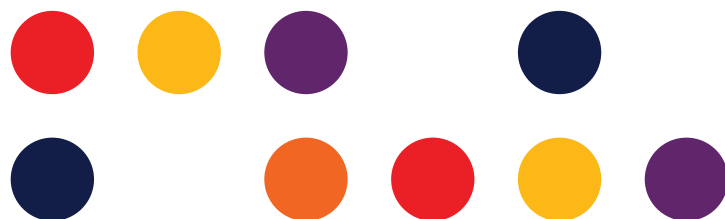


# 2020 Radiocommunications reform – consultation paper

Department of Infrastructure, Transport, Regional Development and Communications

July 2020

Public submission



Public

## Summary

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TPG Telecom Ltd (**TPG**) welcomes the opportunity to provide these comments in response to the 2020 Radiocommunications Reform consultation paper (**Consultation Paper**) and the Exposure Draft of the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (Reform Package or Package)*.

The Reform Package is a welcome step in the modernisation of the *Radiocommunications Act 1992 (Act)*. Most of the elements of the Package are well constructed. However, guidance from the ACMA on how it intends to exercise its new powers and responsibilities is required.

While we are largely supportive of the Reform Package, we do have some concerns:

- Firstly, it is inappropriate that the ACMA should be able to unilaterally vary renewal statements for spectrum licences. This unfairly devalues spectrum licences *ex post* acquisition.
- Secondly, given the impact of the changes would largely depend on the ACMA's discretion, the ACMA should be required to publish appropriately detailed guidelines on how it intends to exercise its new powers, particularly with regards to:
  - o administration of the licence renewal process
  - o varying renewal statements
  - o issuing/cancelling of long-dated apparatus licences
  - o commencing the reallocation of encumbered spectrum, and
  - o making direct allocations.
- Thirdly, we highly recommend that the Government conduct public consultations prior to the finalisation of any Ministerial Policy Statements (**MPS**).

## The Reform Package

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A major objective of the Reform Package is to add flexibility and to remove unnecessary friction in the Act. This goal is largely achieved by implementing structural changes to achieve the following:

- Removing Ministerial powers in respect of day-to-day administration of the Act. For example, the Minister no longer initiates the formal process of reallocating encumbered spectrum under s60 of the Act. Instead the Minister's involvement is indirect, via issuing ex ante MPSs which the ACMA must have regard to in the exercise of its powers including with respect to the reallocation of spectrum (see proposed s28B and s28C amendments). The Minister also has general powers to direct the ACMA under the *Australian Communications and Media Authority Act 2005* (**ACMA Act**).
- Concentrating decision-making power with the ACMA. For example, the ACMA would, post-reform, formally commence a reallocation of encumbered spectrum and set allocation limits (see proposed s60 amendments).
- Blurring the lines between spectrum licences (**SL**) and apparatus licences (**AL**). For example, both SLs and ALs can be issued for up to 20 years, and both can contain renewal rights (see, proposed s65 and s103 amendments).

Collectively, these will result in a wholesale change in the way the Act is administered and a significant expansion of the ACMA's powers.

## Apparatus and spectrum licences should not have the same value

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While we are largely supportive of the Reform Package, we are particularly concerned about the lack of differentiating features between SLs and ALs. This changes assumptions about the utility (and value) of SLs and ALs, and it will inevitably have an impact on major spectrum allocation processes.

The ongoing 26GHz auction process is an illustrative example. Putting aside firstly that the ALs only enable Fixed Wireless Access (**FWA**) use, a key distinguishing feature between 26GHz SLs and 26/28GHz ALs (i.e. 'Area Wide Licences') is that the SL will authorise access for 15 years and the AL will only authorise access for a maximum of 5 years. There is also no explicit or implicit renewal path for ALs. This means that if a party intends to

deploy long-term network equipment using 26/28GHz spectrum, that party should value SLs significantly higher than ALs.

Under the Reform Package, both SLs and ALs in the 26/28GHz bands may authorise access for up to 20 years (at the discretion of the ACMA). Furthermore, renewal statements may be included in both SLs and ALs and can be varied by the ACMA *ex post* the issue of licences. This means that they can both enable long-term deployment of network equipment, largely on the same conditions, subject to the discretion of the ACMA.

It is unclear how the ACMA would price ALs in these circumstances. If the ALs were priced too low, there may be pressure on the utility of SLs given the similar rights provided to ALs. If the ALs were priced too high, then ALs may be under-utilised and therefore undermining the flexibility of the new regime post Reform.

Furthermore, it would be reasonable to assume that at any price point there may be increased demand for ALs in the 26/28GHz bands, due to their ability to provide similar utility compared to SLs. In which case, some spectrum intended to be covered by ALs should be allocated by a market-based mechanism instead of over the counter. Some spectrum intended to be covered by ALs should be covered by SLs instead.

Administrative questions also arise. For example, what will the ACMA do in cases where it grants a 20-year AL to the first-in-time licensee but determines a short period later there is sufficient market demand to justify a market-based allocation process? Would the ACMA cancel the recently issued AL in order to conduct a market-based allocation? Or would the ACMA ignore the market demand and let the first-in-time licensee enjoy access for 20 years?

The effect of blurring the lines between SLs and ALs would likely incentivise 'land grab' behavior where licensees would rush to acquire ALs in cases where the key value is optionality instead of a need for capacity simply because the first mover advantage is very high if a piece of spectrum is particularly desirable.

As a key differentiator between SLs and ALs, we oppose the amendment enabling the ACMA to vary renewal statements without agreement of the licensee in respect of spectrum licences, and we have reservations about whether the ACMA could issue ALs for up to 20 years.

We are also concerned about the lack of guidance on how the ACMA would approach decisions that would differentiate between SLs and ALs. Therefore, we would welcome guidelines on how the ACMA would balance competing considerations in its decision making on issues such as:

- when would the ACMA issue ALs for longer than 5-year terms, and
- in what circumstances would the ACMA resume ALs where it is clear that a long-dated AL should not have been granted.

## Increased flexibility has a cost

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We support the key objective of the Reform Package to increase flexibility and to remove unnecessary friction from the regime. However, we note that this is not a costless exercise. The tradeoff is an increased risk that a poor decision is made and not corrected.

Under the current regime, friction is embedded into the design of the Act. For example, while the ACMA can make recommendations to the Minister, it is the Minister who must initiate a reallocation process under s60 of the Act. A key benefit of friction in this context is that the decision-making process has built in a 'speed limiter' which provides a margin of error. Other examples include the minimum 2-year reallocation period, and that the ACMA can only set allocation limits upon direction of the Minister.

Some friction in this context is appropriate because reallocation decisions could have significant ramifications for spectrum users (and consumers), therefore, such decisions should not be allowed to be made too quickly, without the necessary checks to ensure such decision is the best option in the circumstances.

In contrast, the Reform Package systematically removes these speed limits and the ACMA can hypothetically hurry through a decision to reallocate encumbered spectrum that may cause significant disruption to users and may not promote the long-term public interest. In order to challenge this decision, a stakeholder can only invoke the internal review mechanism and then take the matter to the AAT (see Part 5.6 of the Act). This process is unlikely to fit for purpose in all cases given its time intensiveness and rigidity.

The Reform Package does not provide a mechanism for swift review of questionable decisions. There is less need for such a mechanism in the current Act because there is friction built into processes (e.g. division of decision-making power between the Minister and the ACMA), however this may not be the case under an amended Act.

We understand that one mechanism introduced in the Package which may alleviate some concerns is the MPSs, which would guide ACMA decision-making. We also understand that the Minister retains general powers to direct the ACMA under the ACMA Act. This may be a suitable check in the very rare circumstances where an ACMA decision has potentially gone awry.

To improve the Reform Package, we suggest that the Minister consults publicly prior to the MPSs being finalised.

We also recommend that the ACMA issue appropriately detailed guidelines on how it intends to:

- administer the licence renewal process, including in what circumstances a renewal statement would be varied (or removed)

- exercise its powers under the proposed s60 amendments, particularly ensuring stakeholders understand what would be different relative to the current process; and
- how it intends to make direct allocations.

## Conclusion

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We are largely supportive of the Reform Package. However, we believe parts of it could be improved. We recommend that:

- The ACMA should not be able to unilaterally vary renewal statements for spectrum licences.
- The ACMA should be required to publish appropriately detailed guidelines on how it intends to exercise its new powers, particularly with regards to:
  - o administration of the licence renewal process
  - o varying renewal statements
  - o issuing/cancelling of long-dated apparatus licences
  - o commencing the reallocation of encumbered spectrum, and
  - o making direct allocations.
- The Government should commit to conducting public consultations prior to the finalisation of any Ministerial Policy Statements.