



DEPARTMENT OF DEFENCE

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Ref: CIO 26/2002

26 April 2002

Productivity Commission - Radiocommunications Inquiry
Locked Bag 2
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MELBOURNE VIC 8003

Dear Sir

DEFENCE SUBMISSION ON DRAFT REPORT OF THE RADIOCOMMUNICATIONS ACT 1992 INQUIRY

The Draft Report of the Radiocommunications Act 1992 Inquiry has been reviewed. Defence remains concerned that insufficient weight is being given to National Security considerations in the Act. Part 1 of this submission addresses two major issues of concern to Defence; the objectives and certain sections of the Act. Part 2 presents some further detailed comments on a number of the Findings and Recommendations. This document is forwarded as both hard copy and electronically in Word 97 format.

If your staff have any further enquiries, my contact officer for this matter is Mr Mike Brown (02 6266 3654) who will be pleased to assist you.

Yours faithfully

Patrick Hannan

Chief Information Officer

Enclosure: Defence Comments on the Draft Report of the Productivity Commission
Review of the Radicommunication Act

DEFENCE COMMENTS ON THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION REVIEW OF THE RADICOMMUNICATION ACT

PART 1

1. Defence has examined the Productivity Commission Draft report and has identified two major issues that have the potential to impact on Defence use of the spectrum.
2. Firstly, Defence remains of the view that the RCA does not afford clear and adequate priority for Defence use of the spectrum and that some of the necessary freedoms in the RCA appeared to be ambiguous.
3. Secondly, since the preparation of Defence's initial submission to the Commission, world events have brought national security issues into very sharp focus. It is becoming increasingly clear that spectrum availability to support a very rapid military reaction to unforeseen situations is an essential component of our military and national security preparedness.
4. National security emergencies can arise without warning and will need a measured and carefully scaled response that is appropriate to the situation. Australia may not have the luxury of time to debate and then plan the response. Accordingly there is a need for clarity in legislation that affords certainty in the way in which the spectrum can be used for Defence purposes.
5. In its previous submission to the Productivity Commission, Defence made two significant suggestions for amendment to the RC Act.

6. Defence identified that:

"A notable omission from the objectives of the Radiocommunications Act (1992) (the RCA) is the objective of providing adequate spectrum for the purposes of national security or in the national interest."

and suggested:

The lack of explicit recognition of national security/national interest requirements in the RCA objective could act to limit the importance ACA attaches to fulfilling National Security requirements. In the extreme, it could result in the ACA treating Defence requirements with the same priority as it accords any commercial company. The inclusion of an objective such as:

*"to provide adequate spectrum for the
requirements of national defence and security"*

may act to provide additional support to the ACA when they have to balance the needs of Defence against other spectrum users.

7. 4. Draft Recommendations. The Commission has not recommended that this objective be included in the Act but has found (at draft finding 4.3).

DRAFT FINDING 4.3

Clause (b) of the objects section of the Radiocommunications Act 1992 clearly states the Commonwealth Government objective of ensuring access for non-commercial users.

8. In its discussion relating to this subject the Commission stated that :

In favouring access for some spectrum users over others, clause (b) has the potential to conflict with the primary objective of achieving efficient spectrum use for the whole community. Where the two conflict, clause (b) should be regarded as a secondary objective to clause (a) (see below).

9. Defence does not agree this finding. The highest and most important role of the Government of any country is to assure the integrity of the state and the safety and security of its citizens. It remains Defence's strongly held view that provision of spectrum for Defence and National Security should be explicitly dealt with in the Act. The situations of declared national emergency or national security should have a distinctly different priority for the spectrum resource when compared with commercial enterprises. The Australian Communications Authority needs to be empowered to implement that priority. At present it is not adequately empowered to make any distinction with respect to the requirements of National Security or National Interest.

10. The only recognition of unique Defence requirements for access to spectrum is in Section 30 of the RCA, reproduced below:

30 Spectrum plans

- (1) The ACA may, by written instrument, prepare a spectrum plan.
- (2) A spectrum plan must:
 - (a) divide into such number of frequency bands as the ACA thinks appropriate so much of the spectrum as the ACA thinks necessary for the purpose of regulating radiocommunications under this Act; and
 - (b) designate one or more bands to be used primarily for the general purposes of defence; and
 - (c) specify the general purpose or purposes for which each other band may be used.
- (3) In this section:
used includes:
 - (a) reserved for future use; and
 - (b) reserved for the prevention or control of interference to radiocommunications.

11. In preceding years spectrum required by Defence has often been diverted to non Defence use. The consequential loss of Defence capability, was on these occasions, assessed as manageable. With the increased dependence on spectrum by Defence it is increasing unlikely that Defence can give up further spectrum without suffering a significant loss of capability. There are many potential spectrum users seeking to access portions of Defence spectrum for their own purposes. Defence spectrum is attractive to those potential users because it provides the only readily available harmonised bands throughout Australia. Both Defence and the ACA have difficulty in preventing further erosion of Defence spectrum when the fundamental legislation does not afford any priority to Defence spectrum use.

12. Defence seeks the addition of an objective to the RCA to specifically identify Defence or National Security as a priority and thus enable both the ACA and Defence to better manage competing applications.

13. Defence also sought the attention of the Commission to an apparent ambiguity in the Act which leads to differing interpretations of the effect of Sects 24-27 of the Act. It was pointed out that:

1. A difficulty has become apparent with sections 24, 25, 26 & 27 of the RCA. These sections are collectively and informally known as the "Defence Exemptions" and were

intended to provide Defence with the freedoms necessary to conduct its business. They variously exempt Defence personnel from the Act or portions of the Act.

2. However, the ACA argues that, whilst they exempt personnel, they do not exempt the Department or the ADF and therefore Defence is bound to comply with the Act in its entirety. Defence believes this was not the intent of Parliament. Such an interpretation by the ACA means, for example, that it would be improper for Defence to order the use of radiocommunications to cause an explosion, an essential activity for any defence force, as it is forbidden in Section 199 of the RCA. It would not, however, be an offence for Defence personnel to actually do this.

3. This issue is being discussed with the ACA but has not yet been resolved. In any revision of the Act, Defence recommends that this apparent ambiguity be rectified.

Defence notes that the Commission has not made any recommendations on this subject.

14. This issue has been discussed with both the ACA and DoCITA and whilst it is the view of both DoCITA and the ACA that there does not need to be any legislative changes, Defence remains concerned about the issue. An exchange of letters between ACA and DOD to clarify interpretation of the Act has been proposed. However this would not, in the opinion of Defence, resolve the fundamental difficulty that some interpretations of the Act render some necessary Defence uses of the spectrum illegal. Accordingly it is again suggested that the Commission address this issue.

15. It could be argued that the provisions of Part 4.4 could be used to afford Defence the necessary freedoms during a Defence emergency. There are two difficulties with this argument:

In the period of a declared emergency the Minister can only make restrictive orders. He cannot make permissive orders and specifically cannot make orders which are inconsistent with the RCA.

There are foreseeable circumstances in which it would be undesirable for the Governor General to declare an emergency as this may exacerbate the situation that lead to the emergency.

16. It has also been argued that Section 13 of the RCA, reproduced below, provides Defence with immunity from prosecution for an offence.

13 Crown to be bound

- (1) Subject to subsection (2), this Act binds the Crown in all its capacities.
- (2) Nothing in this Act renders the Crown liable to be prosecuted for an offence.

17. Whilst Section 13 may offer immunity from prosecution it does not remove the obligation on Defence to comply with the law as expressed in the RCA.

18. Moreover neither Section 13 or Sections 24, 26 and 27 apply to foreign Defence Forces operating in Australia with the consent of the Government or to civilian contractors to the Department of Defence who use the spectrum under the direction of Defence.

19. Defence seeks to have the effect of sections 24, 25, 26 and 27 clearly apply to the:

- Department of Defence,
- The Australian Defence Force,

- Foreign Defence Forces operating in Australia with the consent of the Australian Government, and
- Defence contractors in the performance of their contract with Defence.

PART 2

Comments on other Draft Findings and Recommendations of the Draft Report.

DRAFT FINDING 4.1

Clause (a) of the objects section of the Radiocommunications Act 1992 appears to be the primary objective of the Act — that is, to maximise efficient allocation and use of spectrum.

DEFENCE COMMENT

Defence agrees that this is the primary objective of the Act. Defence had suggested in an earlier submission that this could be better and more simply expressed as: “to maximise the benefit to the nation and its citizens of the radio frequency spectrum”. The word “efficient” implies a measurable efficiency, however parameters by which efficiency is measured can depend on the nature of spectrum use, furthermore the goal of economic efficiency favoured by the Commission is not necessarily the only measure of benefit to the community.

DRAFT FINDING 4.3

Clause (b) of the objects section of the Radiocommunications Act 1992 clearly states the Commonwealth Government objective of ensuring access for non-commercial users.

DEFENCE COMMENT

Defence does not agree this finding. See Defence comments regarding the objectives of the Act in Part 1 of this submission.

DRAFT FINDING 5.3

Australia would benefit from economies of scale in production and greater choice of equipment even in the absence of the Australian Radiofrequency Spectrum Plan.

DEFENCE COMMENT

Defence is uncertain of the validity of this finding. The spectrum plan broadly reflects international usage. It is unlikely that radical departures from international usage within a relatively small market such as Australia would result in the economies of scale of production or greater choice of equipment.

DRAFT FINDING 6.2

While spectrum licences are not entirely technology or use neutral at the time of issue, they are more flexible than apparatus licences in responding to changing uses and technologies over time.

DEFENCE COMMENT

Defence agrees this finding, but notes that unless a vibrant secondary market develops the spectrum license longevity will, in time, bring its own inflexibilities.

DRAFT FINDING 6.4

The practice of using a market-based approach only when there is excess demand for a band may unnecessarily restrict the issue of spectrum licences. From an efficiency perspective, it may be beneficial to sell spectrum licences even when there is only one prospective buyer.

DEFENCE COMMENT

Defence doubts this finding. A virtue of auctioning licences, particularly spectrum licences is the resolution of conflicts for spectrum use by application by award of a

spectrum licence to the party who placed the most value on it. The distribution of a spectrum licence at a negotiated price to a single bidder would not achieve that aim. It would be administratively more flexible and prudent to issue an apparatus licence which could more easily be resumed should demand for the relevant spectrum develop in the future.

DRAFT RECOMMENDATION 10.1

The Commission recommends that:

- *section 31(1b) of the Radiocommunications Act 1992 should be repealed, transferring responsibility for the broadcasting services bands of the spectrum to the Australian Communications Authority, to be managed under the provisions of the Act;*
- *licences granting access to spectrum should be separated from content-related licences that grant permission to broadcast, and the spectrum access charges should reflect the opportunity cost of the spectrum used; and*
- *the Australian Broadcasting Authority should retain responsibility for issuing licences to broadcast and for determining the number of non-commercial broadcasting licences in a licence area. It also should retain responsibility for regulating content, enforcing codes of practice and monitoring ownership.*

DEFENCE COMMENT

Defence strongly supports this recommendation.