

EXPLANATORY STATEMENT

Australian Communications and Media Authority Act 2005

Australian Communications and Media Authority (3.5 GHz frequency band) Direction 2014

Issued by the authority of the Minister for Communications

Authority

Section 14 of the *Australian Communications and Media Authority Act 2005* (the ACMA Act) provides that the Minister for Communications (the Minister) may give written directions to the Australian Communications and Media Authority (the ACMA) in relation to the performance of its functions and the exercise of its powers.

The *Australian Communications and Media Authority (3.5 GHz frequency band) Direction 2014* (the Direction) is made by the Minister under section 14 of the ACMA Act.

Purpose

The purpose of this Direction is to require the ACMA to complete, by 30 April 2015, all steps necessary to enable apparatus licences of a type which would be appropriate for use for the National Broadband Network (NBN) to be issued in the 3.5 GHz frequency band. The Direction also requires the ACMA to take into account certain matters when deciding whether to issue an apparatus licence for the relevant spectrum.

Background

The Commonwealth Government's communications policy aims to ensure all Australians have access to very fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers. As part of its Statement of Expectations, the Government agreed for the NBN to be delivered through an 'optimised multi-technology' model with NBN Co Limited (NBN Co) to determine which technologies are to be utilised on an area-by-area basis. The network design of the NBN is a combination of optical fibre to the node, optical fibre to the premises, fixed wireless and satellite technologies.

On 7 May 2014, NBN Co released its Fixed Wireless and Satellite Review. The review was commissioned to better understand the current and expected progress of serving the non-fixed line footprint aspects of the NBN and to provide options for NBN Co to meet the Government's broad policy objectives. The review identified that approximately 80,000 premises in the metro fringe and hard to service areas of the mainland major cities will require an NBN fixed wireless service.

NBN Co currently holds spectrum licences for wireless broadband and satellite services in the 2.3 GHz and 3.4 GHz frequency bands in regional areas, however it does not have access to spectrum in metro areas and the surrounding metro fringe which extends a significant distance from each city to support the deployment of fixed wireless services in these areas. It is considered that if these areas were to be served with fixed line technology (for example, due to ongoing lack of spectrum), the premises would likely be delayed access to fast broadband until late in the fixed line rollout, with substantially increased deployment costs to NBN Co.

The Review recommended that NBN Co work closely with the ACMA on options to secure sufficient spectrum to address the spectrum gap. The ACMA identified that area-wide apparatus licences within the 3.5 GHz frequency band (3400 – 3600 MHz) may be suitable for the purposes of NBN Co.

The Direction recognises the Commonwealth Government's policy commitment to deliver a wholesale-only, open access communications network that provides all Australians with access to very fast broadband as soon as possible, at affordable prices and at least cost to tax payers.

The Direction serves a twofold purpose. First, it directs the ACMA to undertake by 30 April 2015 all necessary preparatory steps that are required to enable apparatus licences suitable for use for the NBN to be issued. Second, it directs the ACMA, in deciding whether to issue apparatus licences for the relevant spectrum, to have regard, amongst other matters, to the Commonwealth Government's core communication policy objectives.

Paragraph 5(2)(b) of the Direction also requires the ACMA to determine an amount of tax that reflects a market price in respect of a transmitter licence issued for the relevant spectrum.

In determining a market price for the particular apparatus licences, it is worthwhile to note that in the *Radiocommunications (Spectrum Access Charges) Direction 2012*, the then Minister specified \$0.03/MHz/population of a licence area as being the amount he considered to be the value of the spectrum in relation to any spectrum licences issued for the 3.4 GHz parts of the band (3425–3492.5 MHz and 3542.5–3575 MHz). In reaching that conclusion, the Minister was informed by way of expert advice from a leading international firm, an inter-Departmental Evaluative Committee as well as consultations with licensees.

This Direction is a legislative instrument under the *Legislative Instruments Act 2003* but it is not subject to disallowance: item 41 of the table in subsection 44(2) of that Act specifies that ministerial directions to any person or body are not subject to disallowance.

Consultation

The ACMA has been consulted in relation to the contents of the Direction. Public consultation on an exposure draft of the Direction was conducted from 21 August to

22 September 2014. Ten submissions were received. Following consideration of these submissions, the Minister concluded no change was required to the Direction that was publically released.

Regulatory impact

The Office of Best Practice Regulation has agreed that a Regulation Impact Statement is not required for the Direction.

Notes on Sections

Section 1 provides for the title of the Direction.

Section 2 provides that the Direction commences on the day after it is registered on the Federal Register of Instruments.

Section 3 provides that the Direction ceases to have effect as if repealed by another instrument 12 months after it commences.

Section 4 defines the terms used in the Direction. It identifies that the relevant spectrum referred to in the Direction means the parts of the spectrum from 3400 MHz up to and including 3425 MHz and from 3492.5 MHz up to and including 3542.5 MHz.

Section 5 specifies the directions.

Subsection 5(1) requires the ACMA, by no later than 30 April 2015, to have completed all steps necessary to enable apparatus licences of a type which would be appropriate for use for the NBN – having regard to the matters listed in the Schedule – to be issued in respect of the relevant spectrum. This direction does not require actual licences to be issued by 30 April 2015 but rather ensures that the ACMA is in a position to be able to issue such licences by that date.

In undertaking the relevant steps required by subsection 5(1), the ACMA is required to ensure consistency with:

- the *Australian Radiofrequency Spectrum Plan 2013* – the plan is a legislative instrument prepared by the ACMA under section 30 of the Act which divides the spectrum into a number of frequency bands and specifies the general purpose for which each band may be used; and
- any other requirements under the *Radiocommunications Act 1992* (the Act).

The above provisions are in effect ‘avoidance of doubt’ provisions to make clear that the Direction is consistent with and does not intend to depart from the legislative scheme set out in the Act.

Paragraph 5(2)(a) of the Direction requires the ACMA to consider whether it is satisfied that there is a type of transmitter licence appropriate for use for the NBN in the relevant spectrum, and if not, to determine such a licence in accordance with section 98 of the Act. Section 98 enables the ACMA to determine the types of transmitter and receiver licences that it may issue. Subsection 98(2) prevents the ACMA from issuing an apparatus licence that is not a transmitter or receiver licence of a type so determined.

Paragraph 5(2)(b) requires the ACMA to determine in accordance with section 7 of the *Radiocommunications (Transmitter Licence Tax) Act 1983* an amount of tax that reflects a market price in respect of a transmitter licence issued for the relevant spectrum. Section 7 of that Act provides for the ACMA to determine an amount of tax in respect of the issue of a transmitter licence, the anniversary of a transmitter licence coming into force or the holding of a transmitter licence. Subsection 7(2) provides that the determination may, among other things, provide for amounts of tax in relation to specified periods, specified classes of licences or specified classes of persons.

Section 100 of the Act provides the ACMA with the discretionary power to issue apparatus licences. In deciding whether to issue an apparatus licence, subsection 100(4) of the Act requires the ACMA to have regard to:

- (a) all matters that it considers relevant; and
- (b) without limiting paragraph (a), the effect on radiocommunications of the proposed operation of the radiocommunications devices that would be authorised under the licence.

Subsection 5(3) of the Direction requires the ACMA, in deciding whether to issue an apparatus licence for the relevant spectrum, to have regard to the matters listed in the Schedule, in addition to the matters prescribed by subsection 100(4) of the Act.

The **Schedule** lists the matters to which the ACMA must have regard when acting in accordance with each of subsections 5(1), 5(2) and 5(3) of the Direction. The Schedule sets out the core communication policy objectives of the Government in respect to the NBN and the steps necessary to achieve these objectives. The Schedule also reiterates one of the objects of the Act is to support the communications policy objectives of the Commonwealth Government.