



Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020

Defence Submission

Spectrum is vital to Defence capability. Efficient and effective spectrum management is required to support Defence access to this shared national resource. These factors underpin the capabilities prioritised in the 2020 Defence Strategic Update and the 2020 Force Structure Plan, released 1 July 2020. Government priority on these matters is demonstrated by the release timing of these documents and associated spending allocations (\$270 billion over 10 years).

Defence wishes to emphasise (currently unresolved) matters raised in the similar 2017 consultation on the Radiocommunications Act, particularly the inclusion of modern principles-based exemptions for Defence, to ensure that contemporary operating contexts and associated operational requirements, including training, for Defence are consistent with current radiocommunications legislation. This clarity is needed, in particular, to permit rapid decision-making and action, when rapid operational responses are required, in complex operational scenarios. These matters are supported by Chief Counsel, Defence Legal. They are described under question 6 below, and in Addendum 1.

Questions for Consideration

1. Given the established administrative practice of ACMA preparing the Five-Year Spectrum Outlook on an annual basis, does the proposed legislative ACMA annual work program provide stakeholders any additional benefit in terms of certainty and transparency?

Yes. The Five-Year Spectrum Outlook is a forecast. This is a vehicle for engaging the spectrum stakeholder community on future directions. The Legislative ACMA Annual Work Program is useful in terms of planning the timing of resource involvement and introductions of revised legislation. Both vehicles should provide clear traceability to the change drivers (Ministerial Policy Statements, Directions or ACMA initiatives). This combination will contribute to certainty and transparency.

Defence is concerned that some spectrum planning activities are being progressed without clear policy guidance or advice from the Government Spectrum Steering Committee on strategic spectrum policy matters. Examples include approaches for spectrum sharing, 5G and Wireless Internet Service Providers (WISP).

2. Under the reforms, there will be several legislative mechanisms to provide transparency, clarity and, potentially, review rights to existing licence holders where ACMA is seeking to re-allocate spectrum (such as the annual work program and licence renewal statements). In these circumstances, does the spectrum re-allocation declaration process continue to be of use to stakeholders?



Defence regards the spectrum re-allocation declaration process to be a useful contributor to transparency and certainty and should be retained. However, there is no overarching policy guiding which particular areas of spectrum can be considered for re-allocation and under what circumstances. Defence recommends that the Government Spectrum Steering Committee be used to provide whole of Government policy on spectrum re-allocation.

3. The reforms are intended to permit ACMA to facilitate the development and testing of banned devices in Australia through the exemptions framework provided for in relation to the revised Part 4.1 of the Act, while still protecting existing licence holders from interference. Do the proposed exemption provisions achieve this aim?

The proposed exemption provisions are a step in the right direction. However, the ACMA has to be thorough in making their determinations, such that there is appropriate transparency across processes. Incorporating Defence proposals into the exemption framework for additional classes of persons will also improve the management of such matters.

4. The reforms introduce graduated compliance mechanisms for ACMA to regulate and enforce the provisions of the Act. Are ACMA's proposed powers appropriate and are there any additional regulatory tools that stakeholders would like to see be made available to ACMA to perform its spectrum management functions?

Defence recommends that a formal appeal mechanism be developed in the Australian spectrum regulatory framework, for application in cases where it becomes evident after implementation, that spectrum outcomes are adverse to particular stakeholder groups. This would permit such matters to be dealt with in a disciplined and structured manner. Such measures would contribute to flexibility and certainty in spectrum allocations.

A contemporary case is the current controversy between the Federal Communications Commission and the US Department of Defence concerning repurposing of GPS spectrum for future 5G use by operator Ligado (Ref 1). The underlying constraint is that many receivers, currently in use, are susceptible to interference from unrelated systems operating in adjacent frequency bands. Consequently, systems relying on low power signals (such as GPS) can be adversely affected by changes in domestic and international regulations.

5. Are there any additional transitional matters or grandfathering of processes that should be considered? For example, do you consider that any additional existing processes or provisions should be retained for current licences, with the new provisions only applying to licences issued after the reforms commence?

Defence supports the reforms in respect of new and renewed licences. Renewal of existing licences with 90 day notice and 30 day invoice, can be adopted by Defence.

6. Are there any additional reforms the Department should consider as part of the proposed amendments to the Act, or that should be considered further as part of future reforms to the spectrum management framework?

6.1 Objects of the Act and Licence Allocation Processes:

The current Objects refer to "the defence or national security of Australia". Defence recommends that the reference to defence and national security be retained as the first item in the new Objects, whether or not law enforcement and emergency services are also separately listed, as follows:

- (i) defence or national security purposes
 - (i) Commercial purposes; and
 - (ii) Non-commercial purposes (including...)

In support of this, Defence additionally recommends that a national security/interest test is necessary to ensure the ACMA and/or the Minister has the ability to refuse, suspend or cancel a licence if it is in the national interest to do so. These measures would be intended to ensure appropriate transparency in the trading, ownership or use of spectrum by foreign interests (including by subordinate companies or contractors). Clauses should be inserted into the draft Bill that:

- a) cause notification to the Minister of the above intentions;
- b) provide for constraints on spectrum access by the reported entity to be imposed by the Minister;
- c) provide for the denial of spectrum access to the reported entity to be imposed by the Minister;
- d) allow the ACMA to deny a radiocommunications licence based on the above.

Note that there are parallels in relation to this issue with the recently implemented Telecommunications Sector Security Reforms.

The following text is provided as an example of how this requirements could be reflected in the Bill:

The ACMA may request information from an applicant or licensee on:

- (1) the general purposes for which the licence is or will be used, including use by foreign entities; and
- (2) any foreign entities which are current, planned or potential users of the licence.

An applicant or licensee must inform the ACMA of any changes that:

- (1) alter the general purposes for which the licence will be used;
- (2) include use of the spectrum covered by the licence by any foreign entities.

The ACMA may deny, suspend or cancel a licence if the issue of the licence is contrary to the national interest.

The Minister may direct the ACMA to deny, suspend or cancel a licence if the issue of the licence is contrary to the national interest.

The ACMA may issue a licence that includes a condition specifying:

- (1) any purposes for which operation of radiocommunications devices is not authorised under the licence; and
- (2) any foreign entities not authorised to operate radiocommunications devices under the licence.

6.2 Exemptions: Defence wishes to emphasise matters raised in the similar 2017 consultation, particularly the inclusion of modern principles-based exemptions for Defence, to ensure that contemporary operating contexts and associated operational requirements, including training, for Defence are reflected within radiocommunications legislation. This clarity is needed, in particular, to permit appropriate development and sustainment of Defence capabilities and rapid decision-making and action when rapid operational responses are required in complex operational scenarios. This position is supported by Chief Counsel, Defence Legal.

References

1. Federal Communications Commission ruling FCC 20-48.
<https://docs.fcc.gov/public/attachments/FCC-20-48A1.pdf>