

The Chair  
CABINET ECONOMIC DEVELOPMENT COMMITTEE

## SECURITY OF TENURE FOR RADIO LICENCES

### PROPOSAL

- 1 This paper reports on the results of public consultation and seeks agreement for decisions and further work on security of tenure for the radio licence regime.

### EXECUTIVE SUMMARY

- 2 The lack of security of tenure under the radio licence regime may inhibit investment in radio spectrum and wireless infrastructure. Radio licences may be revoked even if licensees have deployed infrastructure using the spectrum.
- 3 In December 2006 Cabinet [EDC Min (06) 23/11 refers] agreed to public release of a discussion paper, *Radio Licences Security of Tenure*, and invited the Minister of Communications to report back on the outcome of the consultation.
- 4 The Ministry of Economic Development received 13 submissions from industry groups, telecommunications companies, land mobile operators, broadcasters, and other radio licence users. The public consultation shows stakeholder support for providing greater security of tenure for radio licences.
- 5 To increase security of tenure, this paper seeks agreement for a provision setting out the terms and conditions for the revocation of radio licences, including a five year notice period, to be made by amendment to the Radiocommunications Regulations. The paper also seeks agreement that a Government policy on transition plans for radio licence holders, including the option of providing financial assistance with the costs of transition, is developed and published.

### BACKGROUND

- 6 The Radiocommunications Act 1989 (the Act) establishes two separate regimes for management of the radio frequency spectrum in New Zealand.
  - The property rights-based “management rights regime” applies to ranges of frequencies for which a record of management rights is registered pursuant to section 10 of the Act. Management rights are usually allocated on a competitive basis to commercial users.

- The administrative-based “radio licence regime” applies to all frequencies for which a management right is not registered<sup>1</sup>; Part 13 of the Act and much of the Radiocommunications Regulations 2001 apply to the radio licence regime. Radio licences are allocated on a first-come-first-served basis with an administrative fee charged annually.
- 7 One of the difficulties associated with the current radio licence regime is that users of radio licences have no guarantee of tenure.
- Regulation 15 of the Radiocommunications Regulations 2001 provides that the Chief Executive of the Ministry of Economic Development (MED) 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.
  - 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.
- 8 Radio licences may be revoked even if licensees have deployed infrastructure using the spectrum. The lack of security of tenure under the radio licence regime may inhibit investment in radio spectrum and wireless infrastructure.
- 9 Improving the security of tenure for radio licences was raised in the 2006 Select Committee process for the Communications Legislation Bill by users of land mobile radio spectrum. At that time, the Commerce Committee noted that MED intends to undertake a review of transitional provisions in the Radiocommunications Act covering land mobile radio frequencies.
- 10 In December 2006 Cabinet [EDC Min (06) 23/11 refers] agreed to public release of a discussion paper, *Radio Licences Security of Tenure*, and invited the Minister of Communications to report back on the outcome of the consultation.
- 11 MED received 13 submissions from industry groups, telecommunications companies, land mobile operators, broadcasters, and other radio licence users. Individual submissions have been posted on the Ministry’s website.

## SECURITY OF TENURE

### Responses

- 12 Twelve out of thirteen respondents supported providing greater security of tenure for radio licences.

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

- 13 Respondents recognised that greater security of tenure could be counterproductive to the flexibility and availability of radio licences, with two respondents stating that rapid access to radio spectrum is more important than security of tenure.
- 14 There was little support for converting all (or most) radio licences to spectrum licences under Crown-owned management rights. On the whole, the management rights regime was not favoured because respondents considered it difficult to gain access to spectrum via competitive allocation processes. Further, respondents did not believe that the management rights regime would be suitable for all types of radio spectrum users.

### **Analysis**

- 15 In practice, MED already recognises existing investment under the radio licence regime. This was acknowledged by two respondents, who maintained that any provisions for greater security of tenure would merely be a formalisation of the present situation. Nevertheless, these respondents considered that formal provisions could help to increase certainty and so create better investment incentives than the status quo.
- 16 I propose that formal provisions to increase the security of tenure for radio licences be introduced. These are outlined further in the sections below.

### **SECURITY OF TENURE WITHIN THE RADIO LICENCE REGIME**

#### **Responses**

- 17 The majority of respondents were in favour of allocating radio licences with more certainty over their term. This can be achieved through specifying either a set term for licences, or a minimum notice for revocation.
- 18 A minimum notice for revocation was preferred by respondents, with most people indicating a period of five years. Respondents considered that this would increase certainty by providing a transparent and upfront 'grace period' in which licensees would be able to make suitable arrangements for transition.
- 19 The responses suggested that provisions for greater security of tenure should be made within the Radiocommunications Regulations, with four respondents in favour of this option. Two respondents supported licence changes, one preferred legislative change, and two stated that no changes were required as long as there is thorough and ongoing consultation.

#### **Analysis**

- 20 Allocating radio licences with more certainty over their term would increase licence holders' confidence in their business planning and investment decisions, thus encouraging investment in wireless infrastructure. I propose to establish a minimum notice of five years for revocation of licences under the radio licence regime. Most respondents considered that this timeframe would be sufficient for licensees to make suitable transition arrangements.

- 21 Where radio spectrum for new services is required within a shorter timeframe, MED could require faster transition, but only on the basis of a suitable transition plan being developed in consultation with existing users. Such a plan would consider a range of measures including the availability of alternative spectrum and the possibility of financial incentives to assist with transition costs.
- 22 In certain cases, immediate or shorter notice of revocation of radio licences is reasonable to ensure the effective management of the radio spectrum. These cases would be described in terms and conditions for the revocation of radio licences. In particular, when:
- the licensee is in breach of licence conditions, such as the requirement to pay annual fees or comply with technical conditions;
  - 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;
  - the licence is unused or no longer required for its original purpose;
  - revocation is required for the prevention of harmful interference; or
  - revocation is desirable for national security reasons or to comply with an international agreement.
- 23 I note that a minimum notice period would not limit the ability to grant temporary licences with an expiry date shorter than five years from commencement.
- 24 I also note that MED would retain the power to revoke radio licences if they are not being used.
- 25 The terms and conditions for revocation could be implemented in the licence conditions, a statement of Government policy, Radiocommunications Regulations, or the Radiocommunications Act. The pros and cons of each option are discussed below:
- A provision in licence conditions would be relatively quick to implement, but gives the least amount of certainty and could lead to inconsistency from one licence to another.
  - A statement of Government policy would be easy to implement but does not provide as much certainty as legislative or regulatory provisions. Policy statements may be amended without debate or consultation.
  - A provision in the Radiocommunications Regulations would be simple, cost-effective, and would apply to all licences. Changes to Regulations can be made in a reasonable timeframe and would afford more legal certainty than licence conditions or a statement of Government policy. The Radiocommunications Act empowers regulations to set out the terms and conditions subject to which radio licences may be revoked.

- A legislative provision would offer the greatest certainty. However, this would also be the most costly, complex, and least flexible option, with potentially a timeframe of several years before it could be implemented.

26 I recommend that a provision setting out the terms and conditions for revocation of radio licences, including a five year notice period, be made by amendment to the Regulations. This was supported in the public consultation, with respondents expressing a preference for regulatory changes over the other options.

## **SECURITY OF TENURE ON REGISTRATION OF A MANAGEMENT RIGHT**

### **Responses**

27 The majority of responses indicated support for granting defined transitional rights to affected radio licensees when spectrum is converted to the management rights regime. However, respondents were divided on whether such rights should be to a guaranteed replacement spectrum licence for a set period, or a suitable transition path.

28 Moreover, a number of respondents believed that this issue should be considered on a case-by-case basis, rather than having one fixed solution. These respondents recognised that the radio spectrum is a finite resource, and that it might not always be possible to find replacement spectrum. Respondents were also divided on whether legal provisions should be made for security of tenure on registration of a management right and if so, what type of provision should be made.

### **Analysis**

29 The terms and conditions for revocation of radio licences would not apply to radio licence holders affected by the registration of a management right. This is because radio licences cease to exist when a management right is created.

30 The Radiocommunications Act 1989 provides transitional rights to 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 corresponding spectrum licence under the management right at a preset cost. The default period for transitional rights is five years.

31 As radio spectrum is a finite resource, it may not always be possible to provide defined transitional rights to all other radio licence holders who are displaced when a management right is created. In practice, MED seeks to find replacement spectrum, or a transition plan, for all affected radio licence holders. However, this approach is case-by-case, and there is no formal policy to guide the Ministry. Responses to the discussion paper indicate that formalising the transition process for all radio licensees would increase overall security of tenure under the radio licence regime.

- 32 The regulation-making powers in the Act do not provide for transition plans to be made under the management rights regime. Therefore, security of tenure on registration of a management right can only be improved through implementation of government policy or a change to the Radiocommunications Act.
- 33 Legislative change would take time and, while offering a high degree of certainty, would limit the possibility for flexible solutions which are required for dynamic and focused policy-making. In contrast, a formal government policy would provide greater security of tenure than the status quo, and would also enable flexible options to be considered on a case-by-case basis.
- 34 I recommend that a policy for transition plans on conversion of spectrum to the management rights regime be developed and published to offer greater security of tenure. This policy would also be applied to transition plans under the radio licence regime.
- 35 I note that MED would retain the power to revoke any radio licences not in use at the time of registering a management right, in accordance with the proposed terms and conditions for the revocation of radio licences set out above.
- 36 Responses to the discussion paper revealed some support for legislative change to provide security of tenure on registration of a management right. The option of further reinforcing the transition plan policy with legislation will be addressed when the Radiocommunications Act is next reviewed.

## **FINANCIAL ARRANGEMENTS**

### **Responses**

- 37 Approximately half of the respondents supported financial assistance for changes imposed on radio licensees, particularly if transition is required in a short time and there are no other provisions for transitional rights. It was suggested that such funds could come from the proceeds of any management right auction, or from the new users of the radio spectrum who stand to benefit from the change.
- 38 Several respondents maintained that if security of tenure for licences was improved, explicit financial assistance would not be necessary. Any person seeking early access to spectrum would be required to negotiate an agreement with existing licensees.

### **Analysis**

- 39 The Crown has generally not offered financial assistance when making changes to radio licences. In some cases there have been arrangements between users, sometimes brokered by MED, but not a cost to the Crown. Granting transitional rights to radio licensees would continue to facilitate this procedure, as incoming users could then negotiate with existing licence holders for early access to spectrum.

- 40 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 incurred by radio licensees in making changes to infrastructure.
- 41 However, radio licensees make investment decisions on the basis of expectations of continuing access to spectrum. If these expectations are curtailed then there is an argument that it is reasonable to consider financial contributions on a case-by-case basis to assist licensees. In the event that transitional rights are granted, this would occur only when existing licence holders are not given five years notice, or when they are required to forgo their transitional rights.
- 42 I propose that the Government policy on transition plans include the option to consider financial assistance with the costs of transition, in exceptional circumstances and on a case-by-case basis.

### **CONSULTATION**

- 43 The Treasury, Inland Revenue Department, Ministry for Culture and Heritage, and Te Puni Kokiri were consulted in the preparation of this paper. The Department of Prime Minister and Cabinet has been informed.

### **FISCAL IMPLICATIONS**

- 44 I propose that costs associated with financial assistance for transition of radio licences on registration of a management right, are funded through the existing Crown contribution for spectrum sales activities under Vote Communications, Management and Enforcement of the Radiocommunications Act 1989. Note that this proposal could be regarded as extending the current scope of the authority relating to this appropriation.

### **HUMAN RIGHTS**

- 45 There are no human rights issues raised by this paper.

### **LEGISLATIVE IMPLICATIONS**

- 46 There are no legislative issues raised by this paper.

### **REGULATORY IMPACT ANALYSIS**

- 47 MED confirms that the Code of Good Regulatory Practice and the regulatory impact analysis requirements, including the consultation RIA requirements, have been complied with. A Regulatory Impact Statement (RIS) was prepared and MED considers the RIS and the RIA analysis undertaken to be adequate. A draft RIS was circulated with the Cabinet paper for departmental consultation purposes.

## PUBLICITY

- 48 The Minister of Communications will announce these decisions and release relevant documents (including this paper and associated minutes) in due course.

## RECOMMENDATIONS

- 49 It is recommended that the Committee:

- 1 **Note** that in December 2006, Cabinet [EDC Min (06) 23/11 refers] agreed to public release of a discussion paper, *Radio Licences Security of Tenure*, and invited the Minister of Communications to report back on the outcome of the consultation;
- 2 **Note** that public consultation shows stakeholder support for providing greater security of tenure for radio licences;

### *Security of tenure under the radio licence regime*

- 3 **Note** that in practice, the Ministry of Economic Development (MED) already recognises existing investment under the radio licence regime, but that formal provisions for security of tenure could help to increase certainty and create better investment incentives;
- 4 **Note** that public consultation indicates that there is support for allocating radio licences with more certainty over their term, either through a set term for radio licences, or a minimum period of notice for revocation;
- 5 **Note** that a minimum notice for revocation of five years would increase certainty by providing a transparent and upfront grace period in which licensees could make suitable arrangements for transition, and that this option was preferred by respondents;
- 6 **Note** that a minimum notice period would not limit the ability to grant temporary licences with an expiry date shorter than five years from commencement;
- 7 **Note** that MED would retain the power to revoke radio licences if they are not being used;
- 8 **Agree** that terms and conditions for the revocation of radio licences be established to require a five year minimum notice of revocation while allowing for immediate or short notice of revocation where:
  - 8.1 the licensee is in breach of licence conditions, such as the requirement to pay annual fees or comply with technical conditions;
  - 8.2 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;
  - 8.3 the licence is unused or no longer required for its original purpose;

- 8.4 revocation is required for the prevention of harmful interference; or
- 8.5 revocation is desirable for national security reasons or to comply with an international agreement;
- 9 **Agree** that a provision setting out the terms and conditions for the revocation of radio licences, including a five year notice period, be made by amendment to the Radiocommunications Regulations;
- 10 **Invite** the Minister of Communications to instruct Parliamentary Counsel to prepare an amendment to the Radiocommunications Regulations to implement the recommendations above;

*Transitional rights on conversion to the management rights regime*

- 11 **Note** that the public consultation confirmed that there is general support for granting defined transitional rights to affected radio licensees when spectrum is converted to the management rights regime;
- 12 **Note** that in practice MED already finds replacement spectrum, or a transition path, for radio licence holders when a management right is created;
- 13 **Agree** that a Government policy on transition plans for conversion of spectrum to the management rights regime, and within the radio licence regime, be developed and published to offer greater security of tenure;
- 14 **Note** that responses to the discussion paper revealed support for legislative change to provide security of tenure when a management right is registered, and that this option will be addressed in the next review of the Radiocommunications Act;
- 15 **Invite** the Minister of Communications to consult with industry and report back by December 2007 seeking agreement to the policy on transition plans referred to in 13 above.

*Financial Arrangements*

- 16 **Note** that half of the respondents supported financial assistance for changes imposed on radio licensees, particularly if transition is required in a short time and there are no other provisions for transitional rights;
- 17 **Note** that respondents suggested that funds for financial assistance could come from the proceeds of any management right auction, or from the new users of the radio spectrum who stand to benefit from the change;
- 18 **Agree** that the Government policy on transition plans include the option to consider financial assistance with the costs of transition, in exceptional circumstances and on a case-by-case basis;

*Fiscal Implications*

- 19 **Agree** that the current scope of the Crown contribution for spectrum sales under the Departmental Output Expense appropriation for Vote Communications, Management and Enforcement of the Radiocommunications Act 1989 be extended to include costs associated with financial assistance for transition of radio licences when a management right is created; and

*Publicity*

- 20 **Invite** the Minister of Communications to announce these decisions and release this paper and other relevant documents in due course.

Hon David Cunliffe  
**Minister of Communications**

## **Regulatory Impact Statement**

### **EXECUTIVE SUMMARY**

The current radio licence regime does not provide radio licence holders with any guarantee of tenure. The lack of security of tenure may inhibit investment in radio spectrum and wireless infrastructure. This paper proposes that the Radiocommunications Regulations be amended to increase the security of tenure for radio licences. Responses received to a public consultation indicate that this would provide increased certainty and better investment incentives for radio licensees.

### **ADEQUACY STATEMENT**

The Ministry of Economic Development (MED) has reviewed this Regulatory Impact Statement and considers it to be adequate.

### **STATUS QUO AND PROBLEM**

One of the difficulties associated with the current radio licence regime is that users of radio licences have no guarantee of tenure.

- Regulation 15 of the Radiocommunications Regulations 2001 provides that the Chief Executive of the MED 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.
- 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.

Radio licences may be revoked even if licensees have deployed infrastructure in the spectrum. The lack of security of tenure under the radio licence regime may inhibit investment in radio spectrum and wireless infrastructure.

Improving the security of tenure for radio licences was raised in the 2006 Select Committee process for the Communications Legislation Bill by users of land mobile radio spectrum. At that time, the Commerce Committee noted that the MED intends to undertake a review of transitional provisions in the Radiocommunications Act covering land mobile radio frequencies.

### **OBJECTIVES**

The options for providing security of tenure within the radio licence regime were measured against the following objectives:

- the extent to which they would provide security of tenure for radio licensees;
- the extent to which they would allow for flexible policy-making to address the dynamic nature of the radiocommunications market and technological change;
- legal and administrative simplicity;
- cost-effectiveness;

- how easy (or difficult) it would be to implement; and
- the degree to which the option was supported by respondents in the public consultation process.

### **ALTERNATIVE OPTIONS**

The alternative options for providing greater security of tenure within the radio licence regime are outlined below.

- *Licence conditions*: Would be relatively quick to implement, but gives the least amount of certainty and could lead to inconsistency from one licence to another.
- *A statement of Government policy*: Would be easy to implement but does not provide as much certainty as legislative or regulatory provisions. Policy statements may be amended without debate or consultation.
- *Legislative change*: Would offer the greatest certainty. However, this would also be the most costly, complex, and least flexible option, with potentially a timeframe of several years before it could be implemented.

### **PREFERRED OPTION**

The preferred option is for a provision setting out the terms and conditions for revocation of radio licences, including a five year notice period, to be made by amendment to the Radio communications Regulations. This was supported in the responses to the discussion paper, with a preference for regulatory changes expressed over the other options.

A provision in the Regulations would be simple, cost-effective, and would apply to all licences. Changes to Regulations can be made in a reasonable timeframe and would afford more legal certainty than licence conditions or a statement of Government policy. The Radiocommunications Act empowers Regulations to set out the terms and conditions subject to which radio licences may be revoked.

Note that this option only applies to the radio licence regime, and would not apply to radio licence holders affected by the registration of a management right. This is because radio licences cease to exist when a management right is created. In order to provide security of tenure on registration of a management right, this paper also recommends that a Government policy on transition plans for radio licensees is developed and formalised. The option of reinforcing this policy with legislation can be addressed when the Radiocommunications Act is next reviewed.

### **IMPLEMENTATION AND REVIEW**

The Minister of Communications will instruct Parliamentary Counsel to prepare an amendment to the Regulations. Radio licence holders will be informed of the change via MED electronic newsletters. Email advice will also be sent out directly to the parties who responded to the discussion paper.

## **CONSULTATION**

In December 2006, the MED released a discussion paper, *Radio Licences Security of Tenure*, for public consultation.

The MED received thirteen submissions from industry groups, telecommunications companies, land mobile operators, broadcasters, and other radio licence users.

The responses suggested that provisions for greater security of tenure within the radio licence regime should be made within the Regulations, with four respondents in favour of this option. Two respondents supported licence changes, one preferred legislative change, and two stated that no changes were required as long as there is thorough and ongoing consultation.