

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:

1. 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.
2. The administrative-based "radio licence regime" applies to all frequencies for which a management right is not registered.¹ 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;
- 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:

1. 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.
2. 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:

1. The Ministry wishes to re-plan the band for another use;
2. The licensee is in breach of licence conditions, such as the requirement to pay annual fees or comply with technical conditions;
3. 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 Kōkiri;
4. The licence is unused or no longer required for its original purpose; or

5. 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.

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