

Friday, 12 April 2002

Dr David Robertson
Presiding Commissioner
Productivity Commission
Locked Bag 2
Collins Street East

Dear Dr Robertson

Thank you for the opportunity to make a submission in response to the Draft Report of the Productivity Commission Review of the Radiocommunications Acts and the Role of the Australian Communications Authority.

Please find attached a submission by Unwired Australia Pty Ltd.

This submission addresses only on those matters where the company asks the Commission to review its findings and recommendations before submitting the final report to Government. The issues where Unwired seeks a review are as follows:

- . Spectrum auctions - while ex ante competition limits in spectrum auctions should be abandoned, there will be circumstances where the Commission's preferred view of promoting the possibility of s.50 TPA sanctions against anti-competitive acquisitions will not be sufficient and will not provide the certainty that new players will need in order to finance the development of their networks;
- . Perpetual tenure – for all spectrum licensees perpetual tenure is necessary for long term investment certainty and Unwired is disappointed that the Commission has not fully explored in this paper its own strong recognition of the public policy value of perpetual rights. Instead, the Commission has taken a view that the secondary market is not yet sufficiently mature to allow such a change, and rather than charting a course that could be implemented, the Commission has instead focused on options to deal with the problems that emerge at licence expiry if this is not done.
- . Spectrum leasing - contrary to the Commission's understanding, spectrum leasing arrangements are already in place and are working well within the existing framework. Unwired does not support mandatory registration of these agreements. We believe that the spectrum licensee alone is and should be responsible for compliance with the law, and that there is no public policy justification in requiring information about private contractual matters to be collected.
- . Market reporting - information about "substantial" trades of spectrum licences is already reported to the market as a function of market reporting requirements for publicly listed vehicles. There is no compelling case for a statutory requirement to report and register trades, volumes and prices. Indeed private contractual arrangements could disguise the true nature of any consideration in a licence transfer under bilateral negotiation rendering any information unhelpful.
- . Device registration - there are substantial problems with the device registration process. Unwired supports the view of Spectrum Engineering Australia that the

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s.145 procedure is a "technical farce" and its forced application on this company is a cost burden with little or no public benefit. Registration of *all* devices is unnecessary to secure the public policy objectives of the Register of Radiocommunications Licences. In simplex systems, certainly there is a need to register transmitters, but in duplex wide-area systems such as the FWA system being deployed by Unwired, the public policy objective can be easily met by registering the base station transmitters and receivers, for this provides adequate notice to intending other users that both frequencies for the duplex are in operation at a particular locality. It is unnecessary to require interference impact certificates because already, licence conditions on spectrum licensees require the licensees to be responsible for spectrum management of their spectrum licences, and the interference impact certificate and the s.145 procedure on which it hinges are flawed.

If the Commission has any queries about any of the matters raised in this submission, I invite you to contact Suzanne Campbell, General Manager – Commercial 02 9231 6055. Suzanne Campbell and Ian Hayne, advisor to Unwired, will also make representations to the Commission on these matters.

Yours sincerely

Unwired Australia Pty Ltd

David Harris

Chief Executive Officer

SUBMISSION IN RESPONSE TO THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION REVIEW OF THE RADIOCOMMUNICATIONS ACTS AND THE ROLE OF THE AUSTRALIAN COMMUNICATIONS AUTHORITY

10 April 2002

Introduction

Unwired Australia Pty Ltd (Unwired) is pleased to be able to offer comments in response to the draft Productivity Commission *Review of the Radiocommunications Acts and the Role of the Australian Communications Authority*.

Unwired is a licensed carrier and holds radiocommunications spectrum licences won at auction and acquired in the secondary market. These licenses are being commercialised through the deployment of Fixed Wireless Access.

Unwired congratulates the Commission on this thorough and extensive review of the radiocommunications regulatory regime. Unwired supports the findings and recommendations of the draft report in general but identifies in this submission those areas where the company believes the Commission should review the direction of these findings and recommendations before putting the final Report to Government.

This submission also provides a response to matters where the Commission has requested more information and where Unwired is able to assist.

About Unwired Australia Pty Ltd

Unwired holds (via a wholly owned subsidiary Akal Pty Ltd) national 3.4GHz licenses, covering approximately 95% of the Australian population. In the spectrum auction conducted by the Australian Communications Authority ("ACA") in late 2000, Unwired purchased 2 x 32.5MHz paired in the 3.4GHz band, and in 2001 acquired 2 x 17.5MHz from Austar.

Unwired now owns close to 100% of the 100MHz of 3.4GHz spectrum that was made available in Sydney and Melbourne, and a majority of the spectrum in Australia's other capital cities. Unwired intends to use this spectrum to participate in the rapidly expanding broadband Internet market by rolling out Fixed Wireless Access and by delivering bundled voice and broadband access services to Carriers and Internet Service Providers (Retail Service providers) for residential customers, SOHO

(Small Office/Home Office) and SME (Small and Medium Enterprise) customers.

Unwired is independent, having no alignment to or investment by any Australian or international telecommunication carrier.

Unwired's shareholders include New York-based private equity investment firms Credit Suisse First Boston International Equity Partners, Bruckmann Rosser Sherrill and The Invus Group Ltd and other private equity raised mostly from Australian investors.

Unwired's Fixed Wireless Access network will provide bundled voice and broadband access services to Retail Service Providers and Internet Service Providers.

Issues

This submission addresses issues in the order of the Draft Report.

Competition Limits on Licence Purchase

Unwired welcomes the Commission's recommendations regarding the abolition of *ex ante* bidding limits from spectrum auctions except in one very specific set of circumstances, and that is where there is a dominant incumbent, and that dominant incumbent has the capacity and motivation to extend its monopolistic coverage in order to limit competition.

In 2000, Unwired participated in an auction for spectrum that could be used to deploy a cost effective alternative to the copper-based customer access network. Currently the customer access network is dominated by the incumbent. If the incumbent had been permitted to bid for this spectrum, it would have been impossible for the founders of Unwired to attract sufficient funding to secure the spectrum or establish Unwired. If the Commission's proposal for abolishing bidding limits had applied in that auction, the most likely outcome would have been the incumbent winning the spectrum and the elimination of facilities based competition via Fixed Wireless Access.

To counter the issue of market dominance, the Commission places its faith in the deterrence effect of s.50 of the Trade Practices Act and the capacity of the ACCC to order divestiture where there might have been a substantial lessening of competition. Unwired suggests this effectively "shuts the gate after the horse has bolted". The possibility of having to bid against a dominant incumbent, even if they are later forced to divest, may be enough to deter investors from funding an auction participant.

Unwired therefore supports the call to abolish bidding caps on spectrum auctions except in circumstances where the asset to be sold would offer a dominant incumbent another technical means of furthering its dominance. Unwired does not support the view that the existence of s.50 sanctions under the Trade Practices Act is sufficient to promote a climate where potential new players can raise funding to develop innovative services.

Licence tenure for Spectrum Licences

Unwired welcomes the Commission's views on market-based allocation; the assignment of technically neutral spectrum property rights; and the call for a strengthening of property rights allowing the market rather than administrative actions to manage spectrum.

Unwired also welcomes the Commission's view that indefinite rights would improve the certainty with which owners could use the spectrum and eliminate the recurring problem of reassigning rights as they expire.

Unwired was therefore disappointed that the Commission did not take up the opportunity to develop a comprehensive set of recommendations for Government to advance the objective of a properly functioning market with unlimited tenure. Instead, the Commission have focused in Chapter 6 on narrow "band-aid" options that respond to an already well diagnosed set of symptoms, but do nothing to cure the long term disease. The implementation of any or all of the four "possible arrangements" considered at pp.121-122 of the Draft Report will do nothing to advance the objective of indefinite rights that the Commission has so specifically endorsed.

Unwired was equally disappointed that the Commission's thoughts here seem to have been dominated by concerns about windfall gains that might accrue to existing licensees should their current fixed term rights be converted to perpetual rights. Unwired points out that windfall gains from converting to perpetual rights are only realised (a) if the licence is traded in the market and (b) the licence trades for significantly more than the residual value and that the increase in value cannot be attributed to other factors such as the emergence of an innovative service or technology. The push for perpetual rights by telecommunications companies has little to do with seeking windfall gains, but rather investment certainty so that carriers may continue to have confidence to invest in new technology and in ongoing capital maintenance.

The Commission notes that it "...does not consider it appropriate to introduce indefinite spectrum licences yet as secondary markets are still relatively immature". Unwired does not believe this is sufficient reason, for as the Commission notes, the first spectrum licences are not due to expire for some time yet. It might be that by the time these licence do expire; the conditions necessary in the secondary market are sufficiently mature. If the Commission presents the Government with an action plan to foster those conditions, they might reasonably emerge in good time.

The commission seeks views from Inquiry participants on the advantages and disadvantages of holding auctions at a specified time (for example, three years) before spectrum licences expire.

Firstly, Unwired does not believe that spectrum licences should expire. Unwired fully endorses the Commissions view that "the best way to resolve this problem would be to remove the time limit on spectrum licences – that is, to create perpetual licence".

Holding auctions three years before the end of the licence term does not address the fundamental problem of investment certainty. If a licensee takes a decision to limit its risk by winding back its investment program from year 8 to manage the risk of losing the licence 7 years later, then holding an auction at year 12 of the term (or years 13 or 14) is going to be *irrelevant* in their consideration. This suggests, therefore, that the re-auction should occur before the licensee begins adjusting their investment outlook for the risk of losing their licence. In most cases this will be at least 5 to 7 years before the expiry of the licence. However, to properly bid in such an auction, the bidder would need to be prescient about both the economic and technological circumstances forecast to exist 7 years out. And bidders would need to scale back their bidding budget to manage the risks associated with forecasting uncertainty.

Unwired believes that only property rights with unlimited tenure are able to provide the level of certainty necessary to sustain large scale infrastructure investments that have *significant and ongoing* capital requirements.

Unwired believes that it is possible within the existing statutory framework to establish the conditions for a viable secondary market upon which the Commission believes perpetual rights depend. The inhibitions on the widespread deployment of spectrum licensing are ones of policy and administration rather than law.

One specific recommendation the Commission could make relates to the default licence approach. At the moment, the default licensing approach is apparatus licensing. Class licensing and spectrum licensing are the exceptions that must be justified on public policy grounds.

Unwired believes that a simple "reversal of proof" to make spectrum licences the default condition, and to make state intervention through apparatus licensing the exception that needs to be justified is sound and consistent with other reforms and goals identified by the Commission. And it will lead to conditions where the secondary market can mature, and in turn provides the background against which permanent tenure can be implemented.

Spectrum Leasing

The Commission notes that "it appears that leasing of spectrum and apparatus licences has not occurred to any significant extent".

Unwired has established a spectrum leasing business in part of its spectrum and this business will generate virtually all of the company's revenue for calendar year 2002. The company is actively considering other spectrum leasing opportunities.

Unwired is providing private band management services over part of its spectrum in the Sydney and Melbourne markets to another carrier. In this business, Unwired authorises the other party to operate radiocommunications devices in Unwired spectrum for a monthly fee. The monthly fee is significant and commercially agreed even though this fee is

many multiples of the apparatus licence fees charged by the ACA for equivalent access.

In this arrangement, Unwired remains the spectrum licensee and remains responsible for compliance with the licence conditions. Only devices that are agreed by Unwired are registered with the ACA.

Unwired and its customer are very satisfied with the current arrangements and with the regulatory framework in which the agreement sits.

Unwired would be very concerned at any suggestion that further rules be applied to third party authorisation, especially to any suggestion that agreements such as the company has entered ought to be registered with the ACA or be otherwise notified to the ACA. In the company's view, spectrum licensees remain responsible for all operations within their spectrum licences and there is no public policy benefit in imposing further regulation.

Unwired supports private agreements and the spectrum licensee remaining fully accountable for the activities of all third parties.

Trading Spectrum Licences

Unwired has been active in the secondary market for spectrum licences. While the company accepts that the secondary market is currently immature, it is already quite dynamic (given the number of spectrum licences and licensees).

Unwired notes the Commission's observation that provision of public trading information such as volumes traded and prices paid is likely to improve the function of the secondary market, and we note that for the most part, this has happened as a matter of course. Trades such as the Austar/TARBS and Austar/Akal transfers were significant in for the publicly listed Austar United, and so reporting of the transfer was necessary under the requirements of the ASX. Such transfers to or from public listed vehicles are likely to be considered significant, and therefore must be reported. Lesser transfers are not as relevant to establishing the secondary markets.

Unwired does not support statutory mandatory reporting of spectrum licence trading volumes and prices. Unwired would be very concerned if such an approach was to be recommended by the Commission. In the company's opinion, there are too many ways for the parties to a bilateral (or multilateral) negotiation could disguise the true consideration in a spectrum transaction for such mandatory reporting to be useful.

However, we believe that if a private trading exchange or market place was to be established, it should be open for the members and participants of that exchange to agree on their own mechanisms for market transaction reporting.

Unwired does not support the idea of a statutory trading exchange being centrally run by the regulator. The company believes that such a function is not one for Government and that the ACA and Government more generally do not have the skill or technology base to make it work well.

Register of Spectrum Licences and the Registration of Devices

Unwired supports the idea of a public register of spectrum licences that identifies the licensee, the area coverage of the licence, the frequency band of the licence and such other details as are necessary to define the rights of the licensee to use spectrum.

However, the company believes that the current information requirements are excessive, and could be substantially streamlined. Unwired understands that in order to do this, it will be necessary to simplify the terms of the licence conditions and the s.145 Determinations established by the ACA. Unwired believes this is necessary, desirable and in the public interest, for there is no public benefit in shrouding these licences in technical language and complex processes.

Unwired have a number of serious concerns with the device registration process, and with the procedures outlined in the s.145 Determinations. Unwired concurs with the sentiments expressed by Spectrum Engineering in the original hearings that "...the device boundary construct is a technical farce".

Unwired's concerns relate to the fact that, both the base station and the subscriber terminal are required to be registered under current rules. This is unnecessary, inefficient and costly. Unwired will have potentially hundreds of thousands of subscriber terminals, and has the capacity in its business plan to double if not triple the current size of the entire ACA RADCOM database of devices!

Unwired believes that the only public policy requirement here is the notification of all spectrum users via the register that there are two discrete frequencies at work in a locality, and so it is only necessary to register the base station transmitters and the base station receivers, for the base station receivers act as a proxy for the subscriber terminal transmitters (they operate on the same frequency) and are clustered around the base station. The same is true of mobile communications systems, although for these, the ACA has exempted mobile phones from the device registration requirements.

Unwired disagrees strongly with the Commission's recommendation over interference impact certificates. All spectrum licensees are directly responsible under their licence conditions for good radio engineering of their systems and for limiting the potential for unacceptable interference. In Unwired's case, our network will be rolled out in accordance with the highest radio engineering standards by companies with ISO quality assurance certification. Further, Unwired has a powerful commercial vested interest in planning the use of its spectrum resources well and to

avoid interference with others. If the company interferes with others through poor planning, the risk is that others will interfere with this business. We see the same being true of other spectrum licensees.

Interference impact certificate only certify that an accredited person has undertaken the device polygon and boundary procedure set out in the s.145 Determinations. Our own independent advice from specialist radiocommunications consultants Market Dynamics Pty Ltd and Cemdia Pty Ltd, is consistent with the views of Spectrum Engineering Australia, the procedure that Interference Impact Certificate certifies against is a technical farce. So we can only conclude the certificates themselves are farcical and can be dispensed with as a statutory requirement.

Unwired's view is that while we accept and endorse mandatory device registration, the ACA should accept the intent of the licence conditions as it applies to spectrum licensees; i.e. the ACA should accept that licensees are responsible for spectrum management and do not need to be bound by the application of a demonstrably flawed procedure.

Unwired believes that the device process can be substantially simplified with no loss of public benefit by simply permitting spectrum licensees to register the devices that they intend to operate directly with the ACA *without interference impact certificates*. If the ACA is open and transparent about the standards of radio engineering that should be applied in planning systems, then there is no public policy or compliance issue. The ACA is always open to audit a spectrum licensee's application of these standards and policies, and a compliance/enforcement regime can be constructed around this.