



## **Communications Law Centre, UTS**

Submission to the ACMA Review of the operation of low-power open narrowcasting (LPON) services

5/4/2013

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## Communications Law Centre, UTS

### Executive Summary

1. Low Power Open Narrowcast (LPON) radio services provide listeners with content that is not always available through other media. LPON services play an important role in increasing media diversity in Australia. LPON services should continue to be made available until at least 2020.
2. The regulatory regime for LPON services and FM radio broadcasting services should differ, because FM radio broadcasting services have greater reach and influence.
3. FM radio broadcasting services should have exclusive access to spectrum, in exchange for fulfilling certain public interest mandates.
4. The allocation of the 87.5-88.0 MHz sub band to LPON services provides alternative spectrum that is readily accessible to the public. 87.5-88.0 MHz should continue to be allocated to LPON services.
5. LPON services in the FM Broadcasting Services Band should be reassigned to the LPON sub band wherever possible. Drop through determinations under s 34(1) BSA should be cancelled for those LPON services that currently operate in the FM BSB.
6. A moratorium on any new FM radio broadcasting licences operating on 88.1 MHz and 88.3 MHz should be considered in order to establish a guard band between the LPON sub band and the FM BSB.
7. The ACMA should consider making the frequency 87.5 MHz available for LPON services in areas within the radii of lower powered 88.1 MHz transmitters.
8. The ACMA should consider the removal of the price-based allocation system for LPON apparatus licences.
9. LPON licences in Low Density Geographic Locations and LPON licences in Medium and High Density Geographic Locations with a single applicant should be allocated automatically for a nominal fee on a first come, first served basis.
10. LPON licences in Medium and High Density Geographic Locations with two or more applicants should be allocated on merit. Licences should be made available biannually.
11. In the unlikely event that there are not enough frequencies available in a Low Density Geographic Area, a simple merit review should be conducted.
12. Notionally, allocation decisions should be made on the basis of who is in the best position to serve the community (and hence public) interest. An applicant's financial capacity should not be emphasised, so long as it does not impact on the applicant's ability to provide a service with reasonable regularity.
13. A non-price-based allocation system should encourage diversity and localism in LPON services.
14. The introduction of merit based allocations should not materially increase regulatory burdens on the ACMA.
15. As a 'quid pro quo' for obtaining an LPON apparatus licence for a nominal fee, both the 'use it or lose it' licence condition and the licence condition to provide a service with reasonable regularity should be retained.

## 1. Introduction

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- 1.1 The Communications Law Centre, UTS (CLC) is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to respond to the ACMA's Inquiry.

## 2. The value of LPON services

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- 2.1 Low Power Open Narrowcast (LPON) radio services provide listeners with content that is not always available through other media, such as national, commercial and community radio services ("FM radio broadcasting services"). As noted in the Discussion Paper, LPON services target niche interest groups and communities such as tourists and ethnic minority groups. LPON services play an important role in increasing media diversity in Australia.
- 2.2 LPON services should continue to be made available until at least 2020.

## 3. Consolidation of LPON services in the 87.5-88.0 MHz sub band should be pursued

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- 3.1 The distinction between broadcasting and narrowcasting may become redundant as media converge, particularly in the presence of common carriage (such as on the National Broadband Network). However, while the radiofrequency spectrum continues to be important as a means of service delivery, the distinction between broadcasting and narrowcasting remains a relevant policy consideration.
- 3.2 FM radio broadcasting services should have exclusive access to spectrum, in exchange for fulfilling certain public interest mandates such as providing news and current affairs content of national and local significance. LPON services, whilst sharing some characteristics with FM radio broadcasting services, serve niche interests and communities. Although influential in the context of their focus group, the reach and influence of an LPON service is less than that of an FM radio broadcasting service which has wide appeal. Regulatory regimes should differ in accordance with s 4(1) *Broadcasting Services Act 1992* (Cth.) ("BSA").
- 3.3 This is not to say that LPON services should not be allocated spectrum, but rather they should be allocated a different portion of the spectrum to FM radio broadcasting services. The allocation of 87.5-88.0 MHz sub band provides a workable compromise. The sub band is alternative spectrum that is readily accessible to the public because it is parallel to the FM Broadcasting Services Band (FM BSB)<sup>1</sup>, since most commercially available FM radio receivers can tune down to 87.5 MHz. 87.5-88.0 MHz should continue to be allocated to LPON services.

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<sup>1</sup> The FM BSB occupies 88.1 MHz-108.0 MHz.

- 3.4 The CLC recognises that some LPON services were required to operate in the FM BSB to accommodate Band II television services, particularly those operating on VHF Channel 3.<sup>2</sup> Large population centres such as Bunbury, Newcastle and Wollongong would not have had access to any LPON services if s 34 allocations in the FM BSB were not made.<sup>3</sup> However, it will no longer be necessary to protect Band II television services after December 2013.
- 3.5 On a practical level, the placement of low powered transmissions used by LPON services in the same band as medium and high powered transmissions used by FM radio broadcasting services creates the potential for mutual co-channel and adjacent channel interference. The potential for interference has the potential to limit the availability of frequencies in the FM BSB for FM radio broadcasting services.
- 3.6 The consolidation of LPON services to the 87.5-88.0 MHz sub band has the potential to limit the availability of the frequencies 88.1 MHz and 88.3 MHz for FM radio broadcasting services. However, many more frequencies are currently unavailable for FM radio broadcasting services because of the presence of LPON services in the FM BSB. For example, an LPON service on 98.4 MHz at Bunbury, Western Australia<sup>4</sup> renders all frequencies from 98-99 MHz unavailable for FM radio broadcasting services in that immediate area.
- 3.7 LPON services in the FM BSB should be reassigned to the LPON sub band wherever possible. Although tenure is not guaranteed, existing operators should initially be allowed priority access to spectrum. This will allow these LPON operators to continue their service.
- 3.8 Drop through determinations under s 34(1) BSA should be cancelled for those LPON services that currently operate between 88.1-108.0 MHz (i.e., in the FM BSB).
- 3.9 A moratorium on any new FM radio broadcasting licences operating on 88.1 MHz and 88.3 MHz should be considered in order to establish a guard band between the LPON sub band and the FM BSB.
- 3.10 The ACMA should consider making the frequency 87.5 MHz available for LPON services in areas within the radii of lower powered (e.g. <1 kW Effective Radiated Power) 88.1 MHz transmitters, subject to engineering assessment. A separation of 600 kHz may be sufficient in such cases.<sup>5</sup>

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<sup>2</sup> VHF Channel 3 occupied 85-92 MHz inclusive, thus no LPON services could operate between 87.5-88.0 MHz in areas with a VHF Channel 3 transmitter.

<sup>3</sup> SSW3 Bunbury, NBN3 Newcastle (off air) and WIN3 Wollongong (off air).

<sup>4</sup> See Licence no. 483196, Western Tourist Radio Pty. Ltd,  
[http://web.acma.gov.au/pls/radcom/assignment\\_search.lookup?pACCESS\\_ID=155465&pDEVICE\\_ID=100750](http://web.acma.gov.au/pls/radcom/assignment_search.lookup?pACCESS_ID=155465&pDEVICE_ID=100750).

<sup>5</sup> FM radio broadcasting services 2SWR Blacktown and 2MCR Campbelltown operate within 40 km of each other, on 99.9 MHz and 100.3 MHz respectively, i.e. a separation of 400 kHz. Both services are licenced to operate at 200 watts ERP. See 'Radio and television broadcasting stations: Internet edition', Jan 2013, available from [http://www.acma.gov.au/webwr/assets/main/lib100059/stations\\_book\\_electronic\\_edition-09jan2013.pdf](http://www.acma.gov.au/webwr/assets/main/lib100059/stations_book_electronic_edition-09jan2013.pdf).

#### 4. LPON licence allocation process and licence conditions

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- 4.1 The ACMA should consider the removal of the price-based allocation system (i.e. auctions) for LPON apparatus licences. Alternatively, the CLC proposes a two-tiered system for LPON apparatus licence allocation.
- 4.2 LPON apparatus licences in Low Density Geographic Locations should be allocated automatically on application to the ACMA for a nominal fee on a first come, first served basis. This would remove some regulatory burden on the ACMA in areas with low demand.
- 4.3 In Medium and High Density Geographic Locations, licences should be made available twice annually (i.e., every six months on average). Applications should be received by a certain date nominated by the ACMA for each of the two rounds. The allocation process should be as follows:
- Where there is a single applicant in an area, licences should be allocated over the counter for a nominal fee, as with Low Density Geographic Locations.
  - Where there are two or more applicants (a '**contested application**'), licences should be allocated on merit, similar to community broadcasting licences. The criteria should be less rigorous than that in place under s 84(2) BSA for community broadcasting services, taking into account both the limited resources of many LPON operators and the greater reach and influence of community broadcasting services. The successful applicant should receive the licence for a nominal fee.
  - Notionally, the decision should be made on the basis of who is in the best position to serve the community (and hence public) interest, taking into account the proposed format of the service among other things. In particular, an applicant's financial capacity should not be emphasised, so long as it does not impact on the applicant's ability to provide a service with reasonable regularity.
  - In the unlikely event there are not enough frequencies available in a Low Density Geographic Area, a simple merit review should be conducted.
- 4.4 We believe that the licence allocation system for LPON licences should be closely aligned with that for community broadcasters, since LPON services should be community (rather than commercially) focused- they serve niche interest groups in local areas, as noted in para. 2.1 above.
- 4.5 The two-tiered allocation system will encourage diversity in LPON radio services. Under the current price-based allocation system, many LPON licences are controlled by commercial broadcasters and large organisations/individuals that have financial resources.<sup>6</sup> This can impact on diversity of control and localism- both of which are key objectives of the BSA. A non-price-based allocation system should allow smaller operators to obtain more licences, if they are in a better position to serve the community than larger operators.

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<sup>6</sup> See 'Allocation results- 87.6, 87.8 and 88 MHz- Low Powered Open Narrowcasting-2001 to date', ACMA, Round 46, available from [http://www.acma.gov.au/webwr/\\_assets/main/lib310911/lpon\\_auction\\_results-02jan2013.xlsx](http://www.acma.gov.au/webwr/_assets/main/lib310911/lpon_auction_results-02jan2013.xlsx).

- 4.6 Diversity of control and localism with respect to LPON services should be encouraged, but not legislated by way of ownership limits or local content quotas. As noted in para. 3.2 above, broadcasters and narrowcasters should have separate regulatory regimes, and broadcasters should be subject to more regulation than narrowcasters because of their greater reach and influence.
- 4.7 The introduction of a merit based allocation system for contested applications should not materially increase regulatory burdens on the ACMA. Currently, LPON licence allocations occur every quarter. Under our proposed system, licence allocations for Medium and High Density Geographic Locations would occur biannually. Further, as noted by the ACMA in the Discussion Paper, only a small minority of LPON auctions are competitive (thus requiring assessment). Allocations for Low Density Geographic Locations would be automatic and ongoing.
- 4.8 The ACMA is familiar with merit based allocations for community broadcasting licences and thus should be able to conduct processes efficiently. Since a lower standard than that for community broadcasters should be required, decisions should be made in a timely manner.
- 4.9 As a 'quid pro quo' for obtaining an LPON apparatus licence for a nominal fee, both the 'use it or lose it' licence condition and the licence condition to provide a service with reasonable regularity should be retained. Hoarding licences is not in the public interest whilst spectrum remains scarce.

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