TELSTRA CORPORATION LIMITED

Exposure draft of Radiocommunications Legislation Amendment (Reform and Modernisation) Bill

24 July 2020

Executive Summary

We welcome the opportunity to respond to the Department's *Exposure draft of Radiocommunications Legislation Amendment (Reform and Modernisation) Bill*. We support the Department taking this more pragmatic approach by concentrating on the reforms that offer the greatest value and can be achieved relatively quickly, rather than rewriting the Act entirely as originally contemplated. We also commend the Department and all others involved for their work in preparing the extensive set of information contained in the consultation package.

We see the opportunity for the reforms to be beneficial to spectrum users, and ultimately Australian businesses and consumers, as the amendments will result in a simpler framework that is more flexible, efficient and responsive. This will help ensure Australia can continue to maximise the value of the scarce spectrum resource for the economy and society more generally, It will enable industry to be more agile in introducing the latest wireless technology innovations to enhance domestic productivity and Australia's global competitiveness. It will also help underpin and accelerate Australia's transition to the digital future as everyone and everything becomes increasingly dependent on wireless technology for connectivity. Our views are prompted by the need to ensure the spectrum regime operates efficiently and effectively to maximise the value to the Australian economy and society of the spectrum resource.

In our submission, we highlight the importance of transparency and consultation, and ensuring there are sufficient checks and balances to support the flexibility and agility of the new regime. In particular, we identify a number of improvements to the proposals that we consider are necessary to ensure that the reforms will be effective and can realise their full potential.

Benefits of the proposed reforms

We support the following changes:

- The increase in the maximum licence term for both spectrum and apparatus licences to 20 years, which will help facilitate major longer-term investments, such as those in public mobile networks;
- The introduction of licence renewal statements which define the renewal process and other arrangements at licence expiry. These statements should provide licensees with greater certainty for investment planning as well as supporting third-party trading towards the end of a licence term.
- A more streamlined allocation process that removes the Minister from regular administrative approvals and confers increased spectrum management decision-making power on the ACMA. This will enable industry to access spectrum and bring innovative wireless services and technologies to market more quickly, for the benefit of Australian businesses and consumers.
- The introduction of Ministerial Policy Statements (MPSs) as a mechanism for government to provide strategic guidance to the ACMA and industry on the allocation and use of spectrum. These statements will be an important tool for promoting confidence in the new regime.
- The strengthened compliance and enforcement regime should be valuable for enabling the ACMA to be more agile in managing interference with licensed services, including addressing the supply of illegal or non-standard equipment that can cause interference.

The expedient introduction of these amendments is important so the benefits can be realised without delay.

Improvements

We have identified a number of improvements to the amendments that we believe are necessary for the successful implementation of the reforms. The key ones are summarised below.

Strengthen the requirement for the Minister to consult on Ministerial Policy Statements

Under the proposed amendments, the Minister is granted power to make Ministerial Policy Statements (MPSs) in relation to the performance of the ACMA's spectrum management powers. There are many topics in the draft Bill which would benefit from a MPS, including guidance on licence renewals and the public interest test criteria used in renewal decisions, the approach to calculating the price for spectrum licence renewal, criteria to be considered by the ACMA when setting allocation limits. Given that these statements are likely to have significant and longer-term consequences, it is important their creation is well informed through industry consultation. The explanatory notes state there is an 'expectation' that consultation will generally occur, but we recommend that this be strengthened – preferably as a mandatory requirement in legislation or at least as a clear requirement in the Explanatory Memorandum.

Additionally, while we recognise there may be instances where the ACMA departs from a MPS, in order to promote certainty and confidence in the spectrum regulatory framework we suggest that it would be appropriate to clarify that the ACMA may only do so if it can demonstrate that this is justified by exceptional circumstances (e.g. acting in accordance with a MPS would be inconsistent with the Object of the Act).

Criteria for ACMA allocation limit decisions

Under the current regime, in which only the Minister can determine allocation limits, the Minister has adopted the practice in recent auctions of setting out the criteria by which he or she intends to make the decision regarding those limits. We believe the ACMA must also have regard to a similar set of criteria when making decisions about allocation limits to ensure the decisions take account of all relevant factors (including advice from the ACCC) to enable an optimal allocation outcome. The criteria would ideally be stated in the legislation but could also be communicated though a MPS. Additionally, requirements should be built into the legislation for the ACMA to consult with interested stakeholders on proposed allocation limits, and to provide reasons for its final decision.

Presumption of renewal

We are of the view that the draft Bill should include a presumption of renewal applicable to all licences as the default position. In practice, most licences are renewed under the current regime so adopting a presumption of renewal would not be a major deviation from current practice. It would increase certainty to promote investment and third-party trading, and has potential to reduce administrative costs as there would no longer be a requirement to formally consider and justify renewal for most licences. Circumstances could still be prescribed for situations where renewal would not be a default outcome.

Licence renewals – variations of licence renewal statements and public interest test criteria

We welcome the introduction of renewal statements as a potentially valuable tool for creating additional certainty to support investment. However, we are concerned that the ability for the ACMA to make unilateral variations to the renewal statements pertaining to spectrum licences without the licensee's consent will nullify the additional certainty they are designed to deliver. To avoid this outcome, it is important the amendments are adjusted so that any variation or revocation of a renewal statement is only possible with the consent of the licensee. We are less concerned about the ACMA making

variations to renewal statements for apparatus licences as investment certainty is less critical for licences in this category.

The renewal of licences under the proposed amendments is still subject to public interest considerations – and a specific public interest test for licences with a term longer than ten years – which is not defined and left to the discretion of the ACMA to determine. This lack of clarity about the nature and scope of the public interest test already exists in the current Act and undermines the certainty that is otherwise provided by the addition of the licence renewal statements. As already mentioned, our preference is for this to be addressed by including a presumption of renewal in the draft Act. In the absence of such a presumption, it is essential the new regime sets out the high-level public interest criteria that need to be considered by the ACMA when making licence renewal decisions. The criteria, and how they are to be applied, should be communicated in a MPS.

Clarity on provision for the ACMA to directly allocate spectrum licences without a market process

Based on the explanatory notes accompanying the draft Bill, we understand the direct allocation provisions are intended for use in situations such as defragmenting spectrum or for public safety purposes, and that risk of inappropriate use by the ACMA to directly allocate spectrum is mitigated by the use of these powers being a reviewable decision. In the event this power is used by the ACMA, we believe the opportunity cost of the direct allocation, along with the price to be paid and the reasons for the allocation, should be made transparent so this is clear to the wider industry and public.

Maintaining distinction between licence types

While we accept there are still many clear distinctions between the three licence types (spectrum, apparatus and class licences) in the draft Bill, increasing the maximum term of apparatus licences to 20 years, along with the ACMA's recent creation of the area-wide licence (AWL) type, is reducing the distinctions between spectrum licences and apparatus licences. Arrangements recently proposed by the ACMA for resolving interference issues between spectrum and AWL licensees in the 26 GHz band potentially creates parity between AWL licensees and spectrum licensees by allowing either licensee type to trigger the so-called 'fallback synchronisation' mechanism. This has potential to erode the rights of spectrum licensees and unduly constrain their deployment of services, especially near the geographic and frequency boundaries with apparatus licences.

To resolve this situation, we recommend the legislation be amended to establish a hierarchy of technical protection (from interference) afforded to the different licence types, with spectrum licences being afforded the greatest protection as they generally support the highest levels of investment and are the most expensive to acquire. Both spectrum licences and apparatus licences should be protected from interference caused by devices operating under class licences. Such amendments would instil confidence in prospective spectrum licence bidders and provide valuable investment certainty to the industry as a whole. If legislation is deemed to be inappropriate, then a MPS should be be developed to provide this guidance.

Next steps

We note the changes contained in the draft Bill will be reliant on a range of subordinate instruments to make them effective, especially MPSs. To help us better understand and have confidence in how the new regime will operate, it would be very helpful if indicative drafts of the initial set of MPS instruments could be shared with industry in parallel with the finalisation and passage of the amendments through Parliament.

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01 Introduction

We welcome the opportunity to respond to the Department's *Exposure draft of Radiocommunications Legislation Amendment (Reform and Modernisation) Bill* and to continue engaging with the Department on these important reform proposals. We commend the Department and all others involved for their work in preparing the extensive set of information contained in the consultation package.

A simpler, more responsive and more flexible spectrum management framework is necessary to promote the efficient allocation and use of spectrum, and to meet the evolving needs of spectrum users. Use of spectrum will continue to develop in new and, perhaps, unexpected ways, and Australia needs to be ready and able to embrace new developments as they arise. We support the government in taking the more pragmatic approach of only amending certain parts of the Act, rather than rewriting the Act entirely as originally contemplated.

Our submission is structured as follows:

- Section 02 contains introductory comments that set out the high-level themes in our response to the draft Bill, in order to provide some insight and background to our responses in section 03;
- Section 03 sets out our views on major parts of the draft Bill in sequence;
- Appendix 1 contains answers to the six questions contained in the consultation paper; and
- Appendix 2 contains typographical drafting errors.

02 Overarching views

To continue providing the new and innovative wireless services that Australia requires to be more productive and accelerate its transition to the digital future, industry needs access to a spectrum management framework that is flexible, efficient and responsive. We welcome the proposed amendments as, subject to the improvements identified later in this submission, we believe they can make a significant contribution to this outcome.

Specifically, we support the following proposed amendments in the draft Bill:

- An increase in the maximum licence term from 15 years to 20 years. This will help facilitate longer term planning for major investments such as public mobile networks.

- A more streamlined allocation process that removes the Minister from regular administrative approvals and confers increased spectrum management decision-making power on the ACMA. This should lead to greater flexibility and responsiveness that promotes innovation and reduces the lead time for introducing new technologies and services to Australian businesses and consumers.

- The introduction of Ministerial Policy Statements (MPSs) as a mechanism for government to provide guidance to the ACMA and industry on use of spectrum and future directions for spectrum allocation. This mechanism will be useful for tweaking the regime over time to help ensure that it continues to be fit for purpose as technologies and uses of spectrum evolve.

- The inclusion of licence renewal statements which define the renewal process and other arrangements at licence expiry. These statements will provide licensees with greater certainty to invest and conduct third-party trading towards the end of a licence term.

- The strengthened compliance and enforcement regime. This will be helpful for protecting the integrity of wireless infrastructure by enabling the ACMA to be more agile in addressing interference issues, and better targeting supply-chains importing illegal devices, such as unauthorised mobile repeaters.

2.1. A principles-based regime

We support a new regime in which licensing decisions are determined by the ACMA in accordance with a set of pre-defined principles and without having to rely on Ministerial decisions. The introduction of Ministerial Policy Statements (MPSs) is a critical mechanism for helping define these principles and providing clear strategic guidance to the ACMA and spectrum users. This approach should result in a regime which is more flexible and responsive.

Throughout this submission we highlight the areas where MPS guidance is necessary or likely to be required, sometimes as an alternative to making changes in the draft legislation. Key matters which would benefit from a MPS include:

- criteria for the ACMA to determine licence duration both for the initial term and any renewal;[1]
- the policy surrounding the default position on spectrum licence renewal;[2]
- considerations relevant to applying the public interest test[3] and the types of "specified circumstances" that may form prerequisites to licence renewal;[4]
- guidance on the determination of timeframes for licence renewals;[5]
- the methodology used to calculate the price for spectrum licence renewal;[6]
- criteria for the ACMA to consider when setting allocation limits under section 60(5);[7]
- guidance on the use of the direct allocation provisions under section 60A[8]; and
- clarification regarding the relationship and hierarchy of licence types.[9]

As explained in section 3.3.1 we believe each MPS should be subject to a mandatory consultation process in light of the strategic issues they are likely to address and their long-term consequences. Industry is likely to have valuable perspectives to offer the Minister to assist him or her in furthering the Object of the Act. If our submission regarding mandatory consultation is not accepted, the Explanatory Memorandum needs to at least highlight the Department's expectation[10] that MPSs will be subject to consultation.

[1] See section 3.1.4.
[2] See section 3.1.7.
[3] See section 3.1.9.
[4] See section 3.1.8.
[5] See section 3.1.11.
[6] See section 3.1.13.
[7] See section 3.1.29.
[8] See section 3.1.28.
[9] See section 2.2 and section 3.2.
[10] Explanatory notes, Item 2, p. 13.

It is difficult to assess the effectiveness of many of the proposed amendments without having some visibility of the additional guidance that is contemplated to be communicated through MPSs. In our view, MPS guidance on the default position for spectrum licence renewal and guidance in relation to the ACMA's setting of allocation limits is particularly important and should be given priority above the other areas we have identified. We would welcome the opportunity to review draft MPS on these key matters so that they may be assessed in parallel with the draft Bill.

2.2. Maintenance and enhancement of spectrum licensee rights

To protect and promote investment, it is important that spectrum licensee rights are not diminished, and are preferably enhanced, under the new regime and during the transition to the new regime.

The addition of licence renewal statements is a helpful enhancement, but we are concerned that these statements will not be valuable if the ACMA is given the power to unilaterally vary them. To avoid undermining investment decisions that can amount to billions of dollars, any such variation of renewal statements should only be possible with the consent of the licensee.

We are also concerned about the erosion of exclusive licensee rights in the relationship and hierarchy between different licence types for the purpose of technical coordination and interference management. One example under the current regime is the class licensing of body scanners in the 26 GHz band that is being re-allocated for spectrum licences.[11] Such class licensed body scanners will be permitted to cause interference to spectrum licensees in the 26 GHz band. Another example is the ACMA's proposal to allow holders of area-wide apparatus licences (AWLs) to invoke a synchronisation fallback mechanism to resolve interference issues with spectrum licensees. Both examples highlight the that the legislation would enable the relevant class or apparatus licensee to interfere with or constrain the activities of a spectrum licensee, and thereby eroding the exclusive rights of the spectrum licensee.

To resolve this situation, we recommend the legislation be amended to establish a hierarchy of technical protection (from interference) afforded to the different licence types, with spectrum licences being afforded primacy in the hierarchy and outlining when licensees of different licence types should be treated as peers (e.g. coordinating deployment activities) and when they should be treated as subordinate to one another (e.g. resolving interference issues). If legislation is deemed to be inappropriate, then a MPS should be developed to provide this guidance. We cover this in greater detail in section 3.2.

2.3. Increased flexibility for licensees to manage their spectrum licence holdings

To promote efficiency and agility, we are seeking an increased ability to authorise and manage the use of devices within a licensee's own spectrum licence holdings. We think the draft Bill overlooks the opportunity to provide for private delegation of licensing rights, which could be based on the New Zealand management rights approach. Giving licence holders the ability to formally sub-licence other parties to use part or all of the spectrum contained within a licence will increase flexibility and encourage the development of a more workable secondary trading market. Please see our reply to Question 6 in Appendix 1 for more detail on this proposal.

Further, we note that facilitating a secondary trading market was a key objective of the Spectrum Review. We explain in section 3.1.14 below that we are concerned that the ACMA's proposed power to unilaterally vary renewal statements will have a dampening effect on the prospects for secondary

[11] Radiocommunications (Body Scanning – Aviation Security) Class Licence 2018.

trading, even with 20-year licence terms. This is because a prospective purchaser of a spectrum licence on the secondary market would be wary of the risk that a renewal statement may be varied, and this concern would increase towards the end of the existing licence term.

Last, we consider that the existing one-to-one third party authorisation approach is not an appropriate mechanism to deal with mass market products such as authorised mobile repeaters. Our preference would be for the ACMA to develop equipment rules that allow bulk authorisations to be permitted. We expand on this in section 3.5.2.

2.4. ACMA work program

We believe it is unnecessary to enshrine the ACMA's annual work program in legislation. We are of the view that the added complexity arising from making the ACMA's work program a legislative requirement will not provide significant benefits to spectrum licensees in terms of transparency and certainty, compared to the current Five Year Spectrum Outlook (FYSO) process. However, should the government decide to proceed with enshrining the ACMA's annual work program in legislation, we have some recommendations which we outline in section 3.3.2.

03 Comments on the exposure draft

This section contains our detailed observations and comments on key ideas in the draft Bill.

3.1. Licences

We welcome the steps taken to more clearly delineate between the roles of the Minister and the ACMA in the licence allocation and renewal process, the introduction of a process governing renewal of licences, and increased maximum licence terms for spectrum and apparatus licences. However, our primary concern remains – as it was with the 2017 exposure draft Bill – maintaining the exclusive rights of the licensee afforded under the existing legislation as well as having a clear and transparent process for future allocation. The increased flexibility of the new licence regime need not come at the expense of transparency and consultation, which would undermine certainty and potentially create substantial risk for investment by spectrum users. Our view is that some elements of the draft Bill could be better balanced.

Although the consultation paper indicates the licence allocation process is intended to create increased certainty in spectrum management processes, the capacity of the renewal statement regime to fulfil that objective is compromised by the ACMA's discretion to revoke or vary the renewal statement at any time, without licensee consent.

We are also concerned that regulatory accountability and transparency are not accorded sufficient weight, with decisions about whether to renew a licence and the imposition of different licence conditions on a new licence being made with no mandatory consultation requirement, and decisions about the renewability of licences and licence term being made with no obligation on the ACMA to provide reasons when it issues the decisions. In circumstances where neither the draft Bill nor the explanatory notes provide guidance about the parameters that apply to those decisions, this tips the scales too far in the favour of flexibility and not enough weight is given to assured regulatory engagement with impacted parties, and transparency and accountability for decisions.

The two central themes weaving through all our comments below are the importance of transparency and consultation in decision-making, and ensuring there are adequate procedural checks while retaining a regime that is flexible and agile.

3.1.1. ACMA discretions in licence issue and renewal process

As noted in section 02, we support the conferral on the ACMA of increased spectrum management decision-making power. While we appreciate that the broader policy intent of the draft Bill is to empower the ACMA, as the regulator, to manage the administration of the spectrum, we note this results in a significant number of types of decisions that will be made by the ACMA in connection with licence issue and licence renewal with no procedural constraints included in the draft Bill. Additionally, the breadth of the ACMA's discretions under the draft Bill provides limited opportunity for ordinary judicial and administrative avenues to preserve the integrity of regulatory decision-making. This situation could result in an unacceptable lack of regulatory accountability and investment uncertainty, unless the industry has a meaningful opportunity to engage with the ACMA in the exercise of its broad spectrum management powers, including for example through appropriate consultations and the effective use of work plans, In turn, the ACMA can anticipate stakeholders will expect the ACMA to closely engage with them, and that it should be resourced accordingly so that industry participants have the opportunity to limit the risk of unexpected outcomes and remain involved in any decision-making process.

By way of illustration, the table below lists some of the key decisions to be made by the ACMA under the proposed spectrum licence issue and renewal process in the draft Bill, and identifies whether consultation must occur, whether the draft Bill includes guidance or parameters for the decision, whether reasons must be provided with the decision, and whether the decision is reviewable. In the last column we include a summary of the points we are making in relation to these decision-making powers.

No.	Decisions	Express guidance / parameters?	Consultation?[12]	Reasons required?	Review-able?[13]	Telstra submission
Spectrum licence issue – ACMA decisions required						
1	**Determining Allocation Limits**[14]	X	X[15]	X	X	▪ Guidance to be included in legislation or MPS ▪ Mandatory consultation with stakeholders and regard to submissions ▪ Reasons for decision must be provided ▪ See section 3.1.29

[12] With impacted licensees and/or public consultation.
[13] Reviewable under s285 of the Act.
[14] Draft Bill s60(5).
[15] We note the ACMA must consult the ACCC about allocation limits: s 60(13A) of draft Bill.

No.	Decisions	Express guidance / parameters?	Consultation?[12]	Reasons required?	Review-able?[13]	Telstra submission
2	**Determining licence duration**[16]	X	X	X	X	▪ Guidance to be included in MPS ▪ Reasons for decision must be provided ▪ See section 3.1.4
3	**Determining type of renewal statement applicable to licence**[17]	X	X	X	X	▪ Guidance to be included in MPS ▪ Mandatory consultation ▪ Reasons for decision must be provided ▪ See section 3.1.7
4	**Determining specified circumstances in which licence may be renewed (if applicable)**[18]	X	X	X	X	▪ Examples of specified circumstances to be included in legislation, EM or MPS ▪ Reasons for decision to include specified circumstances must be provided ▪ See section 3.1.8 and 3.1.10
5	**Determining whether licence renewal subject to public interest statement**[19]	X	X	X	X	▪ Clarity needed regarding the purpose of public interest statements in the context of the ACMA's ability to already consider public interest in a wide range of renewal contexts in the draft Bill ▪ Mandatory consultation regarding proposed public interest statements ▪ See section 3.1.9 and 3.1.10

[16] Current Act s65.
[17] Draft Bill s65A(1) and s65A(5).
[18] Draft Bill s65A(1)(c) and s65A(5)(c).
[19] Draft Bill s65A(17) and s65A(19).

No.	Decisions	Express guidance / parameters?	Consultation?[12]	Reasons required?	Review-able?[13]	Telstra submission
6	**Determining timeframes for licence renewals[20] (renewal application periods and renewal decision-making periods)**	X	X	X	X	▪ Guidance should be included in MPS ▪ Reasons for decision must be provided ▪ See section 3.1.11
7	**Determining whether to vary or revoke renewal statement without licensee consent[21]**	X	X	X	✓	▪ Licensee consent should be required In the alternative: ▪ Constraints on when decision can be made ▪ Mandatory consultation and regard to submissions ▪ Reasons for decision must be provided ▪ Compensation for reduction in value of licence ▪ See section 3.1.14
Spectrum licence renewal – ACMA decisions required concerning renewal						
8	**Determining whether to renew licence, having regard to all relevant matters[22]**	✓	X	✓	✓	▪ Presumption of renewal In the alternative: ▪ Mandatory consultation and regard to submissions ▪ Reasons for decision must be provided with notice of decision ▪ See sections 3.1.6, 3.1.20 and 3.1.22

[20] Draft Bill s65A(10), s65A(12) and s65A(15).
[21] Draft Bill s73(3).
[22] Draft Bill ss 65(1)(b), (c) and 77C(7).

No.	Decisions	Express guidance / parameters?	Consultation?[12]	Reasons required?	Review-able?[13]	Telstra submission
9	**Determining whether "specified circumstances" included in a renewal statement have been fulfilled23**	✓	X	✓	✓	▪ Mandatory consultation and regard to submissions ▪ See section 3.1.18
10	**Determining whether licence renewal is in public interest (if applicable)[24]**	✓	X	✓	✓	▪ Guidance should be included in MPS ▪ Reasons for decision must be provided with notice of decision ▪ Mandatory consultation and regard to submissions ▪ See sections 3.1.9, 3.1.10 and 3.1.19
11	**Determining amount of spectrum access charge payable[25]**	X	X	X	X	▪ Guidance should be included in MPS ▪ Pricing principles adopted ▪ See section 3.1.13
12	**Determining licence conditions for renewed licence which may differ from original licence conditions[26]**	X	X	✓	✓	▪ Mandatory consultation with affected licensees where the ACMA proposes different licence conditions on renewal compared to original licence conditions and regard to submissions ▪ Reasons for decision must be provided with notice of decision ▪ See sections 3.1.21 and 3.1.22

We address in the relevant sections below our specific concerns with some of the decisions listed in the above table. As mentioned above, at a conceptual level we broadly understand and support the intention

[23] Draft Bill, s 77C(4).
[24] Draft Bill s77C(5) and s77C(6).
[25] Draft Bill s77C(2).
[26] Draft Bill s77C(10).

of the draft Bill to grant the ACMA greater decision-making power with respect to spectrum management. However, we emphasise that the current approach to decision-making discretion could undermine regulatory accountability and investment certainty absent meaningful industry engagement, and we urge the Department to consider introducing procedural safeguards to improve transparency and increase stakeholder involvement. As set out below, depending on the decision being made by the ACMA, we variously recommend that significant decisions made by the ACMA under the draft Bill should contain:

- specific circumstances in which the ACMA can exercise its power (e.g. variation or revocation of a licence renewal statement should require licensee consent);[27]
- specific circumstances in which the power cannot be exercised (e.g. to the extent licence renewal statement variation or revocation is retained, limits on exercising the power towards the end of the licence term);[28]
- substantive considerations that must be considered by the ACMA (e.g. an obligation to consult and have regard to the views of the licence holder,[29] or factors that may or must be taken into account[30]); and
- procedural requirements, recognising that these should not be so prescriptive as to undermine the worthwhile objective of simplifying the arrangements for renewing licences (e.g. an obligation to invite submissions from the licence holder, or to provide reasons with a notice of decision).[31]

3.1.2. Issue of further spectrum licences

We note that section 82 of the current Act has been repealed, as is appropriate given the re-issue of spectrum licences is now dealt with through the proposed renewal statement provisions and the new Division 3A. However, sections 81, 83 and 84 of the current Act have been retained.

It is unclear what the rationale is behind retaining these sections given:

- section 81 would appear to be redundant given the application of the amended sections 39 and 60-63 to the issue of spectrum licences generally, as read with the retention of section 80 (as amended); and
- sections 83 and 84 still refer to the “re-issue” of spectrum licences when all other references to “re-issue” have been repealed and would also appear to be redundant for similar reasons.

The explanatory notes do not provide any clarity as they do not mention the change to the heading of section 81 nor the retention of sections 83 and 84. Unless there is some reason for the retention of sections 81, 83 and 84 of the current Act (in which case it should be included in the explanatory notes), the provisions should also be repealed.

Last, and consistent with the above comments, the proposed new concept of “further spectrum licences” does not appear to do anything useful. Rather than introducing new terminology into the Act we suggest

[27] See section 3.1.14.
[28] See section 3.1.14.
[29] See e.g. sections 3.1.18, 3.1.20, 3.1.21.
[30] See e.g. section 3.1.8.
[31] See e.g. sections 3.1.4, 3.1.8, 3.1.21, 3.1.22.

it would be preferable to simply refer to "spectrum licences which are not being renewed" in the revised Part 3.2 Division 4.

3.1.3. Maximum licence term of 20 years

We note the retention of the previous proposal for a maximum spectrum licence term of 20 years. We continue to support the extension of the current maximum licence term to 20 years as a welcome improvement from the current maximum term of 15 years (for spectrum licences) and 5 years (for apparatus licences) and as a helpful step toward promoting investment certainty.

However, we still believe the legislation should include a presumption of renewal similar to the approaches adopted in other jurisdictions[32] as set out below in section 3.1.6 to ensure that the right incentives exist for investment and secondary trading.

3.1.4. Determination of licence duration

We note that neither the draft Bill nor the explanatory notes include any guidance on when the ACMA may issue a licence for less than the maximum term (either for spectrum or apparatus licences). For example, there are no criteria or specified factors the ACMA may take into account in determining either the initial term of the licence or the subsequent term of any renewal (other than neither may exceed 20 years and that a renewal longer than 10 years is subject to a public interest test).

Similarly, for apparatus licences, it is not clear when the ACMA would issue 20-year licences and when it would issue licences of one to five-year duration, as it does currently.

Previously the Department indicated in its Information Paper on the 2017 exposure draft Bill that the determination of licence duration would be informed by factors such as:

- the purpose of the licence;
- technology and investment cycles; and
- long term spectrum planning requirements.

The ACMA also provided initial thoughts on how it would determine appropriate licence tenure in supporting material to the 2017 exposure draft Bill including that trade-offs may be necessary between the length of the term and the predictability of renewal. The Department has also previously indicated that the licence issue process is likely to be one of the topics of the initial MPSs. We agree with that proposal (subject to our recommendation in section 3.3.1 that mandatory consultation should apply for all MPSs) and suggest that such MPSs include clear criteria for the ACMA to determine licence duration both for the initial term and any renewal – for both spectrum and apparatus licences.

Furthermore, we consider that to more appropriately balance considerations of flexibility, certainty, transparency and accountability, the ACMA should also provide reasons for the licence term it determines.

[32] See e.g. licences in Canada and the United States.

3.1.5. Licence renewal statements for apparatus and spectrum licences

One of the most important changes proposed by the draft Bill is the introduction of "renewal statements" for both spectrum and apparatus licences. Section 65A(1) of the draft Bill requires any spectrum licence issued after the commencement of the draft Bill to include a renewal statement. For apparatus licences, a renewal statement is discretionary.[33] The consultation paper notes that these changes are intended to provide "clearer processes governing renewal of licences".[34] The explanatory notes to the draft Bill note that "the use of renewal statements is intended to clarify and simplify the arrangements for renewal of spectrum licences, providing predictability surrounding renewal processes which will provide greater certainty for licensees."[35]

Consistent with comments in our submission to the 2017 consultation,[36] to best promote investment in mobile networks and other wireless network infrastructure and to ensure the most efficient use of spectrum in line with the Object of the draft Bill, providing increased certainty about the process and conditions for renewing licences is essential. Given the significant capital outlay required to deploy a large scale mobile and other wireless networks, the absence of renewal certainty will have a chilling effect on investment, which in turn risks Australia's ability to remain globally competitive and at the forefront of technological development.

While we agree that there is the potential for particular elements of the licence renewal process to be more certain under the draft Bill, there are also a number of features of the draft Bill that detract significantly from that potential, as set out below, and potentially leave licensees in a worse position than currently provided for under the Act.

3.1.6. Licence renewal certainty and presumption of renewal

We are still of the view that the draft Bill should include a presumption of renewal applicable to all licences as the default position.

In practice most licences are renewed under the current regime so adopting a presumption of renewal would not be a major deviation from current practice. It would increase certainty to promote investment and third-party trading, and has potential to significantly reduce administrative costs as there would be no longer be a requirement to formally consider and justify renewal for most licences.

We recognise that there may be circumstances in which renewal would not be made available for particular licences, however those instances can be addressed by a statement in the licence rebutting the presumption of renewal contained in the legislation and setting out the reasons why a licence would *not* be renewed.

We understand the proposed amendments are designed to add flexibility to the legislative framework and avoid unnecessary prescription and legislative barriers to allow the framework to remain fit for purpose in a rapidly changing environment – while at the same time providing clearer processes around the renewal of licences. However, we remain concerned that renewal will continue to be a discretionary decision of the ACMA (in the context of licences) or the Minister (acting through MPSs or under the

[33] Draft Bill s103A(1).

[34] Consultation paper p4.

[35] Explanatory notes, Item 40, p22.

[36] Telstra submission on the *Radiocommunications Bill*, 28 July 2017, https://www.communications.gov.au/sites/default/files/submissions/2017-07-28-miller-brian-telstra-submission-spectrum-review-exposure-draft-2017-07-28.pdf.

general power in section 14 of the ACMA Act), perpetuating the command-and-control spectrum management approach and repeating the difficulties and process that occurred under the current Act on licence re-issue.

We think it is appropriate to recognise the ability of licensees to manage technology transitions themselves, as all the Australian mobile network operators have done through several generations of technology since 1992. A good example of managing technology transition is our announcement last year that we will be repurposing the 850 MHz band from 3G to 5G.[37] 5G is only just at the start of its technology cycle, and mobile technology generations run for one to two decades. However, our licence for this band expires in June 2028, which is only part way through the expected 5G equipment life. Lack of licence renewal certainty makes our investment decisions challenging.

A previous example of managing technology transition is where licensees have successfully worked together to defragment the 1800 MHz band to enable the creation of larger bandwidth carriers, enabling transition in the band to 4G technology.

We seek a presumption of renewal for licensees on the basis of clear criteria that are capable of being fulfilled with certainty, so that no residual discretion is left with the ACMA. Reasons for overruling the presumption should be prescribed and should be limited to matters such as inconsistency with changes to international radiofrequency obligations and band plans, a material breach of licence conditions, or lack of use. If any of these circumstances exist, the ACMA should be required to consult with the licensee and undertake a review to determine whether non-renewal would be in the public interest.

3.1.7. Discretion in issuing renewal statements

We provide the following comments on the proposed renewal statement regime, in the event that our strong preference for a rebuttable presumption of renewal is not accepted.

We support the requirement that all spectrum licences issued after the commencement of the draft Bill must have renewal statements included. While we have concerns with some of the proposed provisions for renewal statements (especially the ability for the ACMA to unilaterally vary or revoke the renewal statements), we agree that *in principle* it is possible for a renewal statement to provide a prospective licensee with the certainty needed to facilitate investment in the provision of services to the community. Confidence in renewal rights is also required to facilitate secondary trading in spectrum licences, which will help spectrum move to its highest value use without regulatory intervention.

However, as presently drafted, the draft Bill does not include any guidance as to which of the types of spectrum renewal statement listed in section 65A(1)(a) to (c) would apply in which circumstances. While we understand that one of the key themes of the draft Bill is to provide the ACMA with a greater degree of flexibility to manage radio spectrum as it sees fit, in order for the draft Bill to have the intended effect of providing greater certainty to prospective licensees, and to ensure transparency and consistency about the renewal of spectrum licences, we would expect there to be some guidance included in a MPS about the policy surrounding the default position on spectrum licence renewal and the factors the ACMA is expected to take into account when considering the types of renewal statements to include, with the preparation of, and consultation on, the draft policy statement to commence as a priority, given the proposed timeframe for enactment of the draft Bill.

[37] Nikos Katinakis, "1, 2, 3, 4 and 5: the continuing evolution of our mobile network", *Telstra Exchange*, 9 October 2019, https://exchange.telstra.com.au/1-2-3-4-and-5-the-continuing-evolution-of-our-mobile-network/.

In addition, in the same way that the ACMA currently consults on marketing plans (which usually include a copy of the proposed draft spectrum licences), we would also expect there to be consultation on the proposed renewal statement, and for reasons to be provided as to why a particular renewal statement is being proposed. This could be achieved through an amendment to section 61(2), so that a draft spectrum licence must be provided, and that such draft must contain a draft of its renewal statement. Such an approach would recognise that renewal statements are in the nature of, or at least similar in significance to, core conditions of spectrum licences. Where a proposed renewal statement relates to an existing spectrum licence, consultation should also occur with the incumbent licensee (and wider stakeholders as appropriate). Where the renewal statement includes a requirement for "specified circumstances" to exist (section 65A(1)(c) or 65A(5)(c)), these circumstances should form part of that consultation.

3.1.8. Specified circumstances tests

We are concerned that the "specified circumstances" under which a licence may be renewed[38] are not elaborated upon in any manner in the draft Bill, not even by way of a non-binding example noted in the text. Instead, and disconcertingly, the draft Bill essentially provides for the specified circumstances to be at the complete discretion of the ACMA. This interpretation is supported by the explanatory notes.[39]

In addition, we are very concerned that the drafting of the draft Bill means that even if the specified circumstances that are included in the licence are satisfied, the licensee has no 'right' to renewal, and the ACMA retains its discretion about whether to grant a licence renewal. This materially undermines the theoretical certainty that attaches to the inclusion of specified circumstances in the licence renewal. Although this mechanism provides additional transparency in setting minimum criteria that must be met for a licence to be capable of renewal, it provides no additional certainty about licence renewal compared with a renewal statement that permits the licence to be renewed at the discretion of the ACMA (i.e. under section 65A(1)(b) of the draft Bill for spectrum licences, and in the absence of a renewal statement for apparatus licences).[40]

As noted above, although the intention of the draft Bill is to clarify the renewal process, we consider this to be an unbalanced approach that will discourage investment and limit opportunities for secondary trading.

We suggest it be made clear that if specified circumstances are satisfied, the licensee has a 'right' of renewal, subject only to any public interest test that otherwise applies to the licence under the draft Bill. This means the renewal 'right' does not represent an unacceptable compromise to flexibility, because for any licence with a licence term greater than 10 years, the ACMA will not be required to grant a renewal unless it is satisfied that it is in the public interest to do so.

It would assist stakeholders if categories of specified circumstances were included as examples in sections 65A and 103A, or in the explanatory memorandum or in a MPS, to illustrate when a licensee would have a right to renewal of a licence. In addition, given the potential significance of this decision, it is appropriate for the ACMA to provide reasons for including its chosen specified circumstances, at the time it issues its decision.

[38] Draft Bill s65A(1)(c) and s65A(5)(c) for spectrum licences; draft Bill s103A(1)(b) and s103A(5)(b) for apparatus licences.
[39] Explanatory notes, Item 40, p22.
[40] In deciding whether to renew the licence, the ACMA must have regard to all matters that it considers relevant: section 77C(7)(a) for spectrum licences; section 130(3) for apparatus licences.

3.1.9. Public interest test

Under the existing provisions of the Act, a "public interest" test is applied in two circumstances relevant to the renewal of licences:

- the Minister is entitled (but not required) to determine that there is a specified class of services "for which re-issuing spectrum licences to the same licensees would be in the public interest"; and
- the ACMA is entitled (but not required) to re-issue a spectrum licence to the person to whom it was previously issued if "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".

We have previously highlighted issues with the procedures around these current provisions.[41]

There is currently no legislated "public interest" test in respect of apparatus licence renewal.

We note that under the draft Bill:

- a spectrum licence can also include a separate "public interest statement";[42]
- when the ACMA comes to apply a spectrum licence renewal statement under section 65A(1)(b) or section 65A(5)(b) (i.e. a statement to the effect that the licence may be renewed at the discretion of the ACMA) its considerations would include public interest factors even if there was no express public interest statement in place (see the explanatory notes[43]);
- an apparatus licence can also include a separate "public interest statement";[44]
- any decision by the ACMA to renew a spectrum licence for 10 years or longer is subject to a public interest test;[45] and
- any decision by the ACMA to renew an apparatus licence for 10 years or longer is subject to a public interest test.[46]

Notwithstanding this broadening of the use of a legislated public interest test, there is no greater clarity about how the public interest test will be applied in a particular circumstance. While we are not advocating for there to be a definition of "public interest" hard-wired into the legislation (as we appreciate that this will depend on the particular circumstances), we strongly urge the Department to consider clarifying how the public interest criteria that would apply to a specific licence on renewal, will be communicated upon licence issue. We consider the following process represents an appropriate balance between transparency and flexibility:

- there should be a MPS that addresses the application of the public interest test in licence renewal assessments;

[41] Telstra submission to the "Public Interest Criteria for re-issue of Spectrum Licences" April 2009 discussion paper.
[42] Draft Bill s65A(17) and s69A(19).
[43] Explanatory notes, Item 40, p22.
[44] Draft Bill s103A(15) and s103A(17).
[45] Draft Bill s77C(5).
[46] Draft Bill s130(2E).

- as discussed further in section 3.3.1, we consider a mandatory consultation process for all MPS is critical, with due regard given to submissions received. Consistent with this approach, the Minister should be required to consult with industry before issuing any MPS that addresses the public interest test;

- a public interest statement must describe the public interest criteria that will be relevant for assessing licence renewal, and in setting such criteria the ACMA must have regard to the applicable MPS,

- the ACMA should be required to consult on the public interest criteria to be included in the public interest statement associated with a draft renewal statement Where a proposed public interest statement relates to an existing spectrum licence (which is the process of being renewed), consultation should also occur but be limited to the incumbent licensee; and

- the ACMA should provide reasons for including its chosen public interest policy criteria.

Examples of public interest criteria relevant to licence renewal, which could be appropriately addressed in a MPS, include:

- there is no restriction imposed by Australia's international obligations that would preclude renewal;

- the incumbent licensee can demonstrate substantial investment and long-term prior use on a significant scale of the licensed spectrum;

- the licence is used to supply essential public services and those services could not easily be provided by another licensee;

- failure to renew the licence would have a materially detrimental impact on competition in a particular market;

- renewal is not inconsistent with a relevant MPS, ACMA's work program or other documents governing licence renewal; and

- the ACMA has taken into account submissions in the context of a public consultation as to whether a licence should be renewed.

In those renewal proceedings where there is no express public interest statement in the licence but nonetheless the ACMA is taking into account public interest considerations, the same criteria that apply to assessment of the formal public interest statement should be considered, to the extent appropriate. Examples are the public interest assessment applied where a renewal statement says renewal is at the ACMA's discretion (even absent a formal public interest statement) and where the public interest test applies automatically because the licence term exceeds 10 years. The consultation process in respect of the overarching MPS on public interest criteria should anticipate this wider application of those criteria in renewal processes, i.e. not just where there is a formal public interest statement in the licence.

We recognise that possible criteria supporting a public interest in renewal in one licence context may not be perfectly applicable in respect of other licence types. For example, for long term licences a demonstrated history of investment by the licensee may provide confidence that the licensee would continue to support users of the spectrum with further investment. However, this criterion would not necessarily be useful for assessing renewal of a shorter term licence at the end of its first term, as there

may be justifiable reasons for why the licensee had not yet invested significantly in hardware to make use of the licence, for example due to delays in commercial availability of new technology from vendors. In that case a useful criterion may be evidence of commitment to future investment. However, the common overarching criterion in both cases would be investment to make use of the spectrum.

As we have found from our own experience in applying for re-issue of spectrum licences under section 82 of the current Act, minds can differ as to what public interest factors should apply. The process outlined above would give industry an opportunity to engage with the ACMA on the most appropriate criteria to be included and provide the licensee with greater transparency and certainty about its prospect of renewal.

Separately, it is not clear to us why there is a need for the public interest statements as distinct from the renewal statements for spectrum licences and the ACMA's default decision-making discretion for apparatus licences (where no renewal statement is issued). The explanatory notes already contemplate that any renewal statement requiring renewal at the discretion of the ACMA includes public interest considerations.[47] This is also consistent with the new object of the Act set out in section 3 of the draft Bill. The inclusion of a separate and distinct "public interest statement" suggests that it is something different to what is anticipated by the renewal statements. We would be interested to understand the distinction that was intended (if any): is this a matter of degree of relevance of public interest to renewal, i.e. greater weighting for public interest considerations in those renewal processes where there is an express public interest statement contained in the licence or where the mandatory public interest test is required due to the renewal term being greater than 10-years?[48]

3.1.10. Risk of overlapping criteria as between the specified circumstances requirement and the public interest test

Under the draft Bill, it is possible for a license renewal to be subject to both the fulfillment of specified circumstances and the fulfillment of a public interest test (see sections 3.1.8 and 3.1.9 above). There is therefore a risk that specified circumstances and criteria relevant to the public interest test may overlap in the context of a single licence renewal. For example, a specified circumstance could mandate that a licence be used to supply an essential public service, and this criterion could also be relevant to the application of the public interest test. We request that the Department consider how such overlap and duplication may be avoided, as it would result in confusion for stakeholders and unnecessary red tape (i.e. a licensee could potentially be required to jump through two regulatory hoops of a similar nature and the ACMA required to undertake two separate assessments). Our preference is for the legislation to clarify that this overlap cannot occur.

Alternatively, a practical way to address this concern may be via Ministerial guidance in a MPS which recommends that the ACMA not impose overlapping requirements on a licensee when both specified circumstances and the public interest test are relevant to a licence renewal. A MPS could further clarify that the specified circumstances requirement should be confined to matters that are discrete and specific to a particular licensee or band, so that they will not overlap with public interest considerations.

A practical example which illustrates the potential benefit of a "specific circumstances" approach, while leaving broader considerations for the public interest test, is the need for existing licensees in the 850 MHz band to downshift by 1 MHz to enable greater utility of adjacent spectrum in the 900 MHz band which is being re-allocated. In order to ensure this downshift is not delayed by 850 MHz licensees until

[47] Explanatory notes p22.
[48] Draft Bill, s77C(5).

2028 when the current 850 MHz licences expire, the ACMA might make available the new 900 MHz and 850 MHz expansion band spectrum licences on an initial short term of say, 1 year, with a specified circumstances condition that the new spectrum licences can only be renewed for the balance of 19 years if a winning bidders which also hold existing 850 MHz licences complete the downshift within the first year of the term of the new spectrum licences. Although the 1 MHz downshift is generally a matter that would be regarded as being in the public interest, the detail of how it needs to be accomplished and the manner in which it impacts the utility of the new adjacent 900 MHz licences and the complexity of the auction of those licences, is highly specific.

3.1.11. Renewal application period statement and renewal decision-making period

We support the requirement for spectrum licences issued after the commencement of the draft Bill to include renewal application periods and renewal decision-making periods. We also generally support the default renewal application period of 2 years (for spectrum licences) and 6 months (for apparatus licences) and the default decision-making period of 6 months for spectrum licences, except for long-term licences. For spectrum and apparatus licences with a duration of 10 years or more, we consider that the default renewal application period should be 5 years, rather than 2 years. This would improve investment certainty for licensees who have made long-term licence commitments. Critically, it would assist licensees to mitigate the effects of a refused renewal application by providing them with a fairer period of notice to alter their spectrum investment strategy and also minimise any disruption to customer services.

Our understanding is that these "default" periods apply to any licences existing prior to the commencement of the draft Bill.

We also consider that to more appropriately balance considerations of flexibility, certainty, transparency and accountability, a MPS should provide guidance on determining timeframes for licence renewals (as noted in section 3.3.1, mandatory consultation should apply for a MPS), and the ACMA should provide reasons for the timeframes it determines.

3.1.12. Interaction between "specified class" renewal statements and individual renewal statements

We note the ability for the ACMA to issue a renewal statement by legislative instrument to apply to all licences included in a specified class of spectrum or apparatus licences – but that according to the explanatory notes these "specified class" renewal statements cannot override a renewal statement made under sections 65A(1) or 103A(1) (for spectrum and apparatus licences respectively).

Our understanding is that:

- all spectrum licences issued after the commencement of section 65A(1) *must* include a renewal statement;
- "specified class" renewal statements under section 65A(5) do not apply in the case of existing spectrum licences in their initial term (which we consider to be the effect of section 65A(21) as all such licences would satisfy the criteria in either sub-sections 65A(21)(a) or (b)); and
- "specified class" renewal statements under section 65A(5) cannot override an individual renewal statement made under section 65A(1) – this is due to the restriction contained in section 65A(9);

We suggest that the primacy of an individual renewal statement be clarified in the drafting. For example, the wording in section 65A(9), "has no effect to the extent (if any) to which it is inconsistent with", would provide more certainty to licensees if it instead said, "has no effect if there is".

Undertaking consideration of whether or not a subsequent "specified class" renewal is inconsistent with a prior individual renewal statement may be a complex task. The requirement as drafted is at odds with the intention set out in the consultation paper and the explanatory notes about providing more clarity and transparency around the renewal process. Assessing consistency between a "specified class" and an individual renewal statement could be further complicated in light of the ACMA's ability to unilaterally vary a renewal statement: for example, a licensee may obtain legal advice that an individual renewal statement in a licence it holds, is not impacted by a new section 65A(5) "specified class" renewal statement because it is wholly inconsistent with the individual renewal statement, only for that individual renewal statement to then be varied without the licensee's consent by the ACMA with the consequence that the section 65A(5) "specified class" renewal statement then has partial or total effect (because it is no longer wholly inconsistent). It is undesirable to have the possibility of the ground under a licence shift in this way.

3.1.13. Transparency on methodology for renewal spectrum access charge

We note nothing in the draft Bill provides any certainty about what pricing methodology will be used, or that a renewal statement will include any information about pricing. We assume there is an assumption that the Department's recommendations in the 2018 Spectrum Pricing Review will be implemented.

While we accept that a fixed pricing methodology compromises flexibility, we consider it appropriate that a MPS be issued on the matter (which we submit should be subject to mandatory industry consultation, as noted in section3.3.1) To the extent not already implemented as a result of the 2018 Spectrum Pricing Review, we submit that the MPS should at a minimum require the following principles to be taken into account when calculating the spectrum access charge:

- **Fairness and transparency:** the pricing methodology or price discovery process should be fair, objective (i.e. market-based) and transparent. The ACMA will consult, or engage, with the licensee when determining the spectrum access charge;
- **Non-discriminatory pricing:** charging users of similar spectrum the 'same rate' – irrespective of whether the user is a commercial entity, not-for-profit in nature or part of the Government sector – is a principle central to ongoing integrity of the spectrum management framework. Deviations from this approach can result in market distortions, and could also encourage other parties to secure differential treatment and / or more favourable price outcomes.
- Transparent **payment terms:** the payment terms for a spectrum access charge should be fair, equitable and transparent (e.g. if instalment payment options were offered by the ACMA to a licensee, the same payment terms should be offered to all licensees in similar circumstances and/or for licences being renewed in the same tranche).

3.1.14. Variation or revocation of licence renewal statements by the ACMA

We are very concerned with the provisions in the draft Bill which enable the ACMA to unilaterally vary and revoke a statement in a licence containing renewal rights, without warning, reason, prior consultation or consent.[49] This proposed unilateral variation power undermines any certainty that a licensee might obtain from a statement in the licence setting out the circumstances in which a licence will be renewed.[50] This could result in licensees being no better off than the current uncertainty they face under the current

[49] Draft Bill s73(3).
[50] Draft Bill s65A.

section 82 arrangements in the Act. We strongly urge that the legislation should contain a restriction that any such variation or revocation should only be possible with the consent of the licensee.

The existing spectrum licensing regime recognises that there are some features of a licence that are so fundamental to the rights the licence confers that they cannot be varied without consent during the licence term: the core licence conditions.[51] In substance, a renewal statement is tantamount to a core licence condition, and it is appropriate to accord the renewal statement the same status as a core licence condition, and not allow it to be unilaterally varied during the licence term.

Although we strongly reject the proposal to include a unilateral right to vary or revoke a licence renewal statement, if this approach is to be retained, it is critical for there to be a greater balance between regulatory flexibility and investment certainty.

First, we suggest that the ACMA be prohibited from exercising its power to unilaterally vary or revoke a licence renewal statement within the final 5 years of any licence term (or at any time during the licence term, for licences of 5 years of less). This proposal would not only give licensees more certainty when planning and implementing spectrum investment decisions towards the end of the licence term, but would also support the Government's desire to achieve an active and flexible secondary trading market, by supporting that market for trades late in a licence term.

Second, the balance between flexibility and certainty should also be improved by prescribing the circumstances in which a variation or revocation is permitted, providing transparency and certainty concerning *how* the decision will be made (e.g. a prior consultation with the impacted licensee), providing reasons for the decision and compensation where appropriate.

The regime that applies to the variation or addition of conditions in mining licences in Victoria provides an example.[52] Under that regime, a licensee must be consulted before a licence condition is varied or added, and importantly the Minister may only vary a condition in a small number of specific circumstances (e.g. if the Minister decides it is necessary to eliminate or minimise the risks that the work may pose to the environment or to any member of the public). However, to maintain flexibility, the Government may also prescribe circumstances in which the Minister may vary a condition in the regulations.

Given the scale of investment for spectrum licences, the draft Bill should also entitle a licensee to compensation in specific circumstances. As is the case for water licences in New South Wales, it would be appropriate to require the quantum of compensation to be assessed by a valuer, having regard to the market value of the rights forgone as a result of the change, and a process for appeal if the licensee is dissatisfied with the amount of compensation offered.[53]

Similarly, if a private operator invested in a public asset through a public / private partnership, any exercise by the Government of rights to curtail the interest originally granted to the private operator in an asset on public policy grounds or as the result of a change in law, would normally entitle the private operator to compensation using a pre-agreed adjustment mechanism.

To the extent this power is retained, we acknowledge and support the proposal to make a decision to unilaterally vary or revoke a licence renewal statement reviewable under the Act, meaning that impacted licensees will be afforded the protection and accountability mechanism of merits review by the

[51] Current Act s73(1)(b).
[52] *Mineral Resources (Sustainable Development) Act 1990* (Vic) s34.
[53] *Water Management Act 2000* (NSW) s87.

Administrative Review Tribunal. However, granting a right of review after the fact does not address the fact that a unilateral power to vary or revoke a licence renewal statement materially detracts from the upfront certainty the proposed licence statement renewal regime is intended to provide. We regard the power of the ACMA to dilute rights under licences without consent as being highly undesirable. It reduces investment certainty and no justification has been provided by the ACMA to have such draconian unilateral powers. Further, given the absence of procedural requirements associated with the variation or revocation process, there is limited capacity for an impacted licensee to have recourse to judicial review of the decision. Accordingly, we do not consider that the reviewability of the decision is adequate to protect against the concerns outlined above.

3.1.15. Obligation to notify of licence renewal opportunity

We have previously made submissions suggesting that the ACMA should be required to use reasonable endeavours to provide notice to a licensee in good time prior to commencement of a renewal application period. This was suggested to avoid unintentional mishaps where licensees fail to apply for renewal resulting in public detriment. We suggested this could be achieved by a simple automated software function, which the ACMA could manage. Notice could be given to the contact email address in the ACMA's records for the relevant licence, and evidence of receipt of notice would not need to be collected.

While we note that the draft Bill has included provisions dealing with "deemed applications",[54] presumably to try and mitigate these issues, we are concerned that the proposed drafting does not provide the protection we were seeking in that there is no positive obligation on the ACMA to issue the licence renewal notices.

3.1.16. Renewal of spectrum licences - "effect on radiocommunications" considerations

The proposed section 77C(7) sets out the factors to which the ACMA must have regard when deciding whether to renew a spectrum licence, which includes the phrase "the effect on radiocommunications of the proposed operation of the radiocommunications devices that would be authorised under the new spectrum licence".

It appears that the language has been taken from section 100(4) of the current Act in respect of the issuing of *apparatus* licences (which makes more sense in the context of devices authorised under an apparatus licence). We suggest that the proposed section 77C(7) would benefit from some further explanation or guidance as it is not entirely clear what the intention is behind the extension of the application under the proposed section 77C to *spectrum* licences.

3.1.17. Contravention of licence conditions by a third party authorised by the licensee

Under the draft Bill, in deciding whether to renew a spectrum licence or an apparatus licence, the ACMA may have regard to, among other things, whether the licensee or a person authorised by them has contravened the conditions of the licence.[55] We are concerned that this may result in a reluctance by licensees to authorise third parties to operate radiocommunications devices under their licence. The authorisation process is a useful and well-used regime, including for example in staging licence defragmentation using short-term authorisations, and it should not be inadvertently undermined through licence renewal considerations.

[54] Draft Bill s77A(10) and s129(10).
[55] Draft Bill s77C(8)(b) for spectrum licences; draft Bill s130(3A)(b) for apparatus licences.

We note that the explanatory notes do not mention any instance where the existing use of third party authorisations has been in breach of a licence, in the more than 25 years that this mechanism has been in available for use, so that the provision appears to be trying to solve for a problem that is hypothetical. In our view, amendments to the Act that restrict spectrum re-use and flexibility should only be considered if they are based on evidence of a harm having occurred in the past.

In particular, if the proposed amendment was made to the Act then, as a matter of commercial prudence, spectrum licensees would likely seek a full indemnity from third parties for any loss associated with refusal to renew a licence by the ACMA attributable to a licence breach by the third party. For a mobile network operator the quantum of loss caused by refusal to renew a licence may be very large indeed. Accordingly, licensees acting prudently would likely seek an uncapped indemnity which third parties would be unwilling to provide, and even if they did, it would be an open question as to whether the third party could fulfil that indemnity from a financial capacity perspective and hence whether such an indemnity could be relied upon.

Further, we note that Telstra has also issued third party authorisations under our spectrum licences to enable trials of innovative technology in our spectrum-licensed space, for example the trialling of high-altitude platform systems. While every effort can be made to prevent unintentional effects on other radiocommunications users when these innovative technologies are trialled, because of their experimental nature they present a higher level of risk of breach of technical spectrum licence conditions. If the proposed amendment was made to the Act then it is unlikely we would be able to agree third party authorisations for such innovative trials in the future.

This commercial assessment applies irrespective of the fact that the ACMA has discretion to consider the significance of the licence breach by the authorised third party, and that a breach of a purely unintentional nature and/or one that was of a minor technical nature and quickly remedied, would be unlikely to trigger a refusal to renew the licence. With their licences and their business potentially at stake, the simple assessment that licensees would likely make is, “why even take the chance?”

If there is an insistence on making the conduct of third parties a renewal consideration, a more balanced approach is to place an appropriate degree of responsibility upon licensees for conduct by authorised third parties, by replacing proposed sections 77C(8)(b)(ii) and 130(3A)(b)(ii) with an assessment of whether the licensee:

- knew the authorised third party was committing a material breach of a licence condition, and once possessed of such knowledge, failed to take appropriate steps to prevent such conduct from continuing; or

- was wilfully blind as to whether the authorised third party was contravening a material breach of a licence condition.

This approach would enable licensees to rely on contractual obligations in the commercial agreements used for third party authorisation, that require notice of actual or potential licence contravention by the third party. It would also prevent the use of third party authorisations to conduct business through a proxy entity without consequence for the licensee, as common control of both the licensee and the third party – and hence knowledge of the third party’s conduct – should be easy to discover using the ACMA’s information gathering powers.

3.1.18. No consultation on whether specified circumstances have been fulfilled

As noted in section 3.1.8, the ACMA has discretion to require the fulfillment of any "specified circumstances" prior to exercising its discretion with regards to renewing a licence. We anticipate that in some cases it may be straightforward for the ACMA to make the assessment required by s 77C(4) in terms of identifying whether a specified circumstance has been fulfilled (e.g. if the specified circumstances requires that Australia's international obligations do not preclude renewal). However, in some cases fulfilment of the specified circumstances may require a more nuanced assessment, for example if the specified circumstances require the incumbent licensee to demonstrate substantial investment in the licensed spectrum. We therefore consider it is appropriate for the ACMA to consult the impacted licensee when considering whether specified circumstances have been fulfilled as a prerequisite to renewal under s 77C(4).

3.1.19. No consultation on whether renewal is in the public interest

As noted in section 3.1.9, there are a number of circumstances in which the ACMA will rely on a public interest test assessment in determining whether to grant a licence renewal. Given the complexities of applying public interest criteria – and past experience evidencing that minds differ on how it ought reasonably be applied – we consider it is appropriate to for the ACMA to consult the impacted licensee and wider stakeholders as appropriate when applying this test.

3.1.20. No consultation on proposed decision to renew or not to renew

Where the ACMA is exercising its discretion about whether to renew a licence that is capable of renewal under sections 65A(1)(b), (c) or 103A(1)(b), including having regard to all matters it considers relevant under section 77C(7) (for spectrum licences) or 100(4) (for apparatus licences), it is appropriate to require prior consultation with the impacted licensee, and that the ACMA have due regard to submissions received. A failure to mandate stakeholder engagement where no specific renewal test is being applied (e.g. specified circumstances or public interest criteria) would create an anomaly where the regulator would be less accountable when exercising its broadest renewal powers.

3.1.21. No consultation or notice on proposed new conditions

Under the draft Bill, the licence conditions attaching to a renewed licence need not be the same as those of the licence that it replaces.[56] We understand that this flexibility is important for the Government. However, it is appropriate for the ACMA to provide advance notice of proposed new conditions and reasons for its proposed approach, and to consult with affected licensees before making a decision to change licence conditions in a replacement licence. This is consistent with the approach previously taken by the ACMA, for example in 2014 when it proposed to change core licence conditions in our re-issued 1800MHz band spectrum licence. The fact that consultation has occurred in the past demonstrates the mutually recognised value of stakeholder engagement, and we consider it appropriate to prescribe mandatory consultation as a prerequisite to issuing a replacement licence with different licence conditions, including an obligation on the ACMA to have regard to submissions it receives.

3.1.22. Statement of reasons for refusal to renew or renewal on changed conditions

Under the draft Bill, if the ACMA refuses to renew a spectrum licence, or renews it on different conditions, the ACMA is not required to provide a statement of reasons unless the licensee requests

[56] Draft Bill s77C(10).

such reasons within 28 days of receipt of a notice of decision.[57] Given the serious nature of the decisions to be notified under section 77D (particularly in the case of a refusal to renew, or a change to core licence conditions), the ACMA should be required to provide reasons as a matter of course with every such notice to provide transparency and regulatory accountability. Requiring an affected licensee to request reasons imposes an additional unnecessary step in the administrative process and means a licensee may not receive reasons for the ACMA's decision until up to 8 weeks after the decision has been made.

3.1.23. Deemed refusal of licence renewal application

We note that the draft Bill deems the ACMA to have refused an application for a spectrum licence renewal if the ACMA has not informed the applicant of its decision before the end of the period in which the ACMA is required to make the decision.[58] In other words, the default is that there is a deemed refusal rather than a deemed acceptance in circumstances where the ACMA *fails* to comply with either its own specified decision-making period or the default one under the legislation.

The ACMA has mechanisms available to enable it to make a decision within the required period, including the ability to extend the decision-making period under section 286(3) by requesting further information from the applicant. In our view a default of refusal of licence renewal where no decision has been made by the ACMA, creates the wrong incentives for the regulator as it does not impose a requirement to undergo a disciplined and considered decision-making process. Further, the impact of the current COVID-19 pandemic on many private sector and government services should alert us to the risk that rigid timelines with a deemed refusal at their conclusion, can have unintended harsh consequences.

We recognise that at the end of the prescribed time period for ACMA consideration of renewal (which may include additional time due to information requests), there is a need for certainty of a decision one way or the other, either renewal or refusal of renewal. The decision should not be left in limbo. However, our view is that the deemed outcome should be the opposite to that in the current drafting, i.e. it should be deemed acceptance of the renewal application. We suggest the same considerations should also apply in the case of apparatus licences.

Last, if the current drafting approach is retained, we suggest that even in a "no decision" situation with deemed refusal of a renewal application, it should be clear that the ACMA is still required to provide reasons. Absent this requirement being clear, an unhelpful incentive would be created for no decision to be made in order to avoid the need to provide reasons. We are not suggesting that the ACMA would intentionally conduct itself in this way, but we are mindful that regulatory agencies are often subject to resourcing and budget pressures, and we consider that providing reasons for decisions should remain a priority even in such constrained circumstances.

3.1.24. Application and transitional provisions

We believe that the most important issue to consider in designing transitional arrangements is the protection of incumbent licensee rights, and that a guiding principle for transition is that the rights of existing licensees will not be diminished in the transition. We believe that it is imperative that existing rights and conditions associated with all types of licences be continued under the new regime for the remaining term of the licences. It is critical that existing licence holders continue to have certainty for

[57] Draft Bill s77D.
[58] Draft Bill s286(4) and s286(6).

their investment in existing licences, especially for spectrum licenses, which are typically of long duration and have a high value.

3.1.25. Application of "specified class" public interest statements to existing spectrum licences

The draft Bill, rightly, does not allow a public interest statement to be applied to an individual existing spectrum licence. This is because of the interaction between section 65A(21) (which we understand to not allow a renewal statement to be attached to an individual existing licence which is in its initial term), and section 65A(17) (which only permits a public interest statement to be included in an individual spectrum licence where a renewal statement permits renewal). However, as currently drafted, it appears that the draft Bill would allow a "specified class" of existing spectrum licences to have a public interest statement attached to them. This is the case because proposed section 65A(19) does not apply only in connection with a renewal statement, so the transitional provisions of proposed section 65A(21) are not enlivened.

3.1.26. Application of "specified class" renewal statements and public interest statements to existing apparatus licences

Similarly, we note that the drafting in section 103A(5) allows the ACMA to determine that each apparatus licence included in a specified class of apparatus licences is taken to include a particular renewal statement. While the explanatory notes explain that "a determination cannot apply a renewal statement to licences issued prior to the commencement of the amendments",[59] no such transitional exception is reflected in the current drafting of section 103A (in contrast to section 65A for spectrum licences). As currently drafted, there are no restrictions on the ACMA issuing a "specified class" renewal statement for existing apparatus licences.

We assume that this is an error in the legislation, given the stated intention for renewal statements to only apply to licences issued after commencement. We recommend that section 103A be amended to include a transitional exception restricting the ACMA from issuing "specified class" renewal statements for apparatus licences issued before commencement. The transitional exception should also apply to the issue of public interest statements for existing apparatus licences under section 103A(17) (consistent with our recommendation in respect of spectrum licences in section 3.1.25).

3.1.27. Application of "specified class" renewal statements to re-issued spectrum licences

We note that the drafting in section 65A(5) allows the ACMA to determine that each spectrum licence included in a specified class of spectrum licences is taken to include a particular renewal statement. While the explanatory notes explain that "such a legislative instrument does not apply to licences issued prior to the commencement of these amendments", it is unclear whether it is intended for this to apply to licence re-issued under section 82 of the current Act. The effect of the drafting in the draft Bill[60] limits the transitional exception to situations where a marketing plan was applicable to the issue of the licence and the marketing plan was prepared before the commencement of the section. While there would have been a marketing plan applicable to the *original* issue of the licence, there would not have been a separate marketing plan for the *re*-issue of the licences under section 82.

[59] Explanatory notes, Item 65, p28.
[60] Draft Bill s65A(21).

There is no basis to exclude existing spectrum licences reissued under section 82 of the current Act from the proposed transitional exception under section 65A(21) of the draft Bill. In both circumstances, the licensee has entered into the investment and paid a significant capital outlay in expectation that the applicable renewal test would be that set out in section 82 of the current Act. To allow the ACMA to impose an alternative renewal process by way of a determination would undermine the integrity of that prior renewal process just as it would for any prior issuance process.

3.1.28. Direct allocation of licence

Section 60A of the draft Bill makes provision for the ACMA to directly allocate spectrum licences without a market process. We recognise there may be appropriate contexts for the use this power by the ACMA, such as to facilitate the defragmentation of spectrum with overall efficiency benefits for the community; or for allocation to public safety agencies.

We are concerned that, notwithstanding the possibility of review of direct allocation decisions, dispensing with the use of contestable market-based mechanisms may result in inefficient allocations. In the event this power is used by the ACMA, we recommend the opportunity cost of the direct allocation be made transparent. In other words, it should be a requirement that the ACMA provide reasons for its decision at the time it is made, and that those reasons must include an estimate of the incremental value of the spectrum being directly allocated to the licensee, derived using objective and credible methodology. The final price to be paid should also be made transparent. This will enable the community to, for example, understand the value of the spectrum being provided to public safety agencies should they receive a direct allocation. Recipients of direct allocations should be discouraged from forming a view that spectrum is 'free', as this will dull their incentive to use the spectrum efficiently. Public transparency regarding the estimated value of the spectrum will drive greater accountability for how the spectrum is being used. Our preference is that these requirements should be included in the legislation, however it could also form a key part of a MPS which should be issued in respect of how and when the section 60A power may be used (as noted in section 2.1 of our submission).

3.1.29. Allocation limits

Subject to the caveats outlined below, we support the approach under the draft Bill in relation to allocation limits, namely that the ACMA is granted the power to set allocation limits without receiving a Ministerial direction.[61] This is consistent with the draft Bill's aim to simplify the administration of the Act and provide the ACMA with greater autonomy in its role.

Under the current regime, in which only the Minister can determine allocation limits, the Minister has adopted the practice in recent auctions of setting out the criteria by which he or she intends to make the decision regarding allocation limits.[62] This has been a positive measure for potential auction participants and helped achieve transparency in the process. We believe that the ACMA must also:

- have regard to a set of publicly available criteria in making decisions regarding allocation limits;
- consult with interested stakeholders prior to making a decision regarding allocation limits; and

[61] This is effected via the repeal of s60(9) of the Act.

[62] See for example letter from Minister Fletcher to Rod Sims, 18 October 2019, in respect of the 26 GHz band; letter from Minister Fifield to Rod Sims, 5 March 2018, in respect of the 3.6 GHz band auction; and letter from Minister Fifield to Rod Sims, 4 July 2017, in respect of the 'omnibus' spectrum auction, all available at https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/spectrum-competition-limits.

- provide reasoning at the same time as it makes an allocation limits decision.

The ACMA's decision-making criteria should reflect the Object of the Act and the Principles for Spectrum Management. For example, the ACMA should have regard to whether an allocation limit facilitates efficient use of the spectrum: Is the limit compatible with the technology that is likely to be deployed in the spectrum? Does it help ensure that spectrum is likely to be allocated to the highest value use? Is there a likelihood that it may result in unsold or underutilised spectrum? While we do not support maximising revenue as a Government policy objective, we recognise that taxpayers receiving a fair value return from the sale of spectrum assets may also be a relevant factor in the setting of limits. These are all important considerations which must be integrated into the ACMA's decision-making process, in addition to the competition considerations which naturally will be taken into account via the ACMA's mandatory consultation of the ACCC.[63]

We believe that criteria similar to the above must be clearly communicated to the ACMA to ensure that allocation limit decisions take account of all relevant considerations and produce an optimal allocation outcome. We would prefer to see these decision-making criteria identified in the legislation but recognise that a MPS may be the more practical and appropriate mechanism to guide the ACMA to take them into account. If a MPS is determined to be the most appropriate mechanism, we suggest preparation of, and consultation on, the draft policy statement to commence as a priority, given the proposed timeframe for enactment of the draft Bill.

We also believe that the requirement for the ACMA to provide reasons for any allocation limits decision should be included in the legislation (noting that the draft Bill reflects the requirement to provide reasons in other contexts: see, for example, section 77D).

We note the proposed amendment to section 60(5), which would require the ACMA to take into account a licensee's aggregate holdings across both apparatus and spectrum licences in making a decision regarding allocation limits. This approach has already been used by the Minister to determine the allocation limits in the recent 3.6 GHz auction. We agree that it is appropriate to expressly recognise that this approach can be adopted, and that this express recognition would also make it simpler for the ACMA to determine limits using this approach.

3.1.30. Amendments to section 138 enabling class licences to be issued across spectrum licences

We note that in order to reflect the removal of the concept of spectrum licence "designation", consequential amendments have been made to section 138 which deals with the overlaying of class licences onto spectrum licences. Section 138 is a relatively new provision in the Act, introduced to enable deployment of Ultra Wide Band ("UWB") devices which use a technology approach that merited a very limited relaxation of the otherwise strict exclusive rights enjoyed by spectrum licensees. The section 138 class licence mechanism is a power that should not be used lightly, as indicated by the obligation to consult with the spectrum licensees over whose licences the class licence would be issued. While that consultation obligation has been retained in subsection 138(2)(b), we are concerned that new class licences of this nature may be created before spectrum licences have even been issued, i.e. once a marketing plan has been issued.[64] In that scenario, there are no licensees available to consult. There may be aspirant licensees who intend to participate in a proposed spectrum auction, however they would be at an early stage of preparation for investment in the spectrum and the equipment to make use of it.

[63] Draft Bill section 60(13).

[64] See section 138(1A) in the draft Bill.

The relevant technical standards for use of the spectrum may not be fully matured and vendor's technical specifications may not finalised. In those circumstances it may be far more difficult for an intending acquirer of a spectrum licence to assess the risk which a proposed class licence may pose. Additionally, the proposed approach of enabling class licences to be issued after a marketing plan has been released but before an auction takes place, creates uncertainty in spectrum valuation ahead of an auction as aspirant licensees will not know whether a potentially harmful class licence may be issued just prior or even during an auction.

Given the uncertainties that may exist, we suggest that the issue of class licences under section 138 should be stayed until licences are issued in the relevant spectrum and the affected licensees themselves can be consulted.

3.2. Licence type and hierarchy

We commend the Department for moving away from the previous round's goal of amalgamating all licences into a single licence type. Different licence types have very different attributes; for example, spectrum licences ascribe exclusive licensee rights and require compensation if cancelled by the government; class licenced transmitters must not cause interference to other radiocommunications operators, nor can the licensee claim protection from interference from other operators.

While we accept there are still many clear distinctions between the licence types in the draft Bill, we remain concerned that attempts to bring the licence types closer together is blurring the boundaries between licence types. Recent moves by the ACMA in the 26 GHz band potentially result in creating parity between AWL licensees and spectrum licensees by allowing either licensee type to trigger the synchronisation fallback mechanism[65]. Similarly, first-in-time provisions can afford an apparatus licensee the ability to constrain deployment by a spectrum licensee, thereby eroding the exclusive rights of the spectrum licensee, which we discussed in section 2.2 on maintenance of exclusive licensee rights.

To resolve this situation, we recommend the legislation be amended to establish a hierarchy of technical protection (from interference) afforded to the different licence types, with spectrum licences being afforded primacy in the hierarchy. The amendment should make it clear that in circumstances where there is technical interference between different licence types (where licensees are operating within the bounds of their respective licences), then spectrum licences must be afforded the greatest level of protection from interference. Both spectrum licences and apparatus licences should be protected from interference caused by devices operating under class licences. This hierarchy should displace any existing rules in technical or legislative instruments regarding which device was "first in time" in terms of operation. We believe such amendments would achieve fair outcomes for the industry, in light of the substantial investment made by spectrum licensees and would deliver the industry much needed certainty. If legislation is deemed to be inappropriate, then a MPS should be developed to provide this guidance.

[65] This example is the proposed "synchronisation fallback" interference resolution mechanism for resolving adjacent channel and/or adjacent geography interference between TDD systems in the 26 GHz band. A synchronisation pattern necessarily implies a ratio of upstream to downstream traffic and may be optimised for some use-cases such as video streaming. Providing an apparatus licensee the ability to compel a spectrum licensee to comply with a synchronisation fallback pattern (mandated *ex ante* by the ACMA) which is unsuitable for the spectrum licensee's use case is an example of elevating the status of an apparatus licensee above that of the spectrum licensee. This could readily be resolved in the design of interference management criteria. For example, requiring the synchronisation fallback frame pattern to be specified by the spectrum licensee (rather than mandated *ex ante* by the ACMA) would maintain primacy of the spectrum licence.

3.3. Ministerial Policy Statements (MPSs) and ACMA work plan

3.3.1. Ministerial Policy Statements

We welcome the proposal to remove the Minister from several of the existing administrative decision-making processes in the current Act, and to more clearly define the Minister's role to be one of implementing policy settings through MPSs. The explanatory notes to the draft Bill emphasise the flexibility of these instruments, noting that a MPS made by the Minister under section 28B may be high level and strategic, or also quite specific to a particular spectrum management function or power. We support the flexibility of this approach, particularly as our review of the draft Bill has highlighted a wide range of topics that require MPS guidance (we identify these topics throughout our submission and included a list of key examples at section 2.1).

Given the important role that MPS will play in influencing long-term spectrum management and application of the Act, we believe that the new Act should mandate consultation with stakeholders in relation to any proposed MPS, as is the requirement in other Commonwealth legislation.[66] The explanatory notes state that "*it is expected that the Government would undertake consultation that is appropriate and reasonably practicable in the circumstances, before the Minister makes any MPS*".[67] An "expectation" that consultation will occur is not an adequate procedural safeguard. We note the Department has expressed a clear preference for MPSs to constitute notifiable instruments, rather than disallowable instruments.[68] Notifiable instruments are not subject to Parliamentary scrutiny or oversight, nor a requirement for the Minister to engage with industry on MPS content. Unless the draft Bill is amended to include a consultation requirement, there is no legislated pathway to ensure that MPSs are subject to even a modest level of scrutiny and that industry's views are considered. We appreciate that MPSs are intended to capture Government policy, however industry stakeholders and consumer groups have the capacity to bring varied and unique perspectives to help inform that policy. These perspectives, if consulted, will assist the Minister in formulating MPSs that best achieve the Object of the Act. A consultation requirement could be drafted in a similar way to the ACMA's requirement to consult before determining a work program,[69] such as:

Before determining a Ministerial policy statement, the Minister must:

(a) undertake any consultation that is:

(i) considered by the Minister to be appropriate to undertake; and

(ii) reasonably practicable to undertake.

(2) A contravention of subsection (1) does not affect the validity of a Ministerial policy statement.

We acknowledge there may be circumstances where the Minister needs to provide guidance quickly and definitively – in these cases the Minister still can invoke the power under section 14 of the *Australian Communications and Media Authority Act 2005* (ACMA Act) to make a direction to the ACMA without the need to engage in consultation.

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[66] See the *Environment Protection and Biodiversity Conservation Act 1999* which requires the Minister to consult in relation to various instruments.

[67] Explanatory notes, Item 2, p. 13.

[68] Explanatory notes, Item 2, p. 13.

[69] Draft Bill, section 28F.

In the event the Department disagrees with our submission regarding mandatory consultation, we request that at a minimum the Explanatory Memorandum highlights the general expectation that consultation will occur before a final MPS is released.

In relation to section 28C of the draft Bill, we are supportive of the premise that the ACMA must have regard to MPSs in performing its functions or exercising its powers, but that it is permitted to depart from MPS guidance in making its decisions. However, we do not believe that the current drafting of section 28C accurately reflects the intent as expressed in the explanatory notes[70] (or if it does, we disagree with it). Section 28C(1) states that *"the ACMA must have regard to any relevant Ministerial policy statements".* Section 28C(2) states that *"A contravention of subsection (1) does not affect the validity of* [an instrument made or anything else done by ACMA]". Section 28C(2) therefore effectively relieves the ACMA from needing to have regard to any relevant MPS. We believe that the ACMA should be unequivocally required to have regard to any relevant MPS, but it is entitled to depart from MPS guidance (subject to this only occurring in exceptional circumstances, which is a separate aspect we discuss further below). The failure to follow MPS guidance, rather than the failure to have regard to MPS guidance, should be the relevant failure captured in section 28C(2). We propose that section 28C(2) be re-drafted as follows:

(2) The ACMA's failure to act in accordance with a policy specified in a relevant Ministerial policy statement does not affect the validity of:

> *(a) an instrument made by the ACMA; or*
>
> *(b) anything else done by the ACMA;*

in the performance of its functions or the exercise of its powers.

Additionally, while we recognise there may be instances where the ACMA departs from a MPS, in order to promote certainty and confidence in the spectrum regulatory framework we suggest that the ACMA may only do so if it can demonstrate that this is justified by exceptional circumstances. For example, the ACMA may depart from a MPS where acting in accordance with a MPS in a particular situation would result in an outcome that is inconsistent with the Object of the Act (e.g. a MPS may require a non-discriminatory approach to setting spectrum access charges, but there may be an exceptional circumstance in which it is appropriate to allow a differentiated rate for a specific, short-term licence in order to promote the long-term public interest derived from the spectrum).We think this is an appropriate threshold to set for a departure by the ACMA from MPS guidance, and it should be expressly articulated (this approach is consistent with proposed in section 153J(2A) in the draft Bill). We propose that section 28C(1) be re-drafted as follows:

(1) *The ACMA must:*

> *(a) have regard to any relevant Ministerial policy statements; and*
>
> *(b) act in accordance with any such Ministerial policy statement unless the ACMA considers there are exceptional circumstances that warrant it not doing so.*

If this approach is adopted, the drafting in subsection 28C(2) should also be further amended to clarify that its operation is subject to subsection 28C(1).In addition, we consider that there should be an explicit requirement for the ACMA to self-report on an ongoing basis any instances where it has knowingly

[70] Explanatory notes, Item 2, p. 13

departed from a policy specified in a relevant MPS. We acknowledge the proposed amendment to section 57 of the ACMA Act which would require the ACMA to provide in its annual report *"a summary outline of the operation of subsection 28C(1) of the* [Act]", however we do not believe this broad reporting obligation is sufficient. Where carefully formulated MPS exist that have been relied upon by industry, the ACMA should be required to self-report, with sufficient frequency, cases where it has deliberately departed from a MPS and provide the reasons, so that industry is aware of the basis for the departure. A new sub-section 28C(3) should be inserted to provide for this.

In circumstances where the ACMA makes a decision that knowingly departs from a MPS, we also consider that such decisions should be reviewable (if they do not already constitute reviewable decisions by their nature). Section 285 of the Act should be amended to include as a reviewable decision "*an instrument made or anything else done by the ACMA in the performance of its functions or the exercise of its powers which is self-reported by the ACMA under* [new] *section 28C(3)".*

In summary our expectation is that ACMA should ordinarily follow the guidance provided in a MPS; that the ACMA should only have the ability to depart from MPSs if there is a particular and adequate reason to justify it doing so, which constitute exceptional circumstances; and that we favour a more robust self-reporting requirement and the ability for such decisions to be reviewed in order to improve transparency and fairness for stakeholders.

3.3.2. ACMA work program

We support the ACMA having the flexibility to develop its own work program, however, we believe it is unnecessary to enshrine the annual work program in legislation. We are of the view that the added complexity arising from making their work program a legislative requirement will not provide significant benefits to spectrum licensees in terms of transparency and certainty, compared to the current, administrative FYSO process.

If, however, the government decides to proceed with enshrining the ACMA's work program in legislation, we are concerned about the mandatory requirement for the ACMA to consult with the Minister, as we believe this to be unnecessary bureaucratic overhead (red tape). We observe the drafting of section 28F(1)(a) requires that the ACMA "… *must consult with the Minister*" as part of development of the work program, whereas section 28F(1)(b) only requires the ACMA to undertake "…*any other consultation*…" where it considers it: (i) appropriate; and (ii) reasonably practical to undertake. Given the Minister has the facility to create MPSs, which under section 28C, the ACMA is required to have regard to, we propose the emphasis for the ACMA to consulting on its work plan is the wrong way around. Should the government decide to proceed with enshrining the ACMA's work program in legislation, we propose it should be mandatory that the ACMA consults with the public on its proposed work plan (as it is already inclined to do), and that consultation on the work plan with the Minister should be optional.

3.4. Coexistence of apparatus and spectrum licences

The proposed new section 39(2) in the draft Bill appears intended to protect incumbent apparatus licences from having spectrum licences overlaid upon them, because if that was permitted it may significantly impact the utility of the apparatus licence. We agree with this objective, however we are concerned that the way in which the proposed new section 39(2) has been drafted may result in licence provisions that are unworkable for spectrum licensees. This is because there appears to be an assumption implicit in subsection 39(2)(d) that apparatus licences have defined "areas" – which, unlike spectrum licences, they do not. As the Department is aware, as a general matter apparatus licences do

not confer a geographically bounded "spectrum space" on licensees in which they have exclusive use rights. In particular, point-to-point links are often licensed by means of apparatus licences that can be coordinated with several other apparatus licences which co-exist in the same "spectrum space".

We recognise that:

- it is possible to derive a notional boundary for an existing apparatus licence by way of the technical instruments which manage interaction between spectrum licences and apparatus licences: however, this involves complex analysis using mathematical modelling with a degree of "grey area", i.e. there is a risk of a potentially contested boundary; and
- this problem should not arise in respect of the proposed Area Wide Licence ("AWL") construct being developed by the ACMA as the AWL will have a defined geographic boundary: however, even once fully deployed AWLs will only make up a small proportion of the apparatus licence population.

The practical risk is that licences issued in compliance with a section 39 marketing plan may leave it to the new spectrum licensee to determine the boundaries of existing apparatus licences that do not form part of the spectrum licence. The spectrum licence will have a "swiss cheese" construct in which the apparatus licences are the "holes in the cheese" but their precise boundaries may be unclear. This will cause the products being sold in a spectrum auction to lack certainty and may lead to ongoing interference disputes with negative consequences for customers of both licensees.

A possible solution may be to replace the drafting stating that a marketing plan "does not apply", with the words, "must not apply", in section 39(2). This would place the onus on the ACMA to define the relevant spectrum licence boundaries in the marketing plan and the licence conditions with enough certainty so as not to overlap with any apparatus licences.

3.5. Equipment rules

3.5.1. Permits, bans and amnesty provisions

We support the ongoing role permits can perform in authorising individuals to conduct certain actions related to radio transmitters that would otherwise be prohibited or banned. We observe section 167 of the current Act (to be repealed) requires the ACMA to have regard to the purpose the transmitter will be used for (education, training, demonstration) when issuing permits. This requirement does not appear in the draft Bill[71], allowing the ACMA greater flexibility in issuing permits, which in principle we support. However, we are concerned that with the greater flexibility, permits could be issued to persons such as correctional facilities or law enforcement agencies, permitting the use of devices capable of disrupting communications with mobile telephone devices such as mobile jammers (in prisons) or drone guns.

We propose that where the ACMA intends to issue a permit allowing a person to operate a banned device capable of operating on frequencies that are the subject of a spectrum licence (anywhere in Australia), prior to issuing the permit the ACMA should be required to consult with those licensees. For example, if a permit were planned to be issued to a law enforcement agency for a mobile jammer or

[71] See draft Bill ss159(13)-(16).

drone jammer that is capable of operating in bands allocated to mobile telephony, the ACMA should be required to consult with the spectrum licensee(s) for those band(s).

We also support the introduction of interim and permanent bans which will replace the prohibited devices provisions in Part 4.1, Division 8 of the existing Act. Unlike the existing prohibited devices provisions (sections 189-191 of the existing Act) under the draft Bill the ACMA is not required to consult, other than with ARPANSA in section 172(2). We appreciate the expediency with which interim bans can be implemented as notifiable instruments without consultation, but we propose that for permanent bans, the ACMA should be required to hold a short public consultation (in addition to consulting ARPANSA). This should be added to section 172(2) of the draft Bill.

We welcome the introduction of the amnesty provisions (Schedule 4, Division 4, Subdivision D) for the surrender of banned equipment. We foresee an important role for these provisions in collecting illegal mobile repeaters. In order for an amnesty to be invoked, non-compliant (illegal) mobile repeaters would need to be the subject of a permanent ban, and we would welcome the opportunity to work with the ACMA to specify the characteristics of non-compliant mobile repeaters to be included in a permanent ban. Once the ACMA has subsequently established an amnesty, we would then work through the mobile industry association AMTA (which has extensive experience with its highly successful Mobile Muster program) to propose a scheme that could assist the ACMA by appropriately disabling and recycling illegal devices collected through an amnesty.

See also our answer to Question 3 in Appendix 1.

3.5.2. Bulk party authorisations and mobile repeaters

We welcome the removal of the section 301 scheme for mobile repeaters from the current Act. As stated in our 2017 submission[72], the use of the section 301 scheme for mobile repeaters is an awkward fit with cumbersome regulatory obligations. We look forward to the implementation of appropriate equipment rules to manage the supply of mobile repeaters.

We note there does not appear to be a mechanism to allow “bulk authorisation” under the provisions governing the equipment rules, for example, to allow mobile repeater devices that comply with our network requirements. We consider that one-to-one authorisation requirement is not an appropriate mechanism to deal with mass market products such as mobile repeaters. We note there are potentially other “indirect” avenues within the draft Bill for the ACMA to facilitate bulk authorisations such as the ability for the ACMA to grant an exemption to a particular ‘act’ under section 302(2) of the draft Bill as well as the equipment rules are able to include provisions that enable the ACMA to provide permits to enable the person holding a permit to do something that would otherwise contravene the equipment rules under section 159(13) of the draft Bill. Our preference would be for the ACMA to develop equipment rules that allow bulk authorisations to be permitted.

We also propose that section 284J of the draft Bill be amended to enable bulk authorisations for mass-market devices be issued by a licensee alongside individual authorisations. Section 284J gives inspectors the power to require that a licensee or authorised third party to show a record of an authorisation if required. Again, this provision only contemplates one-to-one third-party authorisations on a bespoke basis and does not permit mass-market device authorisations. If adopted in its current form, this would impose a significant burden on mobile operators who authorise customers to use “smart”

[72] See Telstra submission to the Department of Communications and the Art’s (DoCA) consultation package on the exposure draft of the Radiocommunications Bill 2017 dated 28 July 2017.

repeaters such as the Telstra Mobile Smart Antenna in their homes. In practice, this means individual agreements would need to be signed by a Telstra representative and each customer and retained by both. We believe this is unnecessary given the terms of each authorisation is identical across the entire customer base.

3.5.3. Transitional arrangements for Equipment Rules – prohibited devices

Under section 190 of the Act, the ACMA may make declarations prohibiting the operation, supply, or possession for the purposes of operation or supply, of specified devices. This section will be repealed under the draft Bill and the existing regime of declarations will be replaced by the new concept of "permanent bans". We have a concern that the transitional arrangements under subsection 49(1)(d) of the draft Bill does not cover prohibited devices declared under subsection 190(2)(c) of the Act, namely, radiocommunications transmitters or receivers that would be reasonably likely to have an adverse impact on health and safety. This means any prohibitions of such devices declared by the ACMA prior to the commencement of the new Act will cease to have effect once the new Act comes into effect. We propose that prohibited devices covered under subsection 190(2)(c) of the Act be carried over to the new Act via the transitional arrangements under subsection 49(1)(d) of the draft Bill.

3.6. Accreditation

We agree that the success of the existing accreditation scheme has been a signature and world-leading achievement of the current legislation, and on the strength of this success we support a wider range of activity being done by suitably accredited persons.

3.6.1. Unintended overreach of proposed new section 70

The new proposed section 70 set out in Schedule 5 of the draft Bill in the context of accreditation, gives the ACMA the power to determine new licence conditions for all spectrum licences, or for a class of spectrum licences. The explanatory notes state that the intent was to facilitate use of accredited persons to perform functions that form part of the conditions of spectrum licences.[73] But, as drafted, the power conferred appears to be far broader, with potential for the ACMA to materially alter the rights associated with spectrum licences after they have been paid for by the new licensees. It also differs from sections 66-69 which set out specific requirements regarding conditions that must be included in spectrum licences, rather than creating a power to prescribe new conditions *ex post*. There would be significant overlap between this new power in section 70 and the existing provisions in the Act regarding varying of spectrum licences without licensee agreement in section 73, but absent the protections contained in that section. We suggest that the provision be amended to more narrowly confine its effect to facilitation of the accredited person arrangements.

3.7. Compliance and Enforcement

We are broadly supportive of the provisions outlined in Schedule 6 of the draft Bill. The graduated enforcement mechanisms will enable the ACMA to apply a proportionate enforcement action to contravening conduct depending on the contravention and circumstances. The incorporation of the provisions of the *Regulatory Powers (Standard Provisions) Act 2014* is an effective way to equip the

[73] Explanatory notes, p56,

ACMA with those mechanisms, with the sensible objective of aligning the ACMA's powers and functions with those of other regulators.

We have specific concerns with Schedule 6, set out below:

- The current Act permits inspectors searching premises under a warrant to seize items that are not connected to the offence specified in the warrant, but are connected to another offence under the Act.[74] The Regulatory Powers Act contains a power for inspectors to seize "evidential material" that is specified in an investigation warrant.[75] Similar to the current Act, there is an ancillary power for inspectors to seize items which are not evidential material of the kind specified in the warrant, but which are evidence of the contravention of a "related provision". However, in order for inspectors to be entitled to seize such items, the "related provisions" must be called out in the triggering Act.[76] The draft Bill does not appear to have called out any "related provisions" – the effect is that an inspector would not be able to seize an item that they suspect is connected to an offence other than the one specified in the investigation warrant. We assume this is a drafting oversight – we would expect inspectors to be able to exercise ancillary powers, particularly as the current Act provides for it. We propose that section 284B of the draft Bill be amended (with drafting similar to the *Biosecurity Act 2015* (Cth)[77]) to state that all offences and civil penalty provisions under the draft Bill, as well as Crimes Act 1914 (Cth) or Criminal Code provisions relating to the draft Bill, are "related provisions".

- Under the draft Bill, the Chair of the ACMA may delegate their powers under Parts 5 of the Regulatory Powers Act (re Infringement Notices) to an SES employee who is a member of staff of the ACMA. "SES" is a well-understood term, but it is not defined in the draft Bill or the Regulatory Powers Act. We propose incorporating the definition of "SES employee" in section 34 of the *Public Service Act 1999*.

- We consider that the powers of Inspectors under sections 284G and 284H in relation to the power of inspectors to enter premises and adjust transmitters in emergencies, and to require operation of transmitters, should be widened to permit Inspectors to adjust receivers or direct a person to operate a receiver. Alternatively, sections 284G and 284H could be amended to refer to "radiocommunications devices" to capture both transmitter and receivers. Adjustment of receivers may be appropriate where an interference issue has arisen and the licensee operating the transmitter is being blamed, however the inspector suspects that in fact a fault in the receiver is causing the issue.

- We believe that the amended Part 5.5 should include a section which clarifies that nothing in Part 5.5 has the effect of displacing a person's (the plaintiff's) right under section 50 of the Act to bring civil proceedings against another person (the defendant) in the relevant circumstances, nor does it have the effect of discharging the defendant's liability in a civil context. The need for a clarifying section along these lines is highlighted by the draft Bill's forfeiture provisions (ss 273 – 283). These provisions relieve a person from "any liability… for the alleged contravention" where the person has forfeited a thing in accordance with a forfeiture notice (s 278). Including a clarifying section as suggested would prevent any uncertainty as to whether a person's forfeiture

[74] Current Act, section 273.
[75] Regulatory Powers (Standard Provisions) Act 2014 (Cth), s49.
[76] Regulatory Powers (Standard Provisions) Act 2014 (Cth), ss 52(2) and 40.
[77] *Biosecurity Act 2015* (Cth), s 484(2)(a).

of a thing also has the effect of relieving that person from being pursued and found liable in a civil context.

- The transitional provisions[78] specify that the amended Part 5.5 does not apply to an offence committed, or allegedly committed, before the commencement of the new Act. We consider that an exception to this should be inserted with respect to Division 4 of Part 5.5, regarding the powers of inspectors. Given that inspectors' appointing instruments are being transitioned to reflect powers under the amended Part 5.5 (see point below), it follows that inspectors investigating any offence, whether committed before or after the commencement of the new Act, should be able to rely on the new suite of powers in Division 4 of amended Part 5.5.

- It is not clear how appointing instruments for inspectors made under section 267 of the Act will operate in the context of the proposed new regime. The transitional provisions[79] provide that an appointing instrument made under section 267(1)(a) of the current Act will have effect as if it had been made under section 284(1)(a) of the draft Bill and that a reference in an appointing instrument to a provision of Part 5.5 (current Act) has effect as if it was a reference to the "corresponding provision" of Part 5.5 (as amended) or the *Regulatory Powers Act 2014*. Given that inspector powers will be altered under the new Act (with new powers added and certain powers removed), it is not entirely clear what will constitute a "corresponding provision" as between the current Part 5.5 and the amended Part 5.5. We would like clarification regarding the scope of powers held by inspectors appointed under the Act as transitioned into the new regime.

3.8. Information gathering powers

As stated in our 2017 submission, we are concerned with the broad scope of the power under subsections 284S(1)(a)(ii) and 284S(1)(a)(iii), which currently extends to any information which is relevant to the operation of the Act or equipment rules relating to interference. This provision would capture a wide range of business records held by any entity operating this space, and a large proportion would be irrelevant to the ACMA's functions under the draft Bill.

Our preferred position is that the information gathering powers are only triggered where there is *substantial* interference (as it is now defined under the draft Bill) to radiocommunications. As currently drafted, the information gathering powers can apply in respect of any interference with radiocommunications. We believe this goes too far, as most radiocommunications transmissions must contend with some level of interference, and this "noise floor" should not be the ACMA's concern.

We propose an amendment to subsections 284S(1)(a)(ii) and 284S(1)(a)(iii) as follows:

(ii) the information or document is relevant to the operation of this Act or the equipment rules, so far as this Act relates, or the equipment rules relate, to substantial interference with radiocommunications; and

(iii) the information or document would be reasonably likely to assist in the ACMA in connection with managing, limiting or preventing substantial interference with radiocommunications; or

[78] Draft Bill, p 172, Item 41 of Schedule 6, Part 4, Division 1.
[79] Draft Bill, p 172 – 173; Item 42 of Schedule 6, Part 4, Division 1.

We also suggest that the scope of the power be extended in subsections 284S(b) and 284S(c) to include radiocommunications receivers. There is a presumption that it is always a transmitter which is the cause of interference, when it is possible that the receiver may be suffering from poor design or degraded performance. As such, we recommend that the ACMA's information gathering powers be extended to cover receivers to enable comprehensive investigations to be conducted.

Appendix 1: Answer to questions in the consultation

This appendix contains answers to the six questions raised in the consultation paper.

Question 1: Annual Work Program

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?

We believe it is unnecessary to enshrine the ACMA's annual work program in legislation. We are of the view that the added complexity arising from making the work program a legislative requirement will not provide significant benefits to spectrum licensees in terms of transparency and certainty, compared to the current, administrative FYSO process. However, should the government decide to proceed with enshrining the ACMA's annual work program in legislation, we have some recommendations related to how and with whom the ACMA should consult, which we outline in section 3.3.2.

Question 2: Legislative mechanisms to provide transparency, clarity and rights

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?

The spectrum re-allocation declaration process of Part 3.6 of the current Act continues to be of value to us as an incumbent licensee that often holds existing licences (for example, point-to-point apparatus licences) at the time of re-allocating spectrum. We anticipate the transparency and clarity available through the various legislative mechanisms would also be valuable to other incumbent licensees, for example, wireless ISPs (WISPs), as the mechanisms set out clearly the rights such as the duration of the re-allocation period.

We note in the amended section 153(J) the ACMA can "… [vary] *a spectrum re-allocation declaration if the ACMA considers that there are exceptional circumstances that warrant the variation*." We have some concern regarding what such exceptional circumstances may be that would warrant the ACMA varying a re-allocation declaration. The explanatory notes for section 153(J) do not provide examples, but simply state that in recognition of the impost to industry if a re-allocation declaration were to be varied, the ACMA would have to be satisfied that the circumstances were exceptional.

We propose the explanatory notes should be amended to provide some examples of the types of exceptional circumstances that would warrant a re-allocation declaration to be varied, and we propose that if the circumstances allow, there should be a requirement for the ACMA to conduct a short duration consultation with affected parties to they are engaged in the process for varying a re-allocation declaration.

Question 3: Permits and bans

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?

We are concerned with the revised Part 4.1 of the Act, which allows the ACMA to issue permits to persons such as correctional facilities or law enforcement agencies, permitting the use of otherwise banned devices capable of disrupting communications with mobile telephone devices including mobile jammers (in prisons) or drone guns. There is always a risk of misuse associated with jamming devices, whether purposeful or accidental. This risk will increase if jamming devices proliferate within Australia and their usage increases. The ACMA's 2018–19 *Communications Report* notes that in the most recently measured period over 75% of emergency calls were made from mobile phones. This emphasises the need for protection of mobile communications from interference.

Technical details of the jamming devices are required by stakeholders to understand the potential impact to users of adjacent bands and the possibility that the devices might also technically be capable of accidentally jamming bands used for public mobile telecommunications services (PMTS).

We propose that where the ACMA intends to issue a permit allowing a person to operate a banned device capable of operating on frequencies that are the subject of a spectrum licence (anywhere in Australia), prior to issuing the permit the ACMA should be required to consult with those licensees. For example, if a permit were planned to be issued to a law enforcement agency for a mobile jammer or drone jammer that is capable of operating in bands allocated to mobile telephony, the ACMA should be required to consult with the spectrum licensee(s) for those band(s).

Alternatively, if such detail is considered too sensitive to share with mobile carriers, appropriate oversight could be achieved by the ACMA using the accredited person scheme to certify the counter-drone equipment being used by the police would not interfere with PMTS services in adjacent frequencies; as we proposed in our submission to the ACMA's June 2020 consultation on Exemptions and Prohibitions.

Question 4: Enforcement and compliance powers

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?

We are broadly supportive of the provisions outlined in Schedule 6 of the draft Bill. The graduated enforcement mechanisms will enable the ACMA to apply a proportionate enforcement action to contravening conduct depending on the contravention and circumstances. The variety of different enforcement tools will also equip the ACMA to be more flexible and outcomes-focussed in the way it ensures compliance. We do not consider that the draft Bill needs to include additional regulatory tools. However, in section 3.7 we have suggested that the scope of inspectors' power under sections 284G and 284H in relation to the adjusting of transmitters in emergencies could be expanded to permit the adjustment of receivers as well, or the relevant sections could be amended to refer to "radiocommunications devices" more broadly. Otherwise, our submissions regarding Schedule 6 have focussed on the need for the drafting to clarify a small number of issues.

Question 5: Transitional matters

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?

We have not identified any additional matters to be considered.

Question 6: Other matters and considerations

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?

We suggest the following additional amendments to the Act should be included in the draft Bill:

Q6.1 Stamp duty on trades of spectrum licences

We have explained in numerous submissions to the ACMA and the Australian government over the past decade that the continued imposition of stamp duty by certain state and territory jurisdictions is a disincentive to spectrum trading, at odds with the ongoing objective of enabling a more active and effective secondary marketplace. This is especially the case in respect of national spectrum licences where there is doubt as to the appropriate methodology for application of stamp duty to only certain geographical portions of the licence, in cases where a licence straddles the borders of a State or Territory.

We note that the 2017 joint AMTA / Communications Alliance submission on the *Radiocommunications Bill 2017* and Spectrum Reform covered this concern in more detail, but in summary, we have continuing concerns about the application of stamp duty to trades of spectrum licences. While trades of spectrum licences are no longer subject to stamp duty in the majority of States and Territories, they can still incur this impost in Queensland, Western Australia and the Northern Territory, at rates of 5.15% or more.

Spectrum trades are important for achieving defragmentation of bands, by enabling wider swathes of contiguous spectrum to be used by licensees to progress their technology to 5G services. The efficiency benefits of defragmentation accrue predominantly to users of mobile services, through availability of greater capacity and speed. It is therefore particularly inappropriate for states and territories to apply duty to trades that enable these service improvements which in turn benefit their own consumers and businesses.

In addition to the impact on efficient allocation of spectrum, the application of State and Territory stamp duties to spectrum trades is, and has always been, inappropriate as telecommunications is a Commonwealth jurisdiction. We appreciate that in the past, deference by the federal government to the role of COAG complicated the regulatory reform process on this issue, however we hope that any engagement required with the National Federation Reform Council hereon will be more straightforward.

The abolition of the remaining State and Territory stamp duties on trading in spectrum licences can be accomplished by Commonwealth legislation, and we strongly urge that this be done in the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020*. We recommend the following drafting of a new section in the draft Bill:

> "*No stamp duty or other tax is payable under a law of a State or a Territory in respect of, or in connection with, any licence, authorisation, permission, accreditation or certificate that is required under this Act in order to operate radiocommunications devices.*"

Further details outlining the background to the concerns and the States and Territories where stamp duty is collected, and justification for the use of a legislative solution are contained in the 2017 AMTA / Communications Alliance submission, which can be found in AMTA's submission to the 2017 Exposure Draft Bill consultation.[80]

Q6.2 Modernisation of section 48 of the Act: presumption of possession for purpose of operation

We note and support the proposed amendment to section 47 of the Act to provide for a civil penalty for unlawful possession of radiocommunications devices, as set out in Schedule 6 Part 1 Item 11 of the draft Bill. We further note and support the drafting of the presumption of possession for the purpose of operating equipment, in new sections 178(2) – (4).

However, additional to these amendments we suggest the opportunity should be taken to modernise and align section 48 of the Act, which similarly deals with the presumption of possession.

Alignment of section 48 with the presumption of possession drafting in the new equipment rules provisions, would help to simplify the list of indicia in subsections 48(1)(a) to (f), some of which are becoming anachronistic, for example the reference in subsection (e) to "dials" with its analogue connotation. We suggest eliminating subsections 48(1)(a) to (f) and adopt the wording in subsections 178(2) and 178(4) of the draft Bill. Similarly, we suggest the wording in subsection 48(2) of the Act should be amended to mirror the wording in subsection 178(2) of the draft Bill in regard to submission of evidence rebutting the presumption.

If this suggestion for alignment of the presumption of possession for the purpose of operation is adopted, we further recommend making it clear that acceptable evidence rebutting the presumption which may be presented by a licensee would include a statutory declaration by the licensee that it has ceased using the relevant radiocommunications transmitter and has no intention of using it in the future. Licensees wish to be able to permanently cease use of obsolete equipment and surrender the relevant apparatus licence(s) – which has the benefit of freeing the spectrum up for other uses – with the certainty that they need not physically disable and remove the equipment from the site prior to licence surrender. Confirmation in the Act that a statutory declaration is sufficient evidence of cessation of possession "for the purpose of operation" would provide greater certainty to licensees that they can decommission and remove equipment using an orderly staged program, and need not unnecessarily retain apparatus licences for particular sites where the equipment is no longer used but which their equipment removal program has not yet reached. As a practical matter we understand this is the approach taken by the ACMA, however the current section 47 and section 48 might be capable of a different interpretation, i.e. that even if the licensee has no intention of using the relevant equipment, it should nonetheless retain the licence as a safeguard in order to ensure compliance with section 47 of the Act until the equipment is physically decommissioned and scrapped. We would disagree with the latter interpretation but we think the draft Bill provides an opportunity to settle the matter clearly. We would be glad to further explain the practical need for and benefit of this proposed clarification in section 48 the Act.

[80] AMTA submission to the 2017 Exposure Draft Bill consultation, 28 July 2017, https://www.communications.gov.au/sites/default/files/submissions/2017-07-28-brown-lisa-amta-ca-submission-radcomms-bill-2017-sent-28-july-2017.pdf

Q6.3 Flexibility for spectrum licensees to manage their own spectrum licence holdings

To promote efficiency and agility, we are seeking an increased ability to authorise and manage the use of devices within a licensee's own spectrum licence holdings. We think the draft Bill overlooks the opportunity to provide for private delegation of licensing rights, which could be based on the New Zealand management rights approach. We recommend that a minimum set of management rights be ascribed to most licences issued under the new regime. Giving licence holders the ability to formally sub-licence other parties to use part or all of the spectrum contained within a licence will increase flexibility and encourage the development of a more workable secondary trading market. We recognise that implementation of sub-licensing may take some time, particularly to ensure sub-licences are recorded appropriately on the Register of Radiocommunications Licences, however this would be an opportunity to make use of the expanded accredited person arrangements and need not place additional burden on the resources of the ACMA.

Q6.4 References to the "website" of the ACMA and of market participants

We note that the draft Bill will introduce several references to the ACMA "website" in circumstances where the ACMA is making known important information.[81] In other cases, the "website" of a market participant is referenced, for example mandatory disclosures by a supplier for the purpose of the equipment rules.[82]

We support the updating of the Act to refer to "websites", however we suggest that additionally:

- the term "website" should be defined to include material posted using other online platforms that are now commonly used by the public, such as social media platforms, messaging apps, etc.; and furthermore there should be scope for the ACMA's online communication of important content to evolve over future years, and not be rigidly tied to the term "website".

- in respect of references to any mandatory content which must be provided on the "website" of a market participant, that this include accessibility obligations[83] to ensure that all members of the public have the opportunity to access the information.

Q6.5 Connecting Ministerial Policy Statements with the conciliation process

We note that aside from amendments to enable the use of accreditation arrangements to appoint conciliators, the process for settlement of interference disputes in Part 4.3 of the Act is being retained. To the best of our knowledge this 'conciliation' process has been used rarely, if at all. Nonetheless, we recognise that it could still become a useful mechanism under the Act for interference management as the Australian spectrum environment becomes more congested.

Given the potential for the conciliation process to become a more productive part of the Act in the future, we suggest it is important to add a provision which would require conciliators to have regard to a MPS which has relevance for matters being considered in a conciliation process. Further, compliance with guidance contained in a MPS should be regarded as persuasive in respect of the proposed grounds of settlement and the report prepared by a conciliator under section 208 of the Act.

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[81] See, for example, Draft Bills28E(4), regarding the publication of the ACMA's work program.

[82] Draft Bill s159(9).

[83] Currently Web Content Accessibility Guidelines (WCAG) 2.0, available at https://www.w3.org/TR/WCAG20/

Appendix 2: Typographical and other minor errors in the draft Bill

No.	Document	Item and Schedule	Pinpoint	Description
1	Exposure Draft	Item 33, Schedule 3—Licences etc.	Subsection 60(8)	This item introduces a reference to a subsection 60(7B) but no such subsection exists.
2	Exposure Draft	Item 40, Schedule 3—Licences etc.	Section 65A	Each statement that the ACMA may include in a licence is defined except for class renewal application period statements. A new subsection 65A(13) should be inserted, stating "A statement mentioned in subsection (12) is to be known as a **renewal application period statement**."
3	Exposure Draft	Item 65, Schedule 3—Licences etc.	Section 103A	Each statement that the ACMA may include in a licence is defined except for class renewal application period statements. A new subsection 103A(13) should be inserted, stating "A statement mentioned in subsection (12) is to be known as a **renewal application period statement**."
4	Exposure Draft	Item 24, Schedule 4—Equipment etc.	Subsection 176(2)	The heading for subsection 176(2) currently states "*Offer tof supply*" and should be amended to state "*Offer to supply*".
5	Exposure Draft	Item 44(2)(f), Schedule 4—Equipment etc.	N/A	The reference to subsection 9(1) of the *Radiocommunications Act 1992* in note 1 to subsection 1.5(1) of the *Radiocommunications Labelling (Electromagnetic Compatibility) Notice 2017* is currently preceded by a reference to section 5 of the same Act (ie "device (section 5 and subsection 9(1) of the Act)"). Therefore, it is not necessary for the reference to subsection 9(1) to be taken to be a reference to section 5. Instead, the words "and subsection 9(1)" should be omitted from the instrument.
6	Exposure Draft	Item 31, Schedule 6—Compliance and enforcement	Subsection 284D(2)(a)	The reference to subsection 284(1) is incorrect and should instead be a reference to subsection 248B(1).
7	Exposure Draft	Item 31, Schedule 6—Compliance and enforcement	Section 284J	Section 284J provides inspectors with the power to require a person to produce a licence, authorisation, certificate or permit if the inspector suspects that a person has done an act in respect of which they are required to hold an apparatus licence, spectrum licence etc. It is an offence not to comply: subsections 284J(7), (8). The explanatory notes at page 74 state that "*A person does not contravene the requirement if they have a reasonable excuse*", however this defence is not reflected in the draft Bill. The draft Bill should be amended to include this defence.

No.	Document	Item and Schedule	Pinpoint	Description
8	Exposure Draft	Item 107, Schedule 9—Datacasting	N/A	This item is drafted ambiguously and could be interpreted as stating that section 155 of the *Competition and Consumer Act 2010* will continue to apply to matters that occur after commencement. However, the intention is that section 155 will only apply to matters that arose before commencement (see explanatory notes, page 90). The drafting could be amended to clarify this intention, for example: *Section 155 of the Competition and Consumer Act 2010 has effect, after the commencement of this item, as if:* *(a) a matter that constituted, or may have constituted, a contravention of Division 4A of Part 3.3 of the Radiocommunications Act 1992 prior to its repeal were a matter referred to in subsection (2) of that section; and* *(b) a reference in that section to a designated communications matter included a reference to the performance of a function, or the exercise of a power, conferred on the Australian Competition and Consumer Commission by or under Division 4A of Part 3.3 of the Radiocommunications Act 1992 prior to its repeal.*
9	Explanatory notes	Introduction to Schedule 3—Licences etc.	Page 16, paragraph 5	The second sentence of paragraph 5 ends "however, ACMA will need to consult with the ACCC and express the allocation limit it is applying to an allocation process. ." The word "the" and the full stop are both duplicated. These duplicates should be removed.
10	Explanatory notes	Item 44, Schedule 3—Licences etc.	Pages 24-6 (referring to sections 77AA, 77B, 77C and 77D)	The section titled 'Further information' should be section 77B, not section 77AA. This error has flow on effects for the following sections (Section 77B—Renewal of spectrum licences should be Section 77C—Renewal of spectrum licences etc.).
11	Explanatory notes	Item 29, Schedule 5—Accreditation etc.	Page 60	The reference to paragraph 22(1)(c) is incorrect and should instead be a reference to paragraph 26(1)(c).