



Australian
Competition &
Consumer
Commission

**ACCC submission to the Department of Communications
and the Arts' Legislative Proposals Consultation Paper:
Radiocommunications Bill 2016**

April 2016

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The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission on the proposed approach to key provisions for a new Radiocommunications Bill (the proposed Bill) as outlined in the Legislative Proposals Consultation Paper (the Consultation Paper) released on 10 March 2016. The ACCC supports the proposal to simplify the spectrum management framework and streamline regulatory processes where possible. A simple, efficient and transparent framework is likely to reduce regulatory barriers to participating in markets which rely on spectrum as an essential input to provide services.

The Consultation Paper notes that the economic value of Australia's spectrum to the national economy will be significant in the coming years. We consider that in this context, it will be increasingly important that competition considerations are a key part of the spectrum management framework. This could be reflected in the proposed Bill by giving greater prominence to competition considerations. We have suggested some measures below to give effect to this proposal, as well as provided our comments on the specific proposals for the new framework.

In summary, we suggest that:

- the promotion of competition in markets which rely on spectrum be included as a separate principle in the proposed Bill.
- the ACMA be required to consult with the ACCC on licence limits (or competition limits) in any allocation of spectrum. Further, we consider that where the ACCC recommends the imposition of competition limits, that there be a presumption that the advice will be followed in the allocation process.
- the new framework allow the ACCC to consult publicly when considering setting licence limits, and give the ACCC discretion to publish its advice on licence limits.
- the framework include a mechanism for consulting with the ACCC when licences are renewed.
- section 50 of the CCA apply to the issue of licences, including where licence limits have been applied to the allocation.

Overall, we support the proposals that:

- simplify the licensing framework, and consider that under a new framework competition considerations be given greater weight in licence allocation processes and in setting licence conditions.
- encourage greater secondary market activity.

Promoting competition as a principle of the new framework

The ACCC considers that the spectrum management framework will have an increasingly important role in promoting competition and economic efficiency in markets which rely on spectrum as an essential input, particularly given the forecast growth in demand for spectrum. For example, adequate spectrum holdings will be vital for mobile network operators (MNOs) to meet consumer demand for high quality mobile broadband services and thereby remain competitive in the mobile retail market in coming years.

In these circumstances, we consider that an important principle which should be included in any proposed reform or spectrum regulation is the promotion of competition and economic efficiency in

markets which rely on spectrum. The new framework should also contain sufficient detail to implement this principle in practice. For example, the proposed Bill could expressly state that competition issues will be considered in spectrum allocation processes and in setting licence conditions (as discussed further below). Together, such measures will help to ensure that markets using spectrum, particularly communications markets, operate in a competitive and efficient way.

Consultation with the ACCC on licence limits should be mandatory under the new framework

The ACCC strongly supports the proposal to require the ACMA to consult with the ACCC on licence issue limits (Proposal 8). The consideration of the state of competition in the market at the time of allocation enables licence or competition limits to be imposed which seek to ensure that spectrum allocation processes do not lead to anti-competitive outcomes. For example, while auctioning spectrum can promote allocative efficiency, if limits do not apply to the amount of spectrum that can be issued to a bidder, a single bidder may be able to monopolise the spectrum or block other parties from acquiring spectrum. Such outcomes could limit competition in downstream markets which rely on the spectrum, as operators without adequate spectrum will not be able to offer comparable quality of service to end-users.

As the national competition regulator and economic regulator in the communications sector, the ACCC is well placed to advise on licence limits that will lead to competitive and economically efficient outcomes in downstream markets. Our role in this sector, which is a major user of spectrum, also means that we are well placed to observe and understand trends and developments in communications markets and consider how decisions in one area of the market may impact others. We consider that in an environment where demand for spectrum is expected to grow, potential competition implications and promoting economically efficient outcomes should be considered whenever the allocation of spectrum is under consideration by government.

The proposal in the Consultation Paper is that the ACMA be given flexibility to consult with the ACCC where ‘... appropriate or reasonably practicable to do so’. However, there is no guidance about when it may not be appropriate or reasonably practicable to consult. We consider that this creates a risk that competition concerns may not always be given full consideration and that this may lead to outcomes which are not in the best interests of end-users. Instead, we consider that circumstances in which consultation with the ACCC is required should not be limited to circumstances where it is ‘appropriate or reasonably practicable’. This will help to ensure that the impact that an allocation can have on competition in downstream markets is formally taken into account by the government when considering the allocation or reallocation of spectrum.

We also take the view that the ACCC’s advice on licence limits should be given effect in spectrum allocations. We would support a proposal that there be a presumption that the ACMA implement the ACCC’s advice on competition limits unless it considers there are good reasons for departing from the ACCC’s advice.

Public consultation on licence limits

The current spectrum management framework does not outline a process for public consultation for setting licence limits. While this is not an issue that is addressed in the Consultation Paper, we consider that it is important that under the new framework the ACCC is able to undertake public

consultation before advising on whether licence limits should be imposed, and is able to publish its advice where it considers it to be appropriate.

Public consultation is fundamental to regulatory policy development and implementation. When considering licence limits, the ability to consult publicly will assist the ACCC to understand the relevant markets affected by the spectrum allocation, the spectrum needs of relevant parties, any technical issues, as well as providing stakeholders with an opportunity to contribute their views. Appropriate consultation will also help address concerns from some stakeholders about the need for greater transparency, accountability and certainty in spectrum allocation processes.

Application of section 50 of the *Competition and Consumer Act* to licence renewal

The ACCC supports the proposed application of section 50 of the *Competition and Consumer Act 2010* (CCA) to the renewal of licences (as outlined in Proposal 8). The application of section 50 to licence renewal will help to prevent anticompetitive outcomes where markets have changed significantly since the licence was originally issued. This may be particularly important given the proposal that licences could be issued for a period of up to 20 years (Proposal 6), and that under the proposed Bill a licence could grant the spectrum licence holder renewal rights from the outset at the time of issuing the licence (Proposal 9).

While the application of section 50 of the CCA to licence renewals will help to guard against anticompetitive outcomes, we consider that it will be important for the Bill to contain sufficient details about the process for consulting the ACCC before any spectrum licence expiry and potential renewal. This could be achieved by the proposed Bill making clear that the ACCC will be informed of the renewal and consulted before the licence is renewed, so that any section 50 assessment can be conducted before the licence renewal is finalised.

Section 50 of the CCA should continue to apply where licence limits have applied

The Consultation Paper proposes that section 50 of the CCA would not apply to the issue of spectrum licences if licence limits have been set for the licence issue (outlined in Proposal 8). However, we consider that a preferable approach is for section 50 to apply to the issue of all licences, even where licence limits are imposed.

While licence limits are usually an effective mechanism to reduce the risk of spectrum allocations leading to anti-competitive outcomes in downstream markets, we consider that section 50 remains an important additional safeguard, for a number of reasons.

First, circumstances in the relevant market can change between the ACCC providing licence limit advice and the process for allocating licences, meaning that the original advice may no longer be relevant to the spectrum allocation. For example, it is possible that a party that expresses interest in participating in an auction for spectrum could acquire (or dispose of) spectrum assets (perhaps through secondary trading) in the time between the ACCC preparing and providing its advice and the time of the actual spectrum licence allocation. It may also be possible that the parties expected to participate in a spectrum allocation at the time the ACCC prepared its advice could change. This could manifest in the form of the withdrawal of a previous intention to participate, or an unexpected participant announcing its intention to participate.

Such changes in circumstances could mean that the licence limits may no longer be appropriate to prevent anticompetitive outcomes as a result of a spectrum allocation process. While it may be open to the ACMA or government to seek further advice, there may be occasions where this is not practical or the change in circumstances may not be identified until after the allocation process has commenced.

Second, it is possible that a bidder could engage in anticompetitive conduct during an auction that licence limits could not prevent. For example, it is possible that a bidder could acquire spectrum lots in a particular configuration as a strategy to block another party from acquiring aggregated lots.¹ In this case the application of section 50 to the issue of the licence would help to limit the chance that a bidder could achieve an anticompetitive outcome through their conduct in an auction.

The option to consider whether a spectrum acquisition could have the effect, or likely effect, of substantially lessening competition in a market, is important to ensure that markets remain competitive. An allocation of spectrum could have the effect of substantially lessening competition when it prevents, inhibits or hinders potential bidders competing on their merits because one or more bidders are unable to access the spectrum necessary to provide services. While in the majority of cases, the imposition of licence limits will achieve this objective, the examples noted above illustrate the risks of anti-competitive outcomes occurring because of a change in circumstances. Currently, section 50 applies to spectrum acquisitions and has not lead to uncertainty around spectrum allocation processes, and we consider it would be unlikely to do so if it continues to apply. The ACCC would only conduct a review if it had reasonable grounds to believe that there was an issue in the market that warranted further consideration.

Competition should be considered in licence issue processes and the licensing system

The ACCC supports the simplification of the licensing system and the licence issue process. However, we consider that the involvement of the ACCC in the design of spectrum allocation processes and in the setting of licence conditions would help to ensure that under the new framework competition considerations are given adequate weight.

Design of spectrum allocation processes and additional tools to promote competition

We consider that ACCC involvement in the design of spectrum allocation processes would help to promote efficient and competitive spectrum allocations, and that the ACCC should be given the opportunity to recommend that mechanisms other than licence limits (which set out the maximum amount of spectrum that can be held) are used in spectrum allocation processes to promote competition. Internationally, regulators have a number of tools other than setting licence limits, which they can use in the design of spectrum allocation processes to promote competitive outcomes.

For example, in the UK, Ofcom has used spectrum floors in spectrum auctions to promote competition. These require that a certain number of bidders each be able to acquire spectrum. Spectrum floors are better able to promote competition than limits where it is necessary for all participants in a market to acquire some spectrum within a band to remain competitive in the

¹ Contiguous lots of spectrum can be aggregated and are of greater utility than non-contiguous blocks of spectrum.

relevant market. Another mechanism used internationally is spectrum set-asides or reserves, where a certain amount of spectrum can only be allocated to a certain type of bidder, such as a small player or a new entrant. Such a mechanism may better promote competition than setting limits where there is a smaller player or potential new entrant that requires a certain amount of spectrum to compete in the market.

We would support proposals that provide the ACCC with a formal opportunity to contribute to the design of spectrum allocation processes in order to promote competition and to consider ways to do this other than setting licence limits. Providing the ACCC with the ability to advise on the types of mechanisms that could be included in an auction would help ensure that the auction process best suited the circumstances of the relevant market in order to promote competitive outcomes.

In particular, such mechanisms could help to remove barriers to entry in markets, like the market for mobile services. As spectrum demand is likely to increase in the future, in the absence of such mechanisms it is possible that smaller or new entrants' ability to acquire spectrum will be limited. New entrants and smaller operators are important to competition in markets, such as the communications markets, and help to deliver cheaper and more innovative services to consumers.

We consider the government's competition objectives, particularly the promotion of competition in the long term interests of end-users, could be more effectively implemented in markets that rely on spectrum if the ACCC were to have a role in contributing to the design of spectrum allocation processes. Involving the ACCC in the design process will not only enable it to provide advice about whether mechanisms such as spectrum floors or reserves may promote competition, it will also help to ensure that the risks of bidders engaging in anticompetitive behaviour are minimised.

This proposal could be achieved by requiring the ACMA to consult with the ACCC when it develops a 'licences issue scheme' (as set out in Proposal 7) and by providing the ACCC with the ability to advise more broadly about mechanisms that could be incorporated into an allocation process in order to promote competition in a spectrum allocation. This may include competition or licence limits, but may also include other mechanisms where appropriate. Similarly to our views on the application of competition limit advice, we would also support any new Bill including a presumption that the ACCC's advice on the application of such mechanisms in a spectrum allocation process is implemented unless there are good reasons for departing from the advice.

Consultation on licence conditions

We also consider that requiring that the ACMA consult with the ACCC when setting licence conditions will help to ensure that a new spectrum management framework allows for adequate consideration of competition issues. A number of licence conditions have the potential to raise competition issues. For example, the term of licences can impact the availability of spectrum that would be available for new entrants to the market. Similarly licence renewal rights can also impact competition, as they can influence potential new entrants' decisions about whether to enter a market.

Under the proposed Bill, the ACMA would be able to issue licences for a period of up to 20 years (which is greater than the current maximum term of a spectrum licence of 15 years), and spectrum licences can set out renewal rights as a condition of the licence. We recognise the importance of

regulatory certainty for investment and non-commercial planning purposes. However the ACCC is concerned that the proposed 20 year licence term may inhibit the flexibility needed to respond to changing circumstances. This is particularly relevant to the dynamic wireless communications markets where technological, supply and demand changes occur in a rapidly changing environment.

Therefore, we consider that including a requirement that the ACCC is consulted on licence conditions will help to ensure markets which use spectrum remain effective.

Encouraging secondary trading activities and spectrum trading

The ACCC welcomes the measures in the Bill intended to encourage secondary market activity and spectrum sharing. Such measures can work to promote competition and efficiencies. We also consider that it is particularly important that competition considerations are able to be taken into account when spectrum sharing arrangements are approved, and that section 50 of the CCA applies to all secondary market activity. This will help to ensure that the outcomes of any secondary market activity do not have anticompetitive results.

We would appreciate the opportunity to engage with you further as the proposal for a new Bill progresses. If you have any questions about any of the issues raised in this submission, please contact Clare O'Reilly [REDACTED]