

28 July 2017

Spectrum Reform
Department of Communications and the Arts

By email: spectrumreform@communications.gov.au

Dear Sir/Madam

Thank you for the opportunity to comment on the draft Radiocommunications Bill 2017 (the Bill) and associated consultation papers. ASTRA wishes to confine its comments to the draft Bill and the Broadcasting Spectrum consultation paper.

Executive Summary

First, in relation to the Broadcasting Spectrum consultation paper, ASTRA questions whether the proposed framework for broadcasting spectrum is consistent with the findings of the Spectrum Review and the stated policy aims behind the new Radiocommunications Act. In particular, in relation to Proposal 9 (Secondary trading and sharing of free-to-air spectrum) of the Broadcasting Spectrum Consultation Paper ASTRA's firm view is that spectrum no longer required to transmit the current Freeview platform should be returned to the public and put to its highest value use.

Second, ASTRA proposes that the new licensing arrangements should cater for licensing similar to the current Space (Communication with Space Objects) Class Licence which protects subscription television DTH installations operated by our members, such as Foxtel.

Last, ASTRA supports, where appropriate, a simpler and more flexible legislative framework. However, ASTRA notes that in some areas the legislation may benefit from further detail in order to ensure that the legislative arrangements are applied in a transparent and consistent manner, with appropriate certainty for spectrum users.

About ASTRA

ASTRA is the peak industry body for subscription media in Australia. ASTRA's membership includes the major subscription TV operators, as well as more than 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

ASTRA's members deliver a diverse range of quality news, information, sport and entertainment programs to a broad cross-section of Australians. Our members are the leading innovators in Australian television, using new technology and business models to lower production costs and provide consumers with content wherever, whenever and however they choose.

One in three Australian households subscribe, along with millions more who watch subscription content in public venues.

In 2015/16 ASTRA members invested \$900 million filming local content in more than 200 communities Australia wide. That investment funds the broadcast each week of more than

1000 hours of first-run local content, as well as premier international content. Every year ASTRA members add \$2 billion to the economy and provides jobs for more than 8000 Australians.

ASTRA is concerned to ensure that regulation affecting the industry does not inhibit this investment, innovation, productivity and job creation.

Broadcasting Spectrum consultation paper

Recommendation 1(b) of the Spectrum Review suggested government integrate the management of broadcasting spectrum, including planning, licensing and pricing into the general spectrum management framework”.

It appears that this project will remain incomplete, with free-to-air (FTA) broadcasters continuing to enjoy protections not afforded to other spectrum users.

We question whether the proposed framework for broadcasting spectrum is consistent with the findings of the Spectrum Review and the stated policy aims behind the new Radiocommunications Act. Please refer to ASTRA’s 2016 submission to the Spectrum Review for further discussion of these issues.¹

In that submission ASTRA:

- Objected to any proposal that FTA broadcasters have certainty of access to spectrum which is not consistent with other spectrum users. This would entrench unfair competitive advantage.
- Did not accept that there is any public policy rationale to enable FTA broadcasters to sublet or trade their spectrum, whilst broadcasters maintain a special status under the framework.
- Noted the proposed treatment of broadcasting spectrum appears to be yet further steps in the long-running history of media regulation in which FTA broadcasters are shielded from competition and gifted regulatory protections, with little regard paid to the overall impact on consumers and other industry participants.
- Argued that any additional regulatory benefits proposed for FTA broadcasters should be considered in light of the overall regulatory balance (or imbalance) across the industry.

ASTRA is disappointed that none of these issues have been adequately addressed in the Broadcasting Spectrum consultation paper. The paper includes a number of regulatory ‘gifts’ for FTA broadcasters, without adequate justification or explanation of why the regulatory playing field should be further weighted in favour of just one section of industry.

Proposal 9

ASTRA wishes to comment on Proposal 9 of the Broadcasting Spectrum Consultation Paper, which would “incorporate greater flexibility into the new framework to allow for trading and sharing of spectrum” for FTA television broadcasters.

This is the third Government consultation paper in which sharing and trading/selling of spectrum used by FTA broadcasters has been proposed, yet there remains:

- No explanation of what happens to any spectrum gained from efficiencies derived from sharing spectrum.

¹ http://astra.org.au/pdf/news/FINAL_ASTRA_Sub_Spectrum_legislative_proposals_060516.pdf

- No explanation of what liberties will be afforded to FTA broadcasters to launch new services in spectrum freed up by efficiencies.
- No substantive detail on how FTA broadcasters will be permitted to deal with their spectrum.
- No proposals to ensure additional value conferred by expanded usage rights is taken into account in determining spectrum access charges.
- No adequate explanation of why FTA broadcasters should be afforded these regulatory gifts, whilst retaining special treatment in regards to spectrum access, tenure and pricing.
- No public examination of the impact on the overall regulatory balance that these new usage rights would have, nor of the competitive impact on other broadcasters (who operate with no regulatory protections).

Sharing of spectrum

Whilst not stated in the paper, sharing would presumably enable more efficient use of spectrum by FTA television broadcasters and ASTRA welcomes any reforms which will enable and encourage greater efficiency in use of spectrum, which is a scarce public asset, for this purpose only. ASTRA has long been an advocate of arrangements which would reduce the amount of public spectrum needed to transmit existing FTA television services.²

However, there is no discussion on the potential uses of spectrum released through efficiencies, and it is therefore not possible to adequately assess where the value of freed up spectrum would eventually reside, and in turn, the competitive impact of the proposal.

ASTRA has addressed this issue previously in the context of proposals relating to more efficient transmission and coding technologies.

There are two possible outcomes. Firstly, that the spectrum is returned to Government (the public), or secondly, that FTA broadcasters pocket the efficiencies and exploit them as a backdoor opportunity to expand their multichannel service offering, whilst still enjoying a legislated ban on new competition.

It is ASTRA's firm view that spectrum no longer required to transmit the current Freeview platform should be returned to the public and put to its highest value use. Facilitating greater efficiency through revised regulatory arrangements for spectrum use should not be a vehicle to gift FTA broadcasters the ability to launch new services. It would be inappropriate and contrary to good public policy for any efficiencies to result in windfall gains to existing broadcasters. Indeed, there is no valid public policy outcome identified in the papers for such an outcome. If this is not the Government's intention, this should be made clear at the earliest opportunity.

Efficiency should lead to returns for the public and there would be a significant opportunity cost to Government and taxpayers of not pursuing these returns.

If the Government is considering sanctioning FTA platform expansion, this decision should not be undertaken in isolation, and should be part of a whole-of-industry approach to policy and deregulatory reform, which takes into account the overall regulatory balance and which includes consultation opportunities for other industry participants.

² http://astra.org.au/images/pages/ASTRA_Submission_-_Digital_Television_Regulation_Final_020415.pdf

Permitting FTA broadcasters to exploit additional spectrum capacity freed up through technological innovation would, once again, further distort the regulatory balance in favour of commercial FTA broadcasters.

This at the same time as large international digital giants, who are untouched by local regulation, are placing substantial pressures on existing multi-channel media operators. Subscription TV is in the middle of this squeeze, and further government-sanctioned FTA platform expansion (free of entry costs for spectrum), stands to further disadvantage the sector in its efforts to respond to the pressures of increasing international competition.

It would have been preferable for the Government's consultation paper to make clear its intentions regarding the ultimate goal of greater spectral efficiency. We urge the Government to provide clarity on this issue as soon as possible, with further opportunity for stakeholder consultation.

Trading spectrum

Similarly, ASTRA remains concerned regarding proposals which would enable FTA broadcasters to trade (sell) the spectrum licensed to them. Again, there is little detail in the Consultation Paper regarding the proposed framework for trading of broadcasting spectrum and it is also unclear where the value realised from trading would transfer to.

If, for example, FTA broadcasters use less spectrum to deliver the same services by 'selling' spectrum to a third party who then provides transmission services, this would be a positive outcome. We note that the new broadcasting tax before Parliament will base pricing on use of spectrum, which will act as a further incentive toward efficient use.

However, we seek clarification on whether this, or similar scenarios, are what the Government intends through the introduction of the ability to trade (sell) spectrum. We also seek clarification on what arrangements will be put in place to govern such transactions to ensure the objective is to derive efficiencies, and not to deliver windfall gains.

ASTRA would be concerned if an unfettered right to trade broadcasting spectrum was granted to FTA licensees in a way that allowed them to monetise what is a public asset they gain access to at discounted rates and without contestability.

Under the proposed new spectrum tax for broadcasting spectrum currently before the Parliament, FTA broadcasters will continue to evade market-based pricing of spectrum. We also note with strong concern that there is nothing in the Commercial Broadcasting (Tax) Bill 2017 to enable the value derived from trading spectrum to be taken into account in FTA spectrum pricing.

It would be poor policy for broadcasters to be exempt from the market in terms of their costs (they will be paying an administratively derived fee under the new legislation), but then be able to participate in the market for revenue opportunities. At the very least, ASTRA submits that if trading is to be permitted, the value derived by FTA broadcasters should be taken into account in the calculation of broadcasting spectrum pricing.

We also note that an unfettered trading right could allow FTA broadcasters to pick and choose to whom spectrum may be sold. This would simply allow them to control who their new competitors might be. We do not believe that this approach will deliver the highest value use for excess spectrum.

Space (Communication with Space Objects) Class Licence 2015

Our members operate direct to home (DTH) satellite installations, for the provision of their services, which are authorized under the current Space (Communication with Space Objects) Class Licence (**Space Class Licence**). It is unclear in the reform package as to how these current arrangements and services would continue to be authorised and protected under the Bill and the proposed 'single licencing system'. For example, whilst the majority of existing class licences operate on a 'no protection/no interference' basis, this is not the case for the Space Class Licence which affords interference protection to our members. It is unclear as to whether any provision for interference protection under the Spectrum Authorisation framework is afforded to this type of authorisation, and ASTRA would welcome confirmation that the framework can accommodate this.

ASTRA notes the advice which it received from the Department on this issue that the Bill allows the ACMA to provide protection for receivers through different measures and that the ACMA could also use planning provisions to provide protection for receivers or the receiver user could take out a separate licence. However whilst this advice provides some comfort that protection for receivers could be achieved under the Bill, ASTRA is concerned with how the options noted would be practically implemented. We therefore propose that the new authorisation arrangements for satellite services should include interference protection similar to the current Space Class Licence.

Draft Radiocommunications Bill 2017

The legislative proposals in the draft Bill appear to align with the findings of the Spectrum Review, which ASTRA has supported. ASTRA refers to its previous submissions on the Spectrum Review.³

At this stage of drafting, ASTRA wishes to comment on select areas of the Bill which we think require further clarification. We understand that the policy objective of replacing the existing legislative arrangements with a simpler and more flexible framework and are cognisant of the benefits such a framework provides.

However, ASTRA notes that in some areas the legislation may benefit from further detail in order to ensure that the arrangements are applied in a transparent and consistent manner, with appropriate certainty for spectrum users. Below are three instances, including the provisions relating to compensation payable for the resumption of licences, where we consider the Bill would benefit from further parameters including around timing and use.

Part 3 – ACMA's work program

ASTRA believes that Part 3 of the Bill would benefit from further clarity regarding the timing of the release of work programs and possibly the substantive matters which ought to be addressed in a work program.

ASTRA previously noted in its 2017 response to the ACMA's Five Year Spectrum Outlook (FYSO) that it is highly supportive of ACMA's work plans in which the ACMA specifies clearly identified milestone tasks and timings for priority spectrum management activities to be completed.⁴ ASTRA noted that it is highly supportive of the inclusion of these plans as a regular feature of future FYSOs and noted that the earlier ASTRA is aware of the ACMA's

³ http://astra.org.au/pdf/news/FINAL_ASTRA_Sub_Spectrum_legislative_proposals_060516.pdf
http://astra.org.au/images/pages/ASTRA_submission_-_Spectrum_Review_-_Directions_Paper_-_2_December_2014.pdf

⁴ http://astra.org.au/pdf/news/FINAL_ASTRA_sub_ACMA_FYSO_310117.pdf

activities, the more useful such a plan will be in terms of understanding the impact of ACMA's activities and priorities.

However, we do believe that it would be helpful to include more guidance in this provision as to when such plans can be expected. We believe this can be done without impinging too far on the flexible nature of the Bill, and will help ensure the usefulness of these plans to industry.

For example, it may be helpful to have a 90 day window within which the ACMA must publish a work program, prior to the commencement of a new financial year, and a 30 day window prior to this in which consultation takes place. This would provide further detail beyond the current vague requirement of "At least once each financial year..." and ensure that work programs are valuable and consistently published and used.

Part 4, Section 25 – Compliance with radiofrequency plan

The right conferred in s.25(e) of the Bill for ACMA to issue a licence "that is inconsistent with a radiofrequency plan" if it is "otherwise in the public interest" requires further safeguarding in the legislation to ensure that its use is limited and reviewable.

ASTRA's concerns are primarily focused on the fact that there is no definition or qualification provided in relation to the test of "in the public interest". This section or part should include a definition of "public interest" that enables industry participants to more easily assess the likelihood that a licence could be issued in these circumstances. It is difficult at this stage to understand what matters may qualify given that the section already includes criteria including events of national, international or regional significance, and purposes relating to the defence, security or international relations of Australia.

A further option is to include further wording in s.25(e) e.g. "in the *overwhelming* public interest" to ensure that the provision is not unreasonably relied upon.

ASTRA also considers that the section should include a review mechanism whereby licences which are granted under s.25(e) are reviewable for a specified period. Such an amendment ensures that the provision cannot be taken advantage of and licences cannot be granted over spectrum that is inconsistent with the radiofrequency plan without a great and overwhelming public need.

Part 6, Division 14 - Resumption of licences

The provisions regarding the resumption of licences lack detail regarding the circumstances in which licensees may have their licences resumed. This is of significant concern.

In particular, proposed sections 86-89 do not provide any detail:

1. as to the minimum rate at which compensation is payable, ASTRA believes that at a bare minimum market rates should be referenced as the base minimum rate at which compensation must be paid (before considering interest payable); and
2. regarding fundamental procedural rights including the minimum notice periods which must be provided prior to the resumption of a licence, or the grounds upon which a licence may be resumed.

Part 7 - Spectrum authorisations

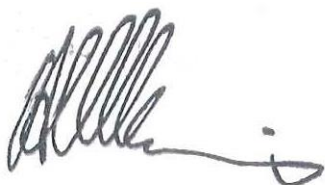
ASTRA considers that there are certain sections in the current *Radiocommunications Act 1992* (the **Current Act**) in relation to class licences, for which parallel provisions should also be considered for inclusion in the Bill e.g. sections on variations and revocations of class licences.

Significantly, the Current Act has provisions relating to requests for advice on the operation of radiocommunications devices (s.140). These provisions are important for our members as they are required when advice is needed and sought from the ACMA as to the compliant operation of consumer products i.e. set top boxes and broadband modems. ASTRA therefore believes that the Government should further consider including similar provisions in the new spectrum regime.

Once again, ASTRA understands and supports the Government in developing a flexible spectrum regime. However we believe that there are some areas of the Bill in which minimum standards must be legislated to ensure certainty and consistency for industry and incumbent users, and this includes the provisions regarding the resumption of licences.

If you have any queries or would like to discuss the issues raised in this submission, please contact Holly Brimble, Policy and Regulatory Manager (holly.brimble@astra.org.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Maiden', with a stylized flourish at the end.

Andrew Maiden
CEO