation takes into consideration incidental long term investments in infrastructure and equipment.

**6. Interference Management**

Dispute resolution and conflict resolution

25. That a requirement is included for the parties, subject to the nature and circumstances of the interference, to attempt to resolve the disputes informally.
26. That failing informal dispute resolution, ACMA intervenes with a defined Alternative Dispute Resolution process, including referrals to expert mediators or to a determination conducted by a registered mediator with expertise in the industry.

## 1. Objects and Preliminary Matters

### 1.1. Public benefit of spectrum for emergency services, national security and law enforcement

#### The proposed Bill

The Information Paper<sup>1</sup> contains policy principles for the Spectrum Review and includes that the draft Bill considered the stakeholder-proposed principle of “consistency”, which states:

*‘treat spectrum users uniformly and equitably while recognising that some users require access to spectrum to perform important public services, such as defence, national security, **law enforcement, emergency services** and other public and community services (such as weather forecasting and scientific research)’ (emphasis added).*

However, this important principle does not appear to have sufficiently informed the development of the relevant sections of the draft bill.

The objects contained within section 3 of the draft Bill propose some potential significant changes, most noticeably the omission of references to law enforcement and emergency services. Section 3 3(b) of the *Radiocommunications Act 1992* (the current Act) states, in relation to the management and allocation of spectrum:

#### “Section 3

#### *The object of this Act*

*The object of the Act is to provide for management of the radiofrequency spectrum in order to:*

*(a)...*

*(b)...adequate provision of the spectrum:*

*(i) For use by agencies involved in the defence or national security of Australia, **law enforcement or the provision of emergency services;**<sup>2</sup> and”*

*(ii) ...”*

In contrast, it is proposed that the objects contained within the draft Bill, where relevant to the allocation of spectrum, will state:

#### “3 Objects

*The objects of this Act are:*

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<sup>1</sup> Department of Communications and the Arts, May 2017, *Radiocommunications Bill 2017: a platform for the future: information paper*, p. 7

<sup>2</sup> Section 3 of the draft Bill in converse to section 3(b) of the current Act has omitted the words: “*law enforcement or the provision of emergency services*”

- (a) *to promote the long-term public interest derived from the use of spectrum by providing for the management of the spectrum in a manner that:*
- (i) *facilitates the efficient planning, allocation and use of the spectrum; and*
  - (ii) *facilitates the use of spectrum **for defence, public and community purposes; and***
  - (iii) *...*

The Authority also notes that, as well as the omission of references to law enforcement and emergency services, the words “*public and community*” are expressed in the draft Bill, with the proposed proceeding word “*purposes*”<sup>3</sup> to replace the word “*services*”, as appears in the current Act. In the context of replacing the word “*services*” with the word “*purposes*”, a position could be assumed that the draft Bill is widening the definition so as to capture more general bodies which operate for a public or community purpose, and which don't necessarily engage in critical life and property protection public services such as law enforcement and emergency services. Indeed, many not-for-profit bodies are constituted for a public purpose but may not necessarily play a vital role in securing the safety of the public or responding to emergency situations.

The Authority submits, on this basis, that it is imperative that the proposed Bill maintains the position of the current Act of expressing references of “*law enforcement and emergency services*” in its objects, thereby retaining the same significance as ‘*defence*’, for which the Bill maintains its current status.

On that point, the Authority notes that, under the current Act, the objects separate “*defence or national security*”, “*law enforcement*” and “*emergency services*” on the one hand,<sup>4</sup> and “*for use by other public or community services*” on the other.<sup>5</sup> On that basis, it is clear that the words “*public or community services*”, under the current Act, do not cover law enforcement or emergency services, given their exclusively separate expressed references within the objects. That observation requires an examination as to whether the construction of the relevant provision within section 3 of the proposed Bill intends to now group law enforcement agencies and emergency services under the wide umbrella of bodies whose objectives are for the provision of a public or community purpose. The Authority, as a further point to those raised above, notes that other provisions throughout the draft Bill, in contrast to the proposed ‘*Objectives*’, make express references to law enforcement and emergency service type organisations<sup>6</sup> without reference to “*public or community purpose*”. It is also noted that further references are made specifically to “*the police force of a State or Territory*” in multiple provisions<sup>7</sup> and similarly the draft Bill provides an express definition of “*emergency service*”.<sup>8</sup>

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<sup>3</sup> Section 3(a)(ii), Radiocommunications Bill 2017 (Exposure Draft)

<sup>4</sup> Radiocommunications Act 1993, section 3(b)(i)

<sup>5</sup> *Ibid*, (ii)

<sup>6</sup> Part 20 – ‘Exemptions’, section 223; Division 3 – ‘Causing interference etc.’, section 114(9), references made to specific emergency services bodies: firefighting (a); ambulance services (b); other organisations with the sole or principal purpose of securing the safety of persons during an emergency (c).

<sup>7</sup> Section 25(c)(ii); Section 56(b)(ii); Section 56(1)(b)(ii); Section 114(v) and Section 223(1)(b).

<sup>8</sup> Radiocommunications Bill 2017, s114(9), in this provision, it is inferred that an express definition and reference to ‘*emergency service*’ is provided for due to the important role those organisations undertake, and that those types of bodies need their important operations protected from interference.



## NSW Telco Authority position

1. That the objects of the Bill include the adequate allocation of spectrum to “law enforcement and emergency services”, separate to “public and community services”.

### 1.2. Defence and domestic law enforcement and emergency services

The Authority acknowledges the important role that ‘defence’ plays in ensuring the security of Australia, as well as protecting the nation’s interests abroad. Without diminishing the importance of defence as an entity, the Authority submits that State and Territory law enforcement and emergency services should also retain an equivalent status in terms of spectrum allocation (whether stated as “adequate”<sup>9</sup> or “efficient” as discussed below). The Authority submits this proposition considers the limits placed on the Australian Defence Force’s (ADF) legal permissibility to be “called out”<sup>10</sup> in the event of a serious domestic incident or emergency occurring wholly within one State.<sup>11</sup> It is in this context that, as legislative requirements stipulate stringent factors be met before the ADF can be “called out”<sup>12</sup> to domestic incidents, and taking into account recent judicial discussion on such scenarios pertaining to the Sydney Lindt Café Siege,<sup>13</sup> it is predominantly State and Territory law enforcement agencies and emergency services that are required to respond to the varying degrees of domestic incidents, as a function of defence, within the context of their broader public safety responsibilities.

The Authority notes that the 2016 Consultation included in its ‘Proposed approach’ (p.5) that ‘[i]t is intended that explanatory material to the legislation will indicate that public or community purposes will include use such as for defence or national security, law enforcement, meteorology and the provision of emergency services. The approach will not limit any particular public or community purpose’. However, the current Draft Bill continues to treat ‘defence’ separately to the other ‘public and community services’ by maintaining its independent significance in the proposed legislative amendment to s 3. As discussed, the Authority contends that ‘law enforcement and emergency services’ similarly require this distinction in the amended objects of the Act, as opposed to general inclusion among ‘public and community purposes’, and without relegation to the explanatory material.

<sup>9</sup> Section 3(a)(b), Radiocommunications Act 1992 states: “[to:]...make **adequate** provision of spectrum” whereas the draft Bill proposes to replace that text with “facilitates the **efficient** planning, allocation and use of the spectrum...” s3(a)(i), draft Bill.

<sup>10</sup> Part IIIAAA, Division 1, Defence Act 1903 refers to the terminology “calling out” in the context of the ADF being invoked to “protect State against domestic violence” as set out in s 51(b).

<sup>11</sup> Section 51(b), Defence Act 1903

<sup>12</sup> Section 51, Defence Act 1903 sets out the requirements of a “call out”.

<sup>13</sup> *Inquest into the deaths arising from the Lindt Café siege, findings and recommendations (Lindt Café findings) (May 2017)*; Chapter 17 of the Lindt Café findings concluded that the preconditions of Part IIIAAA of the *Defence Act 1903* were not met as the NSW Police considered it had the capacity. The ADF did however attend the incident as an observer and acted as a liaison between NSW Police and the ADF: “*Involvement with the ADF*” at p117

**NSW Telco Authority position**

- 2. That State and Territory law enforcement agencies and emergency services retain an equivalent status to defence, as is this case under the current Act, with the objective of adequate allocation of spectrum.**
- 3. That the objectives of the Bill and provisions support the notion of adequate provision of spectrum allocation to continue assisting the State and Territory law enforcement agencies and emergency services in responding to, and protecting the community during times of, domestic incidents, disasters and other significant events.**

**1.3. “Adequate” v “Efficient” allocation of spectrum**

The Authority notes the proposed replacement of the word “adequate”, as contained in the objects of the current Act, with the word “efficient”, as contained in the objects of the draft Bill. The Authority appreciates the Commonwealth Government's intent of providing for the efficient and economically effective management of the allocation of spectrum. However, there is a clear legal definitional departure from the current Act in the draft Bill, with no objective definition provided.

The Authority seeks clarification as to the purpose of this proposed change and how it might affect the adequacy of spectrum allocation, the concern being that this may dilute the State and Territory Governments' future ability to access required spectrum, particularly for the critical operations of law enforcement and emergency services.

In determining the efficient planning, allocation, and use of spectrum, determinations should take into account the allocation of spectrum to enable operational use of technology, such as the narrowband Land Mobile Radio networks and broadband networks. Consideration should also be given to other future technology advances, such as the Public Safety Mobile Broadband (PSMB),<sup>14</sup> which will be considered a critical communications tool for law enforcement and emergency services.

**NSW Telco Authority position**

- 4. That ACMA provides a definition or clearer policy intent for the “efficient”, as opposed to the “adequate”, allocation of spectrum.**
- 5. That ACMA takes into account the crucial public safety requirements for the operational use of technology such as the narrowband Land Mobile Radio networks and broadband networks in the planning and allocation of spectrum.**

<sup>14</sup>See: 'Telco Authority, Response to Productivity Commission Issues Paper: Public Safety Mobile Broadband', August 2015 <http://telco.nsw.gov.au/sites/default/files/Response%20to%20Productivity%20Commission%20-%20Public%20Safety%20Mobile%20Broadband%20-%20FINAL.pdf>

**6. That planning allocation of spectrum continuously factors in other future technology advancements and operational capabilities such as Public Safety Mobile Broadband (PSMB).**

## **2. Definitions**

### **2.1. 'Designated crime/corruption body'**

The section 5 'Definitions' provision in the Draft Bill provides the definition of a 'Designated crime/corruption body' namely that it "*has the meaning given by section 9 [of the draft Bill]*". In reference to the definition of a 'designated crime/corruption body' (designated body) the Telco Authority would seek some clarification and propose some suggestions.

First, the textual construction and interpretation of section 9, as well as the criteria prescribed for an agency to be determined a designated body, would arguably cover bodies such as state and territory police. The Authority flags this point on the basis that the draft Bill, in its current form, appears to differentiate between a 'designated body' for the purposes of section 9 on the one hand, and state and territory police on the other. This is inferred by the fact that express references in various proposed sections make reference to '*the police force of a State or Territory*' as well as expressed references to designated bodies as separate to police, and in some provisions both references appearing in the same provisions (such as at ss 25(4), 56(1) and 223(1)). As the Authority is seeking the proposed Bill to provide special provisions for law enforcement agencies and emergency services, clarification is sought as to whether a designated body does in fact capture state and territory police, and, if so, the Authority encourages this special provision for such bodies. If it was not the intention, the possibility of conflict of the definition of section 9 and the separate reference to law enforcement and emergency services bodies should be examined.

To draw an example from New South Wales, upon examination of section 9 of the draft Bill, in the absence of primary or intrinsic material advising to the contrary, the NSW Police Force would arguably meet the definition of a "*designated crime/corruption body*" under section 9 as the NSW Police Force:

- performs its functions pursuant to the *Police Act 1990*, being a 'law' of NSW, and the NSW Police Force does indeed engage in services related to the investigation and prevention of crime: (s9(1)(a)), and
- is required to provide "police services"<sup>15</sup>, which includes requirements to provide "*services by way of prevention and detection of crime*"<sup>16</sup>, and
- has powers investigate and prosecute matters relating to corruption<sup>17</sup>, with the power to prosecute those offences summarily as a Police Prosecutor<sup>18</sup>, and

<sup>15</sup> Section 6(2)(a), *Police Act 1990*

<sup>16</sup> Section 6(3)(a), *Police Act 1990*; s6(3) also prescribes that the "police services" includes: the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way (3)(b), and the provision of essential services in emergencies (3)(c), and any other service prescribed by the regulations (3)(d).

<sup>17</sup> Part 4A 'Corruptly receiving commissions and other corrupt practices', *Crimes Act 1900*

<sup>18</sup> *Criminal Procedure Act 1986*, Schedule 1, Part 3, Section 12 – matter of corrupt practices to ordinarily be dealt with summarily unless the prosecutor or the accused elects otherwise.

- for the purpose of section 9 of the draft bill, also has a police prosecutory function within the criminal jurisdiction of the Local Court<sup>19</sup> when dealing with summary offences,<sup>20</sup> which also meets the requirements of a “serious crime”<sup>21</sup> as set out in s 9(3), on the basis that many alleged summary offences do provide for a statutory maximum sentence of 12 months or above,<sup>22</sup> and
- Investigates and prevents serious crimes (s 9(3)), but also has policing functions that would not constitute a serious crime.

Similarly to the discussions surrounding section 9 above, the Authority submits that a similar section be drafted in proximity to section 9 of the draft Bill to define and acknowledge emergency services bodies, particularly as references to emergency services are contained in other sections within the draft.<sup>23</sup>

#### **NSW Telco Authority position**

- 7. That clarification is provided as to whether it is intended that section 9 of the draft Bill excludes State and Territory Police, noting that there is a further requirement that ACMA, by legislative instrument, makes a determination as to proposed “crime/corruption bodies” falling within the scope of s9 of the draft Bill.**
- 8. If the answer to (7) is no, then references to State and Territory police should be inserted into section 9 so as to reference State and Territory police on the one hand and designated crime/corruption bodies on the other.**
- 9. If the answer to (7) is yes, then section 9 should be redrafted from its current form, so that the criteria contained within the section does not capture State and Territory Police and that these continue to be expressed separately in all other relevant provisions within the draft Bill.**
- 10. That a similar provision to section 9 be drafted to cover designated emergency service bodies.**

### **3. Operation of Radiocommunications Devices**

#### **3.1. Unauthorised operation of radiocommunications transmitters**

The Authority generally supports the provision contained within s 27 of the draft Bill, but submits that wording could be examined so as to include unauthorised use<sup>24</sup> without the knowledge of the licence

<sup>19</sup> Section 7, Criminal procedure Act 1986

<sup>20</sup> Section 6, Criminal Procedure Act 1986

<sup>21</sup> The proposed definition of a “serious crime” in section 9(3) for the purposes of section 9(9)(1)(a)(i) of the draft Bill, where it states “...punishable by imprisonment for a period exceeding 12 months” should be reworded for legal clarity, such as ...punishable by a maximum penalty of 12 months imprisonment or more” on the basis that during the investigation, prevention and prosecution phase of a crime, it would be indeterminate at that stage as to whether the crime will carry 12 months or more imprisonment, due to judicial discretion, even though it is prescribed as a maximum. Refer to previous discussions surrounding judicial independence from the legislature as Chapter 3 (of the Australian Constitution) Judicial powers of the Commonwealth are implicitly conferred in State and Territory courts: *Kable v the Director of Public Prosecutions* (1996) 189 CLR 51; *Fardon v Attorney-General (QLD)* (2004) 210 CLR 50; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

<sup>22</sup> Summary Offences Act 1988 (NSW); for example s11B “Custody of offensive implement” carries a maximum prison sentence of 2 years.

<sup>23</sup> Radiocommunications Bill 2017, s 114(9), s 223(1)

<sup>24</sup> The NSW Police have raised issues relating to stolen radiocommunications devices to be used as listening devices to eavesdrop on communications occurring over the network.

holder or spectrum authorisation holder. However an examination of this proposition should be done subject to the adequacy of state and territory laws<sup>25</sup> that provide offences of this nature.

**NSW Telco Authority position**

- 11. That section 27 be examined to include an offence for unauthorised use and without the knowledge of licence holders or spectrum authorisation holders.**

## **4. Licences**

### **4.1. Issue of licence**

The Authority submits, as discussed above, that prioritisation should be given to law enforcement agencies and emergency services particularly on matters pertaining to the best interests of the public and importance.

The Authority recommends three mechanisms be established within Division 2 of the draft Bill:

**NSW Telco Authority position**

- 12. That under the proposed section 33 of the draft Bill, a provision be inserted to allow for ACMA to issue a licence to a body where it is determined that specific bodies being issued such a licence is of higher priority public importance, and includes, as part of the issuing of the licence, the adequate allocation of spectrum based on the proposed licensees' core functions i.e. public safety and emergency responsiveness; or**
- 13. That under the proposed section 39 of the draft Bill, a provision be inserted that provides power to the Minister to go beyond a direction to ACMA to provide "a written offer to issue...a licence" to an applicant, to further empower the direction to include the issuing of a licence to a body whose core functions operate for public safety and emergency responses, provided that the proposed bodies operate under a law of the Commonwealth, State or Territory, and that adequate spectrum is allocated; or**
- 14. That an amendment be made to the proposed section 9 of the draft Bill "designated crime/corruption bodies" to ensure it captures all law enforcement bodies, such as state and territory police. Furthermore, a similar provision to section 9 should be considered creating a definition for "emergency service bodies", and express in Division 3 that section 9 bodies and emergency services are to be issued licences with the provision of adequate allocation of spectrum.**

<sup>25</sup> Such as the provisions contained within the *Surveillance Devices Act 2007 (NSW)*

## **4.2. Licensing of spectrum**

As stated previously, the Authority generally supports the move to a single licence system which encompasses the apparatus and spectrum licence systems, however it wishes to clarify the impact of that system and the draft Bill on both the current arrangement around Harmonised Government Spectrum (HGS) and the proposed spectrum area licence.

### **NSW Telco Authority position**

#### **15. That, at a minimum, the draft Bill and other regulatory arrangements:**

- a. Maintain current spectrum allocation for the HGS;**
- b. Maintain any associated management arrangements for the HGS; and**
- c. Include an express right for the government to be allocated suitable spectrum to meet current and future operational requirements.**

## **4.3. Licence and spectrum charges**

The Authority generally supports the retainment of the spectrum charges as set out in Part 5.7 of the current Act provided for in Part 16 of the draft Bill. In relation to section 193 'Spectrum access charges' in the draft Bill, the Authority submits that this section should include a sub-section that expresses that ACMA must take into consideration matters of public interest and importance when making a determination. The following section, s 194(2), regarding ministerial directions, includes examples which relate to spectrum access charges to 'specified classes of public or community services', their inclusion emphasising the importance of limiting or waiving charges to these services in the public interest. In recognition of this, it is suggested that s 193 also expressly include that ACMA must consider those specific issues in making its determinations affecting those groups, thereby potentially reducing any requirement for ministerial directions affecting s 193. Additionally, the delineation of law enforcement and emergency services from other public or community services should be incorporated consistently with recommendations (1) and (2).

Similarly, the Authority supports retaining ministerial directions in the draft Bill pursuant to section 194, as is currently provided for in section 294 of the current Act. The Authority also submits that, under the proposed section 194, the delineation between law enforcement and emergency services, and other public and community services, should be consistently applied.

Ministerial directions pertaining to levels of charges should also take into account previously charged amounts and a degree of proportionality.

Finally, the Authority submits that if a licence fee exemption has been granted for bodies under the current system, they should retain that exemption under the new system.

#### **NSW Telco Authority position**

- 16. Under section 193, that ACMA take into consideration matters of public importance and bodies whose services are a matter of public interest, such as law enforcement agencies and emergency services. This should expressly include the matters provided as examples for ministerial directions in s 194(2)(a), (b) and (c) regarding specified classes of public or community services, and should specify law enforcement and emergency services separately in accordance with recommendations (1) and (2) above.**
- 17. That ACMA, upon making a determination based on public importance and public interest under s193 (as recommended in (16)), ensures that previous levels of charges are taken into consideration if a licence was previously held.**
- 18. That the same provisions in recommendations (1) and (2) above concerning specific reference to law enforcement and emergency services, apply to ministerial directions under section 194 of the proposed Bill.**
- 19. That licence fee exemptions granted under the current system should be retained for the licence holders under the proposed new system.**

#### **4.4. Renewing licences**

The Authority reiterates its position in its written submissions in response to the May 2016 consultation, specifically that any mechanism for renewing licences within the draft Bill should include an express requirement for the ACMA to ensure that adequate spectrum is provided to law enforcement agencies and emergency services. This notion is consistent with the submission regarding 'Objects and Preliminary Matters' regarding the critical public interest roles law enforcement agencies and emergency services provide in protecting the community and responding to emergency incidents.

An expressed provision is also desirable insofar as the planners and operators of the networks are afforded the expectation of a continuation of adequate spectrum before, during and shortly after the licencing renewal process. An expressed assurance will continue to assist the smooth and adequate operation with minimal disruption in terms of planning and contingencies, such as altering levels of allocation moving from the initial licence to renewal.

The Authority submits in relation to s59(1) of the proposed Bill that an additional section or sub-section be inserted to express that government agencies whose core function is law enforcement or emergency services receive an automatic right of renewal in the public interest. This default renewal condition would streamline the renewal of government licenses and would ensure that government and emergency services providers continue to access adequate spectrum to fulfil their public and non-commercial purposes. Further, the Authority submits that reference should be made to Harmonised Government

Spectrum (HGS) in a spectrum of the 400MHz segment and that a simplified licence renewal process for (HGS) be used by law enforcement and emergency services bodies.

**NSW Telco Authority position**

- 20. That the draft Bill includes an express requirement for ACMA to ensure adequate allocation of spectrum to law enforcement and emergency services upon licence renewal.**
- 21. In relation to section 59(1) of the proposed Bill, that a provision is inserted providing for an automatic right of licence renewal for law enforcement agencies and emergency services.**
- 22. That reference is made to Harmonised Government Spectrum (HGS) and a simplified licence renewal process for HGS used by law enforcement and emergency services.**

## **5. Resumption of Licenses**

### **5.1. Compensation**

The Authority supports the provision for compensation in the draft Bill, but submits that compensation should also be appropriate to account for the long-term investment in infrastructure and equipment associated with these licences, and the costs involved with moving to any alternative spectrum.

In reference to the procedures of determining compensation, the Authority is concerned that the very body (ACMA) required to make the compulsory resumption is the same body that acts as the determinant, by the provision of legislative instrument, and is responsible for the creation of procedures for determining compensation payable, as well as determining the rate of interest.

**NSW Telco Authority position**

- 23. That a licensee, the subject of a resumption determination, should have provision to submit, or negotiate in good faith, an appropriate level of compensation.**
- 24. That the amount of compensation takes into consideration incidental long term investments in infrastructure and equipment.**

## **6. Interference Management**

### **6.1. Dispute resolution and conflict resolution**

The Authority supports, in principle, the mechanism in the proposed Bill which provides for the provision of an alternative dispute resolution process, however further encouragement should be provided for parties to a complaint to take more of an informal approach to dispute resolution before any involvement of ACMA. This proposition is made due to the fact that alleged interference with other licensee's spectrum is usually minor, and minor interference is not uncommon, often occurring as a result of a genuine mistake (and not reckless indifference), faulty equipment or unintentionally mistuned equipment. Informal dispute



resolution should be encouraged (upon notification to ACMA) on the basis that only minor interference has occurred or is alleged and does not meet the elements of civil or criminal sanctions. The ACMA should conduct dispute resolution in the event that the parties to an informal dispute resolution fail to achieve a resolution after discussions have been conducted in good faith.

#### **NSW Telco Authority position**

- 25. That a requirement is included for the parties, subject to the nature and circumstances of the interference, to attempt to resolve the disputes informally.**
- 26. That failing informal dispute resolution, ACMA intervenes with a defined Alternative Dispute Resolution process, including referrals to expert mediators or to a determination conducted by a registered mediator with expertise in the industry.**

## **7. Conclusion**

The Authority acknowledges that the proposed *Radiocommunications Bill 2017* is an early draft and looks forward to making further submissions through the Bill's development.

As a final remark, the Authority reiterates that adequate spectrum to support essential law enforcement and emergency services must be maintained as a priority in the amended legislation. The commercial efficiency and the policy direction in terms of commercial spectrum allocation must be balanced with the public interest and importance of efficient and effective law enforcement and emergency services to the community. The Authority's concern is that the merited, specific emphasis on meeting the spectral requirements of critical law enforcement and emergency services is absent from the current draft bill, and that this could lead to future diminishing access to adequate spectrum.

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**Prepared by: Policy Unit, NSW Telco Authority**  
**in consultation with**  
**Spectrum Office, NSW Telco Authority**

**On behalf of: Anna Welanyk**  
**A/Managing Director**  
**NSW Telco Authority**