

Security of tenure transition policy: draft guidelines

Security of tenure for radio licences: transition plan

Draft implementation Guidelines - September 2008

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1. Introduction

The Radiocommunications Act 1989 (the Act) and Radiocommunications Regulations 2001 (the Regulations) provide the legislative framework for the management of the radio spectrum. The Ministry of Economic Development (the Ministry) manages the use of the radio spectrum under the direction of government, and using the framework provided by the legislation.

A Review of Radio Spectrum Policy in 2005 indicated that changes to the radio licence regime may be advisable to promote the highest value use of spectrum. Under the radio licence regime, licensees had no guarantee of tenure. Radio licences could be revoked even though there may be substantial infrastructure deployed. In addition, the lack of security of tenure for spectrum under the radio licence regime may inhibit investment in wireless infrastructure by radio licensees.

The provision of security of tenure for incumbent radio licensees has been considered over the last 20 months, culminating with these draft implementation guidelines.

This document sets out in draft form:

1. Broad guidelines to ensure due consideration is given to various aspects of incumbent radio licence operation when considering a potential change to use of the radio spectrum, including the creation of management rights.
2. Operational guidelines for implementing the Government's policies where a decision has been taken to make changes to the use of the radio spectrum affecting incumbent radio licences.

2. Background

In December 2006 a discussion paper considering options for improving the security of tenure for radio licences was released for public comment. Thirteen submissions were received by the close of submissions on 14 March 2007.

Following consideration of public submissions, the Minister of Communications announced the Government's decision, to revise the radiocommunications Regulations to improve security of tenure arrangements in June 2007, and released the associated Cabinet Economic Development Committee minute of decision.

The Cabinet Economic Development Committee:

agreed 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 [circumstances specified].

To further protect the interests of licensees whose licences were subject to revocation, the Committee:

agreed 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;

agreed 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.

These decisions were confirmed by Cabinet.

In accordance with these decisions, Ministry of Economic Development (MED) officials drafted a policy for the transition of radio licences and published it for public consultation on the web pages of the MED in October 2007. The proposed Security of Tenure Draft Transition Policy consisted of 12 plain-language clauses covering notification of revocation, replacement licences, fees and charges, and financial compensation.

Following the consultation and a report to Government, the Security of Tenure Draft Transition Policy was approved by Cabinet in March 2008 (attached as an Annex) and in April 2008, the Minister for Communications and Information Technology announced the transition policy for radio licences.

3. Potential change

The need for change in the management of the radio spectrum is inevitable. The Ministry follows a broad, but well defined, process in considering the need for change.

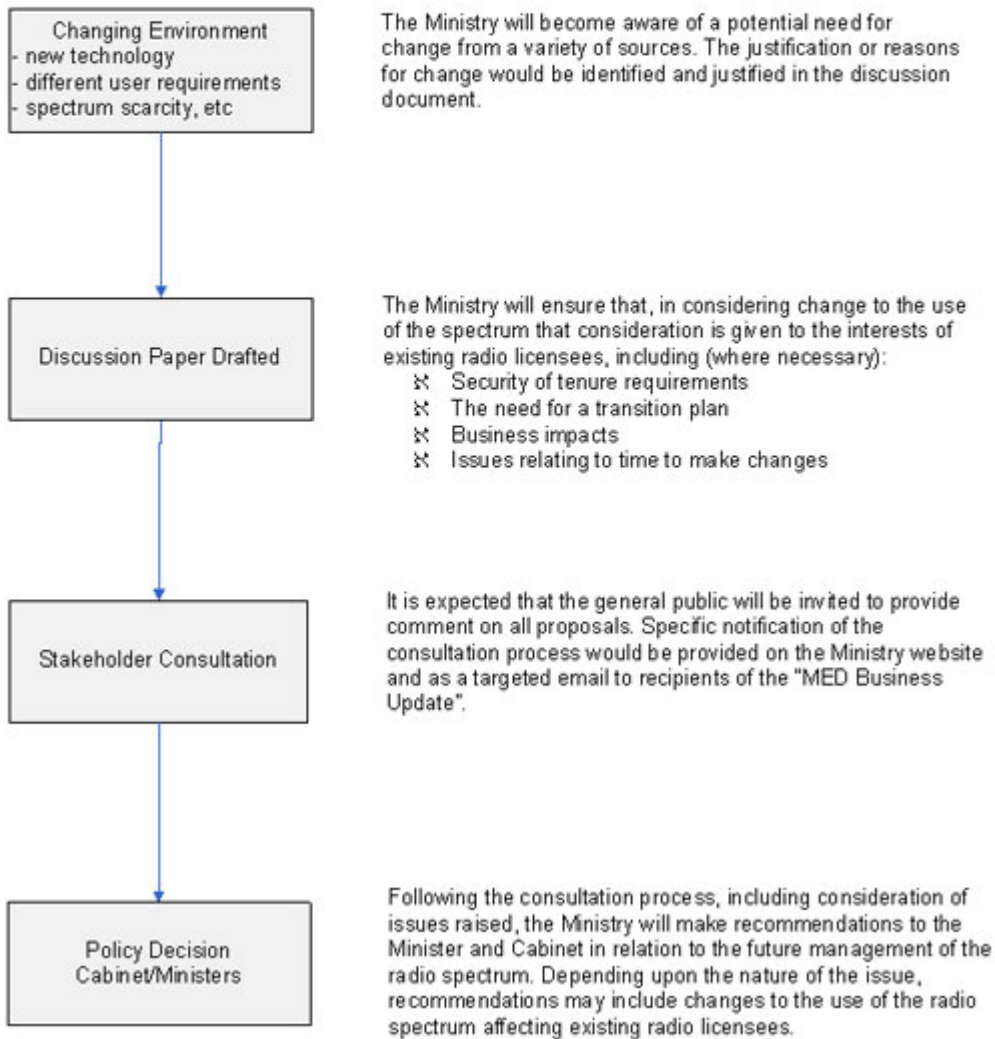
Proposals for change involve the generation of a discussion document for consideration by affected stakeholders. Each party must determine their level of involvement in this consultation process, as it is at this point that decisions relating to the need to change are made by Government.

In considering the need for change, government considerations include, but are not limited to, the following:

- Public versus private interest
- Opportunity cost versus cost to incumbent users
- Legislative provisions under the Act (including transitional rights)

The flowchart below outlines the process discussed.

PROCESS FOR CONSIDERING POTENTIAL CHANGE TO THE USE OF THE RADIO SPECTRUM



4. Changes affecting radio licensees

This section discusses draft operational guidelines for implementing Government policies where a decision has been taken to make changes to the use of the radio spectrum affecting incumbent radio licences. The overall process is summarised in a flowchart at the end of this section.

Notice of Revocation

This policy applies to radio licences that are to be revoked for public policy reasons, either:

- within a five year period; or
- should the licence revocation date be prior to the relevant date of expiry.

This policy applies to radio licences granted by the Crown.

As a first step, the Chief Executive will notify the affected licensee in writing of:

- the intention to revoke the licence;
- the reasons for revocation;
- the planned date of revocation.

The transition policy applies only to radio licences. i.e. it does not apply to spectrum licences, which are governed by the relevant provisions of the Radiocommunications Act 1989.

It is normally expected that the Chief Executive will give five years' notice of revocation. The transition policy applies only when, for public policy reasons, a shorter period of notice is approved by Cabinet (see previous section).

'Public policy reasons' include, but are not confined to, such considerations as efficient use of the radio spectrum, obligations arising from international agreements, and the safety and security of the public.

Before making any decision to impose a period of notice of revocation of less than five years, the Chief Executive will need to consider whether radio licensees will be adversely affected, and whether the public interest outweighs the private interests of licensees.

On all occasions when a radio licence or group of radio licences is to be revoked for public policy reasons, the Chief Executive will post a Notice on the Ministry's web pages and the attention of licensees and other interested parties will be drawn to the Notice through the Ministry's Business Update e-newsletter and direct communication with affected licensees by letter. The letter will explain why, with reference to the relevant public policy issues, a period of notice of revocation of less than five years is necessary, and will provide details of the proposed options available to the licensee under the transition policy.

Transition Plan

It is standard Ministry practice for the Chief Executive to offer an alternative radio or spectrum licence of equal utility to the licensee.

As a general principle, the Chief Executive will consult with the licensee at the earliest possible opportunity to discuss the circumstances of the proposed revocation and to confirm the option that causes a minimum of disruption to the radio service provided by the licensee.

A transition plan will be required to ensure the needs of the licensee and the Crown are met in relation to implementation of changes to the use of the radio spectrum. A number of specific issues have already been outlined in the previously published transition policy. In general the following issues will need to be considered when developing the transition plan.

Statutory Obligations

In developing a transition plan, there are two levels of statutory obligations that must be met. The first is in relation to transitional rights outlined in Part 16 of the Act, which provides rights to qualifying radio licences in specific bands. The second is in relation to the provisions of Regulation 15D & 15E of the Regulations, which limits the Chief Executive when exercising his/her power to revoke radio licences.

Although it is likely that the initial decision in considering the need for change will have taken these statutory obligations into account, their provisions must be adhered to by the Chief Executive.

Contractual Obligations

On a number of previous occasions, the Crown has entered into agreements with licensees when changes have been made to the use of the radio spectrum. Consideration will need to be given to ensure any ongoing contractual obligations of the Crown are met.

Impact of Change

Continuing access to the radio spectrum is an on-going concern of radio licensees, especially in relation to promoting investment. The draft transition plan will consider the impact of the changes to the licensees, together with an assessment of the cost to business and the degree of disruption that may be anticipated. It is noted that levels of cost and disruption will vary widely for licensees. Accordingly, the licensees will need to ensure that information is made available to ensure a suitable transition process that will meet their needs can be formulated.

Replacement Licences

The Chief Executive will consider the options for replacement of the revoked licence, which may (but do not necessarily) include, in order of preference:

- where possible, the offer of a replacement licence of the same power and coverage at the same frequency (eg, where a radio licence is replaced by a spectrum licence under a newly created management right); or
- where possible, the offer of a replacement licence of different power and coverage at the same frequency; or
- where possible, the offer of a replacement licence of the same power and coverage in the same frequency band; or
- where possible, the offer of a replacement licence of different power and coverage in the same frequency band; or
- where possible, the offer of a replacement licence of the same power and coverage in an alternative frequency band; or

- where possible, the offer of a replacement licence of different power and coverage in an alternative frequency band; or no replacement offer (eg, where the band is to be put to a different use and no suitable frequency is available in any alternative band).

The sequence suggested in the policy is practical but not mandatory. A licensee may prefer, for example, to move to a new frequency or location with improved coverage rather than, say, replace a radio licence with a near-identical spectrum licence.

Fees and Charges

No administrative charge payable under legislation will be collected by the Chief Executive for processing any replacement licence granted under this policy, although, after creation of the licence, charges payable during its subsequent term will be levied. Regulation 44(2) applies in this situation.

Should the licence be revoked other than on the anniversary date of its registration, and only at the discretion of the Chief Executive, a proportion of any annual licence fee paid in advance will, subject to the agreement of the Minister, be refunded to the licensee. Regulation 38(2) applies in this situation.

If the claim is reasonable, the Chief Executive will recommend to the responsible Minister that the part-refund be applied against the administrative charge for the replacement licence or, if no replacement licence is offered, be paid directly to the licensee.

If the Minister approves any such part-refund, the Chief Executive will direct Radio Spectrum Management to make the part-refund as agreed by the Minister.

Moratorium on New Licences

Consideration will need to be given to whether new licences can be issued within affected bands. It may be useful to permit additional licences, to existing licensees, for ongoing business reasons. In this type of situation licences would be expected to be of fixed term duration and it is unlikely that there could be an extension of the transition processes to apply to new licences granted after the notice of an intention to revoke licences has been issued.

Financial Compensation

In exceptional circumstances and on a case-by-case basis, the Chief Executive may recommend that financial compensation be paid should he/she, upon application by a licensee, be satisfied that revocation of the licence caused a significant financial hardship to the licensee and that financial compensation is in the public interest.

Any such claim must be supported by a detailed financial analysis, certified by a Chartered Accountant at the expense of the applicant, showing the quantum of the losses. Responsibility for providing and substantiating any claim of significant financial hardship must rest with the licensee, who has sole access to the pertinent evidence.

The Chief Executive need not assess a claim until such additional evidence that he/she reasonably requires from the applicant has been provided to him.

Given that any licensee whose radio licence is subject to revocation would have five years to review and re-align its business operations or, where notice of revocation was less than five years, would be offered a radio or spectrum licence of equal utility where practicable, it is not envisaged that financial compensation would be routinely required.

It is possible, however, that a significant change of frequency, power or coverage may be required and, in these circumstances, a radiocommunications service provider might have to invest significant funds in modifying or purchasing equipment and/or may lose some substantial part of its customer base. This provision may be applicable in these or similar circumstances.

The Chief Executive, on receipt of a claim for financial hardship arising from revocation of a radio licence will acknowledge its receipt in writing.

Within a period of three calendar months, the Chief Executive will examine the evidence presented, if necessary with the assistance of an independent third party, and determine whether or not the claim is valid.

For the purposes of assessing “significant financial hardship” the Chief Executive may consider whether:

- the proposed changes would cause a business to failure the solvency test (Companies Act 1993);
- the proposed changes might cause a person to be able to be judged bankrupt (Insolvency Act 2006);
- depreciation has been claimed in relation to assets such as radio transmitting and receiving equipment, towers and antennas;
- whether assets have been purchased following the presentation of a notice of revocation to the licensee.

The Chief Executive will notify the licensee of his/her decision in writing.

In the event that the claim is judged to be valid, the Chief Executive will recommend to the responsible Minister that the claim be paid from the Spectrum Sales Appropriation.

Confirmation of Process

Although the Crown has historically ensured spectrum is available and there is a process for transition (this process), the draft transition plan would need to confirm the timeframes and processes to be followed on a case by case basis.

Licence in Sufficient Use

Under regulation 15B(2)(d) of the Regulations, where a licence is not in use, the Chief Executive may revoke a radio licence immediately. Accordingly, the draft transition plan may include a requirement for licensees to make a suitable declaration as outlined in regulation 15C(2). Clearly this approach would have no effect on licences in use, but it may allow greater flexibility in the final design of the transition plan.

Other Issues

Other issues potentially affecting the development of a transition plan may also need to be considered. For example, new users seeking early access to spectrum may be prepared to assist affected licensees or provide some form of compensation in exchange for early access to spectrum. Issues such as these will be considered on a case by case basis.

Stakeholder Consultation

When the draft transition plan has been completed, it will be presented to affected licensees for consultation prior to the transition plan being finalised. This will ensure affected licensees are able to ensure their needs are considered as a part of the transition process.

Suitable time will be provided to ensure affected licensees are able to properly consider the draft transition plan and provide comment to the Ministry.

Offers to Licensees

When the scope and timing of the revocation has been confirmed the Chief Executive will determine what alternative licence or licences can be offered to licensees and finalise the transition plan. The guiding principle will be to offer an alternative licence that creates the least impact on the licensees' business operations and costs. The Chief Executive will write to all licensees affected by the planned revocation, stating clearly what alternative licences are available and on what terms.

The Chief Executive's decision must be final, as he/she is responsible for administering the Act. This responsibility cannot be delegated outside the Ministry.

Licensee Response

The licensee will have three calendar months within which to respond to any offer made. Should no response be received by the end of that period, the licence will be revoked on the notified date of revocation.

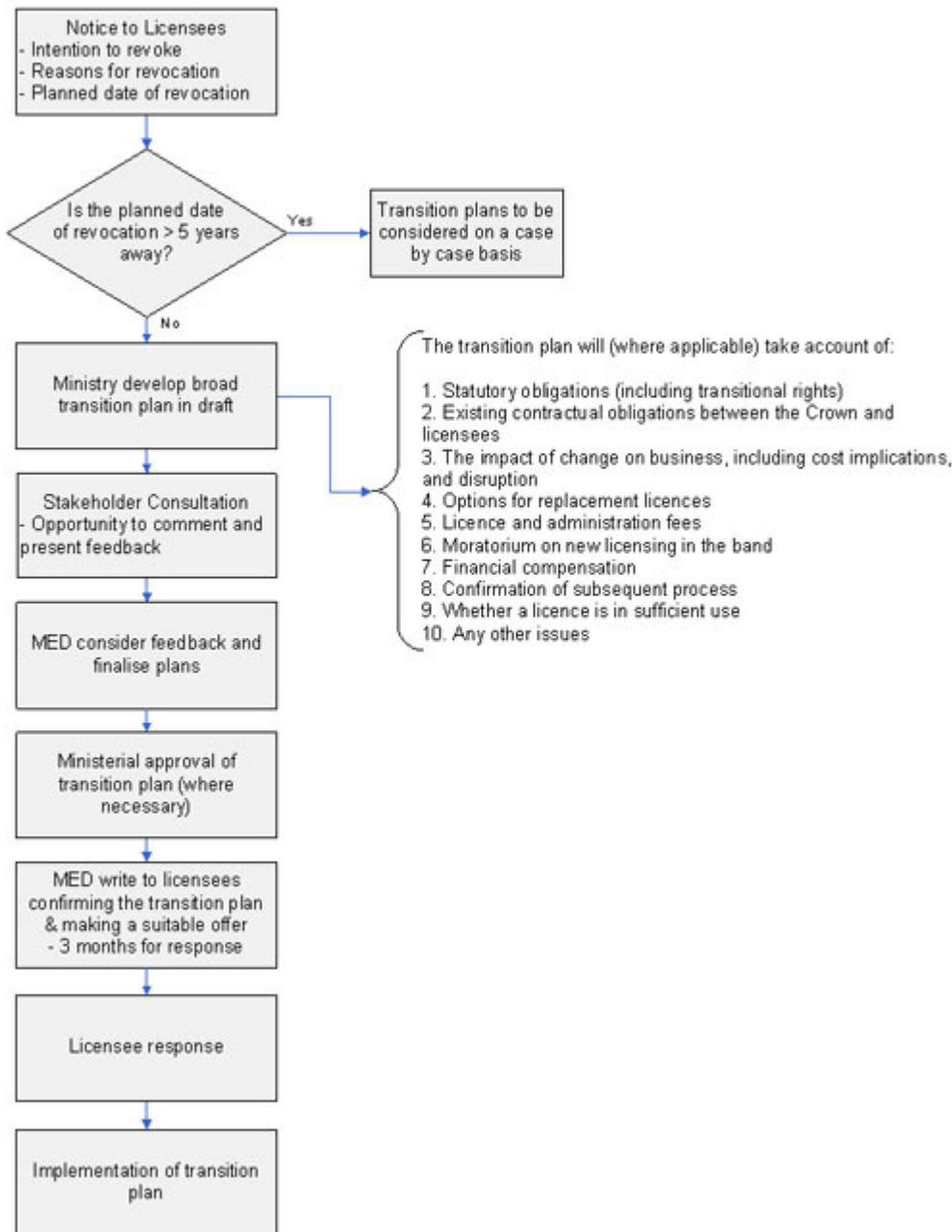
Implementation

Once the process outlined above is complete, the Ministry will implement the decisions taken.

Overall Process

The flowchart on the following page outlines the draft operational guidelines, discussed in this document, where a decision has been taken to make changes to the use of the radio spectrum affecting radio licences.

OPERATIONAL GUIDELINES - CHANGES AFFECTING RADIO LICENSEES



5. Submissions

Comment on these draft implementation guidelines, in the form of written submissions, is invited from radio licensees and other stakeholders.

Submissions should be provided to the Ministry as soon as practicable, but in any case before 5.00 pm on 17 October 2008.

The Ministry requests that submissions are provided electronically to radiospectrum@med.govt.nz in either MSWord or PDF format. Any questions about this paper or the process should also be directed to this e-mail address.

The Ministry's preferred format is:

Respondent's name

Organisation (or, for example, 'private individual')

Nature of organisation's interest (eg, 'land mobile radio operator')

Email address or other address for written communications

Response to Process step 1

.....etc

Any other matters that you believe the Ministry should consider.

The Ministry intends to publish all submissions on the Ministry web site, and notes that submissions are subject to the Official Information Act 1982. If a respondent considers that there are grounds for the Ministry to withhold key information in a submission, this information should be clearly marked and the relevant reason stated so that the Ministry can determine whether withholding may be justified under the Act.

Annex

Transition policy approved by cabinet - CAB Min (08) 8/4 March 2008

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either

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or

- should the licence revocation date be prior to the relevant date of expiry.

1. The policy will apply to radio licences granted by the Crown.

2. As a first step, the Chief Executive will notify the affected licensee in writing of:

- the intention to revoke the licence;
- the reasons for revocation;
- the planned date of revocation.

Replacement Licences

1. In addition, the Chief Executive will notify the licensee in writing of the options for replacement of the revoked licence, that may (but do not necessarily) include, in order of preference:

- where possible, the offer of a replacement licence of the same power and coverage at the same frequency (eg, where a radio licence is replaced by a spectrum licence under a newly created management right); or
- where possible, the offer of a replacement licence of different power and coverage at the same frequency; or
- where possible, the offer of a replacement licence of the same power and coverage in the same frequency band; or
- where possible, the offer of a replacement licence of different power and coverage in the same frequency band; or
- where possible, the offer of a replacement licence of the same power and coverage in an alternative frequency band; or
- where possible, the offer of a replacement licence of different power and coverage in an alternative frequency band; or
- no replacement offer (eg, where the band is to be put to a different use and no suitable frequency is available in any alternative band).

1. As a general principle, the Chief Executive will consult with the licensee at the earliest possible opportunity to discuss the circumstances of the proposed revocation and to confirm the option that causes a minimum of disruption to the radio service provided by the licensee.

2. Where the Chief Executive and the licensee cannot agree on any option offered, the decision of the Chief Executive will prevail.

3. The licensee will have three calendar months within which to respond to any offer made. Should no response be received by the end of that period, the licence will be revoked on the notified date of revocation.


Fees And Charges

1. No administrative charge payable under legislation will be collected by the Chief Executive for processing any replacement licence granted under this policy, although, after creation of the licence, charges payable during its subsequent term will be levied.

2. Should the licence be revoked other than on the anniversary date of its registration, and only at the discretion of the Chief Executive, a proportion of any annual licence fee paid in advance will, subject to the agreement of the Minister, be refunded to the licensee.

Financial Compensation

1. In exceptional circumstances and on a case-by-case basis, the Chief Executive may recommend that financial compensation be paid should he, upon application by a licensee, be satisfied that revocation of the licence caused a significant financial hardship to the licensee and that financial compensation is in the public interest.
2. Any such claim must be supported by a detailed financial analysis, certified by a Chartered Accountant at the expense of the applicant, showing the quantum of the losses.
3. The Chief Executive need not assess a claim until such additional evidence that he reasonably requires from the applicant has been provided to him.

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