



SPECTRUM REVIEW

FOXTEL RESPONSE TO DEPARTMENT OF COMMUNICATIONS ISSUES PAPER

JUNE 2014

INTRODUCTION

Foxtel agrees that a comprehensive review of the Australian spectrum management framework is timely and welcomes the opportunity to comment on the *Spectrum Review Issues Paper* (the Issues Paper) released by the Department of Communications (DoC) in May 2014.

Foxtel is one of Australia's most progressive and dynamic media companies, directly employing around 2,500 people, and delivering a diverse subscription television (STV) service to both regional and metropolitan areas over cable, satellite and broadband distribution.

We offer a better entertainment experience every day to each one of our 2.5 million subscribing homes through delivery of new and inspiring programming across all genres, the world's most popular channel brands, and investment in high quality local content. As constant champions of innovation we have brought customers the iQ personal digital recorder, Australia's largest HD offering, the Foxtel Go App for tablets and mobile devices, and our new internet TV service, Foxtel Play. Furthermore, as announced late in 2013, Foxtel will also soon launch fixed-line broadband internet and telephony services bundled with our television product.

Foxtel and our customers use spectrum in a range of ways:

- Foxtel uses C-Band spectrum (3.7 GHz to 4.2 GHz) to receive numerous international channel feeds.
- For direct-to-home satellite services, we purchase satellite services using the 14 GHz and 17 GHz bands for uplink to the satellite and in the Ku-Band (11.7 GHz to 12.7 GHz) for delivery to subscriber homes.
- Foxtel and our channel partners use spectrum for collecting vision and sound at outside broadcasts (such as sporting events)—with the STV industry recently securing an exclusive allocation in the 2268–2300 MHz bands from 2016 for this purpose.
- Foxtel uses 400 MHz band land mobile radios and wireless audio devices for television production.
- Foxtel customers use mobile spectrum as well as class licensed WiFi spectrum within homes or businesses to wirelessly access our content on services such as Foxtel Play and Foxtel Go.

Foxtel's submission is structured as follows:

1. The **Executive Summary** outlines Foxtel's key submissions.
2. **Part A** sets out Foxtel's general approach to spectrum policy.
3. **Part B** sets out Foxtel's comments on the specific terms of reference in the Issues Paper.

EXECUTIVE SUMMARY

Foxtel's key submissions include:

- **Scope of the review**—the scope of the Spectrum Review should be broad. It should focus on a framework that encourages the most efficient use of spectrum and that does this by creating a level playing field on which different media and communications sectors can compete to deliver innovative services to consumers. In particular, the Review must explicitly extend to identifying ways to undo the history of 'special' or free deals for commercial free-to-air (FTA) television broadcasters to access spectrum.
- **Principles for reform**—principles for reform (such as that spectrum for commercial uses should be subject to market-based pricing, and that reforms should tend to be de-regulatory) should be set now, and inform both shorter-term and longer-term reforms. For example, if FTA broadcasters

wish to access the spare sixth block of broadcast spectrum to test technologies, they should pay market-based prices now, and compete with others for this access—even if reform of how they are charged for their existing allocations takes further consideration.

- **One framework for managing spectrum**—reforms should work toward the establishment of one management framework for all spectrum, set out in one Act of Parliament. There should not be special arrangements for FTA broadcasters set out in broadcasting legislation.
- **Licence types**—we support examination of new ways of licensing spectrum to ensure licence types are fit-for-purpose and encourage flexible and efficient use while providing appropriate protections from interference.
- **Institutional arrangements**—we support institutional arrangements that provide a clear delineation of responsibilities for policy development and regulatory administration, and provide opportunities for regular consultation with spectrum users in relation to both technical and strategic issues, as well as retaining a seat at the table for Australia in international fora.
- **Whole-of-Government and whole-of-economy approaches**—we support development of a holistic approach to developing spectrum policy, including mechanisms to value spectrum across sectors.

PART A: FOXTEL'S APPROACH TO SPECTRUM POLICY

The Issues Paper notes that the spectrum framework:

needs to be modernised to reflect changes in technology, markets and consumer preferences that have occurred over the past decade to better deal with the increasing demand for spectrum for all sectors.¹

In modernising the spectrum management framework Foxtel submits that policy settings must promote the most efficient use of spectrum given that it is a scarce public resource. We also support an appropriate return to tax payers for the use of spectrum—we believe that spectrum for commercial activities should be subject to price-based allocation processes and there should be a consistent management framework regardless of the sector.

We have argued that successive governments have failed to manage broadcasting spectrum in a way which supports competition and innovation. Commercial FTA television providers have been the principal beneficiaries. Special rules for FTA broadcasters have led to inefficient use of broadcasting spectrum, an inadequate return to the public for use of its resources and competitive and economic advantage being conferred on FTA broadcasters.

We consider that regulation of spectrum should be standardised. As such, we were very encouraged when, in 2012, the Convergence Review recommended that:

- the planning, allocation and management of all spectrum should be under a common scheme;
- FTA broadcasters should move to holding fixed term spectrum licences (rather than current arrangements which effectively provide for indefinite licence periods for broadcasters as part of the broader commercial TV licensing arrangements, with their associated obligations and protections); and
- FTA broadcasters should move to paying a market rate for the spectrum they use—in the way that Foxtel pays a market rate for the satellite transmission capacity it acquires.

On this final point, we consider it unacceptable that while commercial FTA broadcasters continue to be protected from competition (because there is a legislated ban on a new licensee) they also enjoy

¹ Issues Paper, p 3.

'limited risk' access to spectrum when it comes to price—their spectrum costs go up and down with their business success. This is not a luxury afforded to other sectors.

We believe that market-based pricing of spectrum is particularly important because it will create an incentive for FTA broadcasters to innovate to use spectrum more efficiently, leading to the possibility of spectrum being returned to the public to be allocated for new services. This will encourage competition and innovation, which will in turn provide consumer benefit; and, in the case of new media services, add to the diversity of voices in the Australian market.

Our view is that broadcasting spectrum used for commercial purposes should be priced by reference to the most valuable alternative use of the spectrum, in whichever sector that may be.

It is Foxtel's view that spectrum management in Australia could be improved by the DoC establishing a government spectrum strategy which the Australian Communications and Media Authority (the ACMA) then implements. In establishing the spectrum strategy, the Department would consult with all the users of spectrum including commercial, public and scientific sectors. Such a framework has recently been developed in the UK by the Department of Culture, Media and Sport.

PART B: THE SPECTRUM REVIEW TERMS OF REFERENCE

The Issues Paper seeks feedback on the proposed terms of reference (ToR) for the Spectrum Review, including whether issues have been missed. Foxtel is broadly comfortable with the draft ToR, although we submit greater emphasis could be placed on ensuring Australian arrangements continue to be coordinated with, and function effectively with international spectrum arrangements and frameworks. For example, institutional arrangements should continue to provide for relevant Australian delegates to have a seat at the table of international fora.

Feedback is also sought on reforms that could be addressed in the short-term and those that may need to be addressed well after the review. While it is difficult to comment in the absence of specific proposals, Foxtel makes the general point that even short-term arrangements must be underpinned by the principles that inform longer-term reform—such as market-based pricing for commercial uses of spectrum, competition and a level playing-field for all sectors.

A case in point is use of the spare 'sixth channel' of spectrum, in relation to which there has been recent commentary about FTA broadcasters seeking access for the purpose of testing new technologies. Foxtel strongly submits that the history of free loans of spectrum to the FTA sector should not continue. In relation to the sixth channel, Foxtel opposes any arrangement that would forestall longer-term flexibility or the promotion of competition.

Moreover, in that particular case, market-based pricing of FTA broadcast spectrum would encourage more efficient use of *current* allocations for testing, which could, for example, be achieved through the use of statistical multiplexing.²

Comments on the specific ToR are set out below.

Term of reference 1: Simplify the framework

Foxtel supports deregulation and a simplified framework for managing spectrum. Reducing overly-complex processes which arise from multiple layers of regulation will reduce transaction costs for business, which would be welcomed.

Foxtel also supports the specific deregulatory initiatives mentioned in the Issues Paper relating to streamlining publication and consultation requirements for regulatory change. So long as the outcome

² For detail see Foxtel's 2012 submission to the ACMA's discussion paper, *Beyond Switchover – The Future Technical Evolution of Digital Terrestrial Television in Australia* – available at <http://www.acma.gov.au/~media/Digital%20Policy/Issue%20for%20comment/pdf/Foxtel%20Submssion%20Beyond%20switchoverthe%20future%20technical%20evolution%20of%20digital%20terrestrial%20television%20in%20Australia.PDF>.

of these reforms is that affected stakeholders are advised of proposed changes and are given an appropriate opportunity to comment, we agree that processes should be kept as simple and efficient as possible—for policy and regulatory agencies and industry alike. Having effective and regularly convened consultative fora, which allow for both Government agencies (at the regulatory administration level; but, also, importantly, at the policy development level) and industry members to raise issues, is a very important complement to formal consultation processes.

The Issues Paper also refers to the opportunity for more conceptual reform—for example, by simplifying the objectives of the *Radiocommunications Act 1992* (the Radiocommunications Act). An important first step would be bringing the management of all spectrum, including broadcasting spectrum, under one framework so that simplified objects can be introduced which cover all uses and sectors.

Finally, we support consideration under this ToR of the most efficient way to plan, allocate and licence spectrum under the Radiocommunications Act. For example, we think the way apparatus licences are issued should be reviewed—to better enable licensing of a system of related apparatus, as opposed to the more resource intensive process of licensing individual apparatus. This may involve a review of the best licence categories for the future, including those which enable flexible use while still providing for interference protection.

Term of reference 2: A more flexible framework which facilitates new and emerging services

Foxtel fully supports a spectrum strategy and associated regulatory arrangements that facilitate new and emerging services, and promote innovation (as noted above in relation to the sixth block of spectrum), with due attention being given to protecting incumbent licensees from interference where the new and/or emerging services are introduced in internationally harmonised shared bands.

An issue for proposed consideration under ToR 2 is a move to parameter-based licensing, which we understand would enable the regulator to tailor a licence to the specific needs of the applicant, setting 'parameters' relating to: duration; the technology able to be used under the licence; whether or not the allocation is exclusive; the geographic area over which the licence is granted; and, technical parameters (for example, maximum power, bandwidth and modulation).

While noting that this would be a significant step away from the current licensing processes and licence types, we support examination of the concept as part of the review. Key interests in this assessment and the design of any new licence types should be providing certainty to licensees and protection from interference, the latter being particularly important given the proposal that the spectrum framework could support greater spectrum sharing.

A useful approach might be to conduct case studies on how innovative technologies might be regulated under any new licence types. For example, cognitive radio, a developing radiofrequency technology, which provides a means by which spectrum can be more efficiently used, could be used to test how parameter-based licences might work.

Term of reference 3: Ensure efficient allocation and incentivise efficient spectrum use

Foxtel strongly supports this ToR which is aimed at assessing opportunities to improve the efficiency of the way in which spectrum is allocated and used. The Issues Paper notes that spectrum licensing, price-based allocation methods, trading and third party authorisation were introduced to the Radiocommunications Act to encourage market-based approaches with an emphasis on economic efficiency. We submit that bringing all spectrum for commercial uses under a framework aimed at improving efficiency in these ways will ensure a better return to the public on the use of this national resource.

The Issues Paper refers under this ToR to the concept of dynamic efficiency, which is explained as being about ensuring spectrum is allocated and used efficiently over time. While it may form part of the assessment of parameter-based licensing, which is already flagged, we recommend assessment

of private park models. These models, previously referred to by the ACMA, encourage efficient use of spectrum across an industry, rather than just by an individual licence holder.³

Foxtel has previously expressed support for private park trials, and indeed the STV industry raised the concept of a private park for the shared use of television outside broadcast (TVOB) spectrum a number of years ago. Under that proposal, TVOB spectrum would have been allocated for use by STV and FTA broadcasters alike, with a simple event booking system being the mechanism for facilitating shared access (a booking system for event-based broadcasts would have ensured that the spectrum is only held by an individual entity when it is needed for an event). While the ACMA decided upon exclusive allocations of the new TVOB spectrum to individual FTA broadcasters and the STV industry, and while Foxtel is very happy with this outcome, private park models may still be appropriate for other allocations.

To the extent that interference management arrangements for spectrum shared in a private park are outsourced to industry participants themselves, this is a good example of deregulation by way of increased self-regulation. Devolving responsibility for managing spectrum in this way is consistent with a theme raised in the May 2014 DoC Policy Background Paper, *Regulating harms in the Australian communications sector – Observations on current arrangements*, which comments on the appropriateness of self-regulatory arrangements for dealing with technical matters. While that paper refers to technical telecommunications regulations, the argument is transferrable to technical radiocommunications regulations. The paper notes that:

*[a] key driver in the establishment of technical codes is the common interest amongst industry participants to make sure common infrastructure is established and common standards are used. Otherwise, there are significant risks to their own network infrastructure or their ability to interoperate with other networks. There are therefore very strong incentives for cooperation on detailed technical codes on which a regulator would be hard-pressed to 'second guess' the industry preferred outcome.*⁴

Term of reference 4: Institutional arrangements

As stated in Part A, Foxtel supports the development of a Government spectrum policy in the form of a set of strategies for allocating, improving efficient use of, and valuing spectrum needs. The institutional arrangements need to include separate transparent policy framework development and implementation processes. Foxtel envisages the policy framework development being a DoC role, and the implementation being the ACMA's role.

We also reiterate the importance of effective domestic consultative fora. Regular dialogue between the policy and regulatory agencies and industry, as well as other public and scientific sectors, on spectrum management outside formal consultation processes is very important.

Similarly, we consider it very important that the framework continue to explicitly confer a role on the relevant agency to take a leading role in international fora. In this regard, we note for reference the recent affirmation by Ofcom of its commitment to take a leading role in international spectrum fora. In the April 2014 *Ofcom Spectrum Management Strategy* the UK regulator notes that it:

*will continue to take an active role in ensuring that international decisions taken at the European and global level are consistent with securing benefits for UK citizens and consumers.*⁵

³ 'Private Park' models could authorise the operation of services in a specified frequency range and geographic area and involve exclusivity being offered to an industry, rather than to an individual entity.

⁴ Department of Communications, *Regulating harms in the Australian communications sector*, May 2014, p 17 – available at http://www.communications.gov.au/_data/assets/pdf_file/0008/231884/Dept-policy-background-paper_2_May-14.pdf.

⁵ Ofcom, *Spectrum Management Strategy*, April 2014, p 10 – available at <http://stakeholders.ofcom.org.uk/binaries/consultations/spectrum-management-strategy/statement/statement.pdf>.

Term of reference 5: Consistency across legislation and sectors

Foxtel fully supports the aim of this ToR which is about ‘creating a level regulatory playing field for spectrum users by treating users consistently and transparently’.⁶ As noted, we support a single framework for spectrum management and oppose moratoriums on entry to markets in which participants use spectrum.

We agree that the review should look for ways in which efficiencies can be gained by streamlining and harmonising provisions across legislation—it is consistent with the Government’s deregulatory agenda that duplication and inconsistencies in legislation be avoided.

Term of reference 6: Framework for public interest spectrum uses

Foxtel acknowledges that sufficient spectrum capacity must be reserved for public interest requirements such as defence, emergency and essential services, and for scientific and meteorological purposes. It is appropriate that the review consider how pricing of spectrum for public interest services is determined—as the value delivered by these services is obviously different to that delivered by commercial services.

Term of reference 7: A whole-of-Government approach to spectrum policy

Foxtel supports the development of an over-arching policy statement for the future direction of spectrum management—covering all sectors.

Term of reference 8: A whole-of-economy approach to valuing spectrum

Similarly, a whole-of-economy approach to valuation of spectrum used both within and outside the media and communications industries is supported. It is desirable that this approach include maximum transparency of how competing uses of spectrum are valued and evaluated.

There may be scope to combine ToR 7 and 8 given that developing a whole-of-economy approach to valuing spectrum appears to be just one component of developing a whole-of-Government approach to spectrum.

⁶ Issues Paper, p 7.