Telstra Corporation Limited

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Productivity Commission

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Draft Report on

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TABLE OF CONTENTS

1 INTRODUCTION **1**

1.1 Executive Summary **1**
Overview 1
Spectrum allocation and the removal of competition limits 1
Security of tenure and conditions for licence renewal 1

1.2 Background **2**

2 SPECTRUM ALLOCATION AND THE REMOVAL OF COMPETITION LIMITS **2**

2.1 Comments on Commission's Draft Findings and Recommendations **2**

3 SECURITY OF TENURE AND CONDITIONS FOR LICENCE RENEWAL **3**

3.1 Apparatus licences **3**
Presumption of renewal 3
Conditions for renewal 4

3.2 Spectrum licences **5**
Introduction 5
The issues 5
Timing of re-issue or re-allocation 6
The options for re-issue or re-allocation processes 6
Current legislative requirements 7
Telstra's comments on the process for re-issue or re-allocation 7
Public interest test 8
Pricing re-issued licences 9

4 OTHER MATTERS **10**

4.1 Comments on various Commission Draft Findings and Recommendations **10**
Spectrum licensing where only one party is interested 10
Draft Finding that spectrum leasing is rare 10
Transaction costs and level of trading 10

4.2 Comments on Commission's further requests for information **11**
Selling 'encumbered' spectrum licences 11
Narrowing the list of device registration details 11

1 Introduction

1.1 Executive Summary

Telstra welcomes this opportunity to provide to the Productivity Commission its comments in response to the Commission's Draft Report on Radiocommunications. This response does not seek to comment on every draft finding and draft recommendation or respond to every request for further information. Rather, Telstra seeks only to comment on matters it considers of utmost importance for the efficient investment in and management of radiocommunications spectrum in Australia. In so commenting, other issues may be touched upon tangentially.

Overview

Telstra is generally supportive of the Commission's Draft Report and its draft findings and draft recommendations with respect to the operation of the Radiocommunications Act 1992 ('Act'). In particular, Telstra supports the overall tenor of the Commission's observations and agrees with the Commission's evident strong preference for increased use of market-based solutions and the operation of market forces to better ensure efficient spectrum management.

Spectrum allocation and the removal of competition limits

Telstra strongly supports the Commission's draft finding that the limitations imposed on bidding for spectrum at auction are unnecessary and fully endorses the Commission's draft recommendation that those parts of sections 60 and 106 of the Radiocommunications Act 1992 that permit the Minister and the Australian Communications Authority's ('ACA') to impose competition limits be repealed and that reliance instead be placed on section 50 of the Trade Practices Act 1974 ('TPA'). Such amendments would still appropriately prohibit anticompetitive acquisitions, allow adequate safeguards through the usual TPA remedies, and be consistent with the Government's stated telecommunications regulatory policy to rely on general competition law wherever possible.

Security of tenure and conditions for licence renewal

Telstra also concurs with the Commission's observations that licence renewal conditions are more important than the licence period in ensuring appropriate investment incentives and efficient use of spectrum.

With respect to apparatus licences, Telstra supports the Commission's draft findings and recommendations relating to enhancing security of tenure through a presumption of renewal except in certain specified circumstances. This accords with general industry opinion.

With respect to spectrum licences, Telstra notes that, in the absence of perpetual licences and the full and free operation of market forces to effect re-assignment of licences, re-assignment should not be limited as suggested by the Commission to an auction process at a set period (perhaps 3 years) prior to expiry of a licence. Instead, Telstra makes some suggestions for an alternative process combining a mid-term review for licence renewal by reference to a public interest test and an auction process if renewal is not granted on that basis.

1.2 Background

Radiocommunications regulation has been the subject of several reviews as part of the requirement of the Competition Principles Agreement that there be systematic review and reform of legislation that restricts competition.

The August 2001 Department of Communications, Information Technology and the Arts Report of the Radiocommunications Review ('DCITA Report') found that greater security of tenure should be available to apparatus licence holders and recommended greater efficiency and transparency in ACA processes. The Government announced that it plans to consult with industry representatives and formally respond to the Report following that consultation.

As part of that consultation process, the Radiocommunications Consultative Council ('RCC') has formed a working group comprising representatives of the industry, DCITA and the ACA to consider issues arising from the DCITA Report. The working group has prepared a report ('RCC Report') setting out its detailed views.

Telstra commends the RCC Report to the Commission as representative of wide industry agreement and recommends it be considered in the Commission's deliberations as offering practical options.

2 Spectrum allocation and the removal of competition limits

2.1 Comments on Commission's Draft Findings and Recommendations

Telstra fully supports the Commission's Draft Finding 6.5 and Draft Recommendations 6.2, 6.3 and 6.4 relating to removing the power for the Minister and the ACA to impose competition bidding limits on spectrum auctions. It was and remains Telstra's submission that such bidding limits are highly distortionary and artificially structure and constrain market development, preferring some participants and technologies over others with great potential for inefficient market outcomes. Telstra considers that such distortions in fact retard rather than foster the development of a competitively-driven telecommunications market. Telstra believes that market participants, subject to the ordinary rigours of the TPA, are more efficiently able to decide upon optimal commercial deployment and use of spectrum within the telecommunications industry.

The policy objective behind the imposition of such limits was apparently to promote competition and to allow new entrants in yet-to-be-created markets a better chance to acquire licences. Although successful to a degree in that regard, it is clear that the ordinary operation of section 50 of the TPA would equally prohibit acquisitions that would have the effect or likely effect of substantially lessening competition in a market. As the Commission observes, in the case of spectrum auctions an assessment of the competitive effect under section 50 would necessarily consider whether the success at auction of any potential bidder would diminish competition. Moreover, reliance on section 50 to the exclusion of specific bidding limits would be consistent with Government's stated telecommunications regulatory policy to rely on general rather than specific competition law wherever possible

Although some submissions argued that new markets need particular regulation, the Commission correctly concludes that separate competition limits are not needed to address

the competitive structure of new and emerging markets compared with that of existing markets. Telstra fully agrees with the Commission's observations that section 50 of the TPA provides a completely adequate restraint on anticompetitive acquisition of spectrum both at auction and in a secondary trading market.

Additionally, Telstra fully agrees with the Commission that Government attempts to "engineer" market structures are likely to fail as they necessarily involve predicting the likely uses of spectrum - a matter best left for commercially informed industry participants in the market. Departmental and regulatory officers do not have access to the detailed technical knowledge and expertise necessary to ascertain and predict the optimal use of spectrum amongst present and emerging technologies. Moreover, the way in which bidding limits have been settled in the past has been far from transparent, compounding the problems generated by the fact of their imposition.

3 Security of tenure and conditions for licence renewal

3.1 Apparatus licences

Presumption of renewal

Telstra supports the Commission's Draft Recommendation 6.5 to amend section 130 of the Act to provide a statutory presumption so that apparatus licences will generally be renewed by the ACA unless licensees have failed to comply with licence conditions or spectrum re-allocation declarations affect the licenses.

Such an amendment will go a long way towards removing the uncertainty surrounding planning and investing in reliance on a short term apparatus licence. While it may only formalise in legislation an arrangement that has long occurred in practice, making specific statutory provision for this presumption is nevertheless appropriate because the current legislation gives no assurance of any continuity of present ACA practice.

A majority of apparatus licences are issued for only one year. However, incumbents are generally satisfied that their annual licence will continue to be renewed for some years. Experience indicates that the risk of non-renewal is quite low and that ACA processes provide notable forewarning that access to a particular band may not be available from some specified point in the future.

Notwithstanding, several industry members have expressed a view that expectation of renewal alone does not provide sufficient certainty for financial institutions or overseas businesses and investors to provide investment funds for capital expenditure. Without any other provisions, that view purports that a short licence period does not provide the ability to secure an adequate return on investment. Moreover, the typical apparatus licence period falls well short of the effective economic life of major capital investment in infrastructure.

However, based on specific consultation on the matter, the RCC Working Group's Report notes that representatives of the financial sector have indicated that a presumption of renewal would be particularly advantageous in securing finance, and that the conditions attached to a licence would generally be considered more important than the actual term of the licence.

Conditions for renewal

This accords with Telstra's view that the conditions for renewal of apparatus licences and consequently the conditions for resumption (or non-renewal) are more critical than the term of the licence. A greater degree of certainty would result if apparatus licences were issued on the basis that, provided certain conditions were met, their renewal would be presumed.

Those conditions should be clearly spelt out in the amended Act. For that reason, it is necessary to give detailed consideration to what those conditions should appropriately be.

The Commission recommends that the conditions for the presumption of renewal should be:

€ the licencee had complied with the licence conditions; and

€ no spectrum re-allocation declaration affected the licence.

For its part, the RCC Working Group's Report recommends the Act be amended to include the presumption of renewal of apparatus licences for a term (and possibly on conditions) to be determined as part of the renewal process, and to include a requirement on the ACA to advise reasons for any non-renewal.

Telstra believes a more expansive set of factors than those proposed should be considered when assessing whether the presumption of renewal should be rebutted. Apparatus licences must be looked at in the wider scheme of radiofrequency use co-ordination. It is important to consider not only issued re-allocation declarations but also wider circumstances affecting renewal - for example if a licence is held in a band likely to be replanned as a result of a ITU or World Radiofrequency Conference decision. This is because continued segregation of certain categories of incompatible services is essential - for example, it is simply not possible to spectrally co-locate high-power broadcasting services and mobile services. There are many other such incompatible radio-based service categories. In that context, the ITU provides the high level international planning framework, with national administrators left to determine detailed local band structures and uses.

Telstra thus proposes that the legislation would set out:

(a) the general renewal conditions including:

€ the term of any renewal; and

€ how many times a licence could be renewed;

(b) that there would be a presumption of renewal provided the ACA was satisfied that:

€ licence conditions were satisfied; and

€ there were no anticipated future uses of the spectrum incompatible with the re-issue of the licence; and

(c) the matters to which the ACA should have regard in exercising its discretion with respect to past usage of the spectrum and anticipated future uses of the spectrum, which may include:

€ the date of initial issue of the licence and the particular conditions attaching to that licence;

€ the economic impact on the broader community of the withdrawal or spectral relocation of the services reliant on the licences;

€ whether the radiofrequency spectrum subject of the licence is currently under review, or likely to come under review within the period of renewal, by any recognised national or international radiofrequency planning and co-ordination forum; and

€ whether the period of renewal is appropriate in view of anticipated national or international radiofrequency planning and co-ordination activities within recognised forums.

(d) a requirement that the ACA publish reasons for its decision to renew or not to renew the licence.

3.2 Spectrum licences

Introduction

Telstra supports the Commission's Draft Finding 6.7 that there is scope for arbitrary and inconsistent outcomes in the operation of section 82 of the Act and that the process for re-issuing licences on public interest grounds should accordingly be made more transparent.

Telstra therefore accepts in principle the Commission's Draft Recommendation 6.6 to amend the Act so that the ACA is required to publish its reasons and state the fees paid if it re-issues a licence to the same person.

However, Telstra does not believe that the Commission's Draft Finding and Draft Recommendation go far enough.

The issues

The Commission's Draft Report highlights a number of major issues with respect to the management of spectrum licences -

€ the lack of certainty surrounding the re-allocation of spectrum licences upon their expiry;

€ whether there should be a mid-term or later review of licences;

€ whether licences should be re-allocated by auction at a specified time before the licence expires; and

€ the conditions on which spectrum licences would be re-issued to the incumbent licencees.

These issues illustrate the troubling lack of commercial certainty currently surrounding re-issue or re-allocation of spectrum licences. The predominant issue is the need to provide far more effective investment certainty for licensees and their financial supporters.

Essentially, this requires reform in two areas:

€ the time at which a decision is made about re-issue or re-allocation of outstanding licences; and

€ the process by which such re-issue orre-allocation is to be effected.

Timing of re-issue or re-allocation

Telstra acknowledges the Commission's observations about the difficulty of determining the ideal time at which a spectrum licence should be considered for re-issue or re-allocation. It is a fundamental question which must be answered based on sound assessment of the advantages and disadvantages of re-issuing spectrum licences at various times.

As the Commission recognises, if re-allocation occurs too late in the term, then it may weaken the incentive for the incumbent to appropriately maintain the infrastructure in the absence of certainty of continued incumbency. Alternatively, re-allocation of the spectrum too early in the term may not attract sufficient interest because of the long lead times before being able to operate the spectrum.

The Commission has recognised that there is an investment disincentive for an incumbent not to know until two years prior to expiry whether the licence will be re-issued. However, Telstra does not agree that the Commission's extension to three years of the period for reassessing the licences (under the Commission's model - auctioning them) is adequate. Telstra does not consider that one extra year will make a substantive difference to the uncertainties faced by an incumbent considering whether, if its licences are not offered for re-issue, to withdraw services from customers and cease transmissions or to re-bid in a hope of retaining the licences beyond the 15 year point.

Rather, Telstra considers that arrangements to re-issue spectrum licences or to re-allocate them by other methods should be put in train at least five years prior to the expiry date of the licence and preferably around the mid-term at seven years prior.

There is a very real danger that an abundance of caution and unnecessary constraint in on-going investment in infrastructure and technologies utilising the spectrum may result from lack of certainty of on-going tenure. There is a real risk that, as investment decreases, efficient exploitation of the spectrum resource will decline. This situation must inevitably undermine the benefits received by the community as a whole.

The options for re-issue or re-allocation processes

A variety of processes have been proposed by participants in the inquiry. These include:

€ reviewing licenses before their expiry (whether mid- or late-term) with a view to determining their eligibility for renewal (perhaps by assessing compliance with licence conditions and examining whether it is likely the spectrum could be put to better use);

€ providing either a presumption of renewal on specified conditions or a right of last reply to the spectrum licence incumbents; and

€ a price-based procedure such as auction to re-allocate expiring spectrum licences.

The Commission has indicated its preference for this latter process as implicitly the one intended by the Act and as being more likely to ensure licences are purchased by parties willing to pay the highest price and thereby lead to a more efficient allocation. In doing so, the Commission favours withdrawing the present capacity of the Minister / ACA to re-issue on public interest grounds.

However, Telstra does not agree with the Commission's reasoning that the Act necessarily does or should require re-issue or re-allocation of existing licences on the open market using a price-based procedure such as auction or tender. Further, Telstra does not agree that re-auctioning a spectrum licence at a pre-determined time - whether at the end of the licence or at a specified time beforehand - will necessarily ensure the most efficient or best use of resources.

Current legislative requirements

The Act currently requires the ACA to provide information about licences expiring in the next two years, seek expressions of interest from parties wishing to have licences for that spectrum issued to them and to prepare draft replacement licences. Thereafter, however, it permits two methods of allocation. First, it gives the ACA the power to re-allocate spectrum in accordance with the price-based procedures used to initially allocate the spectrum. Notably, however, the Act also gives the ACA power to re-issue individual licences to the same licencees if special circumstances exist which make it in the public interest to do so or if the Minister has made a determination that it is in the public interest to re-issue categories of licences. While the notion of "special circumstances" clearly implies that this will not be the usual method of re-issue, no such implication necessarily arises from the concept of "public interest" in the context of a Ministerial determination

As yet, because licences have been issued for the maximum periods of initially 10 and later 15 years, no licences have expired and there is a lack of precedent in applying the legislative provisions.

The Commission has assessed that the public interest re-issue process is likely to be used sparingly and that market-based assignment will be the primary mechanism for re-issuing spectrum licences. However, Telstra suggests that the "public interest" test, appropriately modified, could provide a more effective way of re-allocating licences in an efficient manner.

Telstra's comments on the process for re-issue or re-allocation

Telstra supports the Commission's preference to move ultimately to market-based allocation of spectrum based on property rights but agrees with the Commission's observations that the market is not yet mature enough to do so. While there has been some activity in the secondary sale and authorised use market, this activity has been relatively limited. This is perhaps not surprising considering the relative novelty of the spectrum licensing regime and the disparate uses to which spectrum may be put, especially as between telecommunications and broadcasting.

The operation of the free market would necessarily involve indefinite spectrum licence tenure and the ability to trade in the market at times suitable to the trading parties. In the meantime, Telstra does not believe that an auction process imposed at a pre-determined time prior to the expiry of an incumbent's licence replicates the true concept of a market-based assignment or represents the best transitional path to that longer term goal.

Rather, Telstra argues there should be an option for a mid-term review of spectrum licences, with a view to renewal on the basis of public interest. Should a review not clearly indicate that it was in the public interest to re-issue the licence to the incumbent, or should the incumbent not wish to either renew the licence or renew the licence on the conditions offered, an auction process (in which the incumbent could still participate) could then be used to re-allocate the licence.

Telstra believes that the Commission has potentially seriously understated the potential role of the public interest test for licence re-issue. The Commission has recommended a statutory presumption of renewal for apparatus licences provided certain conditions are met. Whether or not a presumption of renewal could or should be adopted for spectrum licences, a mid-term review could still be conducted with a view to re-issuing the licence if specified tests and conditions are met.

They could include a public interest test and a requirement that the spectrum is not the subject of re-allocation under the International Telecommunications Union's (ITU) rules or ACA planning and the Australian Radiofrequency Spectrum Plan.

Public interest test

Telstra accepts that, if the public interest test is to remain, it is important to provide greater guidance on how the public interest should be assessed in order to give guidance to decision makers and better inform licencees of the circumstances in which their licences might be renewed.

Clearly, what is in the public interest varies according to the facts. The meaning of public interest could be gleaned from the objects of the Act and relevant extrinsic material. But, without further elaboration in the Act, the concept remains undesirably imprecise.

The RCC working group has considered the subject and, with one change, Telstra endorses its findings. While the working group has based the test in the Minister's power to make a determination and accordingly the Minister's exercise of discretion, Telstra believes this test should be applied instead by the ACA in its role in allocating spectrum licenses.

Telstra considers that, to assess the public interest, the Act should provide that the ACA should have regard to:

(a) the nature of the services operated under the spectrum licences;

(b) the number of customers using the services operated under the spectrum licences;

(c) the geographical reach of the facilities operated under the spectrum licences;