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AMTA

Australian Mobile Telecommunications Association

AMTA submission

Department of Infrastructure, Transport, Regional Development and Communications

2020 Radiocommunications Reform

About AMTA

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. Its mission is to promote an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia, with members including the mobile network operators and service providers, handset manufacturers, network equipment suppliers, retail outlets and other suppliers to the industry. For more details about AMTA, see http://www.amta.org.au.

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Introduction

AMTA welcomes the opportunity to comment on the Exposure Draft of the Radiocommunications Legislation Amendment (Reform and Modernisation) (**the Bill**) and appreciates that the Government is committed to passing the proposed amendments in 2020.

We strongly support an amendments-based pathway to reform and recognise that the Bill is the first step in what we anticipate will be a more comprehensive agenda of reform. We suggest that it would be helpful for stakeholders to understand the complete reform agenda more clearly to be able to evaluate the Bill in the context of strategic government policy objectives.

For example, because broadcasting spectrum has been excluded from the Bill, it also means that there is no defined pathway for the reallocation of broadcasting spectrum, so an extent of uncertainty remains around how such a process would be implemented.

AMTA generally supports the Bill and welcomes the adoption of an approach designed to provide both certainty and flexibility within the spectrum licensing regulatory framework.

More specifically, AMTA notes its members support the following reforms:

- increasing the maximum licence term for spectrum licences to 20 years;
- the introduction of renewal statements designed to give licensees greater certainty of the arrangements that will apply at the end of licence term;
- a more streamlined process that removes the Minister from routine administrative tasks and approvals;
- the introduction of Ministerial Policy Statements (MPSs) for the Minister to provide guidance to the ACMA on its policy objectives; and
- an improved and strengthened compliance and enforcement regime that should improve the ACMA's ability to be timelier and more efficient in managing interference issues such as illegal mobile repeaters.

Nevertheless, there are some areas where we think the Bill may have introduced unintended consequences or could be improved further and we outline these below.

AMTA's main concern is that the introduction of increased flexibility in the legislation needs to be balanced against the need to protect the property rights of the owners of spectrum licences. The investment required to purchase spectrum licences is undoubtably significant. These investments are made within the context of long-term objectives around network deployment plans and require a corresponding certainty of the rights being bestowed for the duration of the investment. While we appreciate and understand that building more flexibility into the framework will mean that the distinctions between licence types will be blurred, we strongly believe that in order for continued investment to be made in the deployment of 5G networks, there needs to be a corresponding level of certainty around the property rights conveyed through the allocation of

spectrum licences. We believe that this can be achieved by maintaining a hierarchy of licence types in the framework so that issues around co-existence and interference can be prevented and resolved without diluting the property rights of spectrum licences.

Schedule 2 – Policy statements and work programs

AMTA understands that MPSs will play a key role in the regulatory framework and suggest that consultation with stakeholders will be key to developing such policy statements. We propose that the Bill should require consultation to occur before an MPS is made.

It would also be helpful for stakeholders to have visibility of draft MPSs that will be needed to enable the transitional arrangements for the legislative changes as soon as this is practicable and in time for passage of the Bill through Parliament. Specifically, AMTA members suggest it is important to have visibility of draft MPSs on the following topics:

- the policy around the default position on spectrum licence renewal;
- considerations relevant to applying the public interest test and the types of "specified circumstances" that may form prerequisites to licence renewal;
- the methodology used to calculate the price for spectrum licence renewal;
- criteria for the ACMA to consider when setting allocation limits under section 60(5);
- guidance on the use of the direct allocation provisions under section 60A; and
- clarification regarding the relationship and hierarchy of licence types.

AMTA participates in the ACMA's consultation processes around its work program (i.e. Five-Year Spectrum Outlook) and believes that there is a well-established process for stakeholder consultation embedded in the ACMA's current planning and prioritisation processes that will be further supported by the Bill.

Schedule 3 – Licences

AMTA submits that spectrum licences convey exclusive property rights for the duration of the licence term. These property rights are determined prior to allocation and made explicit in the licence conditions, including the proposed renewal statement. We maintain that the licence conditions of spectrum licences cannot be varied except by agreement with the licence owner.

ACMA discretionary powers must be balanced with transparency

Many of the proposed amendments to the Act aim to provide the ACMA with greater flexibility and decision-making power on a range of licensing aspects such as: allocation limits for auctions; licence duration such as 20 year terms on apparatus licences; renewal prospects; conditions of renewal (e.g. subject to a public interest test); variation of licence conditions and/or renewal statements; to name a few. While we support the objective of improving the agility and flexibility

of the ACMA by giving it greater discretionary power, we believe that to the extent the ACMA's discretion is increased, there should be a commensurate requirement for the ACMA to engage with stakeholders affected by the ACMA's decision.

For example, sections 65A and 103A of the draft Bill require the ACMA to include a renewal statement on new spectrum and apparatus licences respectively. In these sections, however, there is no requirement for the ACMA to consult with prospective licensees on the content of the renewal statement, which under options 65A(1)(c) or 103A(1)(b) may require specified circumstances to exist at the time of renewal. We propose the Bill should include a requirement for the ACMA to consult on the proposed renewal statement, and for reasons to be provided as to why a particular renewal statement (65A(1)(a)-(c)) is being proposed.

Similarly, we are very concerned that under section 73(3) and 103C(1) of the draft bill, the ACMA may vary or omit the renewal statement in a spectrum or apparatus licence (respectively) without consent of the licensee. AMTA submits that any variation of a renewal statement must be by agreement with the spectrum licence owner. To allow the ACMA the ability to unilaterally vary the renewal statement included in a spectrum licence would undermine the principle that licence conditions are determined prior to allocation and that this is what the spectrum licence owner has purchased. In the case of both licence types, we strongly urge that the legislation should contain a restriction that any such variation or revocation should only be possible with the consent of the licensee.

Hierarchy of licence types must be maintained

AMTA notes that the Bill retains the distinction between apparatus and spectrum licences. We strongly support retaining the distinct licence types while also introducing increased flexibility within the licensing framework.

We consider that the strict hierarchy of licence types needs to be reflected more explicitly in the Bill such that apparatus licences cannot infringe on the property rights associated with spectrum licences, and class licences cannot infringe on the rights associated with either apparatus or spectrum licences.

AMTA's concerns stem from the practical considerations that need to be made when situations involving co-existence need to be resolved.

For example, we note that class-licensed body scanners at airports have the potential to cause interference to mobile networks (operating under spectrum licences) and are not required to afford the mobile network operator protection[1]. While class licences ordinarily do not permit the ability to cause interference to others, the security policy objectives associated with airport body-scanners are likely to result in the spectrum licensee incurring the obligation to resolve any

[1] Radiocommunications (Body Scanning – Aviation Security) Class Licence 2018. See Note under clause 6(2). https://www.legislation.gov.au/Details/F2018L01583

interference issues. This undermines the property rights associated with the allocated spectrum licence.

Another example is the interference resolution mechanism "synchronisation fallback" proposed for resolving interference issues between adjacent channel and/or adjacent geography TDD systems operating in the 26 GHz band. A synchronisation pattern necessarily implies a ratio of upstream to downstream traffic, and may only be suitable for some use-cases, which may not be the use case of the spectrum licensee. In this scenario, providing an apparatus licensee the ability to compel a spectrum licensee to comply with a synchronisation fallback pattern (mandated ex ante by the ACMA which is unsuitable for the spectrum licensee's use case) is an example of where the status of an apparatus licensee can be elevated above that of a spectrum licensee. This could readily be resolved in the design of interference management criteria[2] in a way that would protect the spectrum licensee's property rights. What is required is a clear licence hierarchy that ensures spectrum licences are afforded a higher status than apparatus licences, such that spectrum licensees' property rights are maintained.

AMTA takes the view that the property rights included in spectrum licences must not be undermined by giving equal consideration or protection to apparatus/class licences when resolving co-existence issues where equipment or services are operating in the same or adjacent bands. To resolve this situation, we recommend the legislation be amended to establish a hierarchy of technical protection (from interference) afforded to the different licence types, with spectrum licences being afforded primacy in the hierarchy. The amendment should make it clear that in circumstances where there is technical interference between different licence types (where licensees are operating within the bounds of their respective licences), then spectrum licences must be afforded the greatest level of protection from interference. Both spectrum licences and apparatus licences should be protected from interference caused by devices operating under class licences. This hierarchy should displace any existing rules in technical or legislative instruments regarding which device was "first in time" in terms of operation. We believe such amendments would achieve fair outcomes for the industry, in light of the substantial investment made by spectrum licensees and would deliver the industry much needed certainty.

Renewal of licences

AMTA supports the inclusion of a clear renewal pathway for spectrum licences in the Bill via renewal statements.

We have some further suggestions for how renewal statements should work:

- There should be a presumption that spectrum licences will be renewed except in certain circumstances, including where it is not in the public interest; where there is a need to

[2] For example, requiring the synchronisation fallback frame pattern is specified by the spectrum licensee (rather than mandated ex ante by the ACMA) would maintain primacy of the spectrum licence.

harmonise with international spectrum bands; where there has been confirmed lack of use of the spectrum.

- Spectrum licence holders need to have greater certainty around the ACMA's decision-making process around renewals, including the timeline for this process. We suggest the process should not start any later than 5 years prior to expiry and that the terms of renewal should be finalised 3 years prior to expiry (providing a maximum of 2 years for the renewal decision-making process). After the decision, payment terms should be able to be made up until the expiry date.

- Section 60 sets out considerations for the allocation process and we suggest that a similar section should be drafted in relation to renewal statements i.e. to outline in the legislation what factors need to be included in a renewal statement.

- We suggest that renewal statements need to include a clear timeline as well as any tests or factors that will be considered in relation to renewal.

- Apparatus licences should only be renewed for periods exceeding five years when this is in the public interest.

- Renewal statements should form part of the core licence conditions.

Direct allocation of licences

We suggest that this method of allocation needs greater transparency which may be achieved by either including guidance in the Bill or in an MPS.

Section 60A of the draft Bill makes provision for the ACMA to directly allocate spectrum licences without a market process and we recognise there may be appropriate contexts for the use this power by the ACMA, such as those outlined in the Explanatory Note, including defragmentation of spectrum or for allocation to public safety agencies. However, we are concerned that bypassing market-based mechanisms may result in inefficient allocations, albeit that the Explanatory Note observes that risk of inappropriate use by the ACMA to directly allocate spectrum is mitigated by use of these powers being a reviewable decision.

In the event this power is used by the ACMA, we believe the opportunity cost of the direct allocation, along with the price to be paid and the reasons for the allocation, should be made transparent so this is clear to the wider industry and public.

Setting allocation limits

We support the approach adopted in the Bill in relation to allocation limits, namely that the ACMA is granted the power to set allocation limits without receiving a Ministerial direction, as this is consistent with the aim of providing the ACMA greater autonomy and removing the Minister from routine administrative tasks. The ACMA's decision-making criteria for setting allocation limits

should reflect the Object of the Act and the Principles for Spectrum Management. The ACMA should have regard to whether an allocation limit facilitates efficient use of the spectrum to ensure that spectrum is allocated to the highest value use.

We would prefer to see a clear set of decision-making criteria identified in the legislation or an MPS so that the ACMA is provided with a guideline on how it will exercise this power.

Apparatus licences

AMTA suggests that apparatus licences that are allocated for more than 5 years should be subject to a public interest test as part of the allocation process. This test should similarly apply to the renewal of any apparatus licence for more than 5 years. We believe this will provide greater transparency around the decision-making process in relation to the allocation of longer-term apparatus licences and enable the ACMA to consider more explicitly why a longer term licence should be issued as an apparatus licence rather than a spectrum licence.

We note that there are good reasons to allocate longer term apparatus licences, for example, in the 26 GHz band where this enabled more efficient use of the band, however, we believe it would be helpful for the ACMA to have a clearly defined pathway for this decision-making process.

AMTA also suggests that the use of AWLs, for example with 26 GHz band, shows that there is a need to maintain a clear hierarchy of licence types in order for co-existence issues to be resolved without undermining the property rights of spectrum licences.

Schedule 4 – Equipment etc

AMTA welcomes the introduction of more flexible approach to equipment rules in the Bill.

We also welcome the removal of the section 301 scheme for mobile repeaters from the current Act. However, we observe there does not appear to be a mechanism to allow "bulk authorisation" under the provisions governing the equipment rules, for example, to allow mobile repeaters devices that comply with the network requirements of MNOs. We consider that one-to-one authorisation requirement is not an appropriate mechanism to deal with mass market products such as mobile repeaters. Our preference would be for the ACMA to develop equipment rules that allow bulk authorisations to be permitted, which can be done after the draft Bill is enacted.

We support the introduction of interim and permanent bans which will replace the prohibited devices provisions in Part 4.1, Division 8 of the existing Act. AMTA has concerns around the proliferation of exemptions in recent years which we believe has created a somewhat fragmented and uncoordinated framework that potentially undermines the overall policy of prohibition of devices that can cause interference to networks. AMTA recently submitted[3] to the ACMA that prohibition should be the cornerstone that the regulatory framework is built upon. We also

[3] Submission is not yet public but can be provided on request.

acknowledge that the management of spectrum resources is increasingly complex as both the number of users and types of use increase. 5G and the continued growth of the IoT will put pressure on the regulatory framework of prohibitions and exemptions as both devices and applications proliferate.

Unlike the existing prohibited devices provisions (sections 189-191 of the existing Act) under the Bill the ACMA is not required to consult, other than with ARPANSA in section 172(2). We appreciate the expediency with which interim bans can be implemented as notifiable instruments without consultation, but we propose that for permanent bans, the ACMA should be required to hold a short public consultation (in addition to consulting ARPANSA). This should be added to section 172(2) of the draft Bill.

AMTA welcomes the introduction of the amnesty provisions (Schedule 4, Division 4, Subdivision D) for the surrender of banned equipment. We foresee an important role for these provisions in collecting illegal mobile repeaters. In order for an amnesty to be invoked, non-compliant (illegal) mobile repeaters would need to be the subject of a permanent ban, and we would welcome the opportunity to work with the ACMA to specify the characteristics of non-compliant mobile repeaters to be included in a permanent ban. Once the ACMA has subsequently established an amnesty, we would then consider options for collecting illegal devices under the amnesty through AMTA's MobileMuster program so that they could be appropriately disabled and securely recycled.

Schedule 5 – Accreditation etc

We note that section 70 of Schedule 5 of the Bill seems to provide the ACMA with broad powers to determine new licence conditions for all spectrum licences, or for a class of spectrum licences. The Explanatory Notes[4] state that the intent was to facilitate use of accredited persons to perform functions that form part of the conditions of spectrum licences. But, as drafted, the power conferred appears to be far broader, with potential for the ACMA to materially alter the rights associated with spectrum licences after they have been paid for by the new licensees. We suggest that the provision be amended to more narrowly confine its effect to facilitation of the accredited person arrangements.

Schedule 6 – Compliance and enforcement

AMTA welcomes the shift towards a graduated enforcement approach. We note that underlying any enforcement tool-kit there needs to be a strong focus on compliance and ensuring resources are sufficient to actively monitor compliance and take enforcement action where necessary.

[4] Explanatory notes, p56,

AMTA supports the proposed introduction of interim bans to enable prompt action to be taken where there is evidence of non-compliance.

We also welcome and support the inclusion of offences relating to interference.

Schedule 7 – Information-gathering powers

AMTA is concerned with the broad scope of the power under subsections 284S(1)(a)(ii) and 284S(1)(a)(iii), which currently extends to any information which is relevant to the operation of the Act or equipment rules relating to interference. This provision would capture a wide range of business records held by any entity operating this space, and a large proportion would be irrelevant to the ACMA's functions under the new Bill.

Our preferred position is that the information gathering powers are only triggered where there is *substantial* interference (as it is now defined under the new Bill) to radiocommunications. As currently drafted, the information gathering powers can apply in respect of any interference with radiocommunications. We believe this goes too far, as most radiocommunications transmissions must contend with some level of interference, and this "noise floor" should not be the ACMA's concern.

We propose an amendment to subsections 284S(1)(a)(ii) and 284S(1)(a)(iii) as follows:

> *(ii) the information or document is relevant to the operation of this Act or the equipment rules, so far as this Act relates, or the equipment rules relate, to substantial interference with radiocommunications; and*
>
> *(iii) the information or document would be reasonably likely to assist in the ACMA in connection with managing, limiting or preventing substantial interference with radiocommunications; or*

We also suggest that the scope of the power be extended in subsections 284S(b) and 284S(c) to include radiocommunications receivers. There is presumption that it is always a transmitter which is the cause of interference, when it is possible that the receiver may be suffering from poor design or degraded performance. As such, we recommend that the ACMA's information gathering powers be extended to cover receivers to enable comprehensive investigations to be conducted.

Additional reforms for consideration

In response to question 6 from the consultation paper, we would like to propose two additional reforms for consideration for inclusion in the Bill (or subsequent rounds of amendments).

1. **Removal of state and territory-based stamp duty on spectrum licence trades**

The continued imposition of stamp duty by certain state and territory jurisdictions is a disincentive to spectrum trading, at odds with the ongoing objective of enabling a more active and effective secondary marketplace. Spectrum trades are important for achieving defragmentation of bands, by enabling wider swathes of contiguous spectrum to be used by licensees to progress their technology to 5G services. It is particularly inappropriate for states and territories to apply duty to trades that enable these service improvements which in turn benefit their own consumers and businesses.

While trades of spectrum licences are no longer subject to stamp duty in many States and Territories, they can still incur this impost in Queensland, Western Australia and the Northern Territory, at rates of 5.15% or more. We have continuing concerns about the application of stamp duty to trades of spectrum licences and our previous joint submission with Communications Alliance on the *Radiocommunications Bill 2017* and Spectrum Reform covers this in more detail.

2. **Delegation of licensing rights to allow licensees to better manage their own spectrum licence holdings**

To promote efficiency and agility, AMTA is seeking an increased ability to authorise and manage the use of devices within a licensee's own spectrum licence holdings. We think the Bill overlooks the opportunity to provide for private delegation of licensing rights, which could be based on the New Zealand management rights approach. We recommend that a minimum set of management rights be ascribed to most licences issued under the new regime. Giving licence holders the ability to formally sub-licence other parties to use part or all of the spectrum contained within a licence will increase flexibility and encourage the development of a more workable secondary trading market. We recognise that implementation of sub-licensing may take some time, particularly to ensure sub-licences are recorded appropriately on the Register of Radiocommunications Licences, however this would be an opportunity to make use of the expanded accredited person arrangements and need not place additional burden on the resources of the ACMA.

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