

# MSP Process – Wairarapa Complaint and Notice to All Participants

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## Notice to MSP Participants

The MSP concept is an innovative experiment in spectrum management, to our knowledge unique in the world. The initiative is a discretionary activity the Ministry is undertaking in order to allow access to the market to second tier providers. It is based on the concepts of sharing and good faith negotiation. Where sharing is not able to be negotiated a ballot is conducted to reduce the number of applicants.

The Ministry is the holder of the relevant Management Right and is under no legal obligation to accept any or all applications.

The MSP concept includes an expectation that commercial competitors will enter into good faith negotiations and develop ways to share the MSP resource. It is also based on an assumption that MSPs will largely be self-managing and will not generate high administrative costs for the Ministry.

MBIE has seen a number of examples of behaviour that we consider are not in keeping with the intentions of the MSP concepts. Applicants and intending applicants are advised that, while MBIE would prefer that the long term use and sharing of the MSP band is generally determined by the parties involved, MBIE will act to disallow specific applications, specific applicants, and otherwise ensure that the MSP is used in the intended manner.

Given the apparent lack of good faith being shown by some parties MBIE hereby signals that we intend to take a firmer line in future. Ultimately if the expectation of good faith proves to be too naïve, or running the MSP process proves too much of an administrative burden, it is likely the experiment will be discontinued. Applicants, AREs, and other parties should keep this in mind when deciding how they engage on MSP processes.

## Client and ARE responsibilities

There is an expectation that AREs and applicants will engage constructively with other applicants to resolve certification issues or in regard to modification of applications or licences for sharing purposes. This engagement inevitably involves costs on all of the parties involved. This is part of the cost in making an MSP application. If AREs or applicants do not feel comfortable engaging with others in this regard they should decline to work on applications in the MSP.

Given that applicants are initiating applications to suit their purposes it is expected that the associated engineering details will not simply be replicated from other applications, but will be an independent set of documentation. This is not to say however that the use of the same data points will lead to the automatic declining of an application.

AREs should ensure that they are aware of the rules and the costs of participation in an MSP process. AREs should provide guidance to applicants who seek to engage them as to the processes and costs involved for the applicant. This will assist applicants in determining whether it is a reasonable decision to proceed with lodging applications.

Parties who make applications are responsible for any applications in their name and should ensure that they, as well as the ARE that they instruct, are aware of the rules of the MSP application process. Whilst ARE's may act on behalf of an applicant, they should ensure that they advise the applicant of any specific factors that relate to the application and that the applicant is in agreement with the details of the application.

### Definition of Associates

The definition of Associates in the MSP allocation rules excludes parties who are associated solely by virtue of an Agreement on a standalone basis and on arms-length commercial terms to share, purchase, install or maintain technical infrastructure. This exclusion does not cover a service provider and their client. In other words a service provider and client are associates and cannot both bid. If the reason for this is unclear consider the counterfactual where a provider could organise any number of clients to each bid for a licence. This would unfairly advantage that provider relative to others.

# Wairarapa Area MSP Complaint - Decisions

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## Introduction

In November 2012 the Ministry received an application for MSP licences in Carterton, South Wairarapa and Castlepoint from WIZ Wireless Ltd. As per the normal process these were publically notified under MSP Notice 20 and other applications were invited. Two additional sets of applications were received. These applications were, in key respects, identical to each other and to significant parts of the original WIZ Wireless application.

A complaint was subsequently lodged with MBIE. After establishing that these were some *prima facie* irregularities, the MSP process for these licences was placed on hold to allow time for further investigation.

MBIE then spoke or corresponded with all of the parties involved in order to obtain a clearer picture of the background to the MSP applications. There are some discrepancies between accounts but it is not apparent that further investigation would provide any further clarity. MBIE nevertheless has full discretion to make rulings relating to licences it is offering within the Management Right it administers. On completion of our investigation draft decisions were provided to the parties involved and feedback invited. That feedback has now been considered. This document provides a summary of our final decisions.

## Issues

We see two issues with the two additional sets of MSP applications lodged pursuant to MSP Notice 20.

1. The two sets of applications were lodged within minutes of each other, by the same ARE and commissioned by the same sponsor, but on behalf of two separate organisations. This raises a question as to whether there may have been some element of collusion or gaming to increase an applicant's chance of winning a licence in any subsequent ballot.
2. The two sets of applications were identical in substantive content and included extraneous detail showing that the content had been copied from the WIZ Wireless application. This raises the issue as to the extent that AREs are allowed to copy information and the extent to which AREs are responsible for the information they enter.

## Analysis

### Issue 1

The two applications were lodged only a few minutes apart, by the same ARE. The ARE appears to have been commissioned by a single sponsor for both applications. The applications are identical. The details of the commissioning are still not entirely clear to us but we have been provided with correspondence between the parties which shows clearly that they were acting in concert.

Given the ballot process, the MSP process could be gamed if a single party or associated parties were allowed to place multiple applications. The rules make it clear that associated parties may not submit more than one application. The way the applications in question were lodged creates, at minimum, a perception of gaming.

MBIE considers the applications to be associated under clause 11.2(i) of the Allocation Rules. Following release of our draft decisions both applications have been withdrawn by their originators. Had they not been withdrawn we would have rejected them under clause 11.2 (i). Further, we have informed both applicants that we will accept applications from one or other, but not both, in future allocations.

There being no other applications, we therefore award the Carterton, South Wairarapa and Castlepoint MSP licences to WIZ Wireless.

### Issue 2

The two additional applications contain identical information, copied from the WIZ Wireless application. Details from the WIZ Wireless application inadvertently left in the additional applications leave no doubt as to the source. We have been asked whether this is acceptable practice.

*We do **not** ban copying of information from SMART.* This is a public registry and the content of licences is not subject to IP or copyright restrictions. Indeed there are instances where copying of information is the sensible and efficient way to create new licences.

That said, the ARE who creates a licence is responsible for every detail and cannot rely on the work of others for technical or administrative correctness. The technical work of licence creation must still be performed/checked, even if the material lodged in SMART is data copied from another licence.

In this case our enquiries show that technical planning and assessment work was performed as part of the certification and submission process.

We therefore find a lack of attention to detail, but no substantive cause for action against the ARE.

No further audit of the applications is intended as both will no longer be relevant in the application process.

### **Precedent Effect**

We have in this case decided to apply the minimum penalty available to us that is consistent with providing a fair outcome for the affected party. This should be taken as a warning rather than a precedent. More severe penalties are available to us, including banning parties from any further participation in the MSP process.