

**OPTUS**

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Reform**

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## Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the Government's decision to undertake a staged approach to the reform of Australia's spectrum management framework, starting with the introduction of the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020*.
- 1.2 Optus supports the key reform principles of simplicity, flexibility, transparency, certainty and efficiency. This includes the primacy of promoting 'the long-term public interest derived from the use of the spectrum' as the overarching purpose of the Act.
- 1.3 Optus also supports the introduction of Ministerial Policy Statements but recommends that consultation on the development of these statements be mandated in the Act.
- 1.4 The most important reform principle is the establishment of clear and strong property rights for spectrum licence holders. This is vital to ensure that spectrum-licensed spectrum can be used to promote the long-term public interest derived from the use of the spectrum.
- 1.5 The Bill introduces changes that enable the possibility for both spectrum and apparatus licences to co-exist within the same parts of the spectrum. This emphasises the need for a clear hierarchy between the different licence types. The Act should be clear that acquiring spectrum licences grants greater certainty of rights than under apparatus licences. This principle should flow through all the proposed changes, including the ability to alter licence terms, content of renewal statements, and interference management.
- 1.6 Optus supports the requirement that the renewal process be committed to at the time of licence issue through the use of renewal statements. The lack of certainty over renewal rights risks undermining future investment and underutilisation of spectrum assets
- 1.7 Optus further submits that spectrum licences should be allocated with a clear presumption of renewal unless it is in the clear public interest to not renew. Without this assurance, there is a risk of under-investment during the latter years of the licence tenure and compounded by the risk of not being able to retain the licence for a future licence term.
- 1.8 Finally, Optus calls for continual reform of overall spectrum management including the inclusion of broadcasting spectrum into the radiocommunications framework. It is in Australia's interest that all types of spectrum – broadcasting and radiocommunications – be managed under a converged framework.

## Section 2. OVERARCHING PRINCIPLES

- 2.1 The proposed amendments have been targeted to address five priority areas:
- (a) Clarify the object of the Act and the roles of the Minister and the ACMA;
  - (b) Streamline spectrum allocation and re-allocation processes;
  - (c) Improve flexibility and reduce regulatory barriers between licence types;
  - (d) Better reflect modern spectrum needs and supply chains; and
  - (e) Introduce a modernised compliance and enforcement regime with more graduated enforcement mechanisms for breaches of the framework.
- 2.2 We will discuss each of these areas in turn below. However, before we do it is important to outline some principles which will guide this discussion.

### **Clear and strong spectrum property rights promote efficient and benefits of use**

- 2.3 The establishment of clear and strong property rights for spectrum licence holders should remain the bedrock of the licensing regime, to ensure that spectrum-licensed spectrum can be used to promote the long-term public interest derived from the use of the spectrum.
- 2.4 Spectrum ownership by itself does not produce benefits – rather it is the investment in assets that utilise that spectrum and produce services that create the public benefits of use. Clear property rights are key to providing the level of certainty and protection needed for efficient investment. Promoting efficient investment in assets that use the spectrum is the best way to ensure that the long term public interest of use is maximised.
- 2.5 The level of rights associated with a licence should be reflective of the level of investment required to be undertaken over an extended period of time to make best use of that spectrum. Broadly, Optus understands the different licence types (spectrum, apparatus and class) reflects this dichotomy – with spectrum licences appropriate for uses requiring material investment (such as mobile networks) and class licences required for use that require little investment (such as a local area CB radio, cordless phones).
- 2.6 Licensees acquire a set of known rights of use, control and renewal at the time of acquisition. The protection of these rights over the term of the licence is equally important – with different licence types affording different levels of protection. Ultimately, the value of the licence reflects the rights granted and the level of protection over those rights and this should be known at the time of acquisition of the licence and remain unchanged unless agreed to by the licence holder.

### **Licence hierarchy and primacy of spectrum licences**

- 2.7 An important reform proposal is the adoption of a clear licence hierarchy, with spectrum licences at the top of the hierarchy. This hierarchy of rights is especially important given the proposal to allow both spectrum and apparatus licences to co-exist in the same spectrum band.
- 2.8 Optus supports the hierarchy being clearly defined in the Act. Potential licensees must know beforehand the set of rights they are acquiring, and the Act must be clear that acquiring spectrum licences grant greater certainty of these rights than under apparatus

licences. This is akin to the rights attached to buying property (spectrum licence) and leasing property (apparatus licence). With lessees having less rights to use, alter, deal, trade, or sell the property than owners of the property.

- 2.9 At the heart of this distinction is the primacy of spectrum licence property rights. The bundle of rights acquired with a spectrum licence should not change without agreement with the spectrum licence owner. This can be contrasted to an apparatus licence which has weaker rights, where apparatus licence changes could be made without agreement of the licensee (following due process). As noted above, these different rights would be known prior to acquisition of the licence and reflected in the value of the licence itself.
- 2.10 This hierarchy of rights extends to the protections afforded from interference from other users. That is, apparatus licences hold the obligation to not interfere with the rights associated with spectrum licences, and class licences must not interfere with the rights associated with either apparatus or spectrum licences. Allowing lower tier licences equivalence or the ability to dictate the terms for interference protection and obligations will erode the efficiency, utility and value of higher tier licences.
- 2.11 Optus understands that the Department agrees with the general principle and has noted that the differences in the ability to resume licences with and without compensation captures this difference.
- 2.12 Optus submits that the distinction between spectrum and apparatus licences needs to be further defined throughout the proposed changes. For example, the Bill permits renewal statements to be varied with and without agreement for both licence types.<sup>1</sup> The ACMA should not be given discretion to vary a renewal statement without the agreement of the spectrum licence holder to which it applies.

## **Summary of main positions**

- 2.13 In this section, Optus summarises our position on the main reform themes proposed. These are:
- (a) Greater flexibility for the ACMA to make decisions;
  - (b) Clarifying the hierarchy of spectrum licence types; and
  - (c) Introduction of renewal statements.

### **Greater flexibility for the ACMA to make decisions**

- 2.14 Many of the proposed amendments in the Bill aim to provide the ACMA with independence and decision-making powers across a wide range of its spectrum management functions, including its licensing and enforcement capabilities.
- 2.15 Optus supports the removal of prescription across a range of licensing aspects and processes relating to the allocation and re-allocation of spectrum, as well as other reforms including:
- (a) A clearer delineation of decision-making authority by removing the Minister from the need to make routine administrative decisions, but instead allowing

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<sup>1</sup> For spectrum and apparatus licences, respectively – Variation with Agreement (s.72 and 103B) and Variation without agreement (s.73 and 103C)

for Ministerial Policy Statements (MPS) to provide the Government's policy objectives for spectrum management to the ACMA;

- (b) Increasing the maximum licence term for spectrum licences to 20 years;
  - (c) The introduction of renewal statements to provide greater clarity to licensees about the prospect and process for having a further licence issued at the expiry of an existing licence. However, the ability for the ACMA to vary a spectrum licence, including a renewal statement, without agreement of the spectrum licence holder is not warranted and should be removed;
  - (d) The requirement to consult with other regulatory agencies on certain matters – e.g. the ACCC in regard to the setting of allocation limits; and ARPANSA in regard to the setting of equipment rules relating to 'radio emissions';
  - (e) The provision of increased flexibility for the ACMA to determine technical regulation through equipment rules, as well as access to a range of tools to enable graduated responses to non-compliance; and
  - (f) An improved compliance and enforcement regime which includes civil penalties providing the ACMA with increased flexibility to address instances of non-compliance and enables for more timely response to breaches.
- 2.16 Optus also notes that granting the ACMA greater flexibility to undertake its various spectrum management functions and powers, emphasises the need to ensure that an appropriate balance is reached between discretionary power and transparency.
- 2.17 As such, there should be a firm requirement for the ACMA to engage with stakeholders who may be affected by the ACMA's decision, as well as a continued need to ensure that appropriate recourse mechanisms continue to exist.

#### Licensing hierarchy remains central

- 2.18 The Bill introduces changes that enable the possibility for both spectrum and apparatus licences to co-exist within the same parts of the spectrum. As such, Optus considers this further emphasises the need for a clear hierarchy between the different licence types.
- 2.19 This hierarchy of rights similarly extends to the protections afforded from interference from other users, including lower-tier licence holders. Optus submits that the Bill should include changes that make clear where an apparatus licence and spectrum licence co-exist in the same, or adjacent, bands, that the apparatus licence holds the ultimate obligation to not interfere with spectrum licences.
- 2.20 Further, the ability for the ACMA to unilaterally intervene with licences should vary depending on the licence type. Particularly, the Bill should make clear that terms of a spectrum licence can only be changed during the term of the licence by agreement with the licensee.

#### Renewal statements

- 2.21 Optus supports the introduction of renewal statements; and that such statements must be made with spectrum licences; and may be made for apparatus licences.
- 2.22 While it is appropriate that the detailed content of renewal statements be determined at the time of issuing a licence, Optus supports the Bill providing guidance on what must be included in the statements.
- 2.23 Optus submits that the Bill requires renewal statements to include:

- (a) Presumption of renewal for spectrum licences unless it is in the clear public interest to not renew.
- (b) A process to review any changes in market developments or use of the spectrum asset to determine whether licence renewal (or re-allocation) will be in the public interest.
- (c) The renewal process for spectrum licences commencing no later than five-years prior to the expiry of the licence; and any renewal decisions, including price terms, set no later than three-years prior to the expiry of the licence.

## Section 3. CLARIFYING INSTITUTIONAL ROLES AND RESPONSIBILITIES

- 3.1 This section sets out Optus' views on the revised object of the *Radiocommunications Act 1992* (the Act) and clarification of the institutional roles of the Minister and the ACMA.
- 3.2 In summary, Optus
- (a) Supports the primacy of promoting 'the long-term public interest derived from the use of the spectrum' as the overarching purpose of the Act;
  - (b) Recommends consultation on the development of Ministerial Policy Statements be mandatory; and
  - (c) Supports the inclusion of ACMA work programs in the Bill and suggests that the utility of such information for industry will be improved if variations and updates are made in real time, via a streamlined consultation process.

### Object of the Act

- 3.3 The Bill proposes to insert a new, simpler object, which includes three distinct sub-objects (or stated aims) intended to serve the primary object of promoting the long-term public interest derived from the use of the spectrum.
- 3.4 Optus supports the primacy of promoting 'the long-term public interest derived from the use of the spectrum' as the overarching purpose of the Act. We observe that this drafting clarifies that promoting the benefits of efficient use of spectrum is the primary goal of the Act.
- 3.5 Optus also supports the concept of long-term public interest, which brings into the Act key concepts common in other telecommunications legislation, like the long-term interest of end-users which is used in the *Telecommunications Act 1997* and the *Competition and Consumer Act 2010*.
- 3.6 Optus submits that sub-clause (a) should include a reference to 'transparency'.
- 3.7 Given the broad range of discretion the Bill has given to the ACMA, Optus suggests s3(a) be amended to include "facilitates the efficient and **transparent** planning, allocation and use of the spectrum..." as a suitable check without limiting the ACMA's flexibility as spectrum manager.
- 3.8 Optus notes that devolving more decisions to ACMA, thereby granting it greater flexibility to undertake its various spectrum management functions and powers, emphasises the need to ensure that an appropriate balance is reached between discretionary power and transparency.

### Ministerial Policy Statements

- 3.9 The Bill introduces a new Part 1.5 that provides a mechanism for the Minister to provide high-level policy guidance to ACMA by way of notifiable instrument. As a result,
- (a) Minister will now have the power to issue Ministerial policy statement to set out the Government policy objectives for spectrum management (which provides guidance for ACMA but does not have same force as Directions)

- (b) Minister will retain specific directions power to set allocation limits or spectrum access charges
  - (c) Ministerial policy statements will focus on ACMA's spectrum management functions and powers, and have scope to be either broad or specific
- 3.10 Optus understands the intended purpose of Ministerial Policy Statements (MPS) is to guide the ACMA to its functions as a spectrum manager. An MPS will play a pivotal role in providing certainty to industry on both timing and availability of spectrum – which is a critical policy input for investment decision making processes.
- 3.11 The MPS is also recognised as one form in which the Government may communicate its communications policy objectives (a key stated aim of the Act). The other forms include policy guidance provided through Statements of Expectations, or public statements of communications policy made by Government.
- 3.12 Notably, the new section 28C requires that the “the ACMA must have regard to Ministerial policy statements” in the exercise of its spectrum management functions and powers, as well as the ability to depart from an MPS (despite having had regard to it). While this is somewhat contradictory, it appears that any decision that is capable of being varied could be subject to a direction from the Minister to require the ACMA to consider varying a decision to make it consistent with an MPS. This intent should be made clear in the Explanatory Statement.
- 3.13 However, the Bill does not currently require for an MPS to be released in draft form for consultation. Optus considers that it is important from a transparency perspective that an MPS is developed in consultation with industry and the ACMA and recommends this requirement is included in a revised Bill.
- 3.14 Optus notes that in practice, such consultation could be targeted to relevant stakeholders affected by the major initiatives covered by an MPS. The inclusion of a ‘mandatory’ consultation requirement should not be perceived negatively, but as an important step in the policy development process to ensure the Government is properly informed of industry impacts of proposed policy approaches.

### **The ACMA work programme**

- 3.15 The Bill introduces a new Part 1.6 which relates to the ACMA's commitment to determine an annual work plan at least once each financial year period. It is also intended that the annual work programme will build on the ACMA's current Five-year Spectrum Outlook (FYSO) process.
- 3.16 Optus supports the requirement for the ACMA to produce an annual work program in relation to its spectrum management functions on the basis that it will improve certainty, accountability and transparency. Optus also suggests that the utility of such information for industry will be improved if variations and updates are made in real time, via a streamlined consultation process or provision of six-monthly updates.
- 3.17 A gap in previous ACMA work programs has been any requirement for the ACMA to report on its progress against stated intentions, including justifications on why targets hadn't been met. Therefore, Optus supports a requirement for the ACMA to self-report on commitments made in the plan. For example, reporting on the previous year could be included in the following year's work program.
- 3.18 To ensure the utility of the work program Optus also suggests that variations be permitted to be made as for example, government policy positions change. Variations should also be subject to a targeted and streamlined form of consultation with industry.

These changes will help ensure that the work program remains current and agile and a useful reference document for industry.

- 3.19 As spectrum is a significant regulated business input for Optus, having a clear roadmap of what, when and how spectrum will be allocated is critical.

## Section 4. STREAMLINED ALLOCATION AND RE-ALLOCATION PROCESSES

- 4.1 The Bill continues to recognise the role of spectrum and apparatus licences as central to the spectrum management framework. Section 5 discusses the proposed changes to improve licensing flexibility and reduce regulatory barriers between the different licence types. This section sets out Optus' views on the proposed amendments to streamline spectrum allocation and re-allocation processes.
- 4.2 In summary, Optus
- (a) Proposes that spectrum re-allocation periods should not be extended beyond the minimum re-allocation period without exceptional circumstances and should be set no longer than three-years.
  - (b) Considers that the allocation of spectrum licences via direct allocation should include a requirement to provide transparency over 'the way in which prices are to be determined' for licences issued through this allocation method.
  - (c) Supports the flexibility for the ACMA to set allocation limits, subject to consultation with the ACCC, as well as the ability to consider total spectrum holdings of participant in an allocation process.
  - (d) Does not support the ability for the ACMA to vary a spectrum licence, including a renewal statement, without agreement of the spectrum licence holder. This discretion is not warranted and should be removed.

### Re-allocation of encumbered spectrum

- 4.3 The existing legislation contains highly prescriptive timelines for spectrum designation, conversion and re-allocation, as well as prescribed involvement of the Minister at several points in these processes.<sup>2</sup> These highly codified processes cause unnecessary cost and delay to the ACMA's work, and also restrict the ACMA's discretion in respect of matters where repeated Ministerial involvement should not be required.
- 4.4 The Bill proposes to empower the ACMA as the key decision maker for re-allocation processes (i.e. power to issue, vary or revoke spectrum re-allocation declarations) following public consultation and policy guidance from the Minister.
- 4.5 In general, Optus supports the proposed changes to the re-allocation declaration process (section 153), including bringing forward the minimum re-allocation period to at least 12 months, aligning the reallocation deadline to this same date, and commencing the re-allocation period without the current up to 28 day delay. This increases the flexibility for the ACMA by streamlining and removing the ambiguity that the current process entails.
- 4.6 However, we consider there should be a requirement that any re-allocation period that is set for more than the minimum period be subject to a justification statement; and that

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<sup>2</sup> For example, the highly prescriptive steps in Part 2.2 of the Act (designation and conversion) and Part 3.6 of the Act (re-allocation).

further guidance should be given to examples of 'exceptional circumstances' to warrant a variation under the new section 153J(2A).

- 4.7 The Act currently requires that any re-allocation period should be specified for a minimum two-year period. The Act also specified a re-allocation deadline (that is, a date 12 months prior to the end of the re-allocation period) by which the ACMA must issue a licence or the legislative instrument allowed to lapse.
- 4.8 A key purpose of setting a re-allocation period is to ensure that any incumbent licensees are provided with sufficient notice to vacate a spectrum area to enable the ACMA to issue spectrum licences more efficiently.
- 4.9 In general, Optus supports the concept of setting a re-allocation period, but does not agree with the discretionary nature in which the ACMA and the Minister has previously allowed for re-allocation periods to be set for a term that is significantly beyond the minimum period.
- 4.10 For example, the ACMA and Minister set a new precedent during the 3.6 GHz re-allocation process by allowing incumbents in specified areas to be subject to re-allocation period significantly beyond the minimum two-year period (i.e. up to five years in Perth, and up to seven years in Regional areas). This gave the effect of reducing the unencumbered access for the Regional licences to five years in affected areas.
- 4.11 In addition to creating additional barriers for deployment and effective reduction in unencumbered access to licensed spectrum, this extended re-allocation period has led to poor outcomes. Any extension of the re-allocation period beyond minimum re-allocation period should be limited and only considered in exceptional circumstances.
- 4.12 Optus submits the Bill should also introduce a maximum reallocation periods, to address the concerns above. We consider a maximum period of three years should be adopted.
- 4.13 Optus also considers that incumbents should be cleared prior to licence commencement. Therefore, the re-allocation period should end as the licence commences. The Bill does not directly address this concern.
- 4.14 Optus similarly notes that because broadcast spectrum has been excluded from the Bill, this means there is no defined pathway for the re-allocation of broadcasting spectrum and therefore the uncertainty surrounding the processes that will accommodate such a process. As such, this issue will need to be addressed in the subsequent iterations of this reform process.
- 4.15 In summary,
  - (a) Optus proposes that spectrum re-allocation periods should not be extended beyond the minimum re-allocation period without exceptional circumstances.
  - (b) Optus submits the Bill include a maximum re-allocation period of three years. Such a period provides a sufficient notice period to make capital investment decisions.

### **Re-allocating parts of the spectrum using a mix of spectrum and apparatus licences**

- 4.16 The removal of the designation and conversion process also removes the prohibition on issuing apparatus licences in the same bands/frequencies in the same geographical areas as spectrum licences and now gives the ACMA the discretion to issue licences as either spectrum licences, apparatus licences or combination of both.

- 4.17 The Bill introduces changes that enable the possibility for both spectrum and apparatus licences to co-exist within the same parts of the spectrum. As such, Optus considers this further emphasises the need for a clear hierarchy between the different licence types.
- 4.18 Optus submits that the Bill should include changes that make clear where an apparatus licence and spectrum licence co-exist in the same, or adjacent frequencies, that the apparatus licence holds the ultimate obligation to not interfere with spectrum licences. The co-existence of licence types also has significant implications for the operability of equipment – including the existence of transmitters operated under the two licence types within the same parts of the spectrum. For example, these concerns may be exacerbated where the management of co-existence may rely on synchronisation fall-back between spectrum licensed transmitters and AWL licensed transmitters; and there is a proliferation in the number of AWL licensed operators spectrum licensees will be required to co-ordinate with. Under the primacy of spectrum licence rights, the onus should be on apparatus licence holders to ensure they do not cause undue interference with spectrum licensees.
- 4.19 It follows that the strict hierarchy of licence types needs to be maintained such that apparatus licences cannot infringe on the property rights of spectrum licences, and class licences cannot infringe on the property rights of either spectrum or apparatus licences.

### **Allocation of spectrum licences**

- 4.20 The Act currently sets out provisions for the issue of spectrum licences under section 60, which requires the ACMA to determine the procedures to be applied for the issue of spectrum licences. This includes both the allocation method and the required parameters that may apply to each allocation method.
- 4.21 The ACMA will continue to be required to prepare a marketing plan for issuing spectrum licences. This applies to both unencumbered spectrum (section 39) and re-allocation of spectrum (section 39A). These do not apply to the issue of apparatus licences. The Bill also introduces amendments to make clear that the ACMA is able to prepare a marketing plan for issuing licences using a combination of procedures.
- 4.22 Optus also supports the inclusion of provisions to ensure that the protections for incumbent licensees will continue to apply. Namely:
- (a) Marketing plans only apply to unencumbered spectrum, except as part of a re-allocation process;
  - (b) Prohibition on issuing apparatus licences apply where a marketing plan is being prepared/in place; and
  - (c) Restrictions preventing spectrum licences being issued in parts of the spectrum already licensed under spectrum licences.
- 4.23 While these processes will continue to apply, the Bill introduces two key changes:
- (a) The introduction of direct allocation as an allocation method for the issue of spectrum licences; and
  - (b) The ability for the ACMA to determine allocation limits, subject to consultation with the ACCC.

### **Direct allocation**

- 4.24 The Bill introduces a new allocation procedure in the form of 'direct allocation' for the purposes of issuing spectrum licences. Notably, it partially replaces the removal of the

conversion process and appears to be intended to only apply to the allocation of spectrum licences.

- 4.25 While section 60(1) requires that all allocation procedures must be determined in writing, there is no additional guidance provided on the matters that should be considered under a direct allocation process. This is in direct contrast to the matters that may be considered for auctions; tenders; and allocations for a pre-determined price of a negotiated price (sections 60(2), (3) and (4)).
- 4.26 Optus considers that the direct allocation procedures should include a requirement to provide transparency over 'the way in which prices are to be determined or negotiated' for a spectrum licence issued through this allocation method.
- 4.27 The only consideration provided for direct allocation is that the ACMA may have regard to a frequency assignment certificate (section 60(7)). As noted in the Explanatory Note, a frequency assignment certificate may be issued by an accredited person to ensure that the spectrum is efficiently allocated, and interference is effectively managed. However, we do not consider that this is sufficient justification to support the use of direct allocation, as it does not address any transparency concerns relating to price or the method used to ascertain price.
- 4.28 Respecting the spectrum licensing hierarchy and the additional property rights that a spectrum licence should confer, it could be considered inappropriate to issue a spectrum licence via direct allocation as a means to 'convert' an apparatus licence to spectrum licence on the basis that a frequency assignment certificate deems it to be efficient and without the sufficient pricing transparency being provided.
- 4.29 While the ACMA's broad discretion on allocation of spectrum licences is retained in section 60(8), Optus notes that there is currently no information on section 60(7B) to introduced in the provided version of this Bill.

#### Allocation parameters

- 4.30 The Bill introduces new concepts of eligibility requirements and credits as further examples of matters that procedures for allocation may deal with.
- 4.31 In particular, the Explanatory Note considers that:
- (a) Eligibility requirements relate to the setting of eligibility criteria that a person must meet in order to participate; and
  - (b) Credits (if any) relate to a 'specified amount' to which any prospective acquirer may have their bid deemed to be increased by. This would in effect provide such a participant an advantage in any allocation process.
- 4.32 In both cases, the ACMA will have discretion to set the relevant amounts, in line with the relevant section 60 procedures.
- 4.33 While, we acknowledge that further details on these parameters will be considered during the relevant allocation process, it is unclear on what basis the specification of 'credits' should be enshrined within the Act. This is a matter that the ACMA can already consider and introduce under the current arrangements during the consultation process for allocation instruments. Optus considers that consideration of credits should be constrained and limited in use – similar to allocation limits, the use of credits should be subject to external advice such as from the ACCC to ensure that the issue of credits do not cause any unintentional consequences, such as heightened risk of arbitrage or other undue impacts on competition.

- 4.34 Should these concepts continue be included, we would welcome further clarification of its intent and examples of how it may be applied in an allocation process in the Explanatory Statement.

### Allocation limits

- 4.35 The Bill removes the prescription that allocation limits can only be imposed by the ACMA when directed to do so by the Minister; but requires that any limits be subject to consultation with the ACCC.
- 4.36 Optus supports this change. In particular, we welcome the clarification that the ACMA can consider the total spectrum holdings of a participant in an allocation process when having regard to whether an allocation limit facilitates efficient use of the spectrum.
- 4.37 We would also welcome further clarification on a clear set of decision-making criteria that the ACMA may consider when exercising this power. Optus submits that the Bill inserts a new provision that makes clear that when the ACMA is determining allocation limits it must do so consistent with s.50 of the *Competition and Consumer Act 2010*. Absent such a provision, it remains a possibility that the ACMA may set allocation limits which fall foul of s.50 prohibitions.
- 4.38 The Bill also clarifies the role and consideration of allocation limits with respect to the issue of apparatus licences. We agree with these changes as they largely mirror the changes to allocation limits that apply to spectrum licences.

### **Variation of licence conditions**

- 4.39 The Act provides discretion for the ACMA to vary spectrum licences with and without agreement with the spectrum licence holder (section 72 and 73), with the clear distinction that the variation without agreement cannot apply to the revoking or varying of any conditions of the licence that is not a core condition (section 73(1)(b)).
- 4.40 However, with the proposed introduction of renewal statements, and its status as neither a statutory condition nor core condition, it would not be appropriate that any variation to renewal statements – or its related terms – be subject to change without the agreement of the spectrum licence holder. As such, the proposed sections 73(3), (4), (5) and (6) should be removed. Any proposed variations to such terms should remain subject to agreement with the licence holder.
- 4.41 Optus considers that in principle variations to spectrum licences without agreement should not be allowed. In practice, it is likely where a change to licence conditions is warranted, spectrum licensees will accept such changes to be applied.
- 4.42 Further, we note that the Government retains the ability to take back spectrum licences with compensation.

## Section 5. LICENCE FLEXIBILITY AND RENEWALS

- 5.1 This section sets out Optus' views on the proposed amendments to improve licensing flexibility; and reducing the regulatory barriers between spectrum and apparatus licences.
- 5.2 In summary, Optus
- (a) Supports the proposal to negotiate spectrum licences up to 20-year terms, with an upfront presumption of renewal at the end of licence term.
  - (b) While the maximum licence term may be aligned for apparatus licence types, in practical terms apparatus licences should remain limited to a shorter period to allow greater flexibility for the ACMA to review changes and developments that may be required in apparatus licensed bands.
  - (c) Supports the introduction of renewal statements to provide greater clarity to licensees about the prospect and process for having a further licence issued at the expiry of an existing licence. However, the ability for the ACMA to vary a spectrum licence, including a renewal statement, without agreement of the spectrum licence holder is not warranted and should be removed.
  - (d) Supports the requirement that a public interest test must be considered for the issue and re-issue of spectrum licences where the licence will apply for a period of 10 years or more. In addition, consideration for the public interest test should also be required for apparatus licences that are issued for a period of more than five years.
  - (e) The renewal application period should be specified and include guidance on what matters may need to be assessed during that period (e.g. investment test). The renewal process for a spectrum licence should commence at least five-years prior to the licence expiry; and any renewal-related decision completed at least three-years prior to the licence expiry. It follows that any licence payment for renewal be made closer to but before the licence term ends.

### **Spectrum licence term**

- 5.3 The Act currently only allows spectrum licences<sup>3</sup> to be issued for a maximum of 15 years, while apparatus licences<sup>4</sup> are limited to a maximum of five years. However, there is no defined renewal rights stipulated in the Act.
- 5.4 The Bill proposes to extend the maximum duration of spectrum and apparatus licences to 20 years (in line with equivalent amendments to extend the maximum duration of apparatus licences). The Bill also introduces the concept of renewal statements to provide guidance, transparency and certainty on the process licensees may expect to undergo in relation to the renewal of any spectrum or apparatus licences.

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<sup>3</sup> Act, s65(3).

<sup>4</sup> Act, s103(3).

- 5.5 Optus supports the extension of spectrum licence terms to 20 year terms (section 65(3)) but considers that spectrum licences should also include the upfront presumption of renewal.
- 5.6 Optus submits that the issue (or re-issue) of apparatus licences beyond five years should be subject to a public interest test. While there may be some valid applications for long term apparatus licences, these are likely to be outliers with the vast majority of apparatus licences requiring less than a five year term – in line with current arrangements.
- 5.7 While the maximum licence term may be aligned for apparatus licence types (section 103(3)), in practical terms apparatus licences should remain limited to a shorter period to allow greater flexibility for the ACMA to review changes and developments that may be required in apparatus licensed bands. This reflects the different levels of property rights afforded by spectrum and apparatus licences. Optus submits that should the efficient use of spectrum require a 20 year licence, it would indicate that a spectrum licence should be allocated.
- 5.8 To further ensure transparency on whether the right tenure or licence type is issued, the ACMA should be required to justify on what basis the licence term for an apparatus licence beyond five years has been determined. There should be a clear distinction that warrants the issue of a 20-year apparatus licence, compared to a 20-year spectrum licence.

### **Spectrum licence renewal process**

- 5.9 The Bill proposes to introduce renewal statements to provide greater clarity to licensees about the prospect and process for having a further licence issued at the expiry of an existing licence. These are in addition to the current provisions that relate to the re-issue of spectrum licences (sections 78 to 81). The Bill also removes the discretion to re-issue spectrum licences to the same licensee in the public interest (section 82) but introduces discretion for the renewal of spectrum licences to be issued to the applicant without the need to adhere to section 60 (new section 77C).
- 5.10 Optus supports the introduction of renewal statements at the time of licence allocation so that potential bidders have full transparency at the time of acquisition the process required to renew the licence. The rights of renewal and the processes and timing of these key decisions will have a material impact on the value of the licence, and as such, it is appropriate that clear rights are established before parties bid for the licence.
- 5.11 In summary, Optus supports
- (a) A clear spectrum licence renewal process to be included at the time of licence issue. The lack of certainty over renewal rights have been shown to undermine future investment and result in underutilisation of spectrum assets.
  - (b) Presumption of renewal for spectrum licences unless it is in the clear public interest to not renew.
  - (c) A process to review any changes in market developments or use of the spectrum asset to determine whether licence renewal (or re-allocation) will be in the public interest.
  - (d) The renewal process for spectrum licences commencing no later than five-years prior to the expiry of the licence; and any renewal decisions, including price terms, set no later than three-years prior to the expiry of the licence.

- (e) The renewal statement for spectrum licences to not be varied without agreement of the licence holder.

### Certainty over renewals would maximise public benefits of use

- 5.12 Optus supports the introduction of renewal statements. Clarity over licence tenure and certainty of renewal rights will have significant implications for mobile network infrastructure investment. The use of clear renewal statements at time of allocation would:
  - (a) Promote the efficient use of spectrum assets; and
  - (b) Promote long-term and sustainable investment in assets that utilise spectrum.
- 5.13 As a result, renewal of licences and renewal statements are likely to play a key role in ensuring that the long-term public benefits of use of spectrum are promoted.
- 5.14 In addition to the requirement for a renewal statement for both spectrum and apparatus licences, Optus submits that spectrum licences should be allocated with a clear presumption of renewal, to support spectrum utilisation and investment throughout the full licence period.
- 5.15 Without this assurance, there is a risk of under-investment during the latter years of the licence tenure and compounded by the risk of not being able to retain the licence for a future licence term.
- 5.16 Optus does not support a presumption of renewal for apparatus licences, reflecting the lower level of tenure protection associated with these licence types.

### Renewal timeframes should be legislated

- 5.17 If there is to be no right of spectrum renewal, Optus considers that the process for re-allocation should commence within an appropriate timeframe (and not expedited at the end of the licence term). This timeframe should be legislated to provide the necessary certainty to licence holders.
- 5.18 Optus observes that the Bill introduces renewal decision-making timeframes for the ACMA to complete its renewal application decision. Under section 286(3), where this period is defined for spectrum licences, then the decision-making period is specified as that period – but extendable by one day for each day in the period that may associated with an ACMA notice for further information.
- 5.19 Where this decision-making period is not specified, then the decision-making period reverts to the standard 6-month period for spectrum licences (section 286(5)) or the standard 90 day period for apparatus licences (section 286(1)). However, we are concerned with the ability for these periods to be continuously extended following ACMA having received further information.
- 5.20 The re-allocation process should commence as soon as practicable and should take into account the length of network equipment depreciation according standard accounting practices, so that this equipment is not written off prematurely. This would mean that the renewal process should start at a minimum of five years before the end of the licence. And that the renewal process be completed a minimum of three years before the end of the licence.
- 5.21 In this scenario, Optus considers that the requirement to commence the process at least five years prior to licence expiry would enable the following activities to occur:

- (a) Prepare and conduct a spectrum auction or renegotiate the terms of the licence renewal to provide investor confidence in the final years of the licence;
  - (b) Sufficient lead time to identify and activate alternative strategies if the re-allocation process is unfavourable to the spectrum licence holder.
- 5.22 Previous experience on re-allocation processes suggests that this formal process will take around two years to complete, including: the re-allocation determination, technical liaison group, draft and final marketing plan and the auction process, and other associated processes. Further, finalising the renewal process before three years of the end of the licence provides sufficient time to redirect investment to other spectrum assets, or to invest further in the renewed spectrum.
- 5.23 In summary,
- (a) Optus is also concerned with the significant impost on industry – either through renewals or re-allocations – that are expected to take place following the expiry of spectrum licences.
  - (b) Renewal should remain a primary option for incumbents where the spectrum can continue to be demonstrated to be required for the continuity of a service and that it remains the highest value use of the asset.
  - (c) Any renewal or re-allocation process should commence at least five years (and completed at least three years) prior to the end of the licence term, thereby providing certainty on the need for transition or ongoing use of the spectrum asset following expiry of the initial licence tenure.

*Renewal statements for spectrum licences should not be altered without agreement*

- 5.24 The Bill introduces the following renewal concepts to provide greater clarity for licence holders around timeframes and the prospect of renewal. These apply to both spectrum licences (section 65A) and apparatus licences (section 103A).
- 5.25 In general, the changes require that all licences issued must include a renewal statement to the effect that the licence cannot or may be renewed at the discretion of the ACMA so long as specified circumstances exist.
- 5.26 However, we also note that it is unclear where the renewal statement currently sits within the licence, as it is neither considered to be a statutory or core licence condition. However, renewal statements (and its various sub-concepts) are afforded the ability to be varied or omitted by the ACMA both with and without written agreement of the licensee.
- 5.27 Optus strongly opposes the ability of the ACMA to vary renewal statements for spectrum licences without written agreement of the licensee. We agree that this right should remain for apparatus licences. As such, we support the removal of the proposed s.73 in the Bill. Fundamentally, changing the renewal statements changes the bundle of rights that were acquired at the time of acquisition. Where such change is detrimental to the licensee (we assume this must be the case as the change is without agreement) this would represent a resumption of property and should be subject to compensation. We note this concept is reflected in the Bill through the licence resumption powers.
- 5.28 The ability to vary licence conditions, including renewal statements, *without agreement* is not in the long-term interest of licensees, and risks undermining the licence certainty that spectrum licensees expect at the time of initial acquisition.
- 5.29 Optus repeats that the ability for the ACMA to vary a renewal statement in a spectrum licence without agreement should not be allowed.

### Further clarity of contents of renewal concepts is required

- 5.30 While Optus supports the inclusion of renewal concepts, further clarity should be provided on what matters should be included in these statements. For example,
- (a) The renewal statement only requires that a statement be provided to the effect that the licence *may be renewed* at the discretion of the ACMA so long as specified circumstances exist. There is no definition or indication of what constitutes a specified circumstance.
  - (b) The renewal statement should be required to state the circumstances under which a licence will be renewed; and state the circumstance under which a licence will not be renewed. At a minimum, the statement should be required to state licences will be renewed if it is in the public interest to do so.
- 5.31 Where applicable, the definition of public interest remains at the discretion of the ACMA. This suggests that discretion is granted to the ACMA for both the interpretation and the ability to undertake a discretionary power (e.g. to define and undertake a public interest test). Optus supports more clarity over the public interest test. We note that the Consultation Paper identifies the following matters that ACMA may consider relevant in making a decision about the public interest:
- (a) If the licence is used to supply essential public services and there is the potential that a change in licensee may put at risk delivery of services to a significant number of people
  - (b) Whether the incumbent licensee can demonstrate substantial investment and past long term use of the licensed spectrum
  - (c) Whether the incumbent licensee can demonstrate that their operations would be significantly harmed if the further licence were not issued, which could have flow on effects for relevant markets or sectors of the economy
- 5.32 Optus submits these factors are relevant factors whether a licenced should be renewed and there is merit in mandating through legislation that the ACMA take these into account.
- 5.33 The requirement for a public interest test should be reduced to at least five years for apparatus licences. Under the current Act, apparatus licences have limited to a maximum of five-year terms and this has been deemed sufficient in the majority of cases where apparatus licences have been issued. Extending the public interest test to apparatus licence renewals with at least five-year terms is unlikely to create additional burden, as we do not envisage there will be many cases where apparatus licences may require the long-term certainty of tenure. Where longer-term tenure is required, this may raise further questions on why the licence should not instead be issued in the form of a spectrum licence.

### **Public interest test should be clarified**

- 5.34 There is currently no clear statement on the definition of public interest for the purposes of satisfying the public interest criteria for the purposes of a renewal statement.
- 5.35 Under the current Act, section 82 set out broad criteria for the re-issue of spectrum licences to the same licensees in the public interest, including, where:
- (a) The ACMA is satisfied that special circumstances exist as a result of which it is in the public interest for that person to continue to hold the licence; or

- (b) The Minister has determined that a specified class of services for which re-issuing spectrum licences to the same licensee would be in the public interest.
- 5.36 We acknowledge that while this provision is expected to be repealed, we understand that the same criteria may continue to be applied in the future renewal context.
- 5.37 Optus considers that the Bill should contain further guidance on factors that should be considered when making a public interest test. The concept of long-term public interest is common in other telecommunications legislation, such as the long-term interest of end-users which is used in the *Telecommunications Act 1997* and the *Competition and Consumer Act 2010*.
- 5.38 For example, Optus considers that the following concepts would assist in considering the public interest:
  - (a) Promoting competition;
  - (b) Encouraging efficient use of, and investment in, infrastructure
- 5.39 The *Telecommunications Act 1997* similarly refers to three main objectives:
  - (a) The long-term interests of end-users of carriage services or of services provided by means of carriage services;
  - (b) The efficiency and international competitiveness of the Australian telecommunications industry; and
  - (c) The availability of accessible and affordable carriage services that enhance the welfare of Australians.
- 5.40 Optus submits that it would be beneficial if all the major pieces of telecommunications legislation utilise substantially similar concepts. We acknowledge that the proposed objective of the Bill is largely consistent with the LTIE concept.
- 5.41 Optus considers the ACMA should have regard to similar concepts when making decisions to issue or re-issue a spectrum or apparatus licence. To that end, we recommend that the public interest test requires the ACMA to consider the extent to which the decision:
  - (a) Promoted competition in related communications markets;
  - (b) Encourages efficient use of, and invest in, infrastructure that utilises the spectrum;
  - (c) The efficient and international competitiveness of the Australian communications industry; and
  - (d) The availability of accessible and affordable communications services that enhance the welfare of Australians.

## Section 6. OTHER ISSUES

6.1 This section sets out Optus' views on the proposed amendments to improve flexibility for the ACMA to determine technical regulation through equipment rules and other regulatory options; and other issues.

### Modernising equipment rules

6.2 The Bill proposes to replace Part 4.1 with a new framework that will determine technical regulation requirements through the use of Equipment Rules.

6.3 In general, Optus supports the principle of applying detailed equipment rules in subservient instruments rather than the Act, and that these instruments continue to be subject to consultation.

6.4 Specifically, section 156(3) requires that the ACMA only make equipment rules where they are directed towards achieving any or all of the stated objectives. It also requires that any equipment rules relating to 'radio emissions' be subject to consultation with ARPANSA.

6.5 Optus also supports the expanded scope of the equipment rules to also apply to those who 'offer to supply', as this better reflects the modern supply chain and offers the ACMA greater flexibility to identify who in the supply chain is responsible for device compliance.

6.6 To complement these changes, the ACMA will also be provided with a range of graduated responses to non-compliance, including access to tools specific to technical regulation, such as permanent bans, interim bans and recall notices for non-compliant devices. New exemption powers to allow for the development and testing of equipment will also be allowed, where the ACMA is satisfied it is in the public interest to do so.

6.7 In addition, Optus also;

- (a) Supports the introduction of interim and permanent bans as tools to address the operation of banned equipment. We also welcome the introduction of the amnesty provisions for the surrender of banned equipment
- (b) Supports the inclusion of devices other than Radiocommunication Transmitters and Radiocommunications Receivers into the management of radio interference to Radiocommunications systems
- (c) Supports the inclusion of equipment supply into the treatment of banned equipment regardless of whether such equipment is actually in operation.

### Graduated compliance mechanisms

6.8 Optus welcomes the introduction of graduated enforcement powers, through an increased access to a range of tools and powers available for the ACMA to address instances of non-compliance and respond to breaches of the legislative framework.

6.9 The ability for the ACMA to have graduated enforcement powers which includes civil penalties will enable the ACMA to take more timely and proportionate action in response to non-compliance instances and breaches. This is in contrast to the current enforcement regime where only criminal enforcement is available and rarely utilised.

6.10 A graduated enforcement scheme would enable more effective ACMA enforcement against devices causing harmful interference in an increasingly congested spectrum

environment. Optus therefore supports a graduated enforcement scheme (starting with a 'parking ticket' style option) being implemented. In addition, these reforms should also include better linkage between device standards and prohibitions, and the triggering of Border Force action under the relevant provisions.

## **Other issues**

- 6.11 The Department asks whether there are any additional reforms it 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.
- 6.12 Optus submits an important barrier to the efficient allocation of spectrum and an efficient operative secondary market is the application of stamp duty in some Australian jurisdictions to the transfer of spectrum assets.
- 6.13 State and territory stamp duty continues to pose a material cost on and disincentive to secondary market trading of spectrum. There remains some uncertainty as to the instances in which stamp duty will be imposed by the states and territories which still apply this impost to spectrum trades.
- 6.14 Such a duty also prevents consolidation of spectrum holdings to a single owner when spectrum has been acquired by a separate legal entity under the same parent company. This is currently creating unnecessary administrative overheads for both Licensee and Regulator, for example when deploying radio carriers that straddle the frequency boundary of two licences in the same band which are held by the same parent company.
- 6.15 In addition, stamp duty can act as a barrier to a spectrum restack, despite restacks increasing the utilisation of the spectrum. A restack is currently treated as an asset transfer resulting in Stamp Duty taxes in some states and other legal documentation issues. This has been an issue for Optus since our spectrum is owned under multiple legal entities.
- 6.16 Optus proposes a further amendment to the Act which would prohibit the application of stamp duty to spectrum trades, where they apply to:
  - (a) Legal entities held within the same group or parent company; or
  - (b) All business entities where the spectrum trade has been a result of third-party trading or response to de-fragmentation of spectrum holdings.