4 September 2014

Manager
Space and National Interests Planning
Australian Communications and Media Authority
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By email: satellite.coordination@acma.gov.au

Dear Sir/Madam,

ACMA consultation paper IFC 33/2014:
Proposal to remake Radiocommunications (Australian Space Objects) Determination 2000 and Radiocommunications (Foreign Space Objects) Determination 2000

NBN Co welcomes the opportunity to respond to the above Consultation Paper and provides both comments on the queries set out in the Consultation and further comments below.

Introduction

The satellite and space communications industry, and its international regulatory landscape, has changed significantly since the making of the Radiocommunications (Australian Space Objects) Determination 2000 and the Radiocommunications (Foreign Space Objects) Determination 2000 ("Determinations"). The transition from what was initially a public / government industry to a private commercial activity is even more evident and the range of players and types of applications continues to grow rapidly. Individual countries are increasingly competing to attract inward investment and nurture the national growth of this successful industry. One of the main ways countries can attract investment and encourage innovation is by creating competitive national regulatory environments for space businesses that both allow growth and development of already established businesses and encourage appropriate new investment. To achieve this aim effectively, the resulting regulatory framework must be certain, transparent, flexible, objective and not unduly burdensome.

We understand that the ACMA’s vision is to be, and to be recognised as, the world’s best converged regulator. Our proposals in this response, seek to assist the ACMA in driving towards this vision by suggesting refinements to the regulatory framework for space objects to achieve greater certainty, transparency and flexibility to meet the needs of rapidly developing satellite communications sector.

NBN Co is itself a pioneer of innovation in the satellite industry through the development of its Long Term Satellite Service, also raising the profile of advanced technology in Australia and the regulatory landscape managed by the ACMA. NBN Co has applied to have its space objects included in the Radiocommunications (Australian Space Objects) Determination 2000 and would welcome the ACMA’s support to expedite this.
Background

National background – Australian and foreign space objects

NBN Co recognises that the nature of regulation of space services in Australia depends on whether a satellite or satellite network is Australian or foreign. The Radiocommunications Act 1992 ("Act") gives the ACMA the power to determine whether a space object is Australian or foreign, and the Act only applies to foreign space objects in the circumstances specified in a determination by the ACMA.

i. Radiocommunications (Australian Space Objects) Determination 2000 ("Australian Space Objects Determination")

Pursuant to Section 5 of the Act, the ACMA, by legislative instrument, is obliged to determine what an "Australian space object" is. The Act also applies outside Australia to Australian space objects.

The Australian Space Objects Determination is the current legislative instrument which determines what an Australian space object is, thereby providing access to the Act's licensing framework and the ability of the ACMA to regulate and grant space and/or space receive apparatus licences in relation to the Australian space objects listed in the Australian Space Objects Determination.

The ACMA currently considers Australian space objects to be those objects operated or owned by satellite operators who have successfully applied to the ACMA to make filings to access frequencies through the International Telecommunication Union ("ITU"). In other words, the Australian Space Objects Determination extends the application of the Act outside Australia to Australian space objects to allow operators to seek space and/or space receive apparatus licences in relation to the Australian space objects listed in it.

Inclusion of objects in the Australian Space Objects Determination allowing access to the licensing framework is of key commercial and regulatory significance. NBN Co believes that the review of the Determinations provides an opportunity to consider whether the criteria for inclusion could be more clearly and transparently stated.

ii. Radiocommunications (Foreign Space Objects) Determination 2000 ("Foreign Space Objects Determination")

Pursuant to Section 5 of the Act, a foreign space object is a "space object that is not an Australian space object." Section 16(1)(ca) further provides that the Act applies outside Australia, whether or not the space object is in another country, in relation to:

"foreign space objects, in the circumstances specified in a written determination by the ACMA."

The Foreign Space Objects Determination is the current legislative instrument which determines what a foreign space object is, and the circumstances in which the Act applies outside Australia, allowing access to the Act's licensing framework and the ability of the ACMA to regulate and grant space and/or space receive apparatus licences in relation to the foreign space objects listed in that Determination.

The Act will therefore apply outside Australia in relation to a foreign space object that is:

(a) owned, operated or controlled by a company listed in Schedule 1 of the Foreign Space Objects Determination, or is listed in Schedule 2; and a space station on the object is transmitting to, or receiving from, stations in Australia in a frequency range specified in subsection 6(2) or (3) of
the Radiocommunications (Communication with Space Object) Class Licence 1998 ("Space Objects Class Licence"); or

(b) owned, operated or controlled by a company listed in Schedule 3, and a space station on the object is transmitting to or receiving from stations in Australia in a frequency range not specified in Space Objects Class Licence.

The Act allows the ACMA to extend its jurisdiction to foreign space objects on a case-by-case basis, and the ACMA has discretion to determine whether foreign satellites are foreign space objects under the Act. Under current policy, companies may be included in the Foreign Space Objects Determination after "they submit licence applications to or meet with the ACMA to discuss their intention to provide radiocommunications services" to places in Australia.

Again, the inclusion of a foreign company in the Foreign Space Objects Determination may be of significant commercial importance for the company, yet there is a lack of transparency as to how such decisions might be made by the ACMA, the criteria for inclusion or removal – resulting in an opportunity to increase regulatory certainty.

iii. The ACMA's Proposal

NBN Co understands that the ACMA proposes to re-make both the Australian Space Objects Determination and the Foreign Space Objects Determination without significant changes but with a few proposed amendments, which the ACMA is now consulting on.

In this response, NBN Co: provides some general comments on the consultation; responds to both issues for comment raised by the ACMA; and provides some further changes which it invites the ACMA to consider and respond to. NBN Co seeks to encourage regulatory certainty, transparency and the objective application of clear criteria – strengthening the regulatory policy of the ACMA and its international perception as a leading regulator.

International background

As mentioned above, there is considerable competition between countries to encourage growth, investment and innovation in the communications space; and to be perceived as having a competitive regulatory environment on the international playing field. Anything that increases the clarity, transparency, objectivity and certainty of the regulatory landscape to support economic growth and development, and which supports the interests of national players while meeting international obligations and public policy objectives, would increase this perception.

The ACMA has unique regulatory tools in the form of the Determinations. While other countries may maintain general registers of space objects launched in compliance with their obligations under the UN Registration Convention 1975 and other UN space treaties, NBN Co’s research to date indicates that other thought-leading jurisdictions in this sector do not yet maintain lists similar to those in the Determinations, linking the licensing of space-based communications systems to such space objects.

As the Determinations could therefore be seen to be a complex regulatory tool, NBN Co suggests that they must be seen to be transparently and effectively implemented by applying clear criteria and guidance. In its determinations the ACMA must also be seen to be accountable to sustain confidence in the regulatory and policy environment. In this response to the Consultation, NBN Co makes a proposal to achieve such clarity, transparency and accountability while ensuring effective implementation for the benefit of both the ACMA and the industry.
NBN Co’s Response to the Consultation

General Comments

NBN Co agrees with the ACMA that, in general, the Determinations are currently operating reasonably effectively although certain improvements could be made, which NBN Co explains further below. These proposed improvements seek to ensure a certain and effective competitive regulatory environment.

Changes proposed by the ACMA

NBN Co agrees in principle with the ACMA’s proposed changes, in the sense that they need to be updated to reflect the various changes that have occurred since they were first made. However, as explained in detail below, NBN Co submits that this is an ideal opportunity for more significant changes to be made to more efficiently and effectively promote the objectives under the Act, and ensure practical implementation.

Many relevant stakeholders are likely to be affected by the Determinations. Given the close relationship between the two Determinations, NBN Co submits that ideally a single instrument should consistently deal with the subject matter under both current Determinations, especially if NBN Co’s proposed amendments as explained below are accepted. Alternatively, NBN Co would encourage the ACMA to take the opportunity to harmonise and simplify the format of both Determinations as far as possible. NBN Co believes that this would be a large step to ensuring a transparent regime that is perceived by industry to be certain and objective.

Further changes

NBN Co agrees that both Determinations form a necessary part of the existing legislative framework.

NBN Co suggests that, in making the proposed changes to these legislative instruments, the ACMA consider some further amendments to ensure that these instruments are efficient and effective in what they seek to achieve. NBN Co considers that these amendments would contribute significantly to the clarity and effectiveness of these instruments for the ACMA and the industry.

Further proposals - the creation of “Objects Registers”

i. Achieving regulatory certainty and transparency – identifying actual space objects

NBN Co submits that neither the current Determinations, nor the Act:

(a) specify the identity of specific space objects in an accurate and meaningful manner; nor
(b) provide, in precise terms:
   a. how space objects and their owners/operators, may be added to, or removed from, the Determinations, or
   b. the procedure for modifying the criteria and keeping the Determinations up to date.

In relation to (a) above, an example can be given by looking at section 4 of the Australian Space Objects Determination, where an Australian space object is very broadly described as “a satellite operated by, or for, the [relevant entity]” but without linking the actual object to the company and, for example, the relevant ITU-R filing.

It is not clear from the Australian Space Objects Determination how many satellites are in operation by or for the relevant entities listed therein, and whether or not they are still all operational.
Similarly, under the Foreign Space Objects Determination, a foreign space object is very broadly described as one that is owned, controlled or operated by, or for, a company listed in the Schedules.

In NBN Co's experience, a lengthy process is also required to add, update or delete owners, operators or controllers of Australian or foreign space objects from the current Determinations, as this requires amendment of formal legislative instruments.

Further, the current procedure, which affords much discretion to the ACMA in considering the inclusion of Australian or foreign space objects in the Determinations, would benefit from greater transparency and accountability with respect to the decision making process, and the criteria upon which owners, controllers or operators of space objects are assessed in order to be listed in the Determinations, or may appeal against any decision.

Regulatory transparency is essential. This can be achieved through the application of clear criteria for inclusion in the Determinations, through standardised and clear procedures for insertion and for making changes to the lists, through consistent application of those criteria, effective communication to the industry and transparent controls and accountability in connection with the exercise of any discretion.

Regulatory tools such as the Determinations are also a window on how the regulator is organised and how decisions are taken – and the international recognition of the regulator. As such, any improvements could be seen as assisting the ACMA in its vision of achieving the status of the world's best converged regulator.

ii. Ensuring accuracy

It is also important that the lists of the space objects are kept up to date and are maintained accurately. The current process to implement additions, deletions or other changes appears lengthy and cumbersome.

NBN Co has for some time sought to add its name to the Australian Space Objects Determination to allow it to benefit from access to class licensed bands. This request has so far taken over 12 months and, as at the date of this response, remains incomplete.

It is important that changes to the lists be managed efficiently, to ensure that the lists are up to date and to avoid unnecessary delays. A simple, clear and published procedure for such changes is required.

iii. Public ‘Objects’ Registers

To improve the accuracy of the current entries of space objects and ensure that the entries can be managed effectively and in accordance with current ACMA policy, NBN Co proposes that the lists of the companies and space objects be separated out from the Determinations to enable ACMA to establish and maintain two new public registers:

(a) the Australian Space Objects Register, applicable to the updated Australian Space Objects Determination; and

(b) the Foreign Space Objects Register, applicable to the updated Foreign Space Objects Determination,

(together the "Objects Registers") maintained by the ACMA which would:
specify the objective criteria (in association with guidance) that space objects and their owners/operators, would need to satisfy in order to be added to the lists and link objects;
offer flexibility for efficient corrections, updates, additions and deletions to the Objects Registers; and
link the relevant company to the actual space objects and, for example, the relevant ITU-R filing.

iv. Implementation of proposal

NBN Co therefore proposes that the Australian Space Objects Determination and the Foreign Space Objects Determination be amended to make reference to an Australian Space Objects Register and a Foreign Space Objects Register respectively.

Each Objects Register would link each space object (including, where relevant, to its entry in the Industry Minister’s Register of Australian Space Objects pursuant to the Space Activities Act 1998) with the respective owner or operator (whether public or private) and also with the relevant ITU-R filing.

It is proposed that these Objects Registers be made available on the ACMA’s website, similar in manner to how the licensing information is currently presented.

It is proposed that each of the Objects Registers be comprised of two sections as follows:

(a) Part A – satellite operator names; and
(b) Part B – identification of the relevant space objects, owned or operated by the particular satellite operators, set out in Part A, with details of the related ITU-R filings.

The criteria required to be provided or fulfilled before entry into either of the Objects Registers could include the following:

(a) Identity of the company:

- in relation to the owner or operator of an Australian space object, provision of details of the registered company based in Australia and its ACN; or
- in relation to the owner or operator of a foreign space object, provision of the name, address and company registration number of the registered foreign company.

(b) Evidence of network or system status:

- evidence of the publication (receipt from the ITU) of the relevant Resolution 49 information together with the data extracted from the relevant IFIC in relation to the specific satellite network or system.

Every two years, on the anniversary of the date of inclusion in the relevant Objects Register, the owner/operator could have an obligation to notify the ACMA that:

- in relation to an Australian space object, that the owner or operator remains a registered company based in Australia, (or the company is the legal successor of or has majority control over the owner or operator); and
- in relation to the owner or operator of a foreign space object, the registered foreign company’s details remain the same (unless otherwise notified to the ACMA) and the foreign company remains in control of the space object.

The ACMA could also ensure that any relevant information in relation to the suppression of a network filing by the ITU is reflected in the register in real time, for example by removing registrations where appropriate.
v. Efficiency of proposed method

As described in paragraph (i) above, the current Determinations do not identify actual space objects in an accurate and meaningful manner, and therefore, it is not clear which particular space objects that the Act applies to.

NBN Co submits that by:

(a) stipulating key objective criteria for inclusion in the Determinations;
(b) listing all space objects that satisfy such criteria in the Objects Registers; and
(c) linking each space object with any applicable entry in the Register of Australian Space Objects, the relevant owner/operator and also with the relevant ITU-R filing in the Objects Registers,

the ACMA would be taking a reasonable approach in implementing a transparent and certain process that is proportionate to its objective in achieving certainty as to which space objects the Act applies to (as noted on page 1 of the Consultation).

vi. Alignment with the ACMA’s policy and regulatory objectives

NBN Co is mindful of, and welcomes, the government’s initiatives in cutting red tape and avoiding unnecessarily regulation. However, NBN Co considers that regulatory change in the manner proposed in this submission would offer an overall net benefit to all users of spectrum, also aligning with the ACMA’s policy objectives and the objects of the Act (section 3), by:

(a) providing a responsive and flexible approach to meeting the needs of users of the spectrum;
(b) providing a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international markets; and
(c) promoting Australia’s interests concerning international agreements, treaties and conventions relating to radiocommunications or the radiofrequency spectrum.

This proposal will also go some way to preventing the attempted reservation of spectrum and orbital resources without actual use – meeting both the policy and intentions of the ACMA and the ITU. NBN Co understands that the ACMA seeks to support real satellite initiatives and discourage “paper” ones.

Conclusion

With the pace of technological change in the satellite communications industry, and the competition between jurisdictions to attract growth and investment, the remaking of these Determinations as proposed above offers the ACMA the opportunity to show thought-leadership and strengthen the perception of it as an effective and efficient regulator. As described above, transparency and regulatory certainty are essential and NBN Co’s proposal seeks to achieve this in relation to the Determinations.

Yours sincerely,

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