



**Australian
Communications
and Media Authority**

ACMA Submission

Senate Environment and Communications Legislation Committee Inquiry into Radiocommunications Bills 2020

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Executive summary

The Australian Communications and Media Authority (ACMA) welcomes the opportunity to contribute to the Environment and Communications Legislation Committee inquiry into the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020, the Radiocommunications (Receiver Licence Tax) Amendment Bill 2020, and the Radiocommunications (Transmitter Licence Tax) Amendment Bill 2020.

Spectrum is a critical input to Australian communications and media industries as more and more services and activities are relying on wireless and satellite connectivity. As Australia's spectrum manager, the ACMA is responsible for ensuring radiofrequency spectrum is managed in a way that maximises the overall public benefit.

With over 170,000 radiocommunications licences on issue, representing a diverse range of spectrum uses, demand for new spectrum and changes to existing arrangements for licensees continues to evolve quickly. There is also ongoing innovation in radiocommunications technologies that are placing pressure on existing regulatory arrangements.

The ACMA supports the proposed amendments that are intended to add flexibility to the spectrum management legislative framework, remove unnecessary prescription and legislative barriers between different types of licence, and provide a more graduated set of compliance and enforcement powers.

The Bills provide the ACMA with new regulatory discretion in several key areas.

Introduction

The ACMA is established under the *Australian Communications and Media Authority Act 2005 (ACMA Act)* and plans and manages Australia's radiofrequency spectrum in accordance with the Radiocommunications Act 1992 (the Act).

Spectrum is a critical input to Australian communications and media industries as more and more services and activities are relying on wireless and satellite connectivity. As Australia's spectrum manager, the ACMA is responsible for ensuring radiofrequency spectrum is managed in a way that maximises the overall public benefit derived from its use.

Should the Bills be enacted, the ACMA will be primarily responsible for developing and implementing the new spectrum management arrangements.

With over 170,000 radiocommunications licences on issue, representing a diverse range of spectrum uses, demand for new spectrum and changes to existing arrangements for licensees continues to evolve quickly. There is also ongoing innovation in radiocommunications technologies that are placing pressure on existing regulatory arrangements. For these reasons, the ACMA supports the Radiocommunications Bill package as providing improvements to the spectrum management regulatory framework. This will promote spectrum being allocated in a timely way and support new and evolving wireless and satellite communications technologies.

The ACMA supports the proposed amendments that are intended to:

- > add flexibility to the licensing framework which will allowing speedier release of spectrum so that changes in spectrum demand can be met more quickly
- > provide more certainty about key licence conditions that underpin investment certainty, such as licence duration and licence renewal terms
- > provide a more graduated set of compliance and enforcement powers to enable proportionate responses by the ACMA in addressing spectrum interference
- > enable the ACMA to develop equipment rules that will regulate devices across modern supply chains, including recognition of online supply arrangements
- > allow for more external involvement in spectrum management by allowing the ACMA to accredit persons and organisations to make decisions under spectrum management arrangements.

In addition to the legislative reforms, the ACMA has also been actively pursuing spectrum management improvements, including those that can be achieved without legislative change. This has included enhanced transparency measures to provide six and twelve- month progress reporting against our annual work program priorities. In addition, the ACMA has progressed licensing reforms to provide greater flexibility to apparatus licensees through the area-wide apparatus licence which is a scaleable licence that can support multiple technology uses. The ACMA is also implementing the recommendations of the government's Spectrum Pricing Review and conducted recent consultations about its pricing reform priorities.

Our submission focuses on the ACMA's role in implementing new functions and powers to be provided by the proposed arrangements.

ACMA role and functions under the Bills

Transparency and accountability

The Bill proposes to replace the object of the Act. Under the Bill, the object of the Act would be to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that is efficient, facilitates both commercial and non-commercial uses and supports the communications policy objectives of the government. A ministerial policy statement (MPS) will allow the Minister to provide guidance on direction and policy. The Minister will retain direction powers, including under the ACMA Act. The ACMA must also provide an outline in its annual report about the operation of the MPS provision.

The Bill proposes that the ACMA must determine an annual work program each financial year. These provisions give legislative recognition to current ACMA practice, in place for the past 11 years, of publishing a [Five-Year Spectrum Outlook](#), including an annual work program. We currently provide six-monthly updates to stakeholders as a transparency measure, reporting on progress in meeting the annual work program project priorities. As a non-corporate Commonwealth entity, the ACMA is already required under the *Public Governance, Performance and Accountability Act 2013* to report annually on its performance.

The changed objects and annual work program provisions do not significantly change the ACMA's current operational practices. However, the number and scope of MPSs is yet to be determined and the ACMA will need to reflect consideration of each MPS in its relevant decision-making processes.

Licensing

The Bill proposes to retain the current three forms of licensing under the Act—spectrum, apparatus and class licensing—but introduces additional flexibilities to tailor appropriate licensing and allocation processes, and to assist bringing spectrum to market more quickly.

The Bill proposes to provide the ACMA with additional decision-making power to:

- > decide to make 'unencumbered spectrum' available for spectrum licensing (by making a marketing plan)
- > decide that 'spectrum is to be re-allocated by issuing spectrum licences, apparatus licences, or both'
- > set allocation limits in relation to the allocation of spectrum or apparatus licences (after consultation with the Australian Competition and Consumer Commission).

These decision-making powers reside with the Minister under the current Act.

The Bill proposes to confer power on the ACMA to make decisions about licence duration including deciding whether to issue:

- > a spectrum licence for a period of up to 20 years (currently up to 15 years) and
- > an apparatus licence for a period of up to 20 years (currently up to five years).

Key considerations in the setting of licence terms will include a range of factors such as spectrum use cases, band replanning status, where licence tenure can be managed to enable common licence expiry dates, requirements for shared or exclusive spectrum use within a band, the degree of international harmonisation and likelihood that spectrum may move to an alternative use, as well as the budgetary and investment requirements of individual spectrum users.

A new feature of the Bill is renewal statements. These statements are intended to provide certainty for a licensee, from the moment that an initial licence is issued, about whether a further licence will be issued and on the terms of the licence renewal. The Bill confers powers on the ACMA to decide whether a licence should be not renewable, renewed at the ACMA's discretion, or renewed at the ACMA's discretion in specified circumstances. The Bill also confers power on the ACMA to make legislative instruments applicable to renewal statements for particular classes of spectrum licences and apparatus licences and to determine the renewal application period, and renewal decision making period for spectrum licences. If the renewal period for a licence is 10 years or longer, the ACMA must be satisfied that it is in the public interest to renew the licence for that period.

Examples of where a licence would not be renewable include where the ACMA has undertaken a planning process and new or alternative uses have been identified for a spectrum band. Where no change in spectrum use is contemplated, renewal at the ACMA's discretion could operate on terms similar to the ACMA's current practice of default renewal for apparatus licences. In the ACMA's view, renewal in specified circumstances could include matters such as whether the ACMA has provided a notice to the licence that the band is to be administratively replanned or where particular licence conditions such as use conditions are satisfied.

The ACMA expects to consult further with licensees about licence terms and renewal statements once the Bill is passed.

The three licence types established in the Act provide important flexibility to enable the ACMA to tailor spectrum use rights to maximise technical, economic and dynamic efficiency for different technology uses and over time. In establishing licensing and allocation arrangements, the ACMA will continue its practice of extensive industry consultation to inform the design of planning, licensing and allocation arrangements for the deployment of new technologies in Australia and to meet the needs of spectrum users.

The Bill proposes to introduce a consistent approach to the imposition of allocation limits for price-based allocation of spectrum licences and apparatus licences. In addition, it enables consideration of enduring limits for administratively-issued apparatus licences, including the capacity to have regard to aggregate spectrum holdings when deciding whether or not to issue or renew an apparatus licence outside of section 106 of the Radiocommunications Act 1992 price-based allocation of apparatus licences processes. In the ACMA's view, the amended allocation limits powers will enable competition or other public interest considerations to be addressed across all key allocation mechanisms. The advice of the ACCC will assist the ACMA to consider the circumstances in which such limits should be applied.

Compliance and enforcement

The Bill amendments propose to decriminalise some prohibitions under the Act, and to introduce a civil penalties regime, along with the power to give remedial directions. The Bill also proposes to make the infringement penalties and enforceable undertaking regimes under the Act consistent with the *Regulatory Powers (Standard Provisions) Act 2014*. In the ACMA's view the addition of civil penalties provides a more proportionate set of powers to address contraventions of the Act. The shift to a civil penalties regime better aligns the evidentiary burden for a number of offences with potential penalties reflecting the seriousness of the offence. This reflects that in a majority of cases, spectrum interference is inadvertent and caused by faulty equipment or non-harmonised equipment. The Bill provides greater flexibility in the options available to the ACMA in ensuring that non-compliant behaviours can be appropriately dealt with and that interference is reduced at the most appropriate point, by either industry or the ACMA.

The ACMA would continue to have the discretion to undertake enforcement actions in relation to compliance with provisions of the Act. The ACMA and its inspectors would

be able to exercise monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*, in certain circumstances. These amendments will both update the ACMA's compliance and enforcement tools and provide greater capacity for enforcement actions to be proportionate.

Equipment rules and exemptions

Currently, the Act allows the ACMA to make standards applying to devices, and labelling notices that apply to manufacturers and importers of devices for purposes including managing electromagnetic compatibility, managing interference and the protection of health and safety. The Bill proposes to allow the ACMA to make equipment rules which could broaden the range of parties in the equipment supply chain on whom compliance obligations may be imposed, specifically recognising online supply. The Bill also proposes to give the ACMA new powers to issue temporary bans and recall notices for equipment.

The Bill proposes to give the ACMA new exemption powers, principally intended to facilitate development, testing and manufacturing of equipment (including equipment subject to an interim or permanent ban). These exemption provisions could allow the ACMA to facilitate domestic manufacturing of radiocommunications equipment, and research and development opportunities, for example, in the defence industry and technology sectors.

Accreditation

The Bill proposes the expansion of the range of functions where the ACMA can encourage industry involvement. The ACMA would be provided with discretion to accredit persons for the performance of a broader range of functions. The current Accredited Persons scheme assists in the assignment of spectrum frequencies. The ACMA would be required to develop 'Accreditation Rules' to specify procedures for accrediting persons or withdrawing the accreditation of a person and setting out the kinds of accreditation that may be given.

Information gathering

The Bill proposes to add new information gathering powers. These provisions would assist the ACMA in both planning for spectrum use and in conducting investigations. The ACMA's experience is that information gathering powers are particularly important where this a wide and diverse variety of parties involved in the market.

Tax Acts

With the alignment of the maximum duration of spectrum licences and apparatus licences, different timing for the applicable charges and taxes has the potential to introduce inefficiencies in the spectrum management framework by distorting demand between licence types. The Bills propose amendments to the apparatus licence tax legislation to enable the ACMA to determine whether the licensees of particular classes of apparatus licence pay the licence tax for the licence period entirely upfront or by annual instalment. This will provide the ACMA with the option of providing payment arrangements for apparatus licences, similar to those available for spectrum licences.

Implementation

In implementing the new spectrum management arrangements, the ACMA will consider the interaction of each relevant legislative provision to ensure that it develops regulatory arrangements that support spectrum users maximising the utility they receive from their use of spectrum.

If Parliament passes the Bills, the ACMA intends to provide guidance about its approach to exercising its regulatory powers under these new arrangements. The ACMA will, in developing this guidance, consult with industry and other interested stakeholders.

The ACMA will also need to consult on and develop new or replaced legislative instruments, as well as other instruments that will be necessary to ensure that existing regulatory arrangements can continue to operate.