

11 December 2017

Mr Rod Sims
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Australian Competition and Consumer Commission
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ACMA file reference:

Dear Mr Sims *Rod*

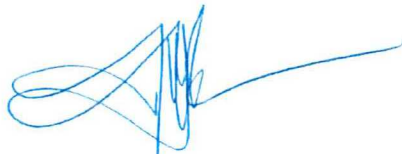
ACCC draft Communications sector market study – ACMA submission

Thank you for the opportunity to comment on the ACCC's draft Communications sector market study report. I am pleased to provide a copy of the ACMA's public submission to this draft report.

Our submission covers three broad areas relating to the ACMA's spectrum management functions, consumer safeguards issues, and emerging technologies and services. Our response is informed by the recent review of the ACMA which was designed to ensure that the ACMA's role and responsibilities remain fit-for-purpose. In our submission, we focus on those areas of the draft report which may have implications for the ACMA's analytical and regulatory approaches.

I look forward to our continuing collaborative partnership with the ACCC and would be happy to discuss our submission in greater detail if required.

Yours sincerely



Nerida O'Loughlin

ACCC draft Communications Market Study 2017

Submission by the Australian Communications
and Media Authority (ACMA)

11 DECEMBER 2017

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Introduction

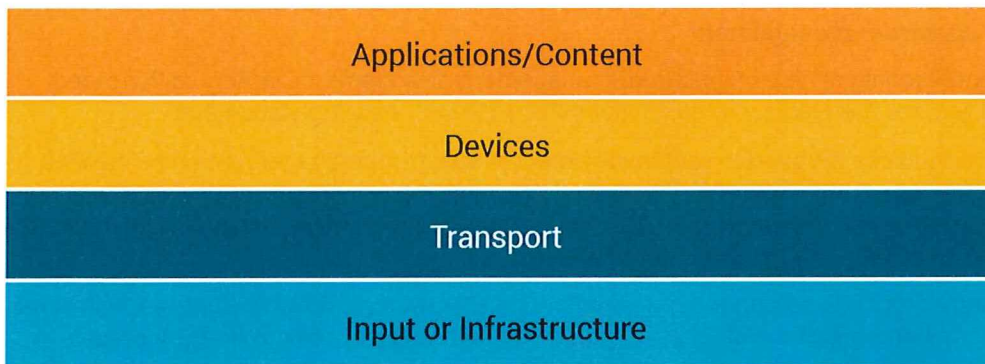
Maximising the benefit that all Australians derive from innovation and growth in contemporary communications markets and technologies requires regulators to continually re-examine regulatory settings to ensure they remain fit for purpose. In the spirit of such testing, the Australian Communications and Media Authority (ACMA) welcomes the opportunity to provide feedback in response to the ACCC's Communications Sector draft Market Study 2017 (the draft Market Study).

Context

The Government has recently accepted (or accepted in principle) recommendations from a comprehensive review of the ACMA which were designed to ensure that its role and responsibilities remain fit-for purpose. The ACMA's submission to the draft Market Study is informed by three major recommendations of this review which have implications for the ACMA's analytical and regulatory approaches to the issues raised.

Firstly, the Review recommended the ACMA's remit should cover all 'layers' of the communications "stack" of services and activities, where each layer in the stack provides services to the layer above and concurrently depending on the layers below. These layers are broadly defined as applications and content; devices; transport; and infrastructure (Figure 1). The ACMA's submission is related to findings and recommendations in the infrastructure, applications/content layers of its redefined regulatory remit.

Figure 1: Layers of the communications sector¹



Secondly, the Review specified key regulator performance principles to guide the ACMA in the performing its regulatory functions. These principles will require the ACMA to:

- > have regard to the importance of promoting industry competition, innovation or efficient investment;
- > use risk-based approaches to regulatory practice that implement interventions that are targeted, evidence-based and commensurate with risk;
- > undertake on-going review of arrangements against cost-benefit analysis to reduce burden;
- > provide transparency to industry and the public about the priorities and objectives that drive its decisions

Finally, the Review highlighted the need for the sectoral and general industry regulators (the ACMA and ACCC respectively) to have robust and clear arrangements between them to ensure collaborative approaches between government and regulatory entities.

The ACMA's submission is consistent with these recommendations in relation to its remit, performance and collaborative approach.

¹ See: Review of the Australian Communications and Media Authority – Final report, p32

ACMA response to the draft Market Study

The ACMA's comments in relation to the draft Market Study cover three broad areas relating to:

1. The ACMA's spectrum management functions
2. Consumer safeguard issues
3. Recent and emerging technologies and services

Spectrum Management

An exposure draft of the Radiocommunications Bill 2017 (the Bill) was released for public comment in May 2017, and the ACMA has started preparations for implementing new spectrum management arrangements when the new Act comes into effect.

In the draft Market Study commentary on spectrum issues and in proposed recommendation 27, the ACCC argues for amendments to various provisions of the Bill to emphasise the assessment of competition in downstream and relevant markets where spectrum is an input.

Our comments focus on a number of elements of proposals for spectrum management.

Proposed recommendation 27: The ACCC strongly recommends that the radiocommunications regime explicitly recognise, and do more to promote, competition in the relevant markets.

The ACMA considers that there are various ways to ensure that concerns about competition in downstream markets can be addressed without additional legislative provisions as recommended in the Market Study. These alternatives are outlined further in our discussion below.

Policy objects for spectrum management

The government completed its review of spectrum management arrangements in August 2015 and announced it would replace the *Radiocommunications Act 1992* with new legislation that:

- > provides opportunities for greater user involvement in spectrum management and simplifies regulatory structures;
- > streamlines operational processes and clarifies the role of government, including the role of the ACMA as the regulator, in spectrum management².

The draft Market Study proposes adding a supplementary condition to the Bill to ensure the ACMA has a positive obligation to consult with the ACCC when proposing to allocate spectrum where there are competing demands and interests for that spectrum (p185).

The objects of the Bill require the ACMA to promote the long term public interest derived from the use of spectrum. In our view, this concept is sufficiently broad enough to encompass consideration of competition matters, including those in downstream markets, and this makes additional process prescriptions unnecessary.

There are also non-legislative means of ensuring the ACMA considers the impact of its decisions on competition. As we noted earlier, the regulator principles implemented under the ACMA Review will guide how the ACMA carries out its activities. This includes giving regard to the impact of our decisions on competition, innovation and efficient investment.

Mandatory consultation requirements

The draft Market Study (p185) recommends the Bill be amended to include mandatory requirements for the ACMA to consult the ACCC on competition limits or any process where there are competing demands and interests for spectrum.

To foster flexible and efficient processes, the Bill seeks to ensure that relevant decision makers have appropriate strategic-level direction and the discretions they need to address issues, rather than specifying detailed processes. The ACMA agrees that consultation with the ACCC is appropriate to

² Department of Communications and the Arts, [Information paper: Radiocommunications Bill 2017: A platform for the future](#), May 2017, p. 7

ensure we fully understand the competition implications of spectrum management. However, using primary legislation to mandate consultation in all cases would be inconsistent with government's intention to establish a flexible, responsive legislative framework and move away from current, highly prescriptive approaches to spectrum reallocation.

The scope of the changes proposed in the draft Market Study raises some additional concerns. While some of the ACMA's decisions (for example, allocation and licence issue schemes) may have a competition impact, the vast majority of administrative decisions would not.

A mandatory consultation requirement introduces significant risk in terms of time delays to allocations and procedural risk. It would introduce gaming opportunities for prospective spectrum users to use procedural challenges to consultation requirements to seek delays as a way of gaining competitive advantage. For this reason, we question the scope and practical efficacy of the proposal as drafted.

As noted above, the ACMA strongly agrees with the development of robust collaborative arrangements between sectoral and general economic regulators. However, we consider these should be established through administrative rather than legislative arrangements. We will continue to work with the ACCC to ensure such administrative arrangements are established and operate optimally.

Application of section 50 even where competition limits apply

The draft Market Study proposes that section 50 of the *Competition and Consumer Act 2010* apply even where competition limits apply, noting that market circumstances may change between the time when competition limits are applied, an allocation held, and licences issued for operation (p 185).

The ACMA does not offer any view on the appropriate competition test that should be applied. However, we believe spectrum management arrangements should offer predictability that supports spectrum users having confidence to make investments where spectrum is an input to their communications services.

Typically competition limits have applied to specific spectrum allocations where there is excess demand for spectrum, with safe harbour from the application of section 50 while the competition limits apply so there is no chilling effect on investment and participation in spectrum allocations. There is often a lengthy gap between auction conclusion and licence issue, so where there is a change in the associated circumstances, for example a merger during that period, our understanding is that the competition limit still applies to the allocation, with remedies available to the ACMA under the auction rules. Therefore, there does not appear to be a need for additional competition assessments.

Alternatively, if competition concerns emerge following the issue of licences, there could be merit in exploring whether there should be a limitation on the period when a competition limit applies (say five years from the conclusion of an allocation), then section 50 assessments could apply to any changes in market circumstances after allocation.

The ACMA's main concern is that if section 50 applies at the same time as the use of limits during an allocation, it increases uncertainty about regulatory treatment of the allocated spectrum, which could deter confidence in the predictability of spectrum management arrangements.

Additional market design tools for the radiocommunications legislation

The draft Market Study expresses concerns that the Bill does not explicitly provide mechanisms such as spectrum set-asides and fee reductions, to promote competition in relevant wireless and mobiles markets and encourage new entrants (p185-186).

Changes to the Bill are legislative design issues for the government to consider. As it stands, the Bill provides a broad set of flexible powers. For example, Clause 39 of the Bill gives the Minister the power to direct the ACMA to offer a licence to a specified person. The effect of such a direction has a similar outcome to spectrum set-asides.

The Bill also provides scope to make a form of set-asides through the application of particular licence issue limits to a part of the spectrum.

Other mechanisms available— such as the licence issue scheme provisions of the Bill— provide a broader and more flexible range of methods of issuing a licence than under the current *Radiocommunications Act 1992*. They would not appear to rule out the inclusion of bidding credits in a licence issue scheme, however careful consideration would be needed before using a licence issue scheme to issue bidding credits.

Consumer safeguards issues

While the ACCC regulates consumer issues across the economy through concepts of broad application (such as prohibition of misleading conduct), the ACMA focuses on the communications and media sector, either shaping or directly making rules that require service providers to take specific actions.

While some important consumer safeguards are given effect through legislative instruments, consumer safeguards in the communications and media sector are largely co-regulatory in nature and, on balance this has benefited both industry and consumers. The Telecommunications Consumer Protections Code (TCP Code), which is registered by the ACMA and includes rules that regulate dealings between consumers and retail service providers, is an important part of these arrangements. The TCP code is currently being reviewed by industry, and the ACMA is actively engaged in this process.

Informing regulatory practice through research and public enquiry

Under proposed action six of the draft Market Study, the ACCC intends to examine non-price terms of access for NBN services, with particular reference to service standards covering the allocation of responsibility for connections and fault resolution, and whether appropriate incentives are in place for all relevant parties. We consider that there should be sensible alignment between wholesale service level standards across the NBN supply chain, the commitments that RSPs make to their consumers and reasonable consumer expectations. There should also be strong incentives in place for the management of any given risk to fall to the party or parties best placed to do so.

The ACMA supports evidence gathering to inform regulatory practice, and in September 2017, we sought information from 21 industry participants involved in providing NBN services, with a view to better understanding what drives consumer satisfaction with migration to the NBN. The ACMA intends to publish the insights gained and proposed actions soon. At a high level, the information gathered shows that:

- > complexity of the supply chain and poor information flows between NBN, Retail Service Providers (RSPs) and consumers is a barrier to consumers managing their NBN migration experience directly through their RSP,
- > RSPs have limited visibility of appointments that NBN and its contractors make directly with the RSP's customers,
- > timeframes for network connection and rectifying faults exceed timeframes specified in both the Customer Service Guarantee and NBN's Wholesale Broadband Agreement,
- > concerns about network connection, network faults and network speeds dominate the consumer complaints to RSPs related to NBN.
- > RSPs are making compensation payments to their customers but very few are seeking any compensation back from upstream providers (including NBN and wholesale aggregators).

The ACMA is currently considering whether current co-regulatory arrangements are sufficiently robust to respond to these issues, as well as other consumer concerns such as those raised with the Telecommunications Industry Ombudsman (TIO).

We have also commissioned research examining the consumer NBN experience across the range of technologies now in use. The fieldwork for that research is currently underway.

In addition, the ACMA is seeking information about the role of email addresses in consumer and business purchasing decisions. We are considering a consumer's ability to retain email addresses when switching providers and the cost associated with this service. We will share the research findings once complete.

Improving the information available to industry and consumers

Proposed action 19 – improving consumer information

Broadly speaking, the ACMA supports fostering improved information for consumers regarding services available through NBN and process for migration to NBN.

Proposed recommendation 13: using the TCP Code review to assess provider compliance with their Critical Information Summary obligations

The ACMA would argue that assessing compliance with CIS obligations, as proposed by the ACCC, would be better handled through a different mechanism. The ACMA sees the TCP Code review more as an opportunity to assess whether the current set of obligations remain well adapted to dealing with current and emerging service types. This includes review of provisions relating to CISs, complaint

handling and customer service. The way that CISs deal with broadband speeds will be one key consideration of the code review.

However, given the timeframe for the TCP Code Review and the pace of Network roll-out and transition, we are considering earlier intervention in relation to Network-related consumer information and complaint handling obligations. We have also commissioned consumer research to assess the effectiveness of certain specific provisions of the TCP Code.

Separately, we are conducting a comprehensive review of Critical Information Summaries (CISs) and related information provided in respect of services offered on the NBN. The outcomes of that review are expected early next year.

Proposed action 14 - review scope, transparency, and ease of use of comparator websites for communications services and consider need for further intervention

The ACMA is interested in collaborating with the ACCC on reviewing the effectiveness of comparator websites. Comparison of competing service offers is facilitated by the requirement for offers to be clearly set out in the CIS, which may alleviate the need for specific interventions on this issue. Given our role in monitoring compliance with CIS requirements, we also monitor tools made available to consumers to assist them in making comparisons, including comparator websites.

Proposed recommendation 28 - proposals of the Productivity Commission's Inquiry into Data Availability and Use should be implemented to facilitate consumers having access to relevant data about themselves.

The ACMA supports the Productivity Commission's proposals but considers that the provision of raw information alone is unlikely to achieve its intended purpose. The data provided must be in an easily useable form and should align with standardised publications such as CIS, allowing consumers to directly compare their activity with plans on offer. We consider that additional tools and applications will be required to allow consumers to maximise the benefit of this information. As is the case with the [UK's midata initiative](#), this may take the form of third party comparison websites that offer advice on suitable providers or plans based on a consumer's data.

Proposed recommendation 18 – improving the Network related complaint data collected by the TIO

The TIO complaints data is a critical information source and supports the ACCC and the ACMA in carrying out their respective compliance and regulatory activities.

The ACMA has concerns that the TIO data is increasingly being considered as the proxy for all consumer complaints about NBN migrations issues. The TIO data is collected for quite different and appropriate purposes but is not easily modified to fit the needs of regulators and policy agencies.

The ACMA is considering taking action intended to improve the transparency of complaints made to RSPs about NBN-related services. This would provide a more comprehensive, detailed and relevant data set than the TIO is able to collect.

New and emerging technologies and services

A key interest of the ACMA in emerging technologies and services is to understand what role we can play in supporting technological innovation and development of new markets while continuing to deliver enduring policy objectives. Rapidly evolving communications networks are introducing new technologies and enabling new business models and services that are challenging how well conventional regulatory structures apply to current day circumstances. We see OTT services and IoT as manifestations of an increasingly complex communications and media sector that calls for regulators to have a deep understanding of a range of issues affecting achievement of public policy outcomes.

Over-The-Top services

The ACMA supports the draft Market Study findings that OTT services have introduced consumers to a range of alternatives to conventional communication and media services, especially for voice and video calling, messaging services and access to screen content. We note the ACCC's observations that OTT alternatives, however, don't always exactly match the characteristics of conventional services they replicate (p46) and the nature of OTT business models makes regulatory analysis more complex (p40). In our view, the place of OTT services within regulatory frameworks will need ongoing consideration.

In addition to competition concerns, we have an interest in the growth of OTT services in relation to a range of issues affecting regulatory arrangements across the communications and media environment, and whether those arrangements remain fit for purpose. While communications technology is the underlying enabler of OTT services, relationships between consumers and OTT service providers are formed independently of the relationship between consumers and their communications (i.e., broadband) service providers. This introduces a degree of complexity in supply chains and tests the strength of current regulatory arrangements that are based on conventional 'siloed' concepts of the communications and media sector. The government's proposed review of communications consumer safeguards will be a suitable forum for consideration of the treatment of OTT services in regulatory frameworks.

Internet of Things

The ACMA supports the observations in the draft Market Study about IoT's potential application to multiple industry sectors, strong interest in IoT adoption across the economy and the likelihood of rapid growth in IoT applications and services. Beyond this, we consider it is too early in the development of IoT in Australia to draw conclusions about the need for regulatory intervention. We agree that at present IoT should be allowed to evolve without ex-ante regulation, as identified in the Market Study (p110).

As with OTT services, we see IoT as part of an ongoing evolution in communications technology and services which calls for regulators to test whether current regulatory frameworks are fit for purpose. In 2015 the ACMA released the discussion paper [Internet of Things and the ACMA's areas of focus](#) and since then we have continued to monitor developments in IoT.

Spectrum related issues are a key part of the ACMA's interest in IoT, because many of the technologies identified as capable of supporting development of IoT are spectrum dependent. Given the diverse options for implementing IoT, this covers a wide range of technologies, spectrum requirements and models for accessing spectrum. Factors like the degree of complexity or criticality of an IoT application, or the physical environment it operates in, may influence decisions about how spectrum is accessed. This may affect the way demand for spectrum evolves as IoT develops.

There are options in class licensed spectrum such as Wi-Fi and provisions for Low Interference Potential Devices (LIPDs). We have already taken action to expand spectrum available for the LIPD class licence, with further extensions slated. The roll-out of 5G communication networks is widely regarded as a catalyst to further growth in IoT, especially for applications needing very high data rates and very low latency. In this regard the ACMA has brought forward its work program on spectrum to support 5G adoption, including [re-allocation of the 3.6GHz band](#) and consultation on the use of [millimetre wave bands](#). Certain applications may also be supported through dedicated spectrum allocations for sector-specific requirements, such as allocations in the 5.9 GHz band for Cooperative Intelligent Transport systems. Finally, satellite services also have a role in providing communications channels for IoT applications, particularly for rural and remote locations. Responding to global and domestic innovation and investment in satellite services, driven in part by these emerging markets for IoT applications, is another component of the ACMA's spectrum work program.

In addition to spectrum matters, the ACMA has an interest in how implementation of IoT services interacts with communications consumer and citizen safeguards. We see some similarities with OTT services in consumer IoT. Internet connectivity enables IoT applications but relationships between consumers and IoT providers can be formed independently of the relationship between the consumer and their broadband service provider. The wide range of possibilities for adopting IoT will also see the integration of communications technology and services into industry sectors that sit outside the ACMA's remit. Again, these factors represent additional complexity in supply chains that will test the suitability of current regulatory arrangements.

The ACMA considers there are also some unique privacy and security issues in relation to IoT that are emerging against a backdrop of a gap in the digital literacy of consumers to understand and manage these issues.

The ACMA notes a number of initiatives by the IoT Alliance Australia to foster an industry self-regulatory response to potential issues. This suggests a degree of alignment between industry and consumer interests that may help mitigate the risk of consumer harms arising from expansion of IoT. In the meantime, we will continue our engagement with industry and our monitoring of how IoT evolves with a view to taking action or providing advice to government as appropriate.