

Radio Licences Security of Tenure

Discussion Paper

December 2006

First published in December 2006 by the
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PO Box 1473, Wellington, New Zealand
<http://www.rsm.govt.nz>

ISBN 978-0-478-30464-0 (HTML version)
ISBN 978-0-478-30465-7 (PDF version)

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1. The Radio Licence Regime

1. The Radiocommunications Act 1989 (the Act) establishes two separate regimes for management of the radio frequency spectrum in New Zealand:

- a. The property rights-based “management rights regime” applies to ranges of frequencies for which a record of management right is registered pursuant to section 9 of the Act.
- b. The administrative-based “radio licence regime” applies to all frequencies for which a management right is not registered¹. Part 13 of the Act and much of the Radiocommunications Regulations 2001 apply to the radio licence regime.

2. Under the radio licence regime, licences:

- May be revoked;
- Have no value as fiscal assets but may be valued as strategic assets;
- Are not tradable;
- Are under direct government control; and
- Are technology-specific.

3. The radio licence regime operates on a ‘command and control’ basis, through the issue of radio licences under the delegated authority of the Chief Executive. The majority of the radio spectrum is managed under this regime, with approximately 36,000 licences extant. Radio licences are normally allocated on a first-come first-served basis and are issued for a specified period, subject to the payment of annual fees.

4. The *Review of Radio Spectrum Policy in New Zealand* published in early 2005 identified that changes to the radio licence regime may be advisable to promote the highest value use of spectrum.

5. Economic benefits of radio spectrum management are generally maximised where:

- Sufficient exclusivity of use is provided to enhance the value of particular parts of the spectrum;
- Security of tenure encourages spectrum-related investment;
- There is a reliable means of resolving interference problems with minimal transaction costs;

¹ The radio licence regime also applies to transmissions below the “power floor” of management rights: see sections 34A and 110 of the Act.

- Spectrum can be acquired or disposed of freely at a fair market value; and
- Concentration of control of the spectrum does not unnecessarily inhibit competition.

6. The lack of guaranteed security of tenure for radio licences may limit investment in spectrum. In particular:

- a. Regulation 15 of the Radiocommunications Regulations 2001 provides that the Chief Executive may, at any time, transfer, suspend, or revoke a radio licence by notice in writing to the licensee. The Regulations do not contain any specific restrictions on this power, although the Chief Executive exercises the power in accordance with principles of administrative law.
- b. The radio licence regime ceases to apply to frequencies over which a management right is created in accordance with section 110 of the Act. Any radio licences that existed immediately prior to registration cease to apply upon registration of a management right.

7. The Act provides “transitional rights” to some holders of radio licences in some frequency bands when a management right is created, if the radio licence was held by that person prior to July 1989. These transitional rights require the Crown to provide a similar spectrum licence under the management right at a preset cost. The transitional rights recognised that the Act put in place a new basis of licensing in 1989. Transitional rights range from five to twenty years duration and in most cases the licensee is required to pay a fee.

8. Regulation 14(4) provides that the Chief Executive may include in any radio licence any terms, conditions, and restrictions that the Chief Executive thinks fit. In practice, radio licences are granted without an expiry date and usually with no specific conditions relating to termination.

9. In practice, the Ministry exercises its regulation 15 power of revocation of radio licences in a limited set of circumstances, such as where:

- a. The Ministry wishes to re-plan the band for another use;
- b. The licensee is in breach of licence conditions, such as the requirement to pay annual fees or comply with technical conditions;
- c. The licensee is in breach of an agreement relating to use, such as an agreement with the Ministry for Culture and Heritage or Te Puni Kokiri;
- d. The licence is unused or no longer required for its original purpose; or
- e. Revocation is desirable for national security reasons or to comply with an international agreement.

10. Similarly, the Ministry does not usually register a management right without finding a transition path for holders of radio licences whether or not the licensee has statutory transitional rights. The Crown openly discusses changes with licensees, and licensees not entitled to transitional rights under the Act have generally been

offered the opportunity to purchase licences in a similar manner to transitional rights. Licences are not normally revoked without ensuring that licensees have access to suitable licences for several years with contestability thereafter, or are moved to a different frequency band.

11. Actual Ministry practice is illustrated by the following case studies.

12. *Creation of management rights in the 2 GHz band:* Management rights were created in the 2 GHz band in 1999. The Ministry recognised that, should a current licensee fail to acquire the necessary spectrum licences at auction, there should be a reasonable amount of time allowing them to vacate the band and make alternative arrangements for the carriage of their service. Accordingly, the Ministry offered fixed term licences to licensees who did not qualify for transitional rights under the Radiocommunications Act. The offer provided licensees with an option to choose a licence of one to three years duration with payment for administrative costs and resource rental. The Ministry also provided an alternative band to accommodate displaced licensees.

13. *Creation of management rights in the 100-108 MHz band:* Management rights were created in the spectrum band from 100-108 MHz in the late 1990s. Existing radio licensees in this band were not eligible for transitional rights. However, the Ministry provided for a 10 year transition plan for existing licensees and ensured that replacement bands were available. These licensees were free to migrate how they saw fit within 10 years, so that the cost of their relocation could be absorbed into their capital baselines via depreciation. The majority of the displaced licensees were land mobile operators and their customers, who had to bear the cost of equipment changes.

14. *Changes to the 400-420 MHz TETRA band:* In the late 1990s, the New Zealand Police decided to implement a new, encrypted communications network. The 400-420 MHz TETRA band was identified as being suitable for this purpose. The New Zealand Police required the network to be in place within a short timeframe (18 months). Therefore, the Ministry did not have the option of providing a transition plan for existing radio licensees (mostly city councils and studio-to-transmitter links), to absorb the costs of migration. In this case, the New Zealand Police, as the beneficiary, funded the transition of those licensees who were required to move. The Ministry provided replacement spectrum for displaced licensees.

2. The Issues

2.1 Investment

15. The lack of legislative provisions for the exercise of power to revoke radio licences, or for transition paths where a management right is registered, causes apparent uncertainty over tenure. Lack of security of tenure may limit investment in wireless infrastructure.

16. Effective infrastructure is crucial to New Zealand's productive capacity and economic growth prospects. Lack of investment can have major economic and social effects (for example, lower productivity from low broadband penetration).

17. Allocative efficiency refers to the allocation of resources in a way that maximises the net benefit attained through their use. Encouraging investment under the radio licence regime would contribute to allocative efficiency by increasing the net benefit from the use of spectrum.

18. It is noted that investment was made in infrastructure prior to the introduction of the Act in 1989 and that investment has continued to be made over time. It is difficult, if not impossible, to accurately quantify the direct or indirect economic effects of the lack of security of tenure for radio licences.

19. While experience suggests that the Ministry recognises existing investment when considering revocation of radio licences and usually provides for transition periods or negotiates with individual rightholders, licensees have no guarantee that it will continue to do so. Moreover, not all licensees may feel that the provisions have been adequate.

2.2 Security of Tenure

20. One of the main benefits of the radio licence regime is flexibility and low barriers to entry. Whereas allocation of spectrum under the management rights regime typically involves commercial allocation of long-term rights by auction, the radio licence regime typically involves allocation of licences on-demand at administrative cost.

21. Providing greater security of tenure for radio licences might be counterproductive to the flexibility and availability of radio licences. For example, security of tenure might encourage hoarding of licences for anti-competitive purposes or in the hope of getting a pay-off for relinquishing them. While revocation power is little used, the potential threat of revocation limits hold-out by licensees and encourages acquiescence with Crown plans.

22. It might also follow that improvements to security of tenure should not be made in isolation of wider reform to the radio licence regime. Potentially linked reforms include:

- a. encouraging efficient use through competitive allocation and/or resource rentals for radio licences;

- b. introducing tradability of licences; and
- c. introducing use-it-or-lose-it provisions for licences.

23. There is also the possibility that any reform of the radio licence regime may have unintended consequences. For example, different compliance requirements may increase the costs associated with licences.

24. An alternative to reform of the radio licence regime is to move all spectrum to the management right regime by converting all radio licences to spectrum licences under Crown-owned management rights, as was done with the broadcasting bands. This change might improve coherence by managing all the radio spectrum under one regime, and uses the regime better suited to providing security of tenure. The Manager's policies could still provide for allocation on-demand and at administrative cost.

Q1. Should radio licences have greater security of tenure? Why?

Q2. What is more important to your business: rapid access to radio spectrum to implement new services, or security of tenure for investment?

Q3. Could changes to security of tenure be made in isolation from other reforms of radio licences? Might there be unintended consequences?

Q4. Should all (or most) radio spectrum be moved to the management rights regime? Why?

3. Options for Change

25. The remainder of this discussion paper discusses possible options for the radio licence regime to offer greater security of tenure in isolation of any other changes to the regime. It does not consider other possible reforms.

3.1 The Spectrum Allocation Process

26. Changes to spectrum allocations involve consideration of:

- Supply and demand for spectrum;
- Commercial versus public good uses;
- International developments; and
- Technology trends.

27. In most cases, the Ministry uses these inputs to develop a discussion paper to seek public consultation on the best use of a particular spectrum band. The Ministry receives responses to the discussion paper, which are analysed and used to prepare papers for Government with recommendations (i.e. on the best use of the band and optimal method of allocation). Papers are written in consultation with other government departments. Once Government decisions are made, the Ministry undertakes work to implement these decisions.

28. It may be desirable to establish a defined methodology for determining when spectrum is to be reallocated. This would promote certainty around the process for spectrum reallocation.

29. Disadvantages exist to having an overly prescriptive methodology, however. It could lead to a lack of flexibility, meaning that the Ministry's ability, as well as the ability of the Radiocommunications industry, to find innovative solutions may be reduced.

- Q5. Would a defined methodology for determining when spectrum is to be reallocated improve the security of tenure for radio licences?
How and why?
- Q6. What steps and considerations would a defined methodology incorporate?

3.2 Security of Tenure within the Radio Licence Regime

30. As noted above, the Ministry exercises its Regulation 15 power of revocation of radio licences in a limited set of circumstances, such as where:

- a. The Ministry wishes to re-plan the band for another use;

- b. The licensee is in breach of licence conditions, such as the requirement to pay annual fees or comply with technical conditions;
- c. The licensee is in breach of a side agreement relating to use, such as an agreement with the Ministry for Culture and Heritage or Te Puni Kokiri;
- d. The licence is unused or no longer required for its original purpose; or
- e. Revocation is desirable for national security reasons or to comply with an international agreement.

31. The Ministry generally allows long lead times if it proposes to compel users to migrate to another band or to change frequencies. The agreement of the licensee to a transition path is often sought. On this basis, revocation under 30(a) above could be subject to a period of notice of, say, five years (although it could be a different timeframe depending upon specific circumstances. Legislation provides different periods of transitional rights to eligible licensees when management rights are created). A five year timeframe is consistent with existing government policy on renewal of management rights.

32. In addition, for revocation under 30(a) a statement of policy could be made to ensure that a transition path, in accordance with the Ministry's transition plan, is found to replace radio licences that are displaced. In the other circumstances noted under paragraph 30, licences could be immediately revocable on written notice.

33. In order to provide greater certainty around security of tenure, the Regulations could be amended or a statement of policy made describing the framework and circumstances in which the Ministry would exercise its power. A statement of policy would apply to all licences, existing or new. Policies provide less certainty for licensees, as they have limited legal effect and are superseded by subsequent changes in policy.

34. A change to regulations may apply to all existing and new licences, but could have unintended effects, such as providing security of tenure across all licences even if a licence was intended to be terminable. However, it may be possible to write the regulations such that the inclusion of a termination date on the licence conditions overrides any security of tenure. A regulation change may take more time to introduce than the other options described above.

35. Alternatively, it may be possible to include a condition in radio licences setting out revocation rights. Conditions of revocation provide increased certainty for licensees, but only apply to new licences or by amendment to existing licences. It might be used only in well settled bands (e.g. land mobile and fixed) and adapted for other bands. A condition might be implemented relatively simply. The Regulations might also need to be amended to give effect to such a condition.

36. Another option might be to offer radio licences for a minimum period. This would provide certainty for rightholders for the period. Security of tenure would gradually diminish over time and a reallocation policy at expiry would be required, which has potential high implementation costs. Planning of the band would be more complex if the expiry dates of licences did not coincide.

Q7. Should radio licences be allocated with more certainty over their term? How and why?

Q8. If security of tenure should be provided, should different services be treated differently? What criteria might be considered in determining a suitable period for security of tenure?

Q9. In what circumstances would immediate revocation be appropriate?

Q10. Would a change to the licence or regulation be effective to give security of tenure? Is either option preferable?

Q11. Which of the options of a set term or minimum notice for revocation is preferable? Why?

3.3 Security of Tenure on Registration of a Management Right

37. Under Section 110(1) of the Radiocommunications Act, the radio licence regime in Part 13 applies to every radio frequency unless a management right is registered in respect to that radio frequency. Radio licences do not therefore need to be revoked if the band is moved to the management rights regime. Amendments to licences or the regulations may not therefore provide certainty to licensees, as the licence will cease to exist on registration of the management right.

38. The transitional provisions under the Act could be revised to provide more certainty over transition when a management right is created, and to extend the right to all frequency bands. The right to be granted a spectrum licence could be extended to all holders of radio licences. A new right to be provided with a transition path could be provided for in the Act as an alternative.

39. However, it may be that a transition path is not appropriate in all circumstances. Government may consider that people with existing radio licences should compete in an open allocation process when a management right is created in a band. Moreover, the provision of a transition path might not always be feasible if greater amounts of spectrum are converted to the management rights regime.

40. An alternative might be a clear government policy that transition paths will be provided in all cases where management rights are created. While a clear statement of policy would not provide a legislative guarantee, it might provide sufficient certainty to licensees. Section 112 provides for the government to make statements of policy with respect to the radio licence regime.

Q12. Should holders of radio licences have defined transitional rights in the event of conversion to the management rights regime? Why?

Q13. Should such rights be to a guaranteed replacement spectrum licence for a set period, or to be provided a suitable transition path? Are there other options?

Q14. Which option out of changes to licence conditions or regulations, a statement of government policy or legislative change is preferable to provide security of tenure on conversion of spectrum to the management rights regime? Why?

3.4 Financial Arrangements

41. The Crown has generally not offered financial incentives when changes to radio licences are required. In some cases there have been arrangements between two radio licensees, occasionally brokered by the Crown, but not at a cost to the Crown.

42. Under both the Management Rights regime and the Radio Licence regime, once a licence or right expires or is revoked, the previous holder bears the costs of transferring to any new licence or right they wish to use. The difference between the regimes is that under the Management Rights regime, the tenure is longer, so if spectrum is required for re-assignment before the end of the management right, the Crown has to negotiate with the current rightholder/s for early relinquishment.

43. While engineering and licence fees have been waived on occasion where a transition required duplicate services for a period, there has been no assistance with the costs radio licensees incur in making equipment changes. Financial incentives could be provided to radio licensees to assist with the costs of transition (such as equipment changes).

44. There may be disadvantages to providing financial incentives. Firstly, it may create a risk of hold-out if existing licensees decide to hold out for payment whenever a band is re-planned. This may decrease the efficiency of band planning, and increase the amount of time required for spectrum to be re-allocated for new technologies, or in accordance with changes to international standards or Cabinet decisions.

45. It may be unclear where the funding for financial incentives to displaced licensees would come from. The beneficiary of a band re-plan is not always identifiable, for example, in cases where the spectrum is re-allocated under a General User Licence. A possible option is to raise radio licence fees in order to establish a fund to assist licensees with transition costs, should they be required to migrate.

Q15. Should financial incentives be payable for changes to radio licences imposed on licensees? Why?

Q16. How would you see such funds being supplied and allocated?

3.5 Other Issues

Q17. Are there any other issues *in the context of this discussion paper* that you wish to bring to the attention of the Ministry?

4. Request for Comments

46. Comments on the proposals contained in this paper and on any related issues, are invited from interested parties (see Appendix 1). Written submissions should be sent no later than **14 March 2007** to:

By post: Security of Tenure for Radio Licences
 Radio Spectrum Policy and Planning
 Ministry of Economic Development
 PO Box 1473
 WELLINGTON

or emailed to: radiospectrum@med.govt.nz (preferred option)

Any party wishing to discuss the proposals with Ministry officials should contact:

Pam Kitsawat
Radio Spectrum Policy and Planning
Ministry of Economic Development
33 Bowen Street
Wellington
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Ph: +64-4-472 0030

4.1 Posting and Release of Submissions

47. The Ministry may post all or parts of any written submission on its website at www.rsm.govt.nz. The Ministry will consider you to have consented to posting by making a submission, unless you clearly specify otherwise in your submission.

48. In any case, content of submissions provided to the Ministry are likely to be subject to public release under the Official Information Act 1982 following requests to the Ministry. Please advise if you have any objection to the release of any information contained in a submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. The Ministry will take into account all such objections when responding to requests for copies and information on submissions to this document under the Official Information Act 1982.

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49. The Privacy Act 1993 establishes certain principles with respect to the collection, use, and disclosure of information about individuals by various agencies including the Ministry. It governs access by individuals to information about themselves held by agencies. Any personal information you supply to the Ministry in the course of making a submission will be used by the Ministry only in conjunction with the matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that the Ministry may publish.

5. Appendix 1: Submissions

Submissions are to be made in the following format.

Name

Position in organisation

Organisation

Contact details

Nature of organisation's business

Responses to questions

1....

2....

3....

....etc.

Other issues

A....

B....

....etc.

Date/Signature