

2 December 2014

The Project Manager
Spectrum Review
Department of Communications

By email: spectrumreview@communications.gov.au

Dear Sir/Madam

Response to Spectrum Review Directions Paper

The Australian Subscription Television and Radio Association (ASTRA) is pleased to comment on the Spectrum Review Potential Reform Directions Paper (the Directions Paper), released in November 2014.

ASTRA notes that the directions being proposed by the Department are broadly consistent with those supported by ASTRA in its June 2014 submission in response to the Spectrum Review Issues Paper. For example, ASTRA has supported:

- A move to a new **parameters-based model for licensing spectrum**—this would introduce welcome flexibility for the Australian Communications and Media Authority (ACMA) to tailor, in consultation with applicants, licenses to suit particular uses of spectrum. A culture of real flexibility will be required to ensure the full benefits of bespoke licensing are realised.
- A preference for **'market-determined'** or **'market-informed'** pricing of spectrum. ASTRA has long supported market-based pricing for all commercial uses of spectrum—this will create incentives for efficient spectrum use. Concern is noted below about the proposed power for the Minister to intervene to determine that market-based pricing be abandoned in particular circumstances.
- Increased use of **private band management**—ASTRA has previously supported this approach in relation to the management of spectrum used for outside television broadcasts. While not adopted by the ACMA in that case, ASTRA supports the Department's proposal that spectrum management functions be delegable to third parties, so long as the management is limited to operational matters and not spectrum planning, and the ACMA retains appropriate oversight. Delegation should be focused on industry-specific day-to-day functions, while enforcement functions should be retained by the ACMA.

ASTRA is interested to clarify the extent to which the reform proposals contained in the Directions Paper would be applied to the Broadcasting Services Bands (BSBs) used by free-to-air (FTA) broadcasters. ASTRA strongly supports a single spectrum management scheme under which market-based pricing, as well as other licensing rules, are applied equally to all commercial sectors. Retaining special allocation and charging arrangements for just one sector would fly in the face of the reality of convergence where competing commercial audio-visual services are supplied over broadcasting spectrum, satellite, cable and mobile broadband alike.

As detailed below, ASTRA submits that if the Government remains minded to subsidise one sector over another then this should be done transparently. For the avoidance of doubt, it is noted that ASTRA does not support subsidisation of one sector over another. However, if this practice is to persist then the Government should make clear that, as a matter of

industry policy, it is providing a special deal to FTA broadcasters. It should also make clear the reasons why this is warranted (for example by quantifying the connection between FTA spectrum pricing and cost of fulfilling Australian content obligations). While subsidising business models in retreat would not be consistent with recent past practice in other industry sectors—such as automotive—it will be important for the Government to clearly justify any ongoing separate FTA arrangements.

Context

ASTRA supports the stated aims of the Spectrum Review, including boosting innovation and cutting red tape. Opportunities to reduce administrative complexity of the current spectrum management framework are clearly welcomed.

ASTRA agrees with the Department that allocating spectrum to its highest value use on price and access terms that reflect its ongoing opportunity costs is the best way of achieving economic efficiency.

ASTRA also agrees with the observation that an active trading market supports spectral efficiency as it promotes the transfer of spectrum rights to parties willing to pay a market price to put the spectrum to its highest value use. ASTRA welcomes the Department's assessment that the new licensing framework would better encourage spectrum trading and notes that the Department is examining ways to ensure an appropriate level of market information is provided to support trading.

It is also appropriate that, as proposed, any new spectrum policy framework be designed to clearly take into account international harmonisation of spectrum allocations.

The Department seeks feedback on preferred sequencing and timing of spectrum reforms. While ASTRA does not have specific proposals as to sequencing, we reiterate our earlier submission that the Government should take a holistic approach to reform, rather than implement piecemeal changes. While individual reforms might be executed in steps, they should be part of an overarching plan which has been determined through appropriate consultation with industry and which includes appropriate transitional arrangements to ensure reforms are implemented in a non-disruptive manner.

Principles for reform

ASTRA supports the reform principles set out in the Directions Paper: transparency, efficiency, flexibility, certainty and simplicity.

ASTRA particularly supports:

- the application of the transparency principle to ensure that the ACMA exercises its broad discretion within a clearer Government policy framework than currently exists;
- adherence to market-based principles as a way of abiding by the efficiency principle; and
- the principle of certainty—while the flexibility of new arrangements, such as parameters-based licensing, is certainly welcomed, it will be important that industry can seek and obtain licences and make investment decisions relating to spectrum use with certainty. In practice this means that industry should have certainty as to matters such as the period of a licence, any presumption of renewal and pricing.

ASTRA also acknowledges that stakeholder feedback in the first phase of the Spectrum Review revealed that users believe that spectrum allocation should take into account overall public benefit, including social as well as economic benefits. This is relevant to broadcasting services delivered by ASTRA's members which provide both economic benefits (including as a result of the investments our members make in supporting jobs for Australians) and social

benefits (including the diversity of voices in public debate that is delivered by, for example, the broad offering of news channels on STV).

For example, ASTRA has over a long period of time made submissions to a range of policy consultation processes about the social value of television channels delivered to Australia via C-Band spectrum, noting that this is a relevant consideration in the discussion of future use of those bands.

Policy framework

In our earlier submission ASTRA argued that the Minister should provide the overall policy framework and direction for spectrum management, with the ACMA being the independent regulator and manager. ASTRA also supported regular and structured consultation by Government with industry on longer-term, strategic objectives of spectrum policy.

ASTRA is therefore pleased that the Directions Paper proposes that decisions with significant public policy implications would remain in the Minister's control, while the ACMA would be responsible for spectrum planning and management. ASTRA strongly supports a flexible ability for the Minister to issue policy statements which may be broad or specific, apply for a short or longer duration, and which would be the vehicle to set parameters for the ACMA's management of spectrum. To foster transparency and certainty it will be important that policy statements be published together with details of how the policy may be revoked or updated. It should be ensured that clear explanations of the rationale behind changes in policies are provided.

By way of example, the Directions Paper notes that a Ministerial policy statement might be used to establish a whole of government and economy spectrum policy similar to the UK Spectrum Strategy. ASTRA submits that development of such a strategy is particularly important and should be given an elevated priority—it would be appropriate to specify its development as a mandatory building block for a new spectrum framework; it should not arise merely as a result of the exercise of a Ministerial discretion.

ASTRA supports the proposal that the ACMA be required to consult on its annual work program before the plan is presented to the Minister, who would be empowered to require amendments to the program. ASTRA recommends that the Department give further consideration to how both it and the ACMA can most effectively consult with spectrum users during the development of policy statements and work plans.

Single licensing framework

ASTRA has previously noted an emerging need for more innovative and novel approaches to licensing spectrum and therefore welcomes the Department's proposal to establish a single 'parameters-based' licensing framework—replacing existing spectrum, apparatus, and class licences. Among other reasons, ASTRA supports a parameters-based framework because it would allow for a simpler approach to licensing for our members who currently hold apparatus licences. ASTRA also supports the reform because it will increase flexibility and encourage trading, which will lead to efficiency.

The ability to licence by reference to parameters such as frequency, geography, location, type of use and licence term would allow for the development of more innovative spectrum uses. For example, the new scheme might allow for better coordination of what would currently be a spectrum-licensed service with what would currently be an apparatus-licensed service. While it will be important that the ACMA be empowered to develop 'bespoke' licensing solutions, it is considered appropriate that, as proposed, the parameters within which a licence may be designed are set out in the legislation.

Although the Directions Paper suggests that a legislated maximum term (likely to be 15 years) would be specified, ASTRA sees no reason that there be a legislative cap. Tenure longer than 15 years may be appropriate in certain circumstances and flexibility to facilitate this should be provided within the framework.

The Directions Paper suggests that guidance on the development of the new licensing scheme could be the subject of a Ministerial policy statement, which ASTRA considers is appropriate. Detailed consultation on specifics—such as how, during a renewal process, a licensee might be required to demonstrate effective use of spectrum—will be important given this reform would represent fundamental change.

Allocation and reallocation

The Directions Paper suggests that allocation and reallocation processes would be streamlined as a result of the introduction of a new flexible licensing framework. As noted above, a move to simpler administrative arrangements is supported by ASTRA.

ASTRA does not in principle object to the proposal that the ACMA would have discretion to determine allocation mechanisms and processes and to set allocation timing. While it is appreciated that it can be unnecessarily restrictive to have allocation processes and timing specified in legislation, there would need to be a clear statement from the Government and/or the ACMA about expectations in relation to these matters—so that spectrum users can plan and invest with confidence. In this regard it is noted that the ACMA would set allocation timeframes in its annual work plan which would be subject to Ministerial oversight.

Indeed, in relation to the proposed scheme more generally, ASTRA notes that a fine balance will need to be struck between increasing flexibility (by removing detail from legislation and giving the ACMA more discretion) and providing clear signposts as to when and how allocation processes will be conducted.

Pricing and market information

The Directions Paper notes that, subject to Government policy statements, the ACMA would make decisions about pricing. This would include payment structure and timing of payments. It is noted that prices should in general be market-based (the phrase ‘market-determined or market-equivalent prices’ is used). However, the Minister would retain the power to determine otherwise on a case-by-case basis where there is a sound public interest rationale.

While the paper predicts that Ministerial intervention would be on an exception basis, ASTRA is concerned that this power would be used to determine special pricing arrangements for particular sectors (especially the FTA television sector) in a manner that is non-transparent and provides an unfair competitive advantage to those privileged by special pricing formulas. It is a concern to ASTRA members that the Government might perpetuate the ‘special deal’ approach to FTA spectrum licensing when our members, who compete with FTA broadcasters for audiences, pay market rates for the transmission capacity they acquire (and, incidentally, are subject to Australian content obligations as are the FTA providers—albeit in a different way).

The Directions Paper proposes that exceptions to the market-based approach would be permissible where there is a ‘sound public interest rationale’. ASTRA strongly recommends that specific legislative guidance be given on what would constitute a ‘sound public interest rationale’ and that this guidance should provide that divergence from the market-based rule only occur in exceptional circumstances following adequate consultation.

For example, uses of spectrum related to national security might be given as an example of one area in which it is acceptable to determine alternative pricing arrangements. On the other hand, for spectrum which is to be used for a commercial purpose the legislation should specify that market-based pricing principles can only be displaced if a robust cost-benefit analysis has been conducted (as the Government advocated in relation to the NBN) and the public interest benefits clearly outweigh the costs.

The Directions Paper proposes that the ACMA should be given authority to collect information from industry relevant to the performance of its functions. It is acknowledged that these powers would be used to collect and make data available which would assist trading—as noted in the paper, efficient markets rely on timely information on prices, preferences, market structures and conditions of access and use.

ASTRA does not object in principle to the introduction of an information-gathering power in the Radiocommunications Act. However, we submit that the provision should be drafted to ensure that the power can only be used in a targeted manner. The Government should have regard to the significant resources that industry must expend when broad and undirected regulator requests for information are lodged—particularly when these are issued with enforceable timeframes for response.

It would be appropriate, for example, for the legislation to provide that the purpose of the request must be clearly stated and that the scope of the request must be set at the minimum required to achieve this specific purpose having particular regard to minimising the cost impact of requests. It would also be appropriate for the provision to limit a party's search obligations to reasonable standards (having regard to, for example, the costs of retrieving archived information).

As there is a risk that the introduction of this power could create another compliance cost burden on industry ASTRA requests that there be further detailed consultation on the specifics of the proposal.

Compensation

The Directions Paper notes that the new licensing framework would include the ability to specify as a licence parameter a right to compensation where spectrum is resumed by the ACMA during a licence term.

ASTRA has previously supported the concept of financial assistance to spectrum users displaced through resumption and reallocation processes and argued that such compensation should be paid consistently to all users required to vacate spectrum. Therefore, ASTRA supports the proposal, noting that the right to compensation would apply more broadly under the new licensing scheme than it does under current arrangements. ASTRA recommends that compensation be the rule, rather than the exception, under the proposed new licensing framework.

User involvement/private band management

ASTRA strongly supports further investigation of models for delegation of ACMA spectrum management functions to other entities, including private band managers. This may include delegation to companies, individuals, other government agencies, community organisations or industry bodies of day-to-day spectrum management functions.

As noted above, ASTRA proposed a private band management approach to administration of spectrum recently flagged for allocation to both the FTA and STV sectors for outside broadcasting. ASTRA proposed that a third party be established to manage bookings from different broadcasters seeking access to the spectrum. This would have meant that any

spectrum within those bands could be booked on a temporary basis for use, rather than having blocks of spectrum allocated to specific broadcasters even when they were not using them.

While that particular proposal was not adopted, ASTRA remains strongly supportive of the concept of private parks because efficiencies in band management may be achieved by engaging a nimble band manager whose remit is focused on developing the most effective ways to use and share defined blocks of spectrum.

Nonetheless, under a delegation model ASTRA accepts that it will be important that the ACMA retain oversight to ensure functions are performed effectively, as well as retaining enforcement functions.

In further assessing proposals for private band management ASTRA suggests that the Department consider further use of industry codes and guidelines. It may also be worthwhile detailing in the next phase of the Spectrum Review a number of case studies of proposals for private band management.

Technical regulation

While ASTRA does not have specific comments on technical regulation, we note that we do not object in principle to the proposal that device regulation (aimed at managing interference and health and safety risks) be managed via more flexible device-specific schemes which are tailored to the relevant level of risk.

ASTRA notes what appears to be an increasing risk that devices and equipment imported to Australia will cause interference to existing licensees. Even LED lighting systems have been found to cause interference. This risk can be minimised through Australia harmonising its spectrum plans with the International Telecommunications Union's international plans, and relevant ACMA international standards-based regulation.

ACMA review of alternative uses of spectrum

ASTRA notes with some caution the proposal that as part of its annual work plan the ACMA be required to continually review options for allocating spectrum to alternative/higher value uses and propose options for change. This proposal has the potential to have an unsettling effect on licence holders (including their willingness to invest in licences and related infrastructure and equipment), who may fatigue from annual processes under which they must prove the value of their use of spectrum to the ACMA.

ASTRA recommends that the Department give more detailed consideration to this proposal having regard to both the potentially chilling effect on willingness to invest and the resource-intensiveness of annual reviews. It would seem more appropriate for the ACMA to plan review intervals when determining the duration of a licence under the proposed new framework. That is, the ACMA could build into the conditions of a licence the timeframe under which reviews of spectrum use would be conducted—allowing the review intervals to be set taking into account the nature of the particular spectrum and its uses.

ASTRA would support the proposal if it were to relate to stronger processes for engaging with the ACMA on emerging issues so that opportunities to prioritise work programs to facilitate emerging technologies are not missed.

Broadcasting Services Bands and the sixth channel

The Directions Paper notes the September 2014 announcements of the Minister for Communications relating to, among other things, the trial by FTA broadcasters of MPEG-4

compression technology. It was announced that community broadcasters would be required to vacate the 'sixth block' of spectrum at the end of 2015 to enable this testing to occur (and that after such testing the spectrum might be put to non-broadcasting uses).

It is worth noting that STV broadcasters have been using MPEG-4 technology for some time. STV commenced using MPEG-4 in 2009, primarily for HD broadcasts—ASTRA's members did not require other sectors to vacate spectrum to test this technology, nor did they require Government subsidy to make the transition.

In light of this, ASTRA requests clarity about proposed charging arrangements for FTA broadcasters' access to the valuable sixth block spectrum. We reiterate our previous submissions that if FTA broadcasters are to be given access to this spectrum for testing, they should pay market-based prices. There is no justification for a free loan of this spectrum, particularly when community broadcasters are being required to vacate the spectrum for these trials to be conducted.

Please feel free to contact me if you wish to discuss further anything in the above.

Yours sincerely

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

Andrew Maiden
CEO