

6 May 2016

Spectrum Reform
Department of Communications and the Arts

By email: spectrumreform@communications.gov.au

Dear Sir/Madam

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Legislative Proposals Consultation Paper for a new Radiocommunications Bill.

Executive summary

- ASTRA supports the development of a new Radiocommunications Bill and broadly supports the framework for the new scheme set out in the Consultation Paper. Our key concerns outlined in this submission relate to the Government's proposals on broadcasting spectrum.
- We strongly support introduction of a unified spectrum management scheme that deals with broadcasting spectrum like all other spectrum. However, there is a way to go in realising the ambition of a unified scheme if free-to-air (FTA) broadcasters are given a special deal on matters such as spectrum tenure and pricing.
- We object to any proposal that FTA broadcasters have certainty of access to spectrum which is not consistent with other spectrum users. This would entrench unfair competitive advantage.
- We acknowledge the benefit of enabling FTA broadcaster spectrum users to share spectrum for cost efficiencies and infrastructure sharing in the delivery of their existing commercial broadcasting services. However we do not support or accept that there is any public policy rationale to enable FTA broadcasters to sublet or trade their spectrum for other broadcasting or non-broadcasting uses, whilst broadcasters maintain a special status under the framework.
- To the contrary, we submit that, once FTA broadcasters no longer need excessive spectrum allocations having moved to using more efficient transmission technology, it would be simpler and fairer for the Government to re-allocate excess spectrum through a competitive process than to introduce a complex scheme allowing FTA broadcasters to pick and choose to whom spectrum may be sublet. That proposal simply allows them to control who their new competitors might be, and on what terms they provide services. We do not believe that this approach will deliver the highest value use for this excess spectrum.

- ASTRA submits that without transparency on the pricing methodology for these new “broadcast” spectrum licences, and clarity on their terms of tenure and renewal, it is not appropriate for Government to decide on the terms of use, eg tradability, for these licences, nor is it possible for industry to fully assess the impact of the Government’s proposal. For example, it is not clear how the value to be attributed to the “tradability” aspect of the licence will be reflected in the pricing methodology.
- Moreover this lack of transparency makes it hard to assess the competitive impact of the Government’s proposals, which will, in turn, lead to uncertainty in business investment and innovation.
- The Consultation Paper identifies a number of these issues as broadcasting policy matters that should be dealt with under the *Broadcasting Services Act 1992* (BSA). ASTRA strongly submits that development of the new Radiocommunications Bill should only proceed once these broadcasting matters have been properly examined through a public consultation process.

About ASTRA

ASTRA is the peak industry body for subscription media in Australia. ASTRA’s membership includes the major subscription TV operators, as well as more than 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

ASTRA’s members deliver a diverse range of quality news, information, sport and entertainment programs to a broad cross-section of Australians. Our members are the leading innovators in Australian television, using new technology and business models to lower production costs and provide consumers with content wherever, whenever and however they choose.

One in three Australian households subscribe, along with millions more who watch subscription content in public venues.

In 2014/15 ASTRA members invested more than \$796 million filming local content in more than 300 communities Australia wide. That investment funds the broadcast each week of more than 1000 hours of first-run local content, as well as premier international content. Every year ASTRA members add \$2.083 billion to the economy and provides jobs for 8370 Australians.

ASTRA is concerned to ensure that regulation affecting the industry does not inhibit this investment, innovation, productivity and job creation.

The legislative proposals

The legislative proposals in the Consultation Paper appear to align with the findings of the Spectrum Review, which ASTRA has supported. ASTRA refers to its previous

submissions on the Spectrum Review.¹ In particular, ASTRA endorses the following aspects of the current Consultation Paper:

- Creation of a single licence category and parameters-based licensing
- Clarification of the respective roles of the ACMA and the Minister in setting policy and in planning and licensing decisions
- Arrangements which would facilitate private band management (provided the ACMA retains appropriate oversight)
- The proposed transitional arrangements
- Extended licence terms of up to 20 years
- The proposed ACMA annual work plan
- Arrangements for renewal of licences
- Greater eligibility to take civil action in relation to interference
- Introduction of civil enforcement options and additional mid-tier enforcement powers for the ACMA

Notwithstanding its general support for the legislative proposals in the Consultation Paper, ASTRA retains serious concerns regarding the proposals which relate to broadcasting spectrum. In particular, the proposals to enable FTA broadcasters to share, trade or lease their spectrum and the gift of 'certainty' of access need to be more fully explored.

These proposals, on the basis of what is outlined in the Consultation Paper, appear to be yet another step in the long-running history of media regulation in which FTA broadcasters are shielded from competition and gifted regulatory protections, with little regard paid to the overall impact on consumers and other industry participants.

If this is not the intention of the Government, this should be more clearly explained and communicated, and further detail provided so that industry can properly assess the implications of the legislative proposals.

ASTRA members believe there are better ways of introducing competition and new services than introducing a complex sub-licensing scheme which will allow FTA broadcasters to act as gatekeepers of spectrum. Our views are set out in more detail below.

Regulatory balance

ASTRA refers to its submission to the Digital Television Review (2 April 2015),² which explained the need for any additional regulatory benefits proposed for FTA broadcasters to be considered in light of the overall regulatory balance (or imbalance) across the industry. ASTRA is opposed to selective, sector-specific

¹ http://astra.org.au/images/pages/ASTRA_submission_-_Spectrum_Review_-_Directions_Paper_-_2_December_2014.pdf

[http://astra.org.au/images/pages/Spectrum_Review_Issues_Paper_June_2014_\(1\).pdf.pdf](http://astra.org.au/images/pages/Spectrum_Review_Issues_Paper_June_2014_(1).pdf.pdf)

² http://astra.org.au/images/pages/ASTRA_Submission_-_Digital_Television_Regulation_Final_020415.pdf

deregulatory action which would further distort competition and result in additional protection and advantage for FTA broadcasters.

Failure to consider the competitive impact of the proposals and provide regulatory certainty has the potential to depress innovation, investment and job creation in the media sector at a time when existing players are facing increased competition from unregulated overseas operators. There is a pressing need for deregulatory reform that equips all Australian media companies to respond on a competitively neutral basis to the changes underway in technology and consumer behaviour, and the entry of unregulated offshore providers.

This approach is more likely to foster innovation, expand consumer choice, and drive growth and jobs. Ad-hoc concessions to certain broadcasters merely risk undermining the impetus for further deregulation, jeopardising the opportunity to safeguard local investment, innovation and jobs in future.

Given their potential impact, we submit that legislative proposals for broadcasting spectrum should in fact be considered as part of a whole-of-industry approach to policy and deregulatory reform which takes into account the overall regulatory balance and winds back the costly protections that shelter some providers from competition. Whilst the proposals in the Consultation Paper regarding broadcasting spectrum may have their roots in the Government's review of spectrum regulation, there are likely to be wider impacts which appear not to have been in scope of the Spectrum Review.

ASTRA is therefore concerned that, as was the case in the Digital Television Review, significant reform proposals have been put forward in isolation of any consideration of the existing regulatory privileges FTA broadcasters enjoy, the wider industry impact and the impact on the Australian public.

These proposals are put forward in an environment in which the Government is already seeking to legislate sector-specific measures to liberalise the ability of FTA broadcasters to increase their competitiveness by merging with each other, whilst neglecting to reconsider any of the existing regulatory privilege enjoyed by the FTAs, such as the archaic anti-siphoning scheme.

This has been compounded by the Government's announcement of an unconditional rebate for FTA licence fees worth approximately \$150 million.³ This rebate came with no corresponding reduction in the privileges and protections from competition that FTA television networks have amassed over time, and completely pre-empts the outcomes of the Government's work reviewing spectrum use efficiency and spectrum pricing.

It is ASTRA's view that this piecemeal approach to regulatory reform will further entrench distortionary impacts and represents a lost opportunity to mobilise cross-sector support for modernisation of Australia's media regulation.

³ Over the 4 year forward estimates period.

http://www.budget.gov.au/2016-17/content/bp2/html/bp2_revenue-02.htm

Transparency

To assess the policy merit of the legislative proposals relating to broadcasting spectrum, greater visibility of Government intent and process is needed. In particular, there should be greater transparency regarding the interaction between the Digital Television Review, the legislative proposals in the Consultation Paper and the ongoing review of spectrum pricing and FTA licence fees.

As currently articulated, it is difficult for industry to assess the competitive impact of the proposals, and this uncertainty may impede business investment and innovation in the media sector

At the very least, the additional value proposed to be injected into broadcasting spectrum licences (through the ability to trade/share, etc) must be reflected in the outcomes of the Government's review of spectrum pricing and the setting of licence fees.

Ideally, however, the Government would make plain the unified policy approach underpinning decisions as to:

- How efficient FTA broadcasters must be in using spectrum
- What happens to any spectrum gained from efficiencies
- What liberty is afforded to FTA broadcasters to launch new services
- How FTA broadcasters are permitted to deal with their spectrum
- How much additional value is created in FTA spectrum from more flexible use arrangements
- How that additional value is taken into account in determining spectrum access charges
- How spectrum access charges or licence fees will be calculated

Broadcasting spectrum reform proposals

Sharing, trading or leasing of spectrum

ASTRA reiterates its strong concerns regarding any new rights for FTAs to trade or sub lease their spectrum, or space on their multiplexes. It remains ASTRA's view that any spectrum capacity which is not required to replicate the existing Freeview platform should not be treated as a broadcaster asset which can be sublet and monetised. That spectrum is a public asset and unused capacity should be returned to the Government for allocation on commercial terms. ASTRA acknowledges that some capacity for spectrum sharing between broadcasters is appropriate however, we submit, only in order to facilitate efficient and cost effective transmission of existing services, for example the use of multiplex sharing. Any proposal to enable other uses of the spectrum to be exploited by the commercial broadcasters is without merit, unless considered in conjunction with the removal of other broadcaster privileges.

It would be particularly alarming if FTA broadcasters continued to gain access to spectrum at reduced prices, and were then able to charge market rates for access to that spectrum. We understand it is not the intention of the Government to create this kind of wealth transfer. It would be ideal if this had been communicated in the Consultation Paper.

ASTRA acknowledges that the provision of these rights to FTA broadcasters would appear to be consistent with the stated aim of creating a single licence category, given that all other spectrum users falling into the new licence category would have those rights.

However, as discussed further below, application of consistency appears to be selective, and does not extend to exposing FTA broadcasters to the same risks and liabilities that all other spectrum users must accept.

Certainty of access

ASTRA is disappointed that a degree of the ‘special deal mentality’ that has applied to broadcasting spectrum in the past, appears to have persisted into the proposals in the Consultation Paper. This is particularly disappointing in light of earlier indications that consistency of regulation would be a priority. For example, consistency was a feature of the Terms of Reference for the Review:

5. *promote consistency across legislation and sectors, including in relation to compliance mechanisms, technical regulation and the planning and licensing of spectrum*⁴

[...]

*This term of reference is about creating a level regulatory playing field for spectrum users by treating users consistently and transparently.*⁵

Consistency was also a feature of the findings of the Review and is reiterated in the Consultation Paper:

*Consistent with the Review recommendations, it is proposed that the Bill integrate broadcasting spectrum into the general spectrum management framework.*⁶

A case in point is the proposal that ‘certainty of access’⁷ be provided for free-to-air broadcasters.

ASTRA would like to see further rigour and discussion around why this sector is more deserving of certainty than other sectors, who would almost certainly prize any additional security and certainty in their spectrum holdings.

⁴ Spectrum Review Issues Paper, p 3

⁵ Spectrum Review Issues Paper, p 7

⁶ Consultation Paper, p 18

⁷ Consultation Paper, p 2, p 18

Further clarity and discussion on the tenure of the broadcaster spectrum licences and renewal arrangements needs to occur. ASTRA submits that broadcaster spectrum licence terms and renewal arrangements must be consistent with the overall spectrum framework for other commercial uses of spectrum, and FTA broadcasters should not be granted “special” renewal rights. We note that the proposal is that new spectrum licences will include a statement on the licensee’s right to licence renewal. Consideration of what this is, and how this is priced in the transition of the existing licences (which were not granted through market processes at market prices) is key.

Inconsistency in the proposed legislative framework

It is in this provision of ‘certainty’ that we see somewhat of a disjointedness to the policy approach proposed for broadcasting spectrum. On the one hand, it is asserted that the Bill would “integrate broadcasting spectrum into the general spectrum management framework”, whilst on the other hand it is said that this will be done “in a manner that provides certainty of access to spectrum to deliver broadcasting services”.⁸

FTA broadcasters should not be able to claim the benefits of having their spectrum managed in the same way as all other spectrum (ie, rights to trade, sell or sub-lease) whilst at the same time accruing benefits not open to other spectrum users (certainty of access). It would be particularly alarming if broadcasters picked up these additional benefits, yet the outcome of the Government’s review of spectrum pricing and FTA licence fees was that broadcasters would continue to access their spectrum at discounted rates, determined separately to the rates that other spectrum users pay (market-based pricing).

The argument of consistency cannot be used selectively to justify some proposals, but put aside at other times. It would appear the FTA broadcasters will reap the ‘benefits’ of ‘consistency’ (tradable spectrum) whilst avoiding any potential liabilities or risk (contestable access to spectrum and market-based pricing).

Contextual factors

We note that the Consultation Paper makes reference to “an environment of changing technology and increasing competition for content services” as driving a need for FTA broadcasters to innovate. This is then used as a justification for removing constraints imposed by the current spectrum regulatory framework:

[I]n an environment of changing technology and increasing competition for content services, broadcasters will face commercial pressure to innovate. To facilitate this, the constraints imposed by the current spectrum regulatory framework need to be eased to enable broadcasters to offer new services and better manage their costs.⁹

ASTRA does not dispute that these commercial pressures are impacting on FTA broadcasters. However, these same pressures are affecting other market participants, who are not being afforded any additional flexibility or value in their

⁸ Consultation Paper, p 18

⁹ Consultation Paper, p 18

spectrum holdings. Other market participants are required to respond to these pressures without any regulatory leg-up or government compensation (in the form of discounted and/or assured access to spectrum).

In any event, there should be no relaxation of FTA spectrum regulation without a reconsideration of the various privileges those broadcasters continue to enjoy. For so long as broadcasting spectrum is treated differently, it will remain appropriate that more onerous restrictions apply.

The Consultation Paper notes that it is intended that the new Bill deal with spectrum-related matters while the BSA focuses on broadcasting policy matters, including the mix of broadcasting services and market access issues.¹⁰ ASTRA submits that there should be full consultation on these matters and any proposed amendments to the BSA before the new Radiocommunications Bill is progressed.

New services

We also note with concern the proposal that broadcasters be enabled to “offer new services”:

[T]he constraints imposed by the current spectrum regulatory framework need to be eased to enable broadcasters to offer new services.¹¹

As there is little detail provided in the paper, it is not clear exactly what kinds of new services are contemplated. It is also unclear how this proposal relates to the proposal in the Digital Television Review to permit FTA broadcasters to carry narrowcast services on their spectrum.

If the intention is to facilitate the launch of further FTA multichannels by incumbent licensees, this would represent a significant lost opportunity for the Government to enforce more efficient spectrum use and recapture and monetise any additional spectrum. As argued in ASTRA’s submission to the Digital Television Review, the efficiencies gained through migration to MPEG-4 (or other technology standards) open up opportunities for the spectrum allocated to FTA broadcasters to broadcast their current mix of services to be reduced, with the remainder of unused spectrum thus becoming available for recoupment and release on market-based terms. Independent analysis commissioned by ASTRA demonstrates that the excess spectrum freed up by a move to MPEG-4 would generate \$1 billion if returned to the market.

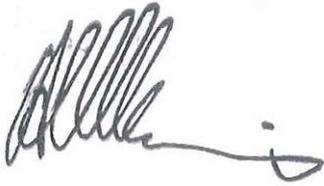
If a policy decision has been taken that new FTA services should be permitted, this should be done on an open basis, with anyone free to compete to provide those services. The right to deliver new FTA services should not be gifted to existing operators, who already benefit from generous regulatory concessions.

¹⁰ Consultation Paper, p 18

¹¹ Consultation Paper, p 18

Thank you again for the opportunity to comment on the Consultation Paper. If you have any questions or would like further information, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Maiden', with a stylized flourish at the end.

Andrew Maiden
CEO