

Consultation on Spectrum Reform – draft legislation and pricing

Submission by Commercial Radio Australia

Spectrum Reform
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601
By email: spectrumreform@communications.gov.au

31 July 2017

Contents

Introduction	1
Executive summary	2
Key issues	5
1. Structural concerns.....	5
2. Legislative objectives	12
3. Spectrum pricing.....	15
4. Digital radio changes	22
5. Continued rights of access.....	24
6. Spectrum sharing.....	28
Proposed way forward.....	30
Attachment A – Responses to questions in Broadcasting Consultation Paper	
Attachment B – Confidential attachment	

Introduction

Commercial Radio Australia (**CRA**) welcomes the opportunity to comment on the spectrum reform legislative package published by the Department of Communications and the Arts (**Department**) for industry consultation (**Draft Legislative Package**) and the Department's spectrum pricing consultation (together the **Spectrum Review**).

The Spectrum Review is the biggest reform to spectrum management since the 1990s. The reforms are ambitious and complex. They will have a profound impact on the future of the commercial broadcasting sector, including the long-term viability of commercial radio broadcasters.

It is critically important that the Government gets these reforms right so they benefit the whole sector. To this end, we want to ensure that the interests of the commercial radio sector are protected over the long term and during any transitional period.

Our objectives include:

- **regulatory certainty**, with our members having the same or better levels of regulatory certainty during the transition and afterwards;
- **price predictability** in relation to the price of spectrum and ongoing rights of access; and
- **commercial flexibility** to encourage more innovative business models in the future (without compulsion or unnecessary disruption).

Our view is that the Department's "clean slate" approach to the Draft Legislative Package is not yet fit for purpose. Substantial changes are needed to give us comfort that our objectives will be met.

While some of our concerns can be addressed through further refinement to the Bill, it will not be reasonably possible for us to support the Draft Legislative Package until we see a complete legislative and regulatory package. This includes:

- broadcasting related changes to the Bill (and any consequential changes to the Broadcasting Services Act 1992 (**BSA**));
- transitional measures, including draft legislation; and
- draft versions of certain Ministerial policy statements, along with drafts of the licence issue scheme and individual licence terms that will apply to commercial radio broadcasters.

This submission sets out our key concerns and potential options for addressing known issues in relation to the Draft Legislative Package and the Department's spectrum pricing consultation.

We look forward to engaging further with the Department on this important reform.

We have also set out brief responses to the questions raised by the Department in its Broadcasting Consultation Paper in **Attachment A**.

Executive summary

Structural changes are far-reaching and create too much discretion for ACMA

- The Radiocommunications Bill (the **Bill**) seeks to shift a considerable amount of power and responsibility for spectrum management away from the Minister to ACMA. It gives ACMA some very broad powers in relation to the planning, implementation and day-to-day management of spectrum.
- ACMA's powers under the Bill are too broad and unconstrained. These need to be addressed through amendments to the Bill itself, or through clear direction in Ministerial policy statements to create a more predictable framework in which ACMA can exercise its new powers.

Too many aspects of the regulatory regime remain open or undefined, creating significant ambiguity

- ACMA's broad powers are also attended by the removal of key legislative protections from the Radiocommunication Act (the **Act**) in favour of regulatory documents that have not been developed (or will not be developed until the new framework is put into place).
- The current package is too undeveloped for us to be confident that it can deliver regulatory certainty for commercial radio broadcasters.
- Greater granularity is needed in the Bill itself, or through the upfront development of key regulatory positions as part of a transitional package.

The Bill does not currently guarantee access to spectrum

- While the Broadcasting Paper states that the current statutory guarantee of access to spectrum in section 102(1) of the Act will be retained for incumbent commercial broadcasters, the precise formulation of this critical element remains undefined and has not yet been implemented in the Bill through an equivalent section.
- This is a key missing element of the current package and reflects a critical missing piece for our members.

Ministerial policy statements are not fit for purpose and won't deliver certainty

- Ministerial policy statements appear to be largely discretionary and are "non-binding" on ACMA, providing little, if any constraint, on ACMA's broader powers under the Bill. This defeats the purpose of having Ministerial oversight over the sector, or the fact that the Minister is to guide ACMA's decision making.
- The purpose, status and scope of Ministerial policy statements needs to be significantly bolstered for these to be fit for purpose. This includes a clear requirement on the Minister to issue statements on select topics, a clear legal obligation on ACMA to comply with these statements and to explain its compliance, as well as strong industry consultation obligations.

Licence terms are not yet known, creating further ambiguity

- The consultation paper accompanying the Bill only provides a high-level articulation of what a broadcaster's licence terms will comprise.
- Our members cannot measure the impact on certainty, including from a licence valuation perspective, until these terms are produced and consulted upon. This is particularly the case for ACMA's approach to designated statements and regulatory undertakings, which offer limited predictability or certainty based on the proposed legislative provisions.
- There needs to be a clear articulation of what terms will be included in a licence issue scheme and individual licences well before the Draft Legislative Package is finalised. Ideally, this will need to be done in parallel with the release of any transitional package.

Legislative objectives are overly focused on economic efficiency and fail to appreciate broader public benefits delivered through spectrum

- When the Department's streamlining of legislative objectives is combined with its proposed approach to spectrum pricing, there is a strong risk that the commercial broadcasting business models will be unduly disadvantaged compared to user pay business models in scenarios where competition for spectrum emerges in the future.
- Legislative objectives, which will guide the Minister and ACMA's approach, need to take better account of the intangible social-value benefits that are provided by the commercial broadcasting sector and advertising based business models.

Future approaches to spectrum pricing are heavily biased against commercial radio broadcasters and fail to recognise intangible benefits

- An opportunity cost approach to the valuation of broadcast spectrum after the expiry of the current 5-year package will artificially increase the costs of access to spectrum if there is competition for access to spectrum in the future, placing additional pressure on the sector when it is already under significant structural stress.
- Critically, the use of an opportunity cost approach would fail to take account of the intangible, social-value related benefits that flow from the use of that spectrum to provide commercial radio broadcasting services, along with the significant regulatory costs that are borne by commercial broadcasters under the BSA. Such an approach also has limited utility in circumstances where there is no alternative demand for spectrum, as is currently the case with radio broadcast spectrum.
- Spectrum fees for commercial radio broadcasters should be calculated based on an administrative cost recovery based approach, consistent with overseas approaches.
- To the extent a further package in relation to spectrum pricing is developed for the commercial broadcasting sector in lieu of the above, then the Government should seek to improve on the current approach by addressing the key issues we have identified with the per transmitter price structure.

Digital radio related changes need to preserve current levels of certainty

- The current Act establishes a prescriptive regime for digital radio services, including clear access entitlements for incumbent commercial broadcasters and a predictable framework for the issuance of DRMT licences and the terms and conditions of access to multiplex capacity. This regime has operated reasonably successfully to date and the key elements of that framework remain relevant today.
- If the Department is to proceed with its “clean slate” approach, then the regulatory protections that exist in the Act currently will need to carry over into new licences and will need to be “locked down” for the duration of those licences.
- Critically, there should be no substantive changes to the existing framework under the new regime. This includes the standard access entitlements and excess capacity access entitlements that are held by incumbent commercial broadcasters today.

Spectrum sharing must not be mandatory for broadcasters and more work is needed for voluntary secondary market trading to become commercially viable in long term

- We support the principle that sharing should not be mandatory for commercial radio broadcasters.
- The Department’s proposal to encouraging spectrum sharing and the development of a secondary trading market is poorly conceived and piecemeal. If a spectrum sharing scheme were introduced, it would need to be accompanied by broader changes to the regulatory environment. This includes the possibility of longer licence terms and a range of other measures.
- Spectrum sharing is not a priority for the commercial radio sector (due to the shared nature of digital radio multiplexing technology and the limited alternative use value of AM and FM spectrum). However, if optional spectrum sharing were introduced, there would need to be a stronger mechanism for addressing BSA related issues that may make a spectrum sharing regime unworkable.

Variation provisions give wide scope to ACMA to vary key aspects of licences

- The Bill gives ACMA exceedingly wide powers to vary or revoke key aspects of the licensing construct that we expect should be “locked down”, such as designated statements and regulatory undertakings. These provisions are not fit-for-purpose and show zero regard for licence certainty. They go materially beyond current variation rights in the Act and contradict the Government’s stated intentions as described in the Broadcasting Paper.
- These provisions need to be redrafted from first principles, with ACMA not being permitted to vary or revoke any aspect of a licence in a way that is inconsistent with the BSA or the licensee’s associated broadcasting licence.
- Designated statements and regulatory undertakings also need to be determined upfront to provide members with certainty that critical aspects of the regulatory bargain will remain unchanged.

Key issues

1. Structural concerns

1.1 Overview

The Draft Legislative Package envisages significant structural changes to the Radiocommunications Act (the **Act**), including to how commercial radio broadcasters are to be treated under that framework.

In particular:

- the Government is proposing to move away from a broadcasting-specific regulatory scheme for spectrum management in favour of a generalised scheme that applies broadly to all spectrum users, with subsidiary documents, such as licence issue schemes and individual licences, providing the basis for differentiating between different types of spectrum users;
- the Minister will have limited involvement in spectrum matters, which will be limited to Ministerial policy statements, a Statement of Expectations issued to ACMA and directions under section 14 of the ACMA Act; and
- ACMA will be responsible for the planning, implementation and day-to-day management of spectrum, largely on a licence-by-licence basis.

This contrasts to the current framework, which is implemented through a prescriptive regulatory structure established within the Act itself and then implemented through a series of related instruments, such as the BSB bands determined by the Minister, licence area plans (**LAPs**), Digital Radio Channel Plans (**DRCPs**) and the Broadcasting Planning Manual (which includes the Technical Planning Guidelines).

While the existing regime is complex, the outcome of the current approach is that key aspects of the regulatory structure are “locked in” through legislation or otherwise, with limited regulatory discretion to change. Critically, the existing regime contains strong links to the BSA and recognises the obligations faced by commercial radio broadcasters under that Act. The enduring nature of the current regulatory framework also means that the current construct is well understood and has benefited from ongoing refinement since the early 1990s.

The Bill radically moves away from the existing approach and arguably has gone too far in the other direction. In particular:

- the Department has shifted too far in favour of a generic legislative framework, which loses critical links to the BSA and fails to recognise the role played by commercial radio broadcasters under the BSA;
- Ministerial policy statements are ambiguous in terms of legal status, scope and process, providing little, if any, constraint on ACMA’s powers; and
- the new licensing regime fails to provide licence holders with certainty and predictability, particularly in its current state of development.

Together, these represent serious structural issues that have created significant uncertainty for the commercial radio sector and which need to be addressed in the next draft of the legislative package.

This uncertainty takes the following forms:

- **temporal or transient uncertainty:** this arises from minimal guidance or certainty as to what positions the Minister or ACMA may take in the future (e.g. because key policy principles remain undefined or key drafting has not been provided). This is compounded by the fact that the new legislative framework is skeletal in nature and many of the substantive commitments will need to be defined at a later point, once the key elements of the legislative package are passed. This type of uncertainty needs to be addressed through greater granularity in the Bill itself, or through the upfront development of key regulatory positions as part of a transitional package.
- **Permanent or structural uncertainty:** this flows from circumstances where the new regulatory framework contains less protections than what exists today. This means that even once the Bill has come into force and Ministerial policy statements and licences have been issued, commercial radio broadcasting licensees will still face uncertainty.

The key areas where these types of uncertainty arise in relation to the Bill are set out in further detail below.

1.2 Guaranteed access to spectrum

The Bill does not currently include any explicit guarantee that licence holders under the BSA will have an ongoing right to spectrum. The Draft Legislative Package will not be acceptable to the commercial radio sector unless such a guarantee is enshrined directly into the Bill.

The Broadcasting Paper states that “the current statutory guarantee to access spectrum will be retained for incumbent commercial broadcasters, consistent with current arrangements”.¹ Whether such a guarantee will be directly enshrined into the Bill appears possible but somewhat open in the Department’s consultation paper.

Our strong expectation is that the Department will maintain the current statutory guarantee by explicitly enshrining it within legislation, as per the current legislative approach.

Under section 102 of the Act, ACMA is required to issue transmitter licences to holders of licences issued under Parts 4 and 6 of the BSA to access the BSBs. These apparatus licences operate to effectively guarantee access to the spectrum necessary to permit broadcasters to deliver broadcasting services. This entitlement to spectrum remains if the broadcaster holds a current BSB licence.

Section 102(1) of the Act provides that:

*Subject to subsections (2AA) and (2AB), if a broadcasting services bands licence (the **related licence**) is allocated to a person under Part 4 or 6 of the Broadcasting Services Act 1992, the ACMA must issue to the person a transmitter licence that authorises operation of one or*

¹ Department of Communications and the Arts, Broadcasting Spectrum: Consultation Paper, May 2017, page 18.

more specified radiocommunications transmitters for transmitting the broadcasting service or services concerned in accordance with the related licence.²

Further, as the Bill no longer includes a BSB concept, there does not appear to be any explicit means of linking the right of access to spectrum back to the broadcast service that the broadcaster is licensed to provide under the BSA.

For example, while the Act currently allows the Minister to designate part of the spectrum as being primarily for broadcasting purposes,³ the Bill allocates responsibility for designating spectrum for broadcasting purposes to ACMA.

We see the following problems with this approach (and the Department's explanations):

- first, the Broadcasting Paper's proposal that a Ministerial policy statement will be used to guide ACMA to have regard to the current (BSB) frequencies used by broadcasters gives insufficient comfort.⁴ As noted below, there is a serious question as to whether the Minister will be required to issue Ministerial policy statements and whether these will be binding on ACMA; and
- second, the Broadcasting Paper relies heavily on the ability of the Minister to influence or manage the designation of spectrum for broadcasting purposes by issuing a direction under section 14 of the ACMA Act. Section 14 relevantly provides that:
 - the Minister may give a direction to ACMA in relation to its "spectrum planning functions"; and
 - the Minister may also give a direction to ACMA in relation to its "broadcasting, content and datacasting functions", but only if that direction is of a general nature.

Critically, the Department's statements on section 14 fail to take account of the fact that some spectrum-related directions could fall within ACMA's broadcasting functions and so can only be of a general nature. These gaps need to be addressed in the next draft of the Bill and as part of the transitional legislative package.

CRA recommendation:

1. That section 102(1) of the Act (or substantively equivalent language) be incorporated into the next draft of the Bill.
2. That the transitional package deems the current Ministerial designation to continue to apply under the Bill as a transitional measure. This would mitigate the current uncertainty as to whether the current and long-standing BSB band designations will apply.
3. That the Bill be amended to specifically require the issuance of a Ministerial policy statement that directs ACMA to designate parts of the spectrum to be used for broadcasting purposes. This would take effect after the expiry of the relevant transitional

² Subsections 2AA and 2AB relate to commercial radio and community radio, respectively, and so are not relevant for current purposes

³ RadComms Act, s 31(1).

⁴ Department of Communications and the Arts, Broadcasting Spectrum: Consultation Paper, May 2017, pages 9-10.

measure and would also ensure that the current and long-standing BSB band designations would apply.

1.3 Ministerial Policy Statements

Even though Ministerial policy statements are positioned as an effective means of Ministerial direction and oversight, they are discretionary and ultimately non-binding. There is also no certainty as to the scope of the Minister's powers, the matters that will be covered and the process that will apply to the development and issuance of a Ministerial policy statement.

Part 2 of the Bill provides for the Minister to issue Ministerial policy statements.

Ministerial policy statements provide a mechanism for the Minister to provide ACMA with policy guidance in relation to the exercise of its spectrum management powers and functions.

However, the level of Ministerial involvement is described inconsistently across the Department's consultation documents. At one level – perhaps to reassure the industry of certainty and stability in the regime – the document emphasises the Minister's ability to issue specific directions under the ACMA Act and refers to the Ministerial policy statement as “enhancing” Ministerial guidance to the regulator. Elsewhere, the Ministerial policy statements are described as “non-binding”, leaving open the possibility that ACMA may choose not to comply with a Ministerial policy statement.

These statements raise significant concerns about the certainty that can be delivered through a Ministerial policy statement and its constraining effect on ACMA's decision making powers. It is also a departure from the recommendation of the Spectrum Review, which stated that in its recommended framework “the ACMA would be required to act consistently with policy statements.”⁵

The Information Paper suggests that Ministerial policy statements are likely to be issued in relation to, among other things:

- the ACMA's annual work program;
- the single licensing system, including license issue and conditions and end of licence term, processes and renewal rights;
- the protection arrangements for the radio quiet zone for the square kilometre array; and
- matters relating to broadcasting spectrum.

However, the Information Paper and the accompanying fact sheet on “Enhancing Ministerial guidance to the regulator” indicate that Ministerial policy statements are intended to:

- be released as needed to provide specific or general policy guidance to ACMA;
- set government expectations and priorities;
- be short or long term;
- be updated or withdrawn as needed; and

⁵ Spectrum Review, March 2015, page 22.

- be open for public consultation.

Critically, the mechanism in the Bill has been formulated to be more informal and adaptable. This is consistent with the Department's characterisation of Ministerial policy statement as "non-binding" in the Broadcasting Consultation Paper.

The Department's proposal raises several significant concerns.

First, the fact that such a statement could be discretionary and non-binding on ACMA raises significant concerns from a regulatory certainty perspective and raises the broader question as to the practical role, if any, that will be played by the Minister in guiding or constraining ACMA's decision making over spectrum matters.

The discretionary and non-binding nature of Ministerial policy statements is not appropriate or practical, providing no clear path forward for the industry. There is no certainty around key processes in the Bill, including:

- whether it will be issued by the Minister at all;
- what it can deal with;
- how long it will be valid for;
- whether it will be legally binding on ACMA;
- whether there is a mechanism for review; and
- whether it will be formally subject to public consultation.

Given the importance of Government policy to the licensing regime for spectrum, particularly in relation to broadcasting, the risks of such an informal approach are likely to be significant.

Second, we remain strongly opposed to the use of section 14 of the ACMA Act as the basis for the Minister to direct ACMA in relation to spectrum management matters. This power is limited to the issuance of general directions and will not provide the legal basis for making the type of granular directions that we would expect to be made at the Ministerial level in relation to key aspects of the regulatory construct that will govern spectrum use.

Third, the existence of a Statement of Expectations that outlines the Government's expectations of ACMA also does little to increase our levels of comfort. As a Statement of Expectations will be expressed in high level terms (e.g. as per the existing approach to the Statement of Expectations that has been issued by the Minister to NBN Co), it would not provide a sufficient basis for the Minister to direct ACMA on specific policy matters or approaches to legislative provisions to the same level of detail as Ministerial policy statements.

Fourth, Ministerial policy statements as a concept are relatively uncommon in Australia, with there being only a few examples of this mechanism.⁶ However, where this approach (or a similar approach is used), the nature and scope of these powers are significantly more robust than those proposed by the Department in the Bill. For example, where this concept is used in other Acts:

⁶ For completeness, we note there are also a number of examples of Ministerial policy statements being made pursuant to an Act, but not in the same context as proposed under the Bill. In these cases, a policy statement is made to clarify or guide a particular provision in an Act or the policy a regulator should follow to interpret a specific term in the legislation (as opposed to being a broader statement of Government policy).

- the statements are a strict binding obligation on the statutory body – this is much more stringent than a non-binding document, or an obligation to merely have regard to the statement; and
- the statements are subject to more prescriptive obligations in relation to the form and content of the statement by the Minister.

Considering the above concerns, we consider that significant changes are needed to the Ministerial policy statement provisions before they are fit for purpose.

CRA recommendation:

That the provisions of the Bill that deal with Ministerial policy statements be amended to:

1. introduce a requirement that the Minister must make a policy statement in relation to specified matters, which are pre-defined in legislation;
2. specify what must be included in a Ministerial policy statement;
3. make the issuance of certain pre-defined Ministerial policy statements by the Minister non-discretionary
4. make ACMA's compliance with a relevant Ministerial policy statement mandatory;
5. require ACMA to provide reasons and an explanation of how it has complied with a relevant Ministerial policy statement;
6. include an explicit legislative requirement to publicly consult on the development of a Ministerial policy statement (this is contemplated in the Information Paper, but not reflected in the Bill);
7. require periodic review of a Ministerial policy statement, and specify the term for which it is to apply (review is contemplated in the fact sheet on *Enhancing Ministerial Guidance to the Regulator*, but this is not reflected in the Bill); or
8. change the Department's working assumption that general directions under section 14 of the ACMA Act will be sufficient to address the more specific expectations that industry participants will have in relation to the role of the Minister.

1.4 Proposed licensing framework

While the Information Paper that accompanied the Bill includes an overview of the key elements that will comprise the new licensing construct, there is currently no clarity around how the licences of commercial radio broadcasters will be structured. When combined with the generic framework established under the Bill and the lack of a full package being made available, it is not currently possible for our members to measure the impact on certainty, including from a licence valuation perspective.

Notwithstanding that we have not yet seen a full legislative and regulatory package, there are nonetheless a number of elements of the proposed structure, which while not fully developed, raise significant concerns for our members. This primarily relates to ACMA's approach to designated

statements and regulatory undertakings, which offer limited predictability or certainty based on the proposed legislative provisions

Along with licence issue schemes that ACMA would be free to develop and implement, there will be three primary mechanisms built into licences issued under the Bill to regulate spectrum matters:

- **Conditions:** these will cover the fundamental scope of the licence, such as the part of the spectrum authorised by the licence and the relevant geographic area. Conditions will also cover the registration of equipment, the relevant payment obligations of the licensee and a condition against disqualified persons. The ACMA can also impose discretionary conditions on licences. Some of these conditions can be set by a legislative instrument setting out common conditions, much like the function of a licence condition determination currently.
- **Designated statements:** these will restrict the way the licence may be treated, including in relation to renewal and restrictions on subdivision and third-party authorisation, among other matters.
- **Regulatory undertakings:** these bind ACMA in how it issues future licences or makes spectrum authorisations in similar parts of the spectrum. In effect, ACMA is undertaking to the licensee to take specific steps (such as consultation, interference assessments or seeking approval) before issuing additional licences in the spectrum bands covered by the relevant licence.

Our primary concern with the proposed approach to designated statements is set out in section 5.1.

Similarly, in the context of regulatory undertakings, while it would be possible for this regulatory feature to give a licensed entity exclusive access to spectrum and ensure that the relevant spectrum cannot be adversely affected by interference from other spectrum users, there is currently no guarantee that regulatory undertakings within the individual licences of commercial radio broadcasters will be structured to ensure this outcome.

For example, the proposal to include ‘regulatory undertakings’ could, in principle, provide certainty to licence holders in relation to exclusive rights of access to spectrum and would commit ACMA to taking specified steps before issuing additional licences in the spectrum bands of the first licence.

These specified steps are not exhaustively set out in the Bill (or a Ministerial policy statement), but could include:

- consulting with a licensee where ACMA is considering issuing a licence or authorisation which has a “relevant connection”⁷ with the licence that is protected by the regulatory undertaking; and
- carrying out an assessment of whether the additional licence or authorisation would create excessive interference to the first licence.

However:

- the licence-by-licence implementation of regulatory undertakings will mean that a prospective licensee (including incumbent commercial broadcasters initially) will have

⁷ “Relevant connection” is defined in detail in section 54 of the Bill.

limited ability to anticipate the scope of regulatory undertakings that will apply in that licensee’s circumstances prior to the issuance of a licence. Commercial broadcasters will need to understand, in advance, how any regulatory undertakings will be structured to determine if they provide sufficient certainty around spectrum rights. Critically, these requirements should set out in a Ministerial policy statement or transitional legislative provisions, rather than being completely open for ACMA to develop.

- The default position should be that the licence of a commercial radio broadcaster should include a regulatory undertaking which entitles the licence-holder to exclusive access to the spectrum, or at least approval rights over any additional licence with a relevant connection to that spectrum, without that regulatory undertaking attracting a financial premium.
- Regulatory undertakings should be “locked down” within individual licences through the inclusion of a statement under section 58 of the Bill precluding ACMA’s ability to vary those terms. There is currently no guarantee that ACMA “lock down” regulatory undertakings in this way in relation to commercial radio broadcasters.

Without such constraints being built into the legislative structure (or a Ministerial policy statement), we consider that the scope of ACMA’s powers will be too broad and unconstrained to provide our members with sufficient comfort that they will have continued rights of access to spectrum. It will also be necessary for licence issue schemes and licence terms for the commercial radio sector to be fully developed upfront (rather than at a later point in time by ACMA) before we can support the Draft Legislative Package.

CRA recommendation:

1. That the Department include, as part of the next draft of the Bill or as part of the development of draft Ministerial policy statements, a clear set of principles that will govern ACMA’s inclusion of designated statements and regulatory undertakings within individual commercial radio broadcasting licences
2. That ACMA prepare, in conjunction with the next draft of the Bill, a draft licence issue scheme and sample individual licence terms (including conditions, designated statements and regulatory undertakings) for the commercial radio broadcasting industry. These should be a fully developed document set.
3. That any designated statements and regulatory undertaking should provide exclusive access to spectrum in the first instance, without any financial premium being payable in respect of that spectrum holding. Licensees would then separately have the option to voluntarily share that spectrum on a commercial basis once any relevant legal and technical issues are addressed.

2. Legislative objectives

The Department has proposed a significant streamlining of the legislative objectives of the Bill, with a very strong focus on economic efficiency. When the Department’s streamlining of legislative objectives is combined with its proposed approach to spectrum pricing and the fact that ACMA will be subject to very little constraints in its decision making, there is a strong risk that the commercial

broadcasting business models will be unduly disadvantaged compared to user pay business models in scenarios where there is potential competition for spectrum.

Our concern is that the legislative objectives of the Bill:

- expose spectrum users to a regulatory decision-making bias that will always favour spectrum decisions that support the highest value use, even where this may disrupt established uses for that spectrum or otherwise de-value other public benefits or externalities that flow from that spectrum use; and
- fails to provide ACMA (or the industry) with any real clarity as to how ACMA should apply the primary legislative objective, resulting in long-term uncertainty.

The legislative objectives in the Bill, which will need to guide the Minister's and ACMA's approach, need to take better account of additional factors, including the intangible, social-value benefits that are provided by the commercial radio sector and advertising based business models.

By contrast to the current Act, which has eight separate objectives that are to be given equal weighting on the text,⁸ the Bill contains only two primary objectives, with the first primary object being broken down into three secondary objectives:

The objects of this Act are:

- (a) *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:*
 - (i) *facilitates the efficient planning, allocation and use of the spectrum; and*
 - (ii) *facilitates the use of the spectrum for defence, public and community purposes; and*
 - (iii) *supports the communications policy objectives of the Commonwealth Government; and*
- (b) *to establish an efficient system for the regulation of equipment.*

The focus of the legislative objectives on economic efficiency is symptomatic of the Department's underlying belief that spectrum is best allocated to the use that produces the most surplus to society, and that the most efficient way of measuring that surplus is through price-based mechanisms. That is, spectrum is best used by whoever is willing to pay the most for it.

However, this rationale fails to consider the other public benefits that flow from spectrum use and which were, at least partially, called out in the objects section of the current Act. This includes public and private benefits that flow from advertising based business models and from commercial radio broadcasting services specifically, such as:

⁸ Although the common understanding, as recorded in the Spectrum Review, is that the first listed object ("maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum") should be given more weighting in practice. The objects section in the Bill broadly reflects this perception, by establishing it as a primary object in section 3(a).

- access and inclusion, promotion of community and educated citizens through free broadcasting services;
- the benefits that flow to the community and the local creative sector from the production and broadcasting of local content; and
- the continued social importance of free to air services in the community.

Objects are particularly important given the discretion afforded to ACMA under the Bill. As discussed below, many of ACMA's new or enhanced decision-making powers are not subject to statutory criteria or thresholds. This reflects the Government's policy intent to increase ACMA's role in relation to spectrum matters.

The new efficiency-oriented objects fail to adequately reflect the long-term public interest in the broader social and public benefits that certain uses of spectrum offer. These benefits are created not just by public or community uses, but also by the commercial free-to-air broadcasting model which facilitates free access to a range of broadcasting services.

Instead of focusing on the use which has the highest financial value, the legislative objectives need to be expanded to acknowledge that these broader social benefits exist, and in doing so, permit regulatory decisions (including spectrum pricing decisions) to take account of these additional considerations.

The omission of these types of legislative objects within the Bill increases uncertainty as to whether ACMA will, in exercising its powers and functions under the Bill in accordance with its objects, act in an equivalent way to today. The Department has not provided any clear articulation to justify such significant changes to the former objects section.

To the extent that the Department is concerned about the lack of hierarchy or weighting of various objects – which is the rationale suggested in the Information Paper – this is best addressed by a restructure of the section and establishing the former (a) as the primary objective – not by removing these objects altogether.

We also note that the Bill offers no guidance to ACMA over how to apply the “long-term public interest” test. Our strong preference is for there to be a more clearly articulated set of factors that ACMA must have regard to when it applies this test. This is consistent with approaches in other analogous pieces of legislation.

Other statutory objects provisions which refer to the “long-term public interest” or a similar objective typically unpack that concept in greater detail using defined terms and through primary and secondary objects to guide regulatory decision making.

For example, section 152AB of the Competition and Consumer Act 2010 (**CCA**) provides that the object of Part XIC (which governs the telecommunications access regime) is “*to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services*”. The CCA expands upon and clarifies this primary objective in considerable detail by defining each of the elements which form part of the “long-term interests of end-users”.

By contrast, the Bill leaves it relatively open as to what is meant by “long-term public interest”.

<p>CRA recommendation:</p>

1. That the legislative objectives in the Bill be re-cast to take greater account of other factors that are relevant to users of spectrum, including the public, social-value benefits
2. That the legislative objectives also recognise that certain users of spectrum have related obligations under the BSA that need to be considered
3. To the extent that efficiency principles are to be given priority in the legislative objectives, that this be addressed by restructuring the legislative objectives, rather than removing the other relevant objectives.
4. That the Department include additional legislative guidance within the Bill in relation to the meaning of “long-term public interest”, using approaches found in the Competition and Consumer Act and other similar legislation.

3. Spectrum pricing

The Spectrum Pricing Consultation Paper proposes that the ACMA administers value-based pricing to spectrum that is not competitively allocated (e.g. via auction). Value-based pricing reflects the value of spectrum to the best alternative use or to alternative users. This is said to mimic the signal that would come from a competitive market allocation. If applied to broadcast spectrum this could see an increase in the spectrum fees to reflect the financial value from other uses.

The Department has proposed that broadcast spectrum pricing will be subject to a separate future review that considers the implications of any recommendations in its Spectrum Pricing Consultation Paper (the review is proposed for some time in the next 5 years).

Our concerns with this approach are as follows:

- delaying any future review of pricing of broadcast spectrum undermines the certainty that has been created through the abolition of broadcast licence fees in the 2017-18 Budget and creates uncertainty in relation to the input costs for spectrum that commercial radio broadcasters will face after the end of the budget package;
- the proposal for value-based pricing for broadcast spectrum should be rejected for commercial radio broadcasting and other analogous broadcasting services as it will provide a value that does not reflect:
 - the social nature of the services that it delivers, its public character and the externality benefits it delivers; or
 - the significant and costly regulations that are imposed on commercial radio broadcasters by Government to deliver social and public policies;
- even setting aside the social nature of spectrum and the cost of regulations, value-based pricing for broadcast spectrum would not lead to more efficient outcomes due to the lack of demand for this spectrum;
- the multiplexing of spectrum used for digital radio means that broadcasters can trade excess capacity. The ability to trade excess capacity delivers a pricing signal to broadcasters to

allocate spectrum to those who (privately) value it the most – negating the need for value-based pricing of spectrum;

- value-based pricing of spectrum would be inconsistent with broadcast policy and would likely lead to social welfare harm; and
- a fee based on the costs incurred by the ACMA in administering spectrum should be the default model for commercial radio broadcast spectrum.

In addition, the pricing structure proposed by the Department for broadcast spectrum results in inefficiencies and inequities and should not be the default model for spectrum fees.

3.1 Value-based pricing for radio broadcast spectrum

The Department has put forward a proposition that an efficient allocation of spectrum requires that similar spectrum be charged at the same rate.⁹ The Government’s justification for this proposal explicitly rejects taking into account external and social value effects from spectrum use and suggests that these external/social value effects should be dealt with directly through explicit subsidy mechanisms. This is notwithstanding the fact that there is currently no corresponding proposal from the Government to utilise an explicit subsidy mechanism.

The proposals envisage a scenario in which bespoke pricing arrangements apply for some spectrum, and allow that these be done under the direction of the Government. The Consultation gives an example of the use of bespoke pricing to “incentivise the production of a public good”. The Government has indicated that bespoke pricing could result in similar spectrum being charged at different rates (and by implication taking into account external and social value factors).

The key uncertainty in the current proposals is that future spectrum fees for radio broadcast spectrum are independently set by the ACMA without considering the broader government policy considerations in the delivery of commercial radio broadcasting. This could see radio broadcast spectrum charges based on the modelled efficient cost of alternative uses without account for the social benefit of using the spectrum for commercial broadcast radio and the costly regulations imposed on commercial radio broadcasters that support social policy initiatives.

It is of serious concern that the Department consultation paper states a view that external and social considerations should not be considered in setting spectrum fees as it will distort the efficient use of spectrum and that it would be preferable to deal with them through explicit subsidy mechanisms that are directed toward the externality.¹⁰

The need to account for service externalities when spectrum is allocated and priced is highlighted by Cave and Pratt as follows:¹¹

“Spectrum should be allocated among the various services which use it to maximise the aggregate incremental value (private and external) of those services minus the (nonspectrum) costs of supply. The external value of services such as broadcasting and mobile communications may be significant, yet we know that spectrum assignment by auction, for example, does not take them into account, because the successful bidder cannot monetise the value of the externality”.

⁹ Draft Proposal 2 in the Spectrum Pricing Consultation Paper

¹⁰ See page 13 of the Spectrum Pricing Consultation Paper

¹¹ M Cave and N Pratt, Taking account of service externalities when spectrum is allocated and assigned, Telecommunications Policy (2016), see: <http://dx.doi.org/10.1016/j.telpol.2016.04.004i>

The delivery of commercial radio broadcasting has many public and social features that create additional benefits to consumers and third parties beyond the monetary value to commercial broadcasters. In economic terms, these effects are referred to as externalities. The commercial radio broadcasting model is beset by externalities. Radio is not paid for directly by listeners, but is funded by advertising time that is inserted within the programming that attracts listeners.

It is useful to set out some definitions in respect of the different types of value that spectrum may generate:

- Private value: this is the value that accrues to consumers or producers. It is typically quantified based on willingness to pay. A consumer will purchase something at a specific price if his private value is equal or exceeds the price of the product. Similarly, a producer will bid for spectrum up to a certain price that reflects the future revenues and costs of using that spectrum, suitably discounted in future to reflect time preferences and alternative uses of his money;
- External value: this is the additional benefits that accrue to consumers/producers or uninvolved third parties. These benefits are not reflected in the private value. External value may be further broken down into:
 - Private external value: the net private value of the service to individuals and that do not use it but are affected by positive or negative externalities; and
 - Broader social value: the value of the service to citizens from its impact on social goods such as social capital, political freedoms, national culture, security and inequality (not reflected in private use or private external value).

The components of the value to society from services using spectrum is illustrated in the following figure from Cave and Pratt:¹²

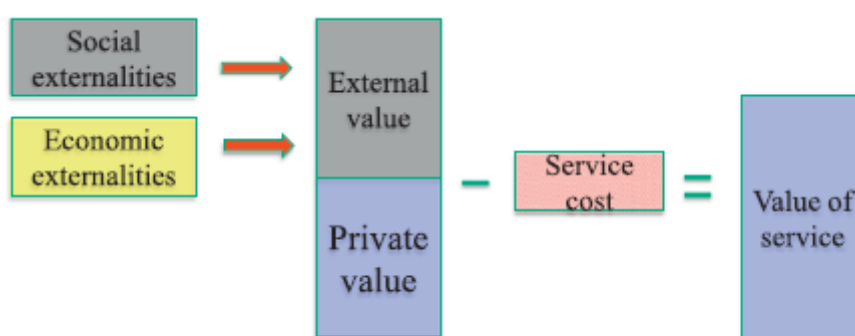


Figure 1: The value to society of spectrum-sharing services

Commercial radio broadcasting provides a service that is near to ubiquitous: in analogue format, commercial radio is nearly universally available across Australia. Radio is a highly appreciated source of entertainment for listeners, but also a key source of news, political dialogue, educational material and cultural programming.

Ofcom has identified several elements of what it terms the “broader social value” of broadcasting spectrum to reflect the value derived from the service because of its broader contribution to society,

¹² Ibid.

including: access and inclusion, belonging to a community, educated citizens, cultural understanding, informed democracy – for example value from services which provide information which facilitates democratic debate, and social “bads”.

The broader social benefits delivered by the commercial radio sector include:

- all regional commercial radio stations must broadcast specified levels of material of local significance, being 3 hours per day of such content for most licensees;
- additional obligations to broadcast local news (12.5 minutes per day), local weather, community services announcements and emergency warnings, along with local presence requirements where there is consolidation or a change in control in the local market;
- emergency broadcast requirements; and
- Australian music requirements, which must be observed by all commercial radio stations. The applicable percentage of Australian music and new Australian music depends on the format of the station. Contemporary hit stations, top 40 and mainstream rock all must play 25% Australian music, of which not less than 25% must be new Australian performances.

In addition, commercial radio confers wider economic benefits that are important to the Australian creative sector by producing original Australian content which, in itself, is important. The industry employs and trains people in the creative sector.

It is notable that Ofcom concluded that:¹³

The strongest remaining market failure case for public service broadcasting is around externalities, and the enduring presence of externalities in broadcasting is at the heart of any discussion of market failure in this area.

However, there would be great complexity in estimating the broader social value and downstream economic benefits of commercial radio broadcasting.

Considering these difficulties, we consider that the better approach is for the Department to recognise that broader social values are important and that they have been given due prominence in the policy framework for commercial radio broadcasting services.

Economics of spectrum pricing with externalities

The textbook economics of this issue is that adjusting spectrum prices (i.e. distorting the price of an input) to account for externalities in final production is a ‘second best’ means of dealing with the externality. A first-best solution is to address the externality directly, in this case through subsidies for the production/output of radio content. In economic terms, this first best solution is preferable to distorting the price of one input (spectrum) as it may distort the efficient mix of inputs, as well as potentially having undesirable competitive effects if competitors use a different mix of inputs.

If it were possible to accurately quantify the value of benefits, an efficient outcome could technically be achieved via a fee to each broadcaster for the use of spectrum based on opportunity cost (and

¹³ Ofcom, Annex 11: Market failure in broadcasting. Available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/32665/annex11.pdf

varying with the amount of spectrum used) and then for this fee to be netted off against a discount or payment from the Government for wider benefits of broadcasting and the cost of social obligations imposed on them. However, this would require the ACMA to quantify social value in a comprehensive way that has not been undertaken by other regulators and for the legislative pricing framework to capture all of broadcasting's special features.

Critically, this approach will also require a commitment from the Government that it will cover the costs of any external subsidy that may be calculated by the Department or ACMA. However, this is not a commitment that the Government has provided to the industry to date.

Value-based pricing of radio broadcast spectrum would create a serious risk of weakening the public delivery of commercial radio broadcasting in Australia. It would also be inconsistent with the objective that broadcasting policy should facilitate the development of local and original content. Higher spectrum charges would also be inconsistent with maintaining the current level of regulation imposed on commercial radio broadcasters.

Because of the significant uncertainties over the social value of radio broadcast spectrum and the inherent bias in estimating non-monetary benefits, there is a significant risk the spectrum charge will be too high. This will likely:

- lead to valuable spectrum being returned and being idle until re-allocated, which could risk a reduction in competition if commercial radio broadcasters exit the market; or
- force commercial radio broadcasters to incur unnecessary and wasteful investments to minimise use of spectrum.

The limited ability of commercial radio broadcasters to pass on higher spectrum charges through higher advertising rates in a very competitive environment would inevitably mean less investment in local and original content. This will also restrict the ability of our members to invest in talent, studio facilities and to further improve technology, such as on-channel repeaters to address coverage blackspots that impact digital radio services.

This will be detrimental to citizens and consumers. It will reduce the private value they accrue from listening and reduce the broader social benefits from commercial radio broadcasting, including less diverse content and the negative knock-on effects on the creative industry and on the wider economy. Studies have shown these knock-on effects to be substantial in other jurisdictions.¹⁴

3.2 Conditions for value-based pricing of radio broadcast spectrum

In Australia, analogue remains the primary technology for radio broadcasting in both AM and FM format. AM radio is primarily used for talk radio given its susceptibility to interference from atmospheric conditions and electrical circuits. FM radio is the preferred technology for broadcasting music.

Digital radio services were launched in Sydney, Melbourne, Brisbane, Adelaide and Perth in 2009 over the DAB+ platform. Figures released in December 2016 showed that 3.6 million Australians, or

¹⁴ Analysys Mason, Report for Department for Business, Innovation and Skills and Department for Culture, Media and Sport - Impact of radio spectrum on the UK economy and factors influencing future spectrum demand, November 2012.

27% of the population in the five capital cities, listened to digital radio via DAB+ devices each week.¹⁵ In terms of spectrum use, digital radio uses a multiplex arrangement and is more spectrally efficient than analogue radio as it can broadcast more stations with the same amount of spectrum. There is no timetable for a digital switchover in Australia.

In addition to the social value issues discussed in the previous section, there are three conditions that suggest that value-based pricing does not even warrant investigation for radio broadcast spectrum:

- the absence of alternative demand for the radio broadcast spectrum from other uses – this means that the alternative-use value of the spectrum is zero; and
- the absence of a timetable and detailed plans for a digital switchover from analogue radio; and
- the existence of tradability in relation to excess digital radio capacity – this means that incentives and mechanisms already exist to transfer excess capacity rights to the highest value users. Value-based pricing would not increase incentives for efficiency in relation to the trading of spectrum between commercial radio broadcasting licensees.

These conditions are discussed below.

First, the International Telecommunication Union has allocated the frequency band between 535 KHz and 1606.5 KHz for the sole purpose of broadcasting across all three international regions. The 88 MHz to 108 MHz has also been designated for the sole purpose of broadcasting for the Africa, Americas and European regions. Only the Asian region has allocated the 87 MHz to 100 MHz band for both broadcasting and fixed mobile.

The requirement for international harmonisation means that there is little commercial interest in the manufacturing of equipment within these bands for uses other than broadcasting.

An evaluation of digital radio switchover in the UK concluded that there was no alternative demand for the use of analogue AM and FM spectrum. In an external report conducted on behalf of Ofcom, Analysys Mason concluded that the band occupied by commercial radio broadcasting was not a viable alternative for either local or national television.¹⁶ This means there are no alternative uses for the spectrum currently occupied by commercial radio broadcasting licensees. As the Ofcom review indicates, opportunity cost pricing should not be used when there is no excess demand.

Ofcom stated:¹⁷

Our Consultation set out the reasons why we believed AIP should not be levied on either DAB radio or local TV. We said an independently commissioned study had identified excess capacity in the spectrum assigned for DAB radio and that this showed there was no evidence of excess demand. AIP is therefore not applicable to DAB radio. Similarly, there is currently no

¹⁵ Commercial Radio Australia, Media release: Canberra, Darwin and Hobart next in line for DAB+ digital radio, 6 December 2016. See, <http://www.commercialradio.com.au/content/mediareleases/2016/2016-12-06-canberra-darwin-and-hobart-next-in-line#.WXglU4iGOuU>

¹⁶ Analysis Mason, Opportunity cost of spectrum used by digital terrestrial TV and digital audio broadcasting, Final report for Ofcom, 12 March 2013, Ref: 35200-95. See, https://www.ofcom.org.uk/_data/assets/pdf_file/0018/33345/report.pdf

¹⁷ Ofcom, Spectrum pricing for terrestrial broadcasting, Statement, Publication date: 24 July 2013, p. 14. See, https://www.ofcom.org.uk/_data/assets/pdf_file/0015/37320/statement.pdf

excess demand for spectrum deployed for secondary, interleaved use by local TV. AIP is therefore not applicable for local TV broadcasting. We remain of this view.

However, we acknowledge that this may not always be the case in future, and that AIP may become an appropriate pricing mechanism at some time for either DAB radio and/or local TV. For the present though, we have seen no persuasive argument that anything other than cost-based fees should apply, for the reasons already stated in relation to DTT.

Given the lack of excess demand for the AM and FM spectrum, Ofcom found it was inappropriate to use opportunity cost based pricing as there is no opportunity cost given the lack of alternative uses. Ofcom recommended “the fees reflecting the cost of spectrum management should apply instead i.e. cost-based fees.”

Second, there is no timetable for a digital switchover for radio in Australia. Whilst uptake of digital radio in Australia has been progressing, there would be significant disruption to listeners and the broadcasting sector from a digital switchover (i.e. analogue switch-off).

Any future digital switchover will require substantial lead time for consumers, equipment manufacturers and coordination amongst industry participants. In the meantime, spectrum charges levied on individual radio broadcasters would not serve to incentivise the switchover.

Third, in terms of spectrum used for digital radio, there is already incentives to use this spectrum efficiently. The ability for broadcasters to trade excess capacity provides incentives for broadcasters to use a proportion of existing spectrum efficiently, through trading of that capacity to users who value it more highly. Value-based pricing would not add to the incentives for efficiency in own-use of spectrum used for commercial radio broadcasting.

On this basis, our very strong preference is to use an administrative cost recovery based approach to the pricing of radio broadcast spectrum for commercial radio services in the absence of a further spectrum pricing package for the benefit of the sector.

3.3 Price structure for any future legislative package for commercial broadcast spectrum

The commercial radio sector is strongly supportive of the five-year transitional package and welcomes the Government’s support for the sector. Going forward, we are keen to see the Government build upon the current package and the Government’s objective of ensuring that commercial broadcasters are not disadvantaged.

To the extent that any further package is to be developed in lieu of the above pricing approaches (e.g. an administrative cost recovery approach), we consider that any future package should be developed having regard to the principle that “all members should be materially better off”, rather than the current “no disadvantage” approach.

For example, in its current transitional package, the Department has proposed a pricing structure which is essentially a ‘per transmitter’ price structure that varies with the location and power of the transmitter. Contrary to the assertion in the consultation paper, this fee is not based on “the usage of the spectrum”.¹⁸

The per transmitter fee formula has a number of elements that can be further improved to ensure that members are treated more fairly and can be better off in the future.

¹⁸ Spectrum Pricing Consultation Paper, page 6

This includes the current reliance on the apparatus licence fee density maps, which create a mismatch between the designated density of the site and the population density of the area being served from that site. This means that broadcasters serving lower density areas adjacent to higher density areas may have very high spectrum fees (if the site being used to transmit is in the higher density area).

The per transmitter fee formula may also be further improved by applying a reduced licence fee for secondary transmitters, known as ‘translators’, in licence areas. In many regional licence areas, the licensee broadcasts from a number of different transmitters to serve the full licence area. Without such translators, there would be ‘blackspots’ in the licence area and people living within those blackspots would not be able to receive the licensee’s signal. A reduced fee should apply to these translators to enable licensees to continue to serve as much of their licence areas as possible, to the benefit of the local community.

We have separately written to the Minister in relation to this matter in the context of the current transitional package. A copy of this correspondence has been provided as part of this submission as a confidential attachment (**Attachment B**). To the extent that the per transmitter fee formula is retained in the future as part of any further package, we consider that there is scope for the Department to improve its approach on this issue.

CRA recommendation:

1. Considering the broader social value delivered by commercial radio broadcasters and the difficulties in quantifying those benefits for the purposes of determining any external subsidy, along with the limited alternative uses (and therefore limited alternative financial value from other uses) associated with radio broadcast spectrum, that:
 - (a) opportunity cost pricing should not be used to value radio broadcast spectrum; and
 - (b) an administrative cost recovery based approach to the pricing of radio broadcast spectrum should be used and enshrined in the Bill and/or a Ministerial policy statement.
2. To the extent a further package in relation to spectrum pricing is developed for the commercial broadcasting sector in lieu of one of the above approaches, that the Government seek to improve its approach by addressing issues that exist with the per transmitter price structure.

4. Digital radio changes

4.1 Overview

The current Act establishes a prescriptive regime for digital radio services, including clear access entitlements for incumbent commercial broadcasters and a predictable framework for the issuance of DRMT licences and the terms and conditions of access to multiplex capacity. This regime has operated reasonably successfully to date and the key elements of that framework remain relevant today as the industry starts the journey of rolling out digital services to regional and rural areas.

The Department has only provided a high-level set of proposals in a Broadcasting Consultation Paper in relation to its approach to the digital radio provisions of the current Act.¹⁹ These high-level proposals do not provide clarity on how the digital radio framework in the Act will be incorporated into the new regulatory framework proposed by the Bill.

For example, it is not currently clear:

- how the current processes for issuing DRMT licences will be migrated to the new licence issue scheme and how such processes will bind key stakeholders, including promoters, DRMT licence holders and ACMA itself;
- how the regulatory structure for access to multiplex capacity, which provides for regulatory oversight by the ACCC pursuant to an approved access undertaking, will be treated and whether it will be possible for the legal powers and functions of the ACCC to be validly included in a subsidiary regulatory document without a clear legislative underpinning;
- how standard access entitlements and excess-capacity access entitlements will be “consolidated”, including whether existing standard access entitlements will be respected; and
- how the DRCPs and LAPs will be reconstructed in the new regulatory structure, given the industry wide nature of those documents.

If the Department is to proceed with its “clean slate” approach, then the regulatory protections that currently exist in the Act will need to carry over into new licences and will need to be “locked down” for the duration of those licences.

Our strong expectation is that there will be no substantive changes to the existing framework as part of the transition to the new legislative regime. This includes the standard access entitlements and excess capacity access entitlements that are held by incumbent commercial broadcasters today

Maintaining the level of certainty offered under the existing framework is critical as:

- the sector ramps up investment and expands the digital radio footprint into regional and rural areas; and
- individual broadcasters invest in new digital radio services to capture market share and take advantage of the spectral efficiency offered by multiplexing.

The types of matters that would need to be locked down within the licence issue scheme for the commercial radio broadcasting sector or within individual licences include:

- the processes to be followed in issuing DRMT licenses;
- the terms and conditions of such licenses;
- the rights of access to multiplex capacity; and
- the regulatory approach that governs access to that capacity.

¹⁹ Department of Communications and the Arts, Broadcasting Spectrum – consultation paper, Proposals 6 to 8

Critically, all access entitlements that are currently prescribed in the Act must be “locked down” in the proposed regime, so that licensees have clear rights of access to spectrum.

CRA recommendation:

1. That all substantive aspects of the current digital radio regime need to be preserved in the new legislative environment.
2. That key elements of the current regime for digital radio be maintained within the Bill itself, with only operational aspects of the current regime being split out and included within subsidiary regulatory documents.
3. That all substantive aspects of the current regime for digital radio be “locked down”, whether they remain enshrined in legislation or included within subsidiary regulatory documents, including all statutory entitlements of access to multiplex capacity.
4. That additional consideration be given to how the existing ACCC access arrangements can be preserved in any transitional legislative package, and how the ACCC will be able to validly exercise its powers and functions in the new legislative environment (e.g. through additional consequential changes to the Competition and Consumer Act).

5. Continued rights of access

5.1 Renewal mechanism

Spectrum is fundamental to commercial radio broadcasters and will remain so for the foreseeable future. Any reforms that jeopardise the current certainty that broadcasters have access to spectrum will put at risk the continued delivery of commercial radio services

The licence renewal regime in the Bill, which applies on a per-licence basis, does not provide a clear right for commercial radio broadcasters to have continued access to spectrum. It provides significant scope for licence-specific renewal statements to be varied or revoked.

Under section 102 of the Act, apparatus licences which are granted to commercial broadcasters pursuant to that section are effectively renewed in perpetuity. This reflects the fact that, under the BSA, there is an express presumption that commercial radio broadcasting licences will be renewed.²⁰ At the end of each licence period, ACMA may only refuse to renew a commercial radio broadcasting licence if the licence renewal process has not been followed or if the applicant does not meet suitability criteria.

Broadcasters’ entitlement to spectrum under section 102 of the Act means that for as long as the broadcaster holds a commercial radio broadcasting licence, it will be guaranteed access to the necessary spectrum. Therefore, while the Act does not technically provide an automatic right of renewal for licences, the outcome of the current link between broadcasting licences under the BSA and licences under section 102 of the Act is that broadcasters have a very strong presumption of renewal.

This presumption of renewal is critical to broadcasters who depend on their spectrum allocation to continue delivering broadcasting services. It is also crucial for broadcasters from a financial and valuation perspective. The effective certainty regarding renewal means that broadcasters can treat

²⁰ BSA, section 47.

these licences as perpetual assets for accounting purposes. If this certainty is weakened, accounting rules may require licences to be amortised over the (relatively short) term of the licence. This will have significant financial impacts on broadcasters.

While the Department has indicated that the current guarantee of access to spectrum for broadcasters is intended to continue, the Bill provides for licences to contain licence-specific terms, including in the form of “designated statements”. One of the designated statements that each licence will be required to contain relates to renewal. Specifically, each licence must include a statement to the effect that:²¹

- there is a right to renew the licence in specified circumstances;
- the licence may be renewed at the discretion of ACMA; or
- the licence cannot be renewed.

This is not acceptable in the commercial radio broadcasting context and is contrary to the statutory presumption that currently exists and which is intended to carry over into the new regulatory regime.

Under section 59 of the Bill, ACMA will be able to determine renewal options for any licensee unilaterally and without any statutory criteria or guidance. Even if ACMA does decide to allow a right of renewal, it has sole discretion as to the circumstances for that renewal. The case-by-case nature of these statements is likely to diminish certainty across the industry, as it will become more difficult to observe standards and consistency across the various licences. This is clearly inadequate compared to the strong presumption that is set out in the current Act and which is outside ACMA’s discretion.

This undermines the purported intention that guaranteed access to spectrum should not be diminished. For example, there is currently nothing to prevent ACMA from including a designated statement under section 59(1)(c) that a licence cannot be renewed – even though the licensee should have guaranteed access to spectrum.

The Information Paper suggests that renewal rights are likely to be the subject of a Ministerial policy statement. However, regardless of whether Ministerial policy statements are strengthened in accordance with our proposals in section 1.3, renewal rights are so fundamental that certain aspects of renewal should instead be expressly set out in the Bill.

CRA recommendation:

1. That the Bill should expressly recognise and reaffirm the current practice of a presumption of renewal for licences granted under the Bill where a commercial broadcaster holds a related licence under the BSA.
2. That the Bill should include an explicit obligation on ACMA to include a designated statement in each commercial broadcasting licence that there is a right to renew the licence under section 59(1)(a) of the Bill.

²¹ Radiocommunications Bill, section 59.

5.2 Variation of licences

The variation powers available to ACMA under the Bill are not fit-for-purpose. They show zero regard for licence certainty and instead grant ACMA exceedingly wide powers to vary licences, including by varying or revoking key aspects such as licence conditions, designated statements and regulatory undertakings.

These rights go materially beyond current variation rights in the Act. The constraints on ACMA exercising its variation rights are insufficient and omit critical limitations currently in the Act. They also clearly contradict the Government's intentions as described in the Broadcasting Paper.

Section 57 of the Bill grants ACMA broad rights to vary a licence upon written notice to the licensee. Specifically, ACMA may vary a notice to:

- include one or more further conditions;
- revoke any conditions of the licence (other than the conditions in sections 46 to 50);
- vary any conditions of the licence (other than the conditions in sections 48 to 50);
- include one or more designated statements in the licence;
- revoke any designated statements included in the licence, other than the renewal application period;
- vary any designated statements included in the licence;
- vary any regulatory undertaking included in the licence; or
- revoke any regulatory undertaking included in the licence.

By comparison, the current variation rights in relation to apparatus licences in the Act are more constrained. Section 111 relevantly provides that ACMA may:

- impose one or more further conditions to which the licence is subject;
- revoke or vary any such further condition; or
- revoke or vary any condition specified under paragraph 109(1)(f), which covers any non-mandatory condition of a licence granted to a broadcaster under section 102.

These current variation rights are constrained to allow ACMA to vary only "further" or non-standard conditions.

There is a further statutory constraint in section 109(2) of the Act, which has not been retained in the Bill. Section 109(2) provides that the conditions of a licence issued under section 102, including any further conditions imposed by ACMA under section 111(1)(a), must not be inconsistent with the associated broadcasting licence as issued under the BSA. This establishes a clear statutory order of precedence. Without it, it is possible that ACMA could vary a licence under section 59 of the Bill in a way which was inconsistent with, or caused the licensee to breach, its associated broadcasting licence.

The very broad scope of this expanded variation right under the Bill has clear and material adverse implications for certainty. So long as ACMA can exercise these powers at its discretion, licensees will be limited in their ability to rely upon their licences.

The Bill appears to rely on two mechanisms to constrain the indiscriminate use of this power by ACMA:

- section 58 of the Bill, which allows a licence to include a statement restricting or limiting ACMA's powers to vary the licence; and
- the potential for a decision by ACMA to vary a licence to be reviewed under Part 18.

We see several issues with this approach:

- there is no explicit requirement for ACMA to include a statement under section 58, or any guidance as to when it will do so. The scope and frequency of these statements is a fundamental component of how the variation rights would work in practice, and without clear and binding obligations on ACMA to use them regularly, any assessment needs to assume that they may be rare or have limited power;
- the review mechanism is time-consuming – even if a decision is reversed through the review mechanism, the harm may have been suffered;
- there are no criteria for variations against which ACMA's decision could be reviewed, other than compliance with generic licence amendment provisions in section 57 of the Radiocommunications Bill and with the objects of the Bill in section 3; and
- unlike the current variation rights in section 111 of the Act, there is no right for the licensee to request a statement of reasons for the change. This further limits the certainty of the review mechanisms, as the licensee will have limited visibility of whether the change is justified or on what grounds the change could be challenged.

Considering the above, we consider the most appropriate response at this stage of the process is a wholesale rethinking of the variation provisions.

CRA Recommendation:

1. That the rights of ACMA to vary a licence should be no greater than the variation rights currently in section 111 of the Act – that is, ACMA should only be permitted to vary or revoke additional or non-standard licence terms (i.e. those which are imposed under section 51 of the Bill).
2. That ACMA should not be permitted to vary or revoke any regulatory undertaking in the licence – this right is fundamentally inconsistent with the concept of an undertaking and undermines the certainty that regulatory undertakings are intended to provide.
3. That the Bill should also include a statement that prohibits ACMA from varying or revoking any aspect of a licence in a way that is inconsistent with the BSA or the licensee's associated broadcasting licence.

6. Spectrum sharing

We support the proposal that spectrum sharing will not be mandatory for broadcasters.

We have some concerns regarding the technical feasibility of any spectrum sharing regime that may be applied to commercial radio broadcasters. Our initial view is that the Department's proposal to encourage spectrum sharing and the development of a secondary trading market is somewhat piecemeal and underdeveloped, and may not be practically workable in the broadcasting context.

However, if a spectrum sharing framework is introduced, and if any commercial radio broadcaster wishes voluntarily to enter into spectrum trading transactions in the future, we wish to ensure that they will have sufficient flexibility to do so within a predictable regulatory environment.

Separate to the commercial and technical issues that would need to be addressed to make spectrum sharing viable in the broadcasting spectrum bands, deeper design thinking is needed to ensure that voluntary secondary trading transactions can be facilitated within the overall legislative structure and licensing framework over the long term.

Secondary trading will only be possible if broader changes are made to the regulatory environment to encourage spectrum sharing. This includes the possibility of longer licence terms and a range of other measures.

It is important to note that spectrum sharing is not a priority for the commercial radio broadcasting sector due to the following factors:

- the shared nature of digital radio, which is based on multiplexing technology;
- the increased usage of the internet to delivery broadcast radio services as commercial broadcasters adapt to changing habits of users;
- high levels of congestion in relation to FM band services, particularly in the eastern licence areas (as evidenced by the current AM-FM conversion process);
- the current lack of alternative uses in relation to the AM, FM and digital radio spectrum bands (VHF Band III), including the lack of any alternative global standard for mobile cellular or other services for these frequency blocks; and
- the technical challenges of interference between broadcasting and new wireless licences, which entail high levels of planning and co-ordination.²²

Over the medium to long term, if industry participants are going to engage in voluntary, commercially-driven spectrum trading (assuming the above issues can be managed or resolved), this will only be possible if additional clarity is built into the legislative structure to more readily facilitate trading.

²² For example, as part of the recent FCC broadcast incentive auction, there was a heightened risk of interference (or "impairment") that was expected to arise from repurposing the 600 MHz band from a model where it was dedicated solely to television broadcasting to a sharing-based framework in which television broadcasters would share that spectrum with other wireless uses. The Federal Communications Commission prepared methods to predict and avoid potential impairments on a per-geographic area basis.

First, in the Broadcasting Paper, the Department states that if a broadcaster wants to share, trade or lease its spectrum for a non-broadcasting use, Government approval will be required.²³ The Broadcasting Paper further states that:

“It is important to note that any such arrangements would need to be initiated by broadcasting spectrum holders, and agreed by Government (...) The Government will not impose forced sharing or trading arrangements”.

Unless a predictable and streamlined process for obtaining government approval for spectrum sharing is available to industry participants, then it is likely that such transactions will face a significant amount of regulatory uncertainty and complexity that may mitigate against these types of transactions being considered by industry participants. It may be prudent for a high-level process in this regard to be built directly into the Bill.

Second, spectrum trading transactions are unlikely to be commercially appealing in circumstances where licence holders are subject to 5-year terms (as is currently the case), unless:

- there are very certain rights of renewal (noting that this certainty does not exist under the initial draft of the Bill, as described in section 5.1); and
- the licence terms are significantly extended (e.g. for 20+ years or in perpetuity).

Accordingly, one major change to create an institutional framework that facilitates spectrum sharing would be to give certainty over licence tenure. If licence tenures are too short, or can be varied, suspended or terminated without appropriate protection, then there will be insufficient certainty on the part of both parties to enter into a sharing arrangement. These risks are further increased by the uncertain and inadequate renewal, variation, suspension and cancellation rights.

CRA recommendation:

1. That the Bill be amended (or a Ministerial policy statement be developed) to clarify that spectrum sharing transactions cannot be mandated by ACMA in relation to broadcasters, with such a principle then being included as the default position in a regulatory undertaking in each individual licence.
2. That the Bill be amended to include a high-level process for broadcasters to obtain government approval for spectrum sharing, or for the Bill to provide for the development of a Ministerial policy statement that sets out the factors that the Minister will have regard to when considering a spectrum sharing transaction that involves a commercial broadcaster.
3. That the Department and ACMA consider alternative licence constructs to provide a more predictable regulatory environment if sharing is undertaken in the future, such as the option for licensees to “upgrade” a licence to a longer term to facilitate a commercially driven spectrum sharing transaction.

²³ Broadcasting Paper, p 20.

Proposed way forward

As the above makes clear, we have some very significant concerns with the overall architecture of the Bill and the Department's proposed approach on many issues. These concerns are also significantly magnified by the fact that there are many facets of the proposed legislative package that remain undefined or undeveloped at this point.

For us to have a fully informed opinion on the extent to which the Draft Legislative Package will meet our key objectives of certainty, predictability and flexibility, a significant amount of future work (and consequently, consultation) is needed from both the Department and ACMA.

The following items need to be further developed or produced for us to be able scrutinise the package in its entirety:

- a further draft of the Bill that takes account of the high-level feedback we have identified in this submission;
- the inclusion of any broadcasting specific amendments within the next draft of the Bill, along with a consequential amendments package in relation to the BSA;
- the transitional package that shows how key elements of the new legislative environment will be put into effect, including the following documents that will need to be developed in draft form to allow industry participants to understand with a degree of precision how the new package will impact their business models and existing licence terms:
 - Ministerial policy statements, particularly those related to the treatment of broadcasting services;
 - the licence issue scheme for the commercial radio broadcasting sector; and
 - a draft licence template for individual commercial radio broadcasters, including a mock-up of licence conditions (including any common conditions that will be set out in a legislative instrument), designated statements and regulatory undertakings.

The Department's proposal represents a very ambitious reform agenda that will impact a broad community of spectrum users. We are committed to engaging with the Department and ACMA to ensure that we can get these reforms right and look forward to further engagement on these matters.

Attachment A - Responses to questions in Broadcasting Consultation Paper

Question 1: Do you consider the change in approach to spectrum planning will have any practical implications?

The Draft Legislative Package proposes a move away from a predictable legislative and regulatory framework in favour of an approach that devolves significant elements of the regulatory design and decision-making process in relation to spectrum to ACMA.

Many of the key aspects of the regulatory framework that will apply to spectrum planning are currently too high-level or underdeveloped to allow us to comment on the practical implications.

Our key concerns include that licence terms are not yet known, broadcasting related changes to the Bill have not been developed and transitional measures (including draft legislation) have not been prepared. Key regulatory documents, such as Ministerial policy statements and the licence issue scheme for the commercial radio sector, have also not been developed.

These documents will need to be developed so we can ascertain the practical implications of the legislative and regulatory package as a whole.

Question 2: What matters should be considered for inclusion in the broadcasting Ministerial policy statements?

As noted in our main submission, we consider that the Department's proposal in relation to Ministerial policy statements contains several structural issues that need to be addressed.

Our main submission contains several suggestions in relation to items that would need to be subject to a Ministerial policy statement (with an obligation enshrined directly in the Bill for a Ministerial policy statement to be issued in relation to these matters), as well suggestions on how the structural issues we have identified can be addressed.

We will be able to provide a more definitive list once we received a more developed legislative package from the Department that also addresses the structural concerns we have identified in relation to Ministerial policy statements.

Question 3: Will consolidating the existing radio LAPS and TLAPs into a general LAP category have any negative implications for licensees?

It is too early for us to be able to respond to this question but we note the high level of reluctance amongst our members to alter LAPs as a general principle. A key requirement in this regard will be to ensure that there is no technical interference to services.

Question 4: Are there any other existing rights that broadcasters have in relation to their licenses which need to be addressed in the proposed framework?

Broadcasting related reforms (and any consequential changes to the BSA) proposed by the Draft Legislative Package have not been developed at this stage. This lack of detail creates ambiguities and uncertainty in respect of the way the proposed reforms will affect commercial radio broadcaster's existing rights, whether under existing licences or as set out in the Act or other documents that comprise the regulatory framework. For example:

- the Broadcasting Paper states that the current right of guaranteed access to spectrum is to be retained, but that right remains undefined and has not been implemented into the Bill; and
- the way existing access entitlements and excess-capacity entitlements to spectrum of incumbent commercial radio broadcasters in respect of digital radio will be incorporated into the Bill is undefined.

It will not be possible for us to respond to this question until the Department provides a complete legislative and regulatory package and we are able to consider the effect of the reforms on existing rights with a sufficient degree of operational detail and finality.

Question 5: Will any of the changes to digital radio create unintended consequences or operational impediments?

The Department has not developed the reforms to digital radio with any granularity and has only released a high-level set of proposals in a Broadcasting Consultation Paper. We are not able to provide an informed view as to the unintended consequences or operational impediments of the proposed changes to digital radio until the Department provides further clarification and detail to enable us to consider the way the digital radio reforms will operate.

Key details which need to be developed by the Department include (amongst other things):

- how the current processes for DRCPs will be migrated to the new license issue scheme;
- how the regulatory structure for access to multiplex capacity will be treated;
- how the Department proposes to deal with standard access entitlements and excess-capacity entitlements, including the treatment of the current ACCC approved access undertaking; and
- how DRCPs and LAPs will be reconstructed in the new regulatory regime.

Attachment B – Confidential attachment

Confidential attachment.

