

Response to Department of
Communications and the Arts
*Spectrum reform legislative
proposals consultation*

20/05/16

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Executive Summary

The New South Wales Government Telecommunications Authority (**Telco Authority**) supports the drafting of a new Radiocommunications Bill (**Bill**) as detailed in the *Legislative Proposals Consultation Paper* of March 2016 (**Consultation Paper**). In particular, the Telco Authority supports the primary aims of the proposed Bill being to simplify the spectrum regulatory framework, create a simpler and more flexible licensing system and to ensure consistency and transparency in the use of spectrum.

Notwithstanding these objectives, the proposed Bill must ensure that the special position of State government agencies and the services that they provide for public safety, emergency services and community benefit continues to be recognised and prioritised. A key concern of the Telco Authority is that the proposed Bill and its ancillary instruments ensures that the existing rights afforded to State government agencies under the current radiocommunications regulatory framework continues, especially where those rights relate to the ability of law enforcement and emergency services organisations to carry out their functions and purposes.

Whilst the Telco Authority appreciates the opportunity to comment on the Consultation Paper, given the high level nature of the paper there is still, understandably, a significant amount of detail in relation to the proposed reforms which is yet to be provided. That detail could directly impact the existing functions of the Telco Authority and NSW government agencies. Accordingly, the Telco Authority will be seeking an opportunity to make further submissions in relation to the:

- Exposure Draft of the new legislation;
- draft Ministerial policy statement on implementation of the new regulatory framework;
- draft ACMA annual work program on implementation of the new framework;
- draft Ministerial policy statement on the implementation of the single licensing system;
- draft subordinate regulation, in particular draft sample licences and draft spectrum authorisation when released for consultation.

In particular, the Telco Authority will be seeking comfort that the efficient and flexible allocation of spectrum will not occur at the expense of the adequate provision of spectrum for public entities, law enforcement and emergency services providers.

Proposal 1 – Objects and span

The Telco Authority is concerned that the proposed new objectives provided in the Bill do not include an acknowledgement of the adequate provision of spectrum for public services as is set out in section 3(b) of the current Act, and is especially concerned that the proposed objectives make no express reference to law enforcement or emergency services providers. Rather the Consultation Paper includes as a proposed objective "*providing arrangements for the provision of spectrum for public or community purposes*". Although the Telco Authority agrees with the shift towards a more flexible and efficient framework for regulating spectrum, this shift should not result in a re-prioritising away from public agencies, and especially emergency services, whose remit is to provide services which benefit the public as a whole. Accordingly, it is suggested that the new objectives section contain an express reference, similar to the current Act, to the "adequate allocation of spectrum" (rather than only arrangements for its provision) to public agencies, especially law enforcement and emergency services providers, and for public purposes.

Additionally, and in the interests of clarity, it is suggested that what is entailed by *public agencies* and/or *public purposes* should be set out in the legislation itself (as it is in the current Act) rather than in the explanatory material.

Proposal 5 – Radiofrequency Planning

The Telco Authority supports this proposal, especially the express reference to plans that would provide for parts of the spectrum to be reserved for the provision of public or community services.

Proposal 6 – Licensing of Spectrum

Harmonised Government Spectrum

The Telco Authority generally supports the move to a single licence system which would encompass the former apparatus and spectrum licence systems, however it wishes to clarify the impact of that system on both the current arrangements around Harmonised Government Spectrum (**HGS**), and the proposed introduction of Harmonised Government Spectrum Area (**HGSA**) licences.

The Telco Authority, which manages spectrum on behalf of NSW government agencies, seeks clarification as to the impact of the proposed Bill on the current arrangements relating to the HGS. Specifically, the Telco Authority seeks to ensure that, at a minimum, the proposed Bill and associated regulatory arrangements would:

- maintain current spectrum allocation for the HGS;
- maintain any associated management arrangements for the HGS; and
- include an express right for the government to be allocated spectrum in the 400MHz band.

In relation to the HGSA, the Consultation Paper does not explain whether the HGSA framework will continue independently of the Bill's proposed uniform licence system, or whether the HGSA framework will

be incorporated into the proposed uniform licence system. If the proposed HGSA licence system is to continue independently of the Bill's uniform system, the Telco Authority seeks:

- clarification as to whether the NSW Government, through the Telco Authority, would be required to acquire a HGSA licence; and
- to ensure that the Bill will not create any incompatibility between the two proposed licence systems.

Spectrum sharing

The Consultation Paper proposes that the Bill would expressly authorise the ACMA to issue a licence or make a spectrum authorisation within spectrum that is already subject to a licence or authorisation. While the Telco Authority generally agrees with removing impediments to spectrum sharing, it is seeking more information in relation to:

- how these subsequent licences or authorisations might impact upon or affect the initial licence;
- the kinds of arrangements that the ACMA may propose in order to manage potential interference; and
- the kinds of licences and/or parts of the spectrum which are likely to be subject to these secondary licences or authorisations.

The Telco Authority notes that the proposed spectrum sharing framework has the potential to allow for greater use by law enforcement and emergency services providers of spectrum which is currently used by commercial carriers. Such a proposal is welcomed by the Telco Authority.

Licence conditions

The Telco Authority requests further information in relation to how the emphasis on flexibility, especially in relation to the changes set out in Proposal 6, would impact the Telco Authority and similar public agencies and service providers, particularly with regard to:

- the types of conditions likely to be imposed under licences to be issued; and
- the ability of such entities to transfer or share spectrum through the secondary market.

Further, the Telco Authority submits that, consistent with the Consultation Paper's emphasis on transparent arrangements, there should be an indication within the legislation, and not only within individual licence conditions, as to appropriate licence fees to be paid by law enforcement and emergency services providers and government agencies. The Telco Authority suggests that the legislation should provide that the price of a uniform licence for government agencies, such as the Telco Authority, must be reasonable, taking into account:

- any licence fee discussions that the Telco Authority has had with the ACMA in relation to potential fees under a HGSA licence; and
- the pricing of previously granted licences to NSW Government agencies.

The Telco Authority suggests that the pricing of uniform licences under the proposed Bill should ensure that benefits and efficiencies which are currently provided under the current Radiocommunications Act and

associated regulatory arrangements remain. Accordingly, the proposed Bill and its associated regulatory arrangements should:

- retain licence fee exempt status for bodies who are currently granted such an exemption. For example, bodies staffed principally by volunteers, whose principal purpose is to provide emergency services, which are exempt under rule 5(7) of the *Radiocommunications Taxes Collection Regulations 1985*; and
- continue the current practice of opportunity cost pricing in remote density areas for the 400MHz band, which as of 5 April 2016, reduced licence tax rates in these areas to \$0.00/kHz.

Proposal 7 – License issue

The same issues raised in the feedback to Proposals 1 and 6 are applicable to Proposal 7 in relation to the prioritisation of public agencies and law enforcement and emergency services providers. In a similar vein, the Telco Authority submits that any mechanism for allocating licences should include an express requirement on the ACMA to ensure that adequate spectrum is reserved for allocation to law enforcement and emergency services.

The Telco Authority seeks confirmation that this requirement will be expressly provided for in the legislation, rather than the relevant licence issue scheme to be issued by the ACMA

Proposal 9 – Licensing – renewal rights

As mentioned above to Proposals 1, 6 and 7, the Telco Authority submits that any mechanism for renewing licences should include an express requirement on the ACMA to ensure that adequate spectrum is provided to law enforcement and emergency services. It is noted that the proposed Bill would remove the Minister's power under the current Act to determine, through a legislative instrument, a class of services where re-issue to the same licensees would be in the public interest. Instead under the proposed Bill, the relevant licence conditions would outline the licensee's right to renew that licence.

The Telco Authority submits that where a licence is issued to a governmental agency or authority providing emergency services, that licence should include, as a default licence condition, an automatic right to renewal, so long as that renewal is not adverse to the public interest. This automatic renewal condition would still be able to be overridden by the ACMA using their reserve power as outlined in the Consultation Paper. This default renewal condition would streamline the renewal of government licences and would ensure that government and emergency services providers continued to be provided with adequate spectrum to fulfil their public and non-commercial purposes.

Proposal 10 – Licensing – resumption

The Telco Authority generally supports the proposal in relation to compulsory resumption of licences. It is submitted, however, that where licences are compulsorily resumed, compensation should be paid, and

the level of compensation should be appropriate to account for the long-term investment in infrastructure and equipment associated with these licences, and the costs involved with moving to new spectrum.

Proposal 11 – Spectrum authorisation (class licences)

The Telco Authority agrees in principle with the replacement of class licences by spectrum authorisations. The Telco Authority would expect that class licences pertinent to the Telco Authority, for instance the 4.9GHz class licence which provides for tactical response by public safety agencies, would be replaced with an equivalent spectrum authorisation.

Proposal 12 – Interference Management

The Telco Authority seeks further information in relation to the proposed extension of eligibility to take civil action to impacted licensees, especially in relation to that extension's impact on government agency licence holders. Unintentional or minor interference with other licensee's spectrum is not uncommon, and is usually as a result of a genuine mistake or faulty or unintentionally mistuned equipment. In the Telco Authority's experience such interference is generally dealt with adequately and efficiently between the parties on an informal basis (albeit with notification to the ACMA).

Because of this, the Telco Authority does not think that it would be appropriate for the threshold for the commencement of civil action due to interference to be one of strict liability as is contemplated in the Consultation Paper. Instead, the Telco Authority submits that the threshold for bringing a civil action ought to be wilful, deliberate or reckless conduct (including failing to remedy a breach or interference expediently after being notified of such breach or interference).

The Telco Authority welcomes the proposal to allow the ACMA to develop non-legislative interference management guidelines to assist the direct resolution of interference disputes, as similar informal processes which are currently used are an efficient way to resolve minor or unintentional interference.

Proposal 15 – Information provision

The Telco Authority welcomes measures which would lead to the fostering of a viable secondary market in spectrum and agrees with the proposal requiring entities to provide information relating to the consideration paid in respect to licence trades or third party authorisations. The Telco Authority suggests, however, that this requirement be restricted to trades or third party authorisations where the counterparty is a genuine third party and not a related entity. Where, for example, the Telco Authority internally allocates a licence or gives authorisation to a related body corporate or agency and passes through to such entity an administration fee, it would not be appropriate for the details of such internal fee to be publically disclosed. It is noted that the value of such a fee would not impact on the creation or operation of a secondary licence market as it is not a true market activity, but instead is simply an internal allocation.

Further, the Telco Authority submits that where a licence is granted to a body such as a law enforcement agency, it will not be in the national interest for information about that licence, such as its user(s), term or conditions, to be made available on the Register of Radiocommunications Licences, or an equivalent register under the proposed Bill. Accordingly, the Telco Authority submits that there should continue to be a provision similar to section 152 of the current Act, to keep such information confidential, and ensure it is not made available to the market.

Proposal 19 – Transitional arrangements

The Telco Authority notes that in order to ensure a smooth and efficient transition to the proposed approach to be set out in the Exposure Draft, it is critical to ensure that any transitional arrangements, especially those in relation to the licence issue and renewal process, minimise interference with current band management and the HGS licence discussions. Specifically, transitional arrangements in relation to:

- Policy statements, should clearly explain when the new policies will come into effect, and their effect on previous ACMA guidelines;
- Licensing, should outline the continuing importance of ensuring adequate spectrum for public, law enforcement and emergency services, and explain when and how current spectrum and apparatus licences will be transitioned to the new unified licence system, including the effects for each type of licence that will arise from this transition;
- Spectrum authorisations, should set out when and how class licences will be transitioned to spectrum authorisations, and any impact on the rights of class licence holders that will arise from that transition; and
- Interference management, should clearly explain the transition to an approach that includes broadened civil liability provisions.

Miscellaneous issues

The Telco Authority supports the continuation of provisions that exclude liability for a breach of the proposed Bill in emergency situations, similar to those in sections 27, 49, 172 and 196 of the current Act. The Telco Authority notes that these provisions are important to ensure emergency services providers are not liable for actions undertaken when dealing with emergency situations that involve a risk of death of, or serious injury to, persons, or substantial loss of, or damage to, property.

The Telco Authority notes that it has no specific comment in relation to Proposals 2 (Application), 4 (Annual Spectrum work plan), 8 (Licensing – limits), 13 (Equipment regulation), 14 (Compliance and Enforcement), 16 (User involvement: accreditation, delegation, industry codes), 17 (Broadcasting) and 18 (Review of decisions) as set out in the Consultation Paper.