

Submission to the Commonwealth Department of Communications

Spectrum Review 2014 - Terms of Reference

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20 June 2014

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1. Executive Summary

Introduction

Telstra welcomes the Department of Communications' decision to undertake a review of Australia's spectrum policy and management framework (the **Review**) and the opportunity to make this submission on the Spectrum Review Issues Paper (**Issues Paper**).¹ Spectrum is a critical resource for Telstra's mobile and fixed networks. The way this resource is managed impacts the services Telstra can offer and the cost of delivering those services. Telstra depends on an effective spectrum policy and management framework to facilitate the investment certainty, technological flexibility and quality of spectrum necessary to continue to provide customers with a superior experience of the latest wireless technologies and services.

- While Telstra generally agrees with the Terms of Reference, Telstra believes there is a need for an additional Term of Reference to consider the appropriateness and effectiveness of the basic building blocks of the existing regime.
- the scope of some of the Terms of Reference are unnecessarily narrow; and
- there is some overlap between the Terms of Reference

Summary

Telstra's key submissions on the Terms of Reference are as follows:

- Telstra strongly believes there is a need for an additional Term of Reference to consider the appropriateness and effectiveness of the key building blocks of the framework to identify which parts of the framework require significant revision, repeal or expansion. Examples of the key building blocks include the object of the *Radiocommunications Act 1992* (Cth) (**Radiocommunications Act**), the existing licence types, licence tenures and renewal frameworks, the technical regulation and interference management mechanisms, and the enforcement powers of the Australian Communications and Media Authority (**ACMA**). Telstra considers a review of the framework at this level as the highest priority because it will inform the Review's inquiries into the framework's complexity, flexibility, efficiency and consistency and the revision of the framework's overarching institutional arrangements.
- Terms of Reference 6 to 8 should be considered together with Term of Reference 3. This is because the development of whole-of-economy and whole-of-government approaches to spectrum management and the assessment of frameworks to govern public-interest spectrum use, should not be carried out in artificial isolation from the broader issue of efficiency, which is already covered under Term of Reference 3.
- Term of Reference 7 appears unaligned with the overall focus of the Review on addressing issues with the regulatory framework and its institutional arrangements. While some policy consideration will be necessary to determine what the appropriate framework should be, any policy work required to apply the framework to particular spectrum bands, uses or technologies should be secondary to the consideration of the appropriateness of the existing regulatory framework and its institutional arrangements.
- Telstra appreciates that there are areas of reform that cannot be achieved in the short term. This is because of the extent of legislative changes that are likely to be required to implement those reforms and the need for transitional arrangements to facilitate a progressive and orderly transition to new or extensively revised mechanisms. However, Telstra thinks there are other areas of reform which could be achieved within the next 12-18 months, including:
 - the need for urgent rationalisation and updating of the overly complex legislative provisions and regulations addressing the supply and use of unlicensed and interference causing devices, particularly illegal boosters and repeaters, and the expansion of the ACMA's enforcement powers to prevent the import, supply and use of these devices in Australia; and

¹ Available at http://www.communications.gov.au/consultation_and_submissions/spectrum_review.

- reforming the spectrum licence re-issue process to streamline the process and enable licensees to have greater certainty about re-issue, including potentially introducing a presumption of re-issue or a perpetual licensing approach with appropriate safeguard mechanisms.

2. Appropriateness and effectiveness of the regulatory framework

Telstra strongly believes an additional Term of Reference is necessary to consider the appropriateness and effectiveness of the basic building blocks of the existing regulatory framework. For example, this Term of Reference should test and consider the appropriateness and effectiveness of:

- the object of the Radiocommunications Act;
- the differing licence types, licence tenures and licence renewal frameworks;
- the mechanisms for technical regulation and interference management;
- the various other types of instruments that give effect to the Act; and
- the enforcement powers, obligations and priorities of the ACMA.

While Terms of Reference 1, 2, 3 and 5 consider the regulatory framework from a complexity, flexibility, efficiency and consistency point of view, Telstra believes it is important to first consider the appropriateness and effectiveness of each building block of the regulatory framework and to identify which parts of the framework require significant revision, repeal or expansion.

The inadequacies that exist in areas such as the interference management framework and the licence tenure and renewal frameworks under the Radiocommunications Act go beyond matters of complexity, flexibility, efficiency and consistency, and accordingly require review at a deeper and more fundamental level. For example, Telstra believes there is a need to significantly expand the ACMA's enforcement powers to enable it to properly combat the sale and import of unlicensed radiocommunications devices into Australia by overseas manufacturers, by enabling it to:

- effect the seizure of unlicensed devices through Customs; and
- direct marketplace providers (like eBay) to prevent the offering of such devices for sale to end-users in Australia.

This level of review should precede and support the review of the regulatory framework's complexity, flexibility, efficiency and consistency.

Telstra proposes this new Term of Reference read as follows:

“Consider the fundamental mechanisms, procedures and underlying instruments of the existing framework to assess their appropriateness and effectiveness with a view to identifying which parts of the framework require significant revision, repeal or expansion.”

Telstra recommends lessons from the fundamental mechanisms, procedures and underlying instruments of comparable regulatory frameworks in other jurisdictions be considered where relevant as part of this additional Term of Reference.

3. Existing Terms of Reference

As noted above, while Telstra generally agrees with the Terms of Reference, Telstra believes the scope of some of the Terms of Reference is too narrow and should be revised to more directly address certain reform agendas. Further, Telstra thinks Terms of Reference 6 to 8 could be subsumed by and are best addressed as part of Term of Reference 3.

3.1. Term of Reference 1

Telstra agrees the regulatory framework is very complex. Inconsistent procedures and mechanisms have been created at various levels within the framework, some being contemplated by and developed under the Radiocommunications Act and others being developed by the ACMA to fill regulatory gaps.

The ACMA is responsible for several hundred determinations, plans, advisory guidelines and other legislative instruments,² many of which have been made under the Radiocommunications Act. However, despite there being highly detailed and prescriptive regulation in some areas, Telstra considers there are still large gaps and inadequacies in others. These gaps and inadequacies are not restricted to the Radiocommunications Act and instruments made under it. For example, the ACMA has relied on directions made under the Australian Communications and Media Authority Act 2005 (Cth) (**ACMA Act**) to set eligibility deadlines and payment terms for the digital dividend auction because the ACMA lacked the powers to do so under the Radiocommunications Act, notwithstanding that the auction rules themselves were made under the Radiocommunications Act.³ Therefore, the powers under the ACMA Act should be included in the proposed review as well.

As a result of these kinds of gaps and uncertainties, Australia has been left with a regulatory framework that is at times unclear and difficult to navigate. This in turn leads to operational inefficiencies and compliance burdens on spectrum users. Telstra's view is that the Review must comprehensively resolve the inconsistencies between the form and placement of various regulatory mechanisms within the regulatory framework and the coherency of its operation as a whole.

While Telstra supports the focus of this Term of Reference on reducing the complexity of the regulatory framework, Telstra notes:

- The Review must first take a more in-depth look at the adequacy of the existing building blocks of the regulatory framework as noted above.
- The use of the term "impact" in the Term of Reference itself is unhelpful. The Term of Reference should more explicitly acknowledge that facilitating ease of use for spectrum users and administrators is the driving purpose behind any deregulation and rationalisation of the existing regulatory framework.
- While Telstra welcomes a review of the appropriateness of the object of the Radiocommunications Act, which was identified by the Productivity Commission as requiring reform in its 2002 review of the Act,⁴ Telstra believes that inquiry should be made as part of the proposed new Term of Reference to consider the appropriateness and effectiveness of the building blocks of the regulatory framework.⁵

Telstra proposes the Term of Reference be amended as follows:

"Simplify the framework to reduce its complexity and facilitate ease of use for ~~impact on~~ spectrum users and administrators, and eliminate unnecessary and excessive regulatory provisions."

3.2. Term of Reference 2

Telstra supports a review of the regulatory framework's flexibility and its ability to facilitate emerging services. However, Telstra considers that Term of Reference 2 as currently drafted is unnecessarily narrow in its focus on improving the flexibility of existing frameworks "while continuing to manage interference."

The Term of Reference should also consider more broadly the need to maintain investment certainty for industry players and to promote industry investment in emerging technologies. Ensuring greater industry confidence in and visibility of the strategic direction of spectrum planning will itself drive an increase in investment in spectrum infrastructure and emerging technologies. Telstra acknowledges that as a spectrum licensee it has benefited from the ability to progressively adopt the latest mobile telecommunications technology. For example, Telstra has transitioned from AMPS to CDMA and then to 3G HSPA in the 800 MHz band and 2G to LTE in the 1800 MHz band. Telstra is strongly in favour of retaining this flexibility going forward.

² Australian Communications and Media Authority, *Sunsetting & ACMA stakeholders* (October 2013) available at <http://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/sunsetting-and-acma-stakeholders> as at 16 June 2014.

³ Australian Communications and Media Authority (*Spectrum Licence Allocation – Combinatorial Clock Auction – Eligibility Deadline and Payment Terms*) Direction 2013 and *Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012*.

⁴ Productivity Commission, *Radiocommunications – Inquiry Report* (December 2002), available at <http://www.pc.gov.au/projects/inquiry/radiocommunication/docs/report> as at 11 June 2014, Findings 5.1- 5.7, pp LXI-LXII.

⁵ See section 2

While Telstra supports flexibility to facilitate the adoption of emerging technologies, Telstra notes that regulators must carefully exercise their discretionary powers (such as the use of spectrum embargoes and determining spectrum assignment reprioritisations) in a consistent manner to maintain industry confidence in the strategic direction of spectrum planning and the level of investment in emerging technologies and associated spectrum infrastructure.

Accordingly, the Term of Reference should acknowledge that improving the flexibility of existing frameworks must be pursued in concert with maintaining investment certainty and industry confidence.

Telstra proposes the Term of Reference be amended as follows:

“Improve the flexibility of the framework and its ability to facilitate new and emerging services including advancements that offer greater potential for efficient spectrum use, while continuing to manage interference, promote investment in emerging technologies and sufficiently protect the interests of existing spectrum users.”

3.3. Term of Reference 3

Telstra agrees that a key objective of the current framework is spectrum efficiency, and supports a review of the role of the regulatory framework in ensuring the efficient use and management of spectrum. However, while the Term of Reference only refers to “efficient allocation, ongoing use and management...”, Telstra believes it would be helpful to expand the Term of Reference to clarify that it will address efficiency at all levels of spectrum management – allotment, licence planning, assignment and use and operation of radiocommunication devices. Telstra uses these terms as follows:

- allocation: the identification of frequency ranges for different services categories in line with ITU regulations;
- licence planning: the division of allocations into channels that can be licensed;
- assignment: the issuing of licences to users for the use of specific channels; and
- use: the deployment and operation of radiocommunication devices within licensed spectrum.

Telstra proposes the Term of Reference be amended as follows:

“Ensure efficient allocation, licence planning, assignment, ~~ongoing~~ use and management of spectrum, and incentivise its efficient use by all commercial, public and community spectrum users.”

In addition, as is explained in more detail further below, Telstra is of the view that this Term of Reference already covers the substance of Terms of Reference 6 to 8 and that the particular issues to be addressed in Terms of Reference 6 to 8 are best addressed together with Term of Reference 3. Accordingly, Term of Reference 3 should replace those Terms of Reference unless it is the Department’s intent for those Terms of Reference to address different issues.

3.4. Term of Reference 4

Telstra agrees there is a need to review the roles and responsibilities of entities involved in spectrum management. However, Telstra believes the Term of Reference should specifically consider the roles of the Minister and Department in developing and setting spectrum management policies and the role of the ACMA in implementing and enforcing those policies. Telstra is also of the view that the issues for consideration under the Term of Reference should include:

- the effectiveness of the checks and balances in current institutional arrangements to ensure there is appropriate accountability for the delivery of policy objectives and the effective application and enforcement of the regulatory framework in a cost effective and timely manner;
- whether the entities involved in spectrum management are equipped with the appropriate tools to carry out their roles (for example, whether the ACMA has the ability to fully implement and enforce the regulatory framework);
- the appropriateness of regulatory decision review mechanisms;
- the allocation of appropriate resources for industry engagement by the ACMA; and
- the potential for industry to play a greater role in the management of spectrum.

Telstra proposes the Term of Reference be amended as follows:

“Consider institutional arrangements and ensure an appropriate level of Ministerial oversight of spectrum policy and management, by identifying appropriate roles and accountability for the Minister, the Australian Communications and Media Authority, the Department of Communications, industry and others involved in spectrum management.”

3.5. Term of Reference 5

Telstra agrees that resolving inconsistencies across legislation is an important focus for the Review. In particular:

- While Telstra supports the ACMA's Priority Compliance Areas program,⁶ given the ongoing difficulties caused by unlawful use of devices such as boosters and repeaters to Telstra and other mobile telecommunications network providers, a thorough review against other regulatory frameworks of the enforcement powers and mechanisms available to the ACMA is necessary. Accordingly, the Term of Reference should make explicit reference to enforcement mechanisms as well as compliance mechanisms.
- In keeping with the Review's focus on improving the efficiency and flexibility of the regulatory framework, the Term of Reference should explicitly refer to the inconsistencies between the spectrum planning regimes in the Radiocommunications Act and the *Broadcasting Services Act 1992* (Cth) and consider the merits of removing the division between the two spectrum planning regimes. Telstra notes that a single and consistent approach to the planning, allocation and management of broadcasting and non-broadcasting spectrum was recommended in the Productivity Commission's 2002 Radiocommunications Inquiry Report and the 2012 Convergence Review Final Report.⁷

Telstra proposes the Term of Reference be amended as follows:

“Promote consistency across legislation and sectors, including in relation to compliance and enforcement mechanisms, technical regulation, the planning and licensing of spectrum, and addressing the division between radiocommunications and broadcasting services legislation.”

3.6. Terms of Reference 6 to 8

Telstra is of the view that, given the breadth of Term of Reference 3 and its focus on efficient use and management of spectrum, Terms of Reference 6 to 8 are adequately addressed under Term of Reference 3.

Term of Reference 6

While Telstra agrees the development of an appropriate framework to consider public-interest spectrum issues is warranted, the specific issue should be considered within the broader focus of Term of Reference 3 because that Term of Reference already deals with the question of the efficiency of allocating spectrum to promote its efficient use by commercial, public and community spectrum users.

The appropriateness of a framework to consider public-interest spectrum issues cannot be considered properly without regard to the broader issue of efficiency. Treating the issue separately runs the risk of detaching it from the broader reform agenda.

Term of Reference 7

Telstra is of the view that this Term of Reference is largely unnecessary and appears somewhat out of step with the overall focus of the other Terms of Reference on addressing issues with the regulatory framework and its institutional arrangements.

⁶ Telstra Corporation Limited, *Submission to the Australian Communications and Media Authority - Five Year Spectrum Outlook 2013-2017* (December 2013) available at <http://www.acma.gov.au/~media/Spectrum%20Outlook%20and%20Review/FYSO%202013%202017/Submissions/Telstrasubmission%205%20year%20spectrumoutlook%20pdf.pdf> as at 16 June 2014, p 7.

⁷ Above note 4, Recommendation 10.1, p LXX; Commonwealth of Australia, *Convergence Review Final Report* (March 2012) available at http://www.archive.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf as at June 18 2014, Recommendation 27, p 88.

This Term of Reference is a specific policy development project. Though a very worthy one, it should be dealt with separately and subsequent to the current Review. Telstra strongly believes that the first and foremost priority of the Review should be the regulatory framework itself and its institutional arrangements as noted above. Any further policy work required to apply the framework to particular spectrum bands, uses or technologies should be secondary to the Review and consideration of the appropriateness of the existing regulatory framework and its institutional arrangements.

So far as Term of Reference 7 is intended to cover approaches to managing public sector use of spectrum, that issue should be considered under Term of Reference 3.

Term of Reference 8

The development of a whole-of-economy approach to the valuation of spectrum that includes consideration of the broader economic and social benefits is best addressed together with the issue of the efficient use and management of spectrum under Term of Reference 3, as valuation, pricing and efficiency are intrinsically related.

4. Questions for stakeholders

Set out below are Telstra’s responses to the questions for stakeholders in the Issues Paper:

1	What additional issues should be considered by the review?	As noted in section 2, Telstra believes there is a need for an additional Term of Reference to first consider the appropriateness and effectiveness of each building block in the regulatory framework and to identify which parts of the framework require significant revision, repeal or expansion. Telstra also proposes the amendments to Terms of Reference 1 to 5, as set out in sections 3.1-3.5.
2	Are there any issues you think should be taken off the table?	As noted in section 3.6, the apparent focus on the development of further policy objectives in Term of Reference 7 appears unaligned with the overall focus of the Review. The development of any further high-level policy can only follow the resolution of issues with the regulatory framework and its institutional arrangements.

3	Which issues should be given priority and why?	<p>Telstra considers the review priorities to be as follows (in order of descent):</p> <ul style="list-style-type: none"> • (Review of framework building blocks) As noted in section 2 above, a review of the adequacy and effectiveness of the building blocks of the regulatory framework is of the highest priority because it will inform the review of the complexity, flexibility, efficiency and consistency of the framework under Terms of Reference 1, 2, 3 and 5. • (Terms of Reference 1 to 5) After the more fundamental review of the regulatory framework, addressing the complexity, flexibility, efficiency and consistency of the framework under Terms of Reference 1, 2, 3 and 5 should be the next priority, alongside the review of the framework's institutional arrangements under Term of Reference 4 to ensure the proper development and implementation of spectrum policy occurs. • (Term of Reference 7) As noted in response to question two above and in section 3.6, while some policy consideration will be necessary to determine what the appropriate framework should be, any policy work required to apply the framework to particular spectrum bands, uses or technologies should be secondary to the Review and consideration of the appropriateness of the existing regulatory framework and its institutional arrangements.
4	Which issues can be addressed in the short term (the next 12-18 months) and which should be considered over a longer period?	<p>Telstra thinks there are simplification and deregulation reforms that can be achieved in the short term, for example:</p> <ul style="list-style-type: none"> • the need for urgent: <ul style="list-style-type: none"> • rationalisation and updating of the overly complex legislative provisions and regulations addressing the supply and use of unlicensed and interference causing devices, particularly illegal boosters and repeaters; and • expansion of the ACMA's enforcement powers to prevent the import, supply and use of these devices in Australia; and • reforming the spectrum licence re-issue process to streamline the process and enable licensees to have greater certainty regarding re-issue, including potentially introducing a presumption of re-issue or a perpetual licensing approach with appropriate safeguard mechanisms. <p>However there remain other areas of reform which cannot be achieved within the next 12 to 18 months. Telstra wishes to emphasise that proper transitional arrangements must be developed together with any significant reform in order to ensure that spectrum users are able to transition to new regulatory mechanisms in a non-disruptive and cost-effective manner. Bringing about timely reform should not come at a disproportionate cost to spectrum users.</p>

5	<p>What should be the extent of reform – can the framework be improved by adjusting what is currently in place or are more fundamental changes required?</p>	<p>As already noted in section 3.1 of this submission, the Review must consider more than just the complexity, flexibility, efficiency and consistency of the existing regulatory framework. There is a real need to address the adequacy of the components that comprise the regulatory framework in order to identify which parts of the framework require significant revision, repeal or expansion.</p> <p>While Telstra believes the reform stemming from the modified Terms of Reference as proposed in this submission should comprehensively resolve the large gaps and inconsistencies between the form and placement of instruments within the framework addressing the various aspects of spectrum management, Telstra also emphasises the need for the extent and manner of reform to be sensibly balanced against the likely costs to spectrum users in migrating to and using new or revised regulatory mechanisms.</p>
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5. Contact details

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