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Dr Heather Smith PSM
Secretary
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Dear Dr Smith

Heather

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make this submission in response to the *Exposure Draft - Radiocommunications Bill 2017* (the Bill).

This submission focuses on the need to strengthen the Bill to include a competition assessment in allocations of spectrum that will, or are likely to, impact downstream retail markets. It also seeks reconsideration of the proposal to limit the application of section 50 of the *Competition and Consumer Act 2010* (the CCA) where licence issue limits have been imposed in a spectrum band.

We were pleased that the Department of Communications and the Arts (the Department) recognised the importance of drawing on the expertise of the ACCC in considering implications of competition on spectrum management in its recent submission to the ACCC's draft decision on the declaration of a domestic mobile roaming service. We consider that further changes to the Bill are essential to ensure that this continues.

Promotion of competition should be a key consideration in spectrum management

The telecommunications market in Australia is at a critical point. Changes to market structure and the rollout of new technologies are placing, and will continue to place, demands on spectrum and its use.

Spectrum is an essential input into wireless markets and services. Without access to adequate spectrum, industry participants cannot offer competitive services. In this environment, ensuring that the impact of spectrum allocation on 'downstream' retail markets is given equal weight to 'upstream' wholesale spectrum markets is vitally important.

The ACCC is disappointed that the exposure draft of the Radiocommunications Bill 2017 (the Bill) does not recognise the importance of spectrum allocations to competition in downstream markets. We consider that there are two essential elements that must be included in the Bill to promote competition in spectrum management.

- (i) First, the ACMA must consult the ACCC about spectrum allocations that are likely to impact downstream markets.

- (ii) Secondly, we consider that section 50 of the CCA should continue to apply in all circumstances where spectrum is allocated, including when a licence issue limit has been imposed.

While we consider that the spectrum management framework would be strengthened if it expressly included the object of promoting competition, we consider that the two elements above are essential if the long-term benefits from spectrum allocation and use in the market are to be realised.

Requirement to consult – competition assessment

The Bill requires that the ACMA promote the long-term public interest derived from the use of the spectrum. The ACMA currently considers that the public interest will be maximised (under the current *Radiocommunications Act*) or promoted (under the Bill) where spectrum is allocated to the use or uses that maximise the value derived from the spectrum by licensees, consumers and the wider community. The ACMA applies a total welfare standard when allocating spectrum, which in essence, measures the sum of its effects on industry, consumers, government and the broader community.

The ACCC, on the other hand, is primarily concerned that markets which rely on spectrum as an essential input are as competitive as possible. While the ACMA's focus is on changing spectrum uses and the value of that spectrum to the market, the ACCC examines the process of competition in the markets to which spectrum will be input. Typically, the ACCC will consider whether an allocation of spectrum is likely to benefit a particular operator(s) or whether allocation will in fact lead to more competitive outcomes through the services offered in the market, the prices at which those services will be offered and the market dynamics. Among other things, it examines market boundaries, substitutable spectrum bands, existing spectrum holdings and the likelihood of new entrants to the market in order to assess the competitive dynamics in the market.

In this context, we consider it is essential that the ACMA have a positive obligation to consult the ACCC when it is proposing to allocate spectrum where there are competing demands and interests for that spectrum. Although the ACMA and the ACCC work closely together on issues of common interest, providing the ACMA with a broad discretion as to when it seeks the ACCC's view on spectrum allocations runs a risk of inefficient outcomes occurring if a competition assessment is not considered either appropriate or practicable.

The ACCC is starting to see complex issues arising in the spectrum markets that have implications for efficiency and competition in communications markets. Australia has a mature mobiles market with three operators who have all been in the market for more than twenty years. TPG has recently announced its intention to build a network covering 80 per cent of the population within three years.

The explosion in demand for data-intensive mobile communications is likely to lead to spectrum becoming increasingly contested. Demand for spectrum suitable for high-value communications services is increasing to a point where supply constraints are being felt, particularly for new entrants. Considering the implications of competition when spectrum is allocated will help to address these concerns.

Spectrum acquisition and the substantial lessening of competition test

For similar reasons, we consider that the application of section 50 to spectrum acquisitions should continue to apply in all circumstances. The threshold competition test set out in section 50 is to examine whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in the relevant market(s) (the SLC test). Among other things, this requires the ACCC to assess dynamic issues in the market, which cannot always be assessed at the time allocation limits are imposed.

As we have previously noted, conditions within the market and individual market participants can change considerably between the setting of licence issue limits in a spectrum allocation process (such as an auction) and the acquisition of spectrum. It is also possible that a bidder could engage in anti-competitive conduct during an auction that licence limits could not prevent. Permitting the ACCC to intervene if an acquisition would lessen competition is an important safeguard for the market, particularly given licences are generally issued for periods in excess of 15 years.

The SLC test is well understood by the market. We do not agree with the proposition that removing the application of section 50 to a particular licence issue if limits have been set will improve certainty in relation to an allocation process. On the contrary, we consider that this will remove an important competitive safeguard that seeks to protect all market participants and consumers from a spectrum acquisition that may have the effect, or is likely to have the effect, of substantially lessening competition in the market(s) in which that spectrum is an input.

In a market that is changing rapidly, and in which spectrum scarcity could result in adverse outcomes for end users, we strongly argue that section 50 must continue to have broad application to create a disincentive for anti-competitive conduct and a means for the ACCC to intervene if necessary.

Other measures to promote competition

While the drafting of the Bill is principles based, we consider that consideration could be given to including additional measures or 'tools' to promote competitive outcomes in spectrum management. For example, internationally, regulators are able to use tools designed to target problems in downstream and related markets, such as the ability to set allocation and licence conditions, such as spectrum 'caps', 'set-asides' or network coverage commitments. Such measures can be useful to promote technical efficiency, to provide some certainty to new entrants or smaller operators that they can make efficient investment and compete with incumbents, and to ensure that spectrum is used to benefit all parts of the community, including regional areas.

While such measures need to be used with caution, the ACCC considers that they potentially offer the opportunity to address concerns, particularly in parts of the country that may be underserved by mobile or wireless services.

Spectrum sharing and secondary trading markets

The intent of the legislation to drive more market-based activity in the form of spectrum sharing and secondary trading has the potential to improve allocative and dynamic efficiency. We support these objectives. Secondary trading could be beneficial, for example, if it enabled smaller wireless operators to gain access to the spectrum they need on the secondary market rather than compete with larger players, with more resources, in competitive allocations for large geographic licences.

However, we note that secondary trading and sharing of spectrum is relatively rare. This may be because insufficient incentives exist for industry to engage in trading activity due to uncertainty of licence tenure. We note that licences issued for fixed terms or with clear renewal terms are generally considered to be a way of encouraging secondary trading.

However, if licence terms were extended and/or renewal rights enshrined in original licence terms without a commensurate increase in secondary trading, the ACCC would potentially be concerned. Where these or other measures are being considered to encourage market activity, we would strongly recommend that the ACMA consult with the ACCC.

Conclusion

While we are encouraged by the proposed intent of the new spectrum management framework to simplify the licensing and allocation processes, to establish a more flexible and efficient regime, and to create the conditions to promote secondary trading, we remain of the view that the implications on competition of spectrum management decisions need to be expressly included in the Bill. In an environment of increasing spectrum scarcity and competing demands, a competition assessment is essential to deliver outcomes that benefit industry and consumers.

If you have any questions regarding this submission, please contact Clare O'Reilly, General Manager, Mobiles, Transmission and Consumer Branch on (02) 9230 3854.

Yours sincerely



Rod Sims
Chairman