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## **COMMENT ON THE PRODUCTIVITY COMMISSION'S FEBRUARY 2002 DRAFT REPORT INTO RADIOCOMMUNICATIONS**

Thank you for the opportunity to comment on the Productivity Commission's cogently argued and well presented Draft Report into Radiocommunications. Presented below are comments for the Commission to consider in preparing its final report.

### **1. Licensing system: Unifying apparatus and spectrum licensing systems**

Before a spectrum licence can be issued under the *Radiocommunications Act 1992* (Radcom Act), the spectrum space covered by the licence must have been the subject of a designation notice under section 36 of the Act or a re-allocation declaration under section 153B, both of which require prior consultation with the public or potentially affected apparatus licensees.

In addition to the above provisions, there apply to spectrum licences a number of provisions of the Radcom Act not applying to apparatus licences, relating to certain matters, for example:

- (a) a maximum 15 year licence period (section 65);
- (b) licence conditions/technical framework (eg section 66 and subsection 145(4));
- (c) trading of spectrum licences in whole or in part and aggregating spectrum licences (Part 3.2, Division 5);
- (d) resuming spectrum licences (Part 3.2, Division 6);
- (e) marketing plans (sections 39 and 39A).

The question arises as to what extent such provisions should apply to apparatus licences. In this regard, it is arguable that where, for example, an apparatus licence involving a highly valuable amount of spectrum is auctioned under section 106 of the Radcom Act, certain provisions applying to spectrum licences (eg concerning maximum 15 year period, resumption, marketing plan, trading and consultation on spectrum to be made available for licensing) should also apply in relation to the apparatus licence, whether or not it is area based\*. The fact that no such provisions would currently apply in relation to such an apparatus licence, at least, appears to be a serious anomaly in the Radcom Act.

\* Under section 98 of the Radcom Act, the Australian Communications Authority (ACA) may be able to determine an area based transmitter licence i.e. one which authorises the operation of transmitters using the spectrum specified on the licence within the area specified on the licence. A spectrum licence has the area based feature.

Amendment of the Radcom Act to ensure the removal of this apparent anomaly would appear to be warranted. One way of achieving its removal might be to amend the

Radcom Act to provide for a unified licensing system (to replace the separate apparatus and spectrum licensing systems, as suggested by the ACA), with the Radcom Act and/or ACA determinations (disallowable instruments) specifying the extent to which the provisions of the kind currently applying in relation to spectrum licences, but not apparatus licences, should be applied in relation to specified kinds of radiocommunications licences\* in specified circumstances.

\* Instead of referring to "apparatus licences" and "spectrum licences", the Radcom Act would refer to "radiocommunications licences".

In the light of the above discussion, the Productivity Commission (PC) may want to reconsider its Draft Finding 6.3.

## **2. Licence tenure: indefinite property rights**

There is a need to ensure that the tenure of radiocommunications licences is consistent with the maximisation of "the overall public benefit derived from using the radiofrequency spectrum" (in line with para 3(a) of the Radcom Act).

At page 282 of its Draft Report, the PC refers to "indefinite property rights", achieved by way of "indefinite tenure" for spectrum licences. (If a unified licensing system, referred to at point 1, were introduced, they would probably not be called spectrum licences.)

If such indefinite tenure were introduced, there would need to be safeguards to ensure that it was in the public interest. For example, it should not detract from "proper" use of relevant spectrum (i.e. in a way designed to optimise social benefit). Also, with changes in technology, spectrum covered by a spectrum licence might become much more valuable than was apparent at the time of auction (assuming the spectrum licence was auctioned), so that the public may not have received a sufficient return at auction for such spectrum.

In regard to increased value of relevant spectrum, this might be dealt with, to some extent at least, by the ACA adjusting spectrum licence taxes to reflect an estimate of the market value of that spectrum. In a broadcasting context, the Productivity Commission (Broadcasting Inquiry Report, Productivity Commission 3 March 2000, pages 194-195) appears to support the payment of an upfront amount for spectrum, determined in a competitive process, combined with an ongoing annual fee, which could be adjusted from time to time to reflect changes in the value of spectrum.

Also, legislation could require the ACA, at set intervals, to publicly review and report on whether spectrum licence taxes properly reflect changes in the value of relevant spectrum, with the ACA making changes to the spectrum licence tax determination recommended in the report.

To ensure the "proper" use of spectrum covered by a spectrum licence, the Radcom Act could perhaps be amended to provide that at the end of a regular interval\*, the ACA would be required to conduct a public review (ie call for and take account of public

submissions) and, in the light of the review, report publicly and make a determination, to be published in the Gazette and national newspapers and perhaps tabled in Parliament, on whether or not continuation of the licence, with or without certain changed conditions, would be in the public interest. An alternative approach would be for the Radcom Act to require the ACA to do the review and make the determination without the public consultation and perhaps also the public reporting requirements. However, this may not properly take account of stakeholder concerns.

- \* For example, a review could be commenced 3 years before the end of each successive 15 year period, with a view to ensuring that, if a spectrum licence were cancelled (see below), arrangements could be made for a spectrum licence using relevant spectrum to be issued immediately after the end of that period.

A further amendment to the Radcom Act could provide for the spectrum licence to be automatically cancelled at the end of the relevant 15 year period (or some other period depending on the interval between reviews) and for the ACA to re-allocate it according to the Act (perhaps only to persons other than the original licensee), where the ACA made a determination that continuation of the licence, with or without certain changed conditions, was not in the public interest; otherwise the spectrum licence would continue in force, with or without changed conditions\*, as the case may be.

- \* Does the Radcom Act need to provide for surrender of a spectrum licence (eg where the licensee considers the changed conditions are unacceptable and it is not interested in trading the licence) or would this situation be covered by resumption provisions?

Whatever the consultation arrangements in relation to any review, the question would arise whether the Radcom Act could perhaps provide for any determination [of whether or not continuation of a spectrum licence would be in the public interest] to be a disallowable instrument\* either (a) in all cases or (b) only where the determination was to the effect that continuation of the licence would not be in the public interest or such continuation would be in the public interest, subject to core licence conditions being changed.

- \* Note that an ACA decision on whether or not to re-issue a spectrum licence under section 82 of the Radcom Act is not a disallowable instrument. Also, the decision does not appear to require a public consultation process and is not a reviewable decision (under Part 5.6 of the Radcom Act), although changes in the core conditions of spectrum licences re-issued under section 82 are reviewable decisions. (Is this reasonable?)

However, it may be better, instead of the determination being a disallowable instrument, for the Radcom Act to provide for the decision embodied in the determination to be a reviewable decision under Part 5.6 of the Radcom Act either (a) in all cases or (b) only where the determination was that continuation of the spectrum licence would not be in the public interest or such continuation would be in the public interest, subject to core licence conditions being changed.

In either case, option (b) would be expected to find more favour with spectrum licensees than option (a), as they would not have to await a decision of Parliament or the AAT before feeling "out of the woods" in the case of the ACA determining for them. In this

regard, it may be relevant that paragraph 285(m) of the Radcom Act provides that refusal to renew an apparatus licence is reviewable up to the AAT, but the Act does not appear to provide that a decision to renew the licence with the same conditions is so reviewable. (Note that certain other decisions referred to in section 285 are also only reviewable when going against an instrument holder.)

In fairness to spectrum licensees, it would be important for the legislation to provide as much guidance as practicable on what was meant by "the public interest". As well as specifying matters to be taken into account by the ACA in ascertaining whether or not continuation of the licence would be in the public interest, the Radcom Act could perhaps describe specific situations where such continuation would be regarded as not in the public interest. An alternative option might be for the Act to provide that such continuation will be regarded as in the public interest unless one or more of a number of specified things (described as clearly and objectively as practicable) obtains. The challenge would of course be to develop an exhaustive list of these things. The list of things could be specified in the Radcom Act itself or in an ACA determination (disallowable instrument), remembering that, with changed circumstances, the list might be amended by changing the Act or the determination.

The Radcom Act may also need to cover the matter of what, if any, compensation should be provided to persons whose spectrum licences were automatically cancelled or had their conditions changed. If indefinite tenure for spectrum licences were introduced, should the Act also allow the ACA to issue spectrum licences for fixed periods, with "must" perhaps being substituted for "may" at line 1 of section 82 of the Radcom Act? This raises the important question whether or not the underlying purpose of introducing "indefinite tenure" for spectrum licences might not be substantially achieved by making the above substitution ("must" for "may" at line 1 of section 82 of the Radcom Act), clarifying what is meant by "the public interest" and introducing appropriate consultation, reporting and review mechanisms.

### *Summary*

If "indefinite tenure" for spectrum licences were introduced, the discipline of regular public reviews, conducted as transparently as practicable, may well be necessary to ascertain whether or not the continuation of a particular spectrum licence was in the public interest.

It would be useful if the PC, in its final report, discussed the feasibility of providing indefinite tenure for spectrum licences, with reference to possible mechanisms for safeguarding the public interest. As the PC considers that the current framework with the PC's suggested amendments can "pave the way for the introduction of indefinite property rights in spectrum" (page XXXII of the Draft Report), it may be incumbent on the PC, at least to some extent, to address the issue of how such rights might "work" in practice, especially in relation to safeguarding the interests of the public.

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