



Radiocommunications Amendment Bill 2010

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Radiocommunications Amendment Bill 2010

Date introduced: 30 September 2010

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: The day after Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Radiocommunications Act 1992* (the Act) to

- enable the Australian Communications and Media Authority (ACMA) to issue both ‘class licences’ and ‘spectrum licences’ on the same radiofrequency spectrum band
- give ACMA more flexibility for parts of the statutory timeframe within which the reissue of expiring spectrum licences is done and
- restrict Parliamentary disallowance under the *Legislative Instruments Act 2003* for certain existing Ministerial determinations.

Background

Coexistence of ‘class licences’ and ‘spectrum licences’ on the same radiofrequency spectrum band

According to the ACMA website, ‘class licences’ are

open, standing authorities that allow anyone to operate particular radiocommunications equipment provided that the operation and the device is in keeping with the conditions of the licence. Class licences do not have to be applied for and no licence fees are payable. Equipment that is currently subject to class licensing in Australia includes citizen band radios, mobile phone handsets, cordless telephones and a range of other low power devices, such as garage door openers.¹

In the case of ‘spectrum licences’, these are

1. See http://www.acma.gov.au/WEB/STANDARD/pc=PC_1612

a form of licensing introduced in Australia by the *Radiocommunications Act 1992*. Spectrum licences are a tradeable, technology neutral (that is, the licence is not related to any particular technology, system or service) spectrum access right for a fixed non renewable term. Instead of authorising the use of a specific device, spectrum licences authorise the use of spectrum space and give licensees the freedom to deploy any device from any site within their spectrum space, provided that the device is compatible with the core conditions of the licence and the technical framework for the bands.²

In the April 2009, the Department of Broadband, Communications and the Digital Economy (DBCDE) released a discussion paper [Public Interest Criteria for Reissue of Spectrum Licences](#). The paper suggested:

there may be an argument for applying co-existence conditions to all re-issued spectrum licences. Co-existence plans for future technologies such as Ultra-Wideband and cognitive radio.

Subsequently, on March 3 2010, Senator Conroy announced that the Government would amend the Act to enable coexistence, but stated that:

Implementation of coexistence will be subject to the development by the ACMA of regulatory provisions to ensure that interference concerns are fully considered. This will be done in close consultation with industry.³

The Explanatory Memorandum comments on this issue:

New and developing technologies have the potential to greatly increase the technical and productive efficiency of spectrum use. These new technologies may be authorised by the ACMA under class licences. Such technological developments will potentially allow devices to share spectrum by utilising a variety of technically sophisticated methods to avoid harmful interference with other services and will be subject to the ACMA being satisfied that:

- unacceptable levels of interference will not occur to the operation of radiocommunications devices operated, or likely to be operated, under spectrum licences; and
- it is in the public interest to issue class licences, in spectrum designated or reallocated for spectrum licences, to authorise devices with the new sharing technology.

It is expected that, over time, there will be widespread adoption of the new technologies in an extensive range of devices developed overseas, including consumer goods that will become readily available in Australia.⁴

2. See http://www.acma.gov.au/WEB/STANDARD/pc=PC_300172

3. Senator Conroy, *address to AMTA Member Networking Forum*, 3 March 2010, viewed 16 November 2010, <http://www.minister.dbcde.gov.au/media/speeches/2010/002>

4. Explanatory Memorandum to the Radiocommunications Amendment Bill 2010, pp. 2-3.

Committee consideration

The Bill has been referred to the Senate Committee on Environment and Communications for inquiry and report by 17 November 2010. Details of the inquiry are at http://www.aph.gov.au/senate/committee/ec_ctte/radiocommunications/index.htm. The closing date for submissions was 22 October 2010 and no submissions had been received by the Committee as of 15 November 2010.⁵

Policy position of non-government parties/independents

In the second reading debate in the House of Representatives, Mr Turnbull stated:

The coalition is in broad agreement with the industry and the government that the majority of the amendments proposed in this bill will lead to greater efficiencies in the issuing of spectrum licences; however, key experts in the industry are concerned with aspects of the amendments, particularly around the coexistence of class and spectrum licences.⁶

There does not seem to have been any obvious comment by any of the Greens or independents.

Position of major interest groups

A large number of organisations made submissions in response to the *Public Interest Criteria for Reissue of Spectrum Licences* discussion paper. The publicly available submissions are available at: http://www.archive.dbcde.gov.au/2010/january/public_interest_criteria_for_re-issue_of_spectrum_licences/public_submissions. Not surprisingly, there are a wide range of views reflected in these submissions. However, on the issue of co-existence, the submissions appear to generally reflect a negative view. For example, the submission by Optus, states:

Optus does not consider that the concept of 'co existence' should be allowed or even considered.⁷

The submission of Unwired had a slightly different perspective:

Co-existence is technically already allowed it is just the authorisation regime doesn't promote secondary use. There should be no changes to licences to accommodate co-existence, Coexistence should be managed by spectrum licence holders.⁸

5. Personal communication, Committee Secretariat staff, November 15 2010.

6. M Turnbull Radiocommunications Amendment Bill 2010, House of Representatives, *Debates*, 28 October 2010, p. 2012.

7. http://www.archive.dbcde.gov.au/data/assets/pdf_file/0003/118371/OPTUS_submission_29_Jun_09.pdf, paragraph 1.12.

8. http://www.archive.dbcde.gov.au/data/assets/pdf_file/0007/118375/Unwired_submission_22_Jun_09.pdf, unnumbered page, Appendix A – response to questions.

Financial implications

The Explanatory Memorandum states:

The amendments have been assessed as having no direct financial impact on the Australian Government or affected parties.⁹

Key provisions

Sections 78 and 79 relate to the process of re-issuing spectrum licences that are due to expire. Currently, these sections only allow ACMA to invite expressions of interest for the re-issue and prepare a draft of a re-issued licence once the current licence is within 2 years of expiry. **Items 1-2** would remove reference to the 2 year period in these sections, and leave ACMA with the flexibility to undertake the above tasks when it considers appropriate.

Section 60 sets out the standard procedure for allocating spectrum licences, which may involve allocation by auction, by tender, or allocation for a pre-determined price or a negotiated price. However, the Minister may issue a determination under section 82 that that this process not be followed, where the Minister considers it is in the 'public interest' to reissue the spectrum licence to the entity that current holds it. As part of this section 82 power, the Minister may also specify a 'class of services' for which it would be in the 'public interest' to reissue a spectrum licence to the entity that current holds it. Note that the term 'public interest', which is used several times in the Act, is not defined anywhere in it.

Such determinations are currently disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. Section 46A of the Acts Interpretation Act has been overtaken by section 42 of the *Legislative Instruments Act 2003* which provides for disallowance. **Item 4** repeals subsection 82(4) of the Act and replaces it with a new version to the effect that the above determinations will be legislative instruments, but will not be disallowable under section 42 of the *Legislative Instruments Act 2003*. The Explanatory Memorandum comments:

This instrument is being exempted from the disallowance regime because any delay stemming from a potential disallowance of such a ministerial determination would severely impact upon the successful conclusion of licence reissue discussions between the Government and the relevant incumbent licensees. There would also be adverse follow-on impacts on commercial and investment certainty for incumbent licensees if reissue discussions are delayed.

In May 2010, the Commonwealth Attorney-General provided policy approval for this amendment.¹⁰

9. Op cit. p. 4.

10. Ibid., p. 18.

Existing section 134 allows ACMA to vary class licences. However, before doing so, ACMA must give notice of its intention and provide interested persons with the opportunity to comment. **Item 5**, which deals with the coexistence issue discussed earlier in this Digest, inserts **new subsection 136(1A)**. It requires that ACMA must be satisfied of certain matters before making a variation that would result in coexistence. These matters are that the variation of the class licence:

- would not result in unacceptable levels of interference to the operation of radiocommunications devices operated, or likely to be operated, under relevant spectrum licences and
- would be in the public interest.

Item 7 is a related amendment. Existing section 138 prevents ACMA from issuing class licences in an area of the spectrum designated for spectrum licences under section 36. Item 7 replaces this with a new version of section 138 that would allow issuing class licences in such circumstances, but only when ACMA is satisfied of certain matters. The first two are the same as the dot points above in relation to **item 5**. In addition, ACMA must consult with all licensees of spectrum licences who may be affected by the proposed issue of the class licence.

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