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## **TELSTRA CORPORATION LIMITED**

### **Submission in response to the Legislative Proposals Consultation Paper – Radiocommunications Bill 2016**

**Public version**

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## EXECUTIVE SUMMARY

Telstra welcomes the opportunity to further contribute to the Department of Communications and the Arts' review of the radiocommunications regime. In order to continue providing the new and innovative services that our customers demand, Telstra needs access to spectrum in a manner that is flexible and responsive to the dynamic technology and social environment in which it operates. Telstra also needs certainty about spectrum access rights and their enforcement, to give it the confidence it needs to invest in communications infrastructure.

The current regime is complex, rigid and slow. A simpler, more responsive and more flexible spectrum management framework is necessary to promote the efficient allocation and use of spectrum, and to meet the needs of spectrum users in the twenty first century.

While supporting the general direction of the proposed reforms, the legislative proposals are expressed at a very high level, making it difficult to provide meaningful comment on their implementation and intended operation. For many of these proposals, there will be significant complexity in the detail. Telstra would like to see more extensive and collaborative engagement with industry as these proposals are developed in more detail.

Telstra's key responses to the legislative proposals are:

- **Objects and span (Proposal 1):** Telstra welcomes the proposal to clarify and simplify the object of the proposed Bill. Telstra believes the over-riding object of the proposed Bill should be to 'maximise the overall public benefit derived from the use of spectrum'. This will occur when spectrum is allocated in an efficient way (i.e. when it is allocated to its highest value use in a cost effective and timely manner) and when conditions are set for its sustainable use (i.e. when appropriate technical and compliance frameworks are in place to manage the risk of interference to radiocommunications services).
- **Ministerial direction powers, policy guidance and accountability (Proposal 3):** Telstra welcomes the proposal to remove the Minister from administrative decision making processes, and more clearly define the Minister's role to be one of providing broad policy settings, through making Ministerial policy statements that must be taken into account by the ACMA. Telstra would, however, like to see more detail around the process by which the Ministerial policy statements will be developed, their potential scope, and the level of Parliamentary oversight that will be applied to them. In particular, Telstra believes the proposed Bill should clearly define the scope of the Minister's power to make these policy statements; require that they be developed in consultation with the ACMA and industry; and require them to be legislative instruments.
- **Annual spectrum work plan (Proposal 4):** Telstra supports the proposal to require the ACMA to prepare and publish an annual spectrum work plan. The work plan should be developed in consultation with industry to ensure it reflects the priorities and needs of spectrum users and should cover all aspects of the ACMA's radiocommunications work: planning, allocation, licensing, compliance and enforcement.
- **Licensing of spectrum (Proposal 6):** Telstra supports the proposal to adopt a single licensing framework. Licences issued under the proposed new framework should be as technology neutral as possible and designed to allow trading of spectrum between parties as well as the ability to authorise use of their spectrum by third parties. However, Telstra does not support the proposal that the ACMA be authorised to issue a licence or make a spectrum authorisation within parts of already licensed spectrum. This only serves to introduce risk and uncertainty for licensees.

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- **Licensing – limits (Proposal 8):** If competition limits are considered necessary, Telstra believes the Australian Competition and Consumer Commission (ACCC) should be responsible for determining the limits. The competition assessment should be undertaken in a transparent and consultative process, with the ACCC's analysis and findings to be published. The test to be applied in undertaking the competition assessment should be the existing 'substantial lessening of competition' test that applies under s.50 of the *Competition and Consumer Act 2010*. This would align the competition test applied to an ACMA conducted spectrum allocation (or reallocation) with the substantial lessening of competition test that applies to acquisitions generally.
  - **Licensing – renewal rights (Proposal 9):** Telstra is strongly of the view that the proposed Bill should specify a presumption of licence renewal at the end of the licence term. Telstra believes a legislated presumption of renewal would provide the certainty needed to promote investment over the full life a licence and would facilitate secondary trading throughout the term of the licence. Reasons for overruling the presumption should be prescribed and should be limited to matters such as inconsistency with changes to international radiofrequency obligations and band plans, a material breach of licence conditions, or lack of use. If any of these circumstances exist, the ACMA should be required to consult with the licensee and undertake a review to determine whether non-renewal would be in the public interest.
  - **Interference management (Proposal 12):** Telstra considers effective interference management remains, and will increasingly be, a vital role for the ACMA. Licensees are paying for the right to use the spectrum licensed to them unaffected by interference. As the use of spectrum increases, and devices with the potential to cause interference proliferate, effective interference management will be more important than ever.
  - **Compliance and enforcement (Proposal 14):** Telstra welcomes the proposal to expand the range of enforcement tools available under the proposed Bill and to introduce a graduated approach to compliance and enforcement activities. In redesigning the compliance and enforcement regime towards a graduated approach, the Department should consider setting clear triggers for each of the 'graduated' enforcement mechanisms. Criminal level culpability should be retained but should not be a pre-cursor or barrier to ACMA intervention. The proposed Bill should also provide for an increased level of co-operation between relevant enforcement agencies such as the ACCC and the Australian Border Force.
  - **Information provision (Proposal 15):** Telstra does not support the proposal to introduce additional reporting requirements in the absence of a clear statement as to what market failure the proposal is intended to address. There is no clear public policy objective in requiring additional disclosure of secondary market spectrum transactions. Telstra considers the proposed disclosure regime could have a negative impact on the likelihood of secondary trades and would add unnecessary compliance costs to licensees without any public benefit resulting.
  - **Transitional arrangements (Proposal 19):** Telstra welcomes confirmation that the rights of existing licence holders will not be diminished in moving to the proposed new framework and considers commencement of the new legislation approximately one year after passage of the Bill is prudent. However, there will be considerable detail that will need to be worked through once the framework is settled and while further legislative transitional provisions are being developed, industry will need to be consulted on the development of these detailed transitional provisions.

Finally, Telstra notes that the proposals outlined in the consultation paper do not represent the full picture for proposed reform. Proposals on the approach to pricing of spectrum and to government use of spectrum remain 'works-in-progress' and there remain provisions of the *Radiocommunications Act 1992* that are not covered by the legislative proposals or the yet to be completed proposals for pricing of spectrum and government use of spectrum. Telstra looks forward to further engagement with the Department as proposals for all of these reforms are further developed.

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## 01 INTRODUCTION

Telstra welcomes the opportunity to respond to the legislative proposals arising from the Department of Communications and the Arts' Spectrum Review.<sup>1</sup> In order to continue providing the new and innovative services that our customers demand (as well as meeting growing demand for Telstra's existing services), Telstra needs access to spectrum in a manner that is flexible and responsive to the dynamic technology and social environment in which it operates. Development of a more flexible and responsive framework for spectrum management will allow Telstra to better meet its customers' needs and all industry participants to better meet the needs of their customers.

The current regime is complex, rigid and slow. A simpler, more responsive and more flexible spectrum management framework is necessary to promote the efficient allocation and use of spectrum, and to meet the needs of spectrum users in the twenty first century. Use of spectrum will continue to develop in new and, perhaps, unexpected ways.

Telstra supports the general direction of the legislative proposals but believes many of the proposals are expressed at such a high level that meaningful comment is difficult. For example, while Telstra is generally supportive of 'a single licencing category that will facilitate and encourage secondary market activities, by allowing assignment, sharing and subdivision', the consultation paper provides very little detail of how this will be implemented. Likewise, the proposal to empower the Australian Communications and Media Authority (the ACMA) to issue licences in accordance with a 'licence issue scheme' appears to have merit, but the consultation paper provides no information on how licence issue schemes will be structured.

Telstra believes there is need for substantial consultation on the details that sit below these high level proposals and would also like to see a more collaborative approach to the consultation on these proposals in the months ahead. It is vitally important that industry continues to be engaged as these proposals are developed into more detailed frameworks and legislation. Telstra is ready and willing to contribute to this next phase of work.

Finally, Telstra notes that this consultation paper does not provide the full reform proposal. Pivotal pieces on the approach to pricing spectrum and on the approach to government use of spectrum are yet to be made subject to consultation. While Telstra understands it will sometimes be necessary to progress separate processes in parallel, in order to maintain momentum for reform, there are clear interrelationships and interdependencies between the legislative proposals set out in the consultation paper and those yet to be made available. Telstra looks forward to engaging on these proposals as they are released.

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<sup>1</sup> Department of Communications and the Arts, *Legislative Proposals Consultation Paper – Radiocommunications Bill 2016*, March 2016.

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## 02 COMMENTS ON THE LEGISLATIVE PROPOSALS

### 2.1. Objects and span

#### Objects

Telstra supports simplification and clarification of the object for the proposed Bill, including setting out a simple primary object, but has concerns the proposal as currently stated introduces ambiguity in two respects. First, there are subtle differences between the language of the proposal and their counterpart clauses in section 3 of the *Radiocommunications Act 1992* (the **current Act**). Second, the proposed object includes two of the eight 'aims' in the current section 3. Telstra believes this continues to promulgate the conflict and confusion about primacy that can arise from the object of the Current Act.

Differences in language include a move from 'maximise ... the overall public benefit' to 'promote the long term public interest' from the use of radiofrequency spectrum. It is not clear whether these differences in language are intended to convey different meaning from their section 3 counterparts. Telstra believes the language used in the object of the proposed Bill should be the same as that used in Current Act unless there is a clear intention to change the meaning (and if that is the case, then we believe the Department should provide an explanation for that intention).

Telstra does not support the proposal to maintain the proposed two limbs in the object of the new act as this contributes to ambiguity. Further the Department has not outlined any rationale as to why it has arrived at the particular proposed object that it has. Why, for example, is 'providing arrangements for the provision of spectrum for public or community purposes' more deserving of particular mention than, say, 'provide a responsive and flexible approach to meeting the needs of users of spectrum'?<sup>2</sup>

Telstra believes the over-riding object of the proposed Bill should be to 'maximise the overall public benefit derived from the use of spectrum'. Telstra believes this will occur when spectrum is allocated in an efficient way (i.e. when it is allocated to its highest value use in a cost effective and timely manner) and conditions are set for its sustainable use (i.e. appropriate technical and compliance frameworks are in place to manage the risk of interference to radiocommunications services). Accordingly, Telstra believes the object of the proposed Bill should be expressed as being to:

*'Maximise the overall public benefit derived from use of the radiofrequency spectrum resource by facilitating the economically efficient allocation and sustainable use of the spectrum.'*

Telstra also believes there needs to be further consultation with spectrum users on the precise wording before it is settled. The object should be clearly articulated and well understood by all stakeholders because it will play a crucial role in the implementation of the proposed Bill. It will serve as a guiding principle for the Minister, in setting broad policy guidance under the proposed Ministerial policy statements, for the ACMA in making decisions and exercising its powers under the proposed Bill, and as a primary aid to further interpretation and implementation of the remaining provisions of the Act.

#### Span

The span of the proposed Bill does not currently appear to include non-radiocommunications devices, even though these devices can have significant interference effects and are covered by the electromagnetic compliance provisions in the Current Act. These devices are currently captured under the definition of transmitter. The definition of 'transmitter' in the Current Act covers both radiocommunications transmitters (which are designed to generate radio waves for

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<sup>2</sup> Subsection 3(c) of the *Radiocommunications Act 1992*.

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radiocommunications) and other devices which are not designed for radiocommunications but still generate radio waves. This has potential to create confusion for a casual reader, so it would be best if the proposed Bill explicitly refers to radiocommunications transmitters and non-radiocommunications transmitters. The proposed Bill should continue to specify obligations for both categories of devices to avoid them causing interference to radiocommunications services.

Telstra notes that the draft proposals arising out of the ACMA Review were released for comment on 6 May 2016, and that consultation on those proposals is currently underway. Some of those draft recommendations suggest that the ACMA's regulatory remit be broadened. It is important that any such broadening of the remit does not detract from the fact that the ACMA will need to continue to undertake important functions in relation to spectrum regulation. In particular, Telstra believes (for reasons set out in sections 2.12 and 2.14 in particular) that certain compliance and enforcement functions must continue to be the responsibility of the ACMA and these should not be devolved to industry for self-regulation or co-regulation.

## 2.2. Application

Telstra notes the proposal to update the drafting language without changing the scope of application in the proposed Bill and looks forward to the opportunity to engage on the detail of this update in the next phase of consultation.

## 2.3. Ministerial direction powers, policy guidance and accountability

Telstra welcomes the proposal to remove the Minister from several of the existing administrative decision making processes in the current Act, and to more clearly define the Minister's role to be one of implementing broad policy settings. As a general rule, Telstra believes the Minister should focus on establishing longer term spectrum management policies and should not be involved in making decisions that concern individual licensees. Telstra supports the proposal that the ACMA be required to report annually on how it has accounted for Ministerial policy statements in the performance of its functions and exercise of powers. However, this accountability should not be left to annual reporting. Telstra considers the ACMA should also be required to demonstrate how it has had regard to a relevant Ministerial Policy Statement when it makes a decision.

The proposal states that Ministerial policy statements will not be legislative instruments or disallowable instruments. This suggests there is no requirement for any Parliamentary scrutiny or oversight of these policy statements and no commitment for the Minister to engage with industry on the content of policy statements or the areas of priority. Telstra considers this unusual. Other examples of Ministerial policy statements that Telstra is aware of<sup>3</sup> are either legislative instruments, notifiable instruments, or subject to disallowance. Telstra considers Parliamentary scrutiny of Ministerial decisions to be an important check on the broad policy power to be granted under the proposed Bill.

The success of these proposals in delivering a more agile, transparent and accountable decision making process will depend on the detail of the implementation and Telstra would like to see more detail about how the proposed Ministerial policy directions will be implemented in practice. Telstra considers the following matters will be important to the success of the proposed change in approach:

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<sup>3</sup> See for example, ss 6(3), 7(3), 8(4), 11 and 26 of the *International Air Services Commission Act 1992 (Cth)*. In this context, the Ministerial policy statements are limited to matters of broader policy and strategy applicable to the general body of determinations the International Air Services Commission may make. The Ministerial policy statements are legislative instruments and are disallowable instruments and they will be invalid to the extent that they purport to deal with specific determinations or decisions by the International Air Services Commission.

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- The legislation should clearly define the scope of the Minister's power to make Ministerial policy statements, setting out what can and cannot be covered.
  - The legislation should require the Minister to develop policy statements in consultation with the ACMA and industry. The legislation should also require the Minister to consult with affected parties before finalising a Ministerial policy statement. The consultation process is an important way for industry to predict and plan for the policy statements ahead of their issue.
  - Ministerial policy statements should be legislative instruments or notifiable instruments under the *Legislation Act 2003* so that a level of parliamentary scrutiny is ensured. Telstra would also support the proposed Bill specifying a periodic time frame for the review of Ministerial policy statements, e.g., every 5 years.
  - Telstra would expect that there would still be merits review or judicial review avenues if the ACMA has not given adequate regard to Ministerial policy statements, and that the ACMA would be transparent about how it has been guided by the Ministerial Policy Statement in performing its functions on a decision by decision basis, in addition to the requirement to report annually to the Minister.

Telstra looks forward to further consultation on the detail of the proposed Ministerial policy statements.

#### **2.4. Annual spectrum work plan**

Telstra supports the proposal to require the ACMA to prepare and publish an annual spectrum work plan. The work plan should be developed in consultation with industry to ensure it reflects the priorities and needs of spectrum users and should cover all aspects of the ACMA's radiocommunications work: planning, allocation, licensing, compliance and enforcement.

For predictability and certainty around processes, Telstra considers it would be useful if the legislation specified the threshold criteria for the 'significant issues' the ACMA would be required to notify to the Minister and an explanation of the powers the Minister would have in response to any issues escalated in this way.

Telstra believes it is critically important that the ACMA be accountable for delivering on its work program and sees the introduction of an annual spectrum work plan as an opportunity to increase transparency and accountability. Telstra looks forward to further engagement on the detail of how the annual spectrum work plan will be implemented.

#### **2.5. Radiofrequency planning**

Telstra supports the proposal to consolidate the currently separate planning powers for spectrum plans, radiofrequency band plans and broadcasting licence area plans into a single, discretionary, legislated power. Increased consistency and flexibility should be the result of such a change. However, Telstra believes there will need to be considerable further consultation on the detail of how the proposed new power will work and on the transitional arrangements for moving to the new framework.

The new arrangements also need to address the problem of long standing licensing embargoes that are put in place pending future spectrum reallocation processes, but which result in spectrum being underutilised for long periods of time (many years in some situations). As discussed in section 2.6, making provision for the reallocation of encumbered spectrum would assist spectrum to be reallocated more quickly and reduce the length of these licensing embargoes.



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## 2.6. Licensing of spectrum

Telstra supports the proposal to adopt a single licensing framework that replaces the existing spectrum and apparatus licencing regimes, provided the rights of existing licensees are not diminished. Licences issued under the proposed new framework should be as technology neutral as possible. This will provide licensees with the flexibility to deploy the technology of their choice and will promote trading of spectrum between parties. These licences should also provide licensees with the ability to authorise use of their spectrum to third parties.

Telstra does not support the proposal that the ACMA will be expressly authorised to issue a licence or make a spectrum authorisation within parts of already licensed spectrum. This only serves to introduce risk and uncertainty for licensees who may have invested significant capital to secure their rights over a scarce resource. Introducing a mechanism under which the regulator could grant authorisations eroding those rights could lead to a reduction in value and utility of the resource to the licensee. Telstra believes licensees will be better placed than the ACMA to make decisions about sub-leases or authorisations for the use of their spectrum and believes this will occur where there is a commercial incentive and where the 'sharing' of spectrum can occur without interference.

The legislation establishing the single licensing framework also needs to provide a means of transparent trading and allocation of spectrum with incumbent users. The requirement of the existing regime that spectrum be cleared prior to reallocation imposes significant delays in allocation and reallocation. Allowing allocation, reallocation and trading of spectrum while incumbent users' rights are maintained (for a certain period of time) would speed up the process of allocation and reallocation and allow for negotiation and commercial solutions to be developed between the incumbent users and the new licensee.

To facilitate sub-leasing and the transfer of spectrum with incumbent uses, and technical coordination with such uses, Telstra recommends that a variation of the single parameter licence instrument be defined that sets out the technical parameters of the sub-leased spectrum space and is linked to the main licence held by the lessor.

Provision for 'experimental' or 'scientific' licences should also be retained within the single licence framework.

While Telstra's preference is that the proposed Bill not specify a maximum term, if there is to be a maximum term, Telstra supports the proposal to extend the maximum licence term to 20 years. Telstra believes this should be legislated as the 'default position' with variations from the 20 year duration being a decision available to the ACMA where it considers appropriate in the circumstances.

The extent to which adoption of the proposed single licensing framework will facilitate increased flexibility of use and encourage secondary market activities by allowing assignment, sharing, aggregation and subdivision will depend the details of the proposed framework and the approach the ACMA takes to implementing it. Telstra looks forward to further engagement on this as the details of the proposed framework are fleshed out.

## 2.7. Licence issue

Telstra supports a simple, streamlined and transparent process for issuing licences and the proposal may provide such a process. However, Telstra considers more detail on how the process is intended to operate is required in order to provide meaningful comment and looks forward to further engagement

with the Department as the details of this proposal are developed. While appearing to provide the ACMA with flexibility, the proposal as currently expressed, leaves a number of questions unanswered.

For example, it is not clear how it will be determined whether a written application will be appropriate or a licence issue scheme be required. For certainty and transparency, Telstra suggests the draft legislation should specify the circumstances in which schemes will apply as opposed to individual written applications. In particular, if there is an intention to depart from the practice of managing bands on a band by band basis then this should be made explicit, or if schemes are more likely to be focussed around common applications for the spectrum (common use cases) then these may be features that justify dealing with the spectrum on a scheme basis rather than on the basis of individual applications.

In the interest of avoiding the reintroduction of complexity, Telstra also believes it is important that the terms of licence issue schemes are made as generic as possible in their application, and limited in number.

The proposal states that the ACMA would be required to consult 'consistent with the requirements under the Legislation Act 2003'. Telstra notes the requirement for consultation in the *Legislation Act 2003*, leaves the form and scope of the consultation to the rule maker's discretion, and a failure to consult will not render the instrument invalid or unenforceable. Telstra would prefer to see a stronger commitment to meaningful industry consultation specified in the legislation itself.

## 2.8. Licensing – limits

Telstra has long said there is no need for the use of competition bidding limits, largely because general competition law remedies are available in any case. This view is consistent with that reached by the Productivity Commission in its 2002 review of the Radiocommunications Act:

*"At best, the competition limits imposed under ss.60 and 106 of the RC Act duplicate the operation of s. 50 of the TPA. At worst, they may be used to engineer industry outcomes that exceed the reach of s.50."*<sup>4</sup>

The Productivity Commission went on to recommend that competition limits be removed and the Australian Consumer and Competition Commission (ACCC) amend its Merger Guidelines to address the assessment of acquisition of spectrum licences. If competition limits were to be retained, the Productivity Commission recommended that competition limits be applied consistently with section 50 of the then *Trade Practices Act 1974* (now *Competition and Consumer Act 2010*) (the CCA) and that the ACCC be responsible for making determinations imposing competition limits.<sup>5</sup>

While Telstra is in favour of removing the Minister from determining competition limits (should they be considered necessary), it does not favour transferring this role to the ACMA. Telstra would support reforms that are more closely aligned to the recommendations made by the Productivity Commission, that are aimed at making the ACMA processes for allocation of spectrum more streamlined and that would increase transparency around the process for determining whether *ex ante* competition remedies should apply and how.

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<sup>4</sup> Productivity Commission, 2002, *Radiocommunications Act – Inquiry Report*, pp. 112.

<sup>5</sup> *ibid*, pp. 114-115.

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If competition limits are retained, Telstra would prefer a model under which:

- The power to decide whether to impose competition limits would move from the Minister to the ACCC, rather than to the ACMA, so that the approach to competition issues affecting the industry would be the responsibility of a single body, that has experience in applying the appropriate test.
- The ACMA would seek a decision from the ACCC about whether a substantial lessening of competition would, or would be likely to, result from any party acquiring spectrum in an allocation process in the absence of competition limits. The ACCC would then advise the ACMA what (if any) competition limits would be appropriate in the circumstances. The advice and reasoning would be published for transparency.
- The ACCC should apply the same test that applies under s.50 of the CCA. Telstra considers that the s.50(3) factors are helpful and there is a good understanding in the industry about how the s.50 test operates and applies. This would align the competition test applied to an ACMA conducted spectrum allocation (or reallocation) with the substantial lessening of competition test that applies in s.50.
- The ACCC's decision about whether to apply competition limits should be treated as a decision under s.50 for the purposes of the specific allocation process.
- The ACMA should be required to follow the ACCC's advice to impose competition limits (or not).
- If the ACCC determined that no competition limits should apply, or alternatively, if competition limits were applied, then any acquisition within the competition limits set would then be protected from further action under s.50 of the CCA because the ACCC will have conducted a competition assessment and concluded that there was no breach of s.50.

If such an approach is not taken, at a minimum, Telstra considers:

- The competition assessment should be undertaken by the ACCC in a transparent and consultative process, with details of its analysis and findings to be published.
- The test to be applied in undertaking the competition assessment should be the substantial lessening of competition test contained in s.50 of the CCA.

## 2.9. Licencing – renewal rights

Telstra is strongly of the view that the proposed Bill should specify a presumption of renewal but with exceptions being prescribed for exceptional circumstances (e.g. inconsistency with changes to international radiofrequency obligations and band plans, a material breach of licence conditions or lack of use) which would trigger the ACMA to undertake a review to decide whether renewal would be in the public interest. The onus should be placed on the ACMA to establish that one (or more) of the prescribed circumstances exists and that any decision to not renew the licence would be in the public interest. Telstra believes a legislated presumption of renewal would provide licensees with the certainty needed to promote investment over the full life of a licence and would facilitate secondary trading throughout the term of the licence.

Telstra recommends that, by a certain date prior to the expiry of a licence (e.g. five years prior to expiry in the case of a licence with a 20 year term), the ACMA should be required to consult with the licensee and either:

- make an offer to renew the licence which is based on a calculated estimate of a fair market price and specifies the amount and timing of the required payments; or

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- in the event prescribed circumstances exist, undertake a review of the situation to decide whether non-renewal of the licence would be in the public interest.

Making such decisions any closer to the licence expiry would reduce incentives for investment and secondary trading during the later years of the licence term and, if reallocation is required, may not leave sufficient time for the ACMA to complete a reallocation process before the expiry of the existing licences and potentially leaving the spectrum unused for a period of time.

New Zealand provides a good example of what Telstra believes is an appropriate approach to the renewal of spectrum licences:

- Commercial spectrum rights are reallocated to existing licensees, five years before expiry, subject to a review on a case-by-case basis to ensure consistency with New Zealand's international obligations and the general objective of maximising the value of the spectrum to society as a whole.
- Spectrum rights are reallocated for a price to be determined by a price-setting formulae that estimates the market value of the rights.
- If existing licensees do not wish to pay this price, the respective rights will be reallocated by way of auction.<sup>6</sup>

The proposed Bill should also set out a framework for the timing of licence renewal payments. It is Telstra's view that payment should not be required until shortly before the renewed licence takes effect.

## 2.10. Licensing – resumption

Telstra strongly supports the payment of compensation to licensees in the event of licence resumption – this is only fair to the displaced incumbents. Resumption should, however, be an extreme last resort. Licensees expect to have unfettered rights to the spectrum they acquire for the full term of the licence. Where alternative, higher value, uses emerge for licenced spectrum, prospective users should seek a negotiated trade with the existing licensee.

Telstra also supports the introduction of provisions that would allow the ACMA to offer payments as an incentive for licensees to surrender a licence rather than resorting to resumption.

## 2.11. Spectrum authorisations (class licences)

Telstra supports the proposal to replace class licences with 'spectrum authorisations' and not to incorporate class licences into the new single licencing framework. The proposal appears to provide the ACMA with the flexibility needed to authorise the use of specific devices. However, the ACMA's ability to issue spectrum authorisations should not extend to already licensed spectrum. As noted in section 2.6, Telstra believes licensees will be better placed to authorise use of their licensed spectrum by other parties.

The proposed Bill should also allow licensees to authorise lower power devices (e.g. mobile handsets) within their spectrum licences without the need to seek such authorisations from the ACMA. Telstra suggests this could be achieved by either using an authorisation instrument similar to that proposed for the ACMA, or by specifying the operation of such devices through parameters on the relevant licence.

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<sup>6</sup> <http://www.rsm.govt.nz/about-rsm/spectrum-policy/expiry-of-spectrum-rights>

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## 2.12. Interference management

Effective interference management remains, and will increasingly be, a vital role for the ACMA. Licensees are paying for the right to use the spectrum licenced to them unaffected by interference and as the use of spectrum increases and devices with the potential to cause interference proliferate, effective interference management will be more important than ever.

Telstra is concerned that the proposal as stated suggests a scaling back of ACMA involvement in interference management and devolution of these responsibilities to licensees. While supportive of widening the scope of enforcement options, Telstra believes effective interference management must remain a core priority for, and responsibility of, the ACMA. The ACMA must be adequately resourced and empowered to enforce spectrum property rights. Making provision for licensees to take civil action should not be seen as a means for scaling back the ACMA's resources and enforcement activities.

Telstra has provided a confidential annexure as Section 3 to this document that outlines one interference case study that highlights the specific inadequacies in the current enforcement regime for Telstra.

Telstra would welcome the opportunity for further discussion of Telstra's experience in managing and responding to devices with interference potential and for further consultation on how the proposed changes will work in practice, and asks the Department to continue engagement with industry as these proposals are further developed.

## 2.13. Equipment regulation

While Telstra supports an outcomes-based approach to equipment regulation, the proposal as outlined contains very little detail about how this will work. Telstra believes further consultation on how the detail of the outcomes-based approach will operate is needed. It would also be useful for the Department to provide examples of outcomes-based approaches the Department is aware of that could provide a model for the approach to be used in the proposed Bill.

As the number of devices relying on radiocommunications increases and consumers become increasingly reliant on such devices (including the anticipated explosion of Internet of Things devices), a compliant and interference free environment will become increasingly important. Telstra considers it vital the ACMA maintain its existing functions of prescribing technical standards and compliance testing requirements in order to ensure the electromagnetic compatibility of equipment, manage the risk of interference, and protect the health and safety of persons from radio emission.

Telstra also supports the introduction of a 'black-list' and 'white-list' approach for equipment as is occurring in other jurisdictions as a complement to enforcement provisions.<sup>7</sup> Provision should also be made to ensure the burden of meeting equipment regulations sits with manufacturers and importers not consumers, who are not familiar with whether or not devices are fit for use in Australia.

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<sup>7</sup> See for example the US Federal Communications Commission response to the use of signal boosters: <https://www.fcc.gov/document/use-and-design-signal-boosters-report-and-order> and Ofcom Statement: *Improving mobile coverage: Enabling the benefits of consumer installed mobile repeaters*, Summary of call for input responses and recommended next steps, 18 March 2016.

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## 2.14. Compliance and enforcement

Telstra welcomes the proposal to expand the range of enforcement tools and introduce a graduated approach to compliance and enforcement activities. The rapidly increasing number of consumer and business devices that rely on radiocommunications means the need for prompt and effective compliance and enforcement activities will only increase over time. Reliability will be paramount and enforcement activities will be needed to provide an interference free environment.

Criminal penalties alone have proven to be a very blunt instrument. Telstra welcomes the proposal to introduce civil penalties. Telstra believes there is need to consult further on the detail of this proposal as it is developed. In redesigning the compliance and enforcement regime towards a graduated approach, the Department should consider setting clear triggers for each of the 'graduated' enforcement mechanisms. Criminal level culpability should not be a pre-cursor or barrier to ACMA intervention. The proposed Bill should also provide for an increased level of co-operation between relevant enforcement agencies such as the ACCC and the Australian Border Force.

Telstra refers to its confidential attachment (Attachment A) that outlines some of the specific inadequacies Telstra has identified in the current enforcement regime. Telstra believes significant improvements could be achieved through:

- Increased resourcing for public education campaigns around radiocommunications interference issues by the ACMA.
- Better enforcement options that address supply in Australia of devices with interference potential: Increased tools for the regulator to monitor and intervene where the devices are being made available for sale in Australia and where there is a real risk of interference if they are operated in Australia. This could include adapting standards regimes or import controls, monitoring of overseas websites (and use of website take down powers), increased cooperation internationally on investigation and enforcement against manufacturers or distributors of devices.
- A new civil penalties regime that can be enforced by the ACMA directly and remedies that are analogous to those available to the ACCC in the consumer protection context (where appropriate): Telstra considers the ability to make orders that require manufacturers or distributors to recall and rectify devices found to be causing interference would be appropriate in a new radiocommunications enforcement regime, and would enhance the effectiveness of the current equipment regulation and interference management regimes.
- Increased resourcing for the ACMA to investigate and intervene and/or better coordination between the ACMA and ACCC. Our experience is that the ACMA has the appropriate technical expertise required to properly investigate and identify root causes of interference, however, the ACCC has more effective enforcement powers. Where the ACMA has referred matters for further investigation by the ACCC, our experience is that this process causes significant delay and is highly dependent on the ACCC's existing enforcement priorities at the time.

Telstra also considers that further clarity is needed around the Department's use of the Attorney-General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers and how this will influence the framing of enforcement and offence provisions in the proposed Bill.

## 2.15. Information provision

Telstra is very concerned about the additional reporting requirements being foreshadowed by this proposal and is uncertain as to what market failure the proposal is intended to address. There is no clear public policy objective in additional disclosure of secondary market spectrum transactions. Telstra

considers the proposed disclosure regime could act as a deterrent to secondary trading and would add unnecessary compliance costs to licensees without any public benefit resulting. Further such information is commercially sensitive and Telstra would strongly oppose publication of such information if disclosure was required.

Listed companies are already subject to financial reporting requirements for material acquisitions and Telstra considers this adequate to address concerns around disclosure for holders of large amounts of spectrum. Telstra does not consider this proposal to be in keeping with the Government's objective to reduce red-tape and compliance costs.

## **2.16. User involvement: accreditation, delegation, industry codes**

Telstra supports the proposal to continue accreditation of persons for matters such as frequency assignment certificates and to introduce scope for the development of industry codes where appropriate.

Telstra has some concerns about the ACMA being given complete discretion to delegate its spectrum management functions. While not necessarily opposed to delegation of band management functions, Telstra considers aspects of the ACMA's interference management, compliance and enforcement responsibilities must be retained by the ACMA and should not be delegated. These include the. The proposed Bill should provide a detailed framework for consultation with affected stakeholders before private band management can be implemented in a particular band. Telstra believes more detail is required to fully understand the nature and extent of the proposed delegation provisions.

Telstra recognises there could be scope for efficiency gains and increased flexibility through enabling the ACMA to outsource certain functions to private providers while still maintaining responsibility for them. Examples include licensing, interference management, compliance and enforcement activities. In such cases, Telstra would expect to see more timely outcomes and at lower cost for industry. Telstra considers that this proposal would benefit from more detailed and constructive consultation with industry to identify appropriate opportunities.

## **2.17. Broadcasting**

Telstra welcomes moves to bring the management of broadcasting spectrum into line with the management of spectrum for other uses. Telstra is strongly of the view that all spectrum users should be treated equally: allocations of spectrum should occur in an open and transparent manner, with all licensees paying a transparent and market based price and receiving the same access rights.

Telstra supports the proposal to allow broadcasters to share, trade or lease all or part of their spectrum with or to other broadcasters or for non-broadcasting uses provided that it is accompanied by changes requiring broadcasters to pay a transparent market price for the spectrum, either by purchasing it up front or through an annual fee.

## **2.18. Review of decisions**

Telstra supports continued review rights for decisions of the ACMA. Depending on how the renewal process is amended, Telstra would support expedited reviewability of the decision to renew a licence. Telstra would also support the proposed Bill specifying that ACMA decisions to set licence conditions, including the quantum of licence fees are reviewable decisions.

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## 2.19. Transitional arrangements

Telstra welcomes confirmation that the rights of existing licence holders will not be diminished in moving to the proposed new framework<sup>8</sup> and considers commencement of the new legislation approximately one year after passage of the Bill is prudent. However, considerable detail needs to be worked through once the framework is settled and the legislation passed and this should not be underestimated. Industry will need to be closely consulted on the development of detailed transitional provisions.

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<sup>8</sup> Department of Communications and the Arts, *Legislative Proposals Consultation Paper – Radiocommunications Bill 2016*, March 2016, p. 19.



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## **ATTACHMENT A: Case Study – limitations of current enforcement mechanisms**

[Commercial-in-Confidence]