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Radiocommunications Inquiry
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003



BY FACSIMILE: (03) 9653 2305

Attention: Mr Paul Belin – Assistant Commissioner

Dear Sir

RE: PUBLIC ISSUES PAPER – RADIOCOMMUNICATIONS ACT

This letter responds, on behalf of this Firm, to your invitation to make a submission to the Radiocommunications Inquiry.

McInnes Pynt is a general commercial law firm, practicing in Sydney. We have a particular interest, and specialty, in the field of telecommunications law. We act for a number of telecommunications companies, and others involved in the Industry, and the writer, through an interest in the theoretical and educational aspects of the field of telecommunications law, conducts a post-graduate Course in that subject as part of the Masters of Law Program at Sydney University. Notably, we advise Macquarie Bank Limited in relation to its nascent spectrum trading facility, Spectrum Desk, launched on a trial basis in March of this year.

Rather than respond fully across all of the issues of the Inquiry, we hope that it might nevertheless be of some assistance to the Inquiry if we confine ourselves, in the form of this short letter, to put forward a few limited points. These pertain to the issue of spectrum secondary trading, and come from an experience gained in the area over the past 12 months. This experience has involved us in having had extensive contact at senior levels, both in the private and public sectors, in the United States and in the United Kingdom.

We assisted Macquarie Bank Limited to prepare formal submissions for parallel enquiries by the FCC in America and also in the United Kingdom (the so-called "Cave Report"), and both endorse those submissions and recommend them to the Inquiry as a broader analysis of issues regarding spectrum secondary trading, as they are viewed by ourselves and by Macquarie Bank Limited.



MEMBER OF THE AVRIO NETWORK OF INTERNATIONAL LAW FIRMS

For the purposes of this letter, the (additional) points we would like to put forward are:

1. At present, in Australia, there is only limited secondary demand for spectrum, most relevantly in relation to spectrum suitable for telecommunications.
2. There is, however, significant interest and activity related to spectrum secondary trading in some other countries, notably the United States and, to a lesser extent, the United Kingdom. In the United States, the drafting of a Notice of Proposed Rule Making by the FCC has been under way for over 12 months, and the thinking is well advanced. This responds to significant pressures on spectrum availability in America, a complex historical legacy of prior allocation practices, and, to some extent, an emergence there of newer technologies and convergence opportunities which are leading to commercial exploitation opportunities.
3. Some of the commercial circumstances which are giving rise to a likely demand for a spectrum secondary relocation mechanism in the United States include:
 - (a) spectrum capacity limitations and prior inefficient allocation practices, giving rise to incumbent demands;
 - (b) emergence of altered trading and business models, such as MVNO and wholesale structures, which offer wholesale communication capabilities to other market participants, including for instance incumbent carriers unable to secure outright ownership of area-specific spectrum to satisfy business needs. The NextWave business model, if it proceeds, for instance, as it has been described in newspaper statements by management, intends to permit availability of pure spectrum capacity as well as a transmission capability on a wholesale basis.
 - (c) Potential infrastructure sharing arrangements, especially for 3-G technologies;
 - (d) Technical innovations, such as the software defined radio platform;
 - (e) re-farming and spectrum sharing initiatives, such as in the field of DTV/Broadband convergence.
4. The emergence of some form of actively traded secondary market for spectrum, although perhaps not fully developed for today, is in the writer's view an inevitability. Disaggregation of structure and asset ownership has been a feature of other industries, notably Utility services and Internet services, and, more recently, fixed line telecommunications.
5. There is today, no equivalent, for instance, in mobile communications to the current secondary trade in switched fixed line capacity. In part, that is due to technical limitations of programming wireless infrastructure into and out of spectrum frequencies. Assuming a technical capability to do so, the commercial incentive for an equivalent secondary re-allocation mechanism for mobile communications would appear to be at least as strong as for fixed line communications. The pressure to provide a solution for this will, in our submission, be intense, given a likely continuation of current disaggregation of business models and the trend towards MVNO business models. Part of providing a workable solution, in this connection, will be the provision of actively traded and available spectrum rights.

There are many issues which arise in relation to a consideration of this topic a number of which are referred to in the Macquarie Bank submission to the FCC, mentioned above. At a practical level if there is to be a consideration by the Inquiry of how active secondary trading might be facilitated, impediments to current spectrum secondary trading which could usefully be reviewed are:

- taxation issues, and notably the operation of Division 380 of the Income Taxation Assessment Act 1997, together with the operation of the Capital Gains Tax Provisions contained in Parts 3-1 to 3-5 of that Act;
- stamp duty issues;
- balance sheet issues – for instance, whether a “disposal” of rights of use for spectrum would require accounting for loss of profit against spectrum book values, and the proper accounting treatment of trading receipts (or benefits in kind, such as from band swaps);
- settlement and delivery provisioning issues, especially if for a time limited basis.

In our respectful submission, the technological innovation which is beginning to appear on the horizon, and the potential commercial changes which accompany it, is beginning to also require an accommodation by an appropriate legal and regulatory framework to permit an active secondary trade of spectrum rights, both in relation to ownership and short term rights of use.

Yours faithfully
McINNES PYNT

