

SUBMISSION TO THE PRODUCTIVITY COMMISSION REVIEW OF RADIOCOMMUNICATIONS ACTS AND OF THE MARKET BASED REFORMS AND ACTIVITIES UNDERTAKEN BY THE AUSTRALIAN COMMUNICATIONS AUTHORITY

Presented below are some points for the Productivity Commission's consideration in its review of radiocommunications legislation and related matters. The suggestions are mainly aimed at making the administration of radiocommunications licensing more flexible by giving greater discretion to the Australian Communications Authority (ACA) in certain areas.

1. Specification of spectrum for spectrum licensing: spectrum denial

Section 36 of the *Radiocommunications Act 1992* (Radcom Act) allows the Minister to give the ACA a written notice designating certain spectrum to be allocated by issuing spectrum licences. Section 153 B allows the Minister to make a declaration that certain spectrum is to be re-allocated by issuing spectrum licences or apparatus licences issued under section 106 (price-based allocation).

Currently a designation notice under section 36 of the Radcom Act or a re-allocation declaration under section 153B may specify particular spectrum with respect to a particular area. From subsections 38(1), 39(1) and 39A(1) of the Radcom Act, it would appear that any area so specified is the area in which radiocommunications devices (transmitters or receivers) may be operated. As a transmitter operated within a boundary could have a coverage area beyond that boundary, a designation notice or a re-allocation declaration, by itself, would not indicate what "spectrum denial" it could entail.

It may therefore be worth considering whether the notice or declaration itself should specify the maximum permitted level of radio emissions at the boundary of such an area (both into and out of the area) to give persons (eg those commenting on draft notices or declarations) an idea of how much "spectrum denial" making of the notice or declaration could entail.

2. Merging of apparatus and spectrum licences

As indicated by subsections 38(1), 39(1) and 39A(1) of the Radcom Act, a key feature of a spectrum licence is that it authorises the operation of devices within a certain part of the spectrum and within a certain area specified in the licence. Instead of having a licence called a spectrum licence, an alternative approach might be to amend the Radcom Act:

- so that section 98 provides that the ACA may issue an "area based" transmitter licence, being defined as a radiocommunications licence authorising the operation of transmitters within spectrum and within an area specified in the licence;
- so that section 98 empowers the ACA to determine (in a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*) the types of

radiocommunications licences that it may issue in addition to the "area based" transmitter type;

- to replace reference to "spectrum licences" with references to "area based" transmitter licences where appropriate, making other necessary consequential changes to the Act; and
- to substitute "radiocommunications licence" for apparatus licence.

Currently the issue of a spectrum licence follows the making of a relevant section 36 designation notice or a relevant section 153B re-allocation declaration. Rather than require the making of such a notice or declaration before an area based licence could be issued in all cases, the Radcom Act could require that a declaration or notice would only be required prior to issue of area based licences and perhaps other radiocommunications licences in specified circumstances. On the making of such a declaration or notice requiring the allocation of area based licences, provisions along the lines of those for the current spectrum licensing scheme (eg relating to marketing and conversion plans) could also apply.

The circumstances requiring a section 153B declaration or a section 36 notice might relate to the amount and value of spectrum to be covered by licences proposed to be issued and possibly the proposed method of allocation. An alternative approach would be to amend the Radcom Act to allow the ACA to make mandatory guidelines (disallowable instrument) setting out the circumstances in which a notice or declaration would be required prior to the issue of area based licences and perhaps other radiocommunications licences.

On the matter of marketing plans there is the issue whether they should be required to be made only where, following a section 153B declaration, spectrum is to be allocated by issuing area based licences or whether they should be made where, following the making of such an instrument, spectrum is to be allocated by issuing other types of radiocommunications licences. Would it be better for the Radcom Act to empower the ACA to determine requirements for marketing plans for different licensing scenarios (at least those not involving the issue of area based licences) by disallowable instrument, as opposed to having these requirements set out in the Radcom Act?

In this regard, there is the additional option of not amending section 98 of the Radcom Act as proposed, but simply having the ACA determine under section 98 a new "area based" transmitter licence type as defined above, which would displace "spectrum licences", and making appropriate consequential changes to the Radcom Act. **In** this case empowering the ACA to determine requirements for marketing and conversion plans may be the way to go, given that the Act itself would have made no reference to "area based" transmitter licences and any mention of conversion in the context of the Act might be understood in the general sense of replacing a licence of one type with a licence of another type (not specifying an "area based" transmitter licence).

3. Specification of spectrum for spectrum licensing: single instrument

It may be desirable to amalgamate section 36 and 153B of the Radcom Act into the one provision allowing for the making of a declaration that specified spectrum for specified

areas is to be allocated by issuing specified radiocommunications licences using a specified method of allocation (eg at the discretion of the ACA or by a price-based mechanism such as an auction). The declaration would specify other matters such as whether incumbent apparatus licences were to be converted to spectrum licences (or "area based" transmitter licences if the suggestion in point 2 were adopted) or whether they were to be cancelled at the end of a re-allocation period, specified along with a re-allocation deadline.

Such a declaration would differ from one made under section 153B at least insofar as it would allow detailed specification of the method of licence allocation (including "at the discretion of the ACA"). A section 153B declaration allows spectrum licences to be allocated in accordance with section 60 and apparatus licences in accordance with section 106 of the Radcom Act.

Also, it may be more appropriate (balancing administrative convenience with accountability) to allow the ACA to make such a declaration (a disallowable instrument).

4. Spectrum licensing: class licensing considerations

Under section 138 of the Radcom Act, the ACA may not issue a class licence for devices within spectrum designated under section 36. However the section does not prevent the issue of a class licence for devices within spectrum specified in a re-allocation declaration under section 153B, which appears anomalous.

Also, it may be desirable for section 138 to be amended to allow class licences to be issued in spectrum space specified for spectrum licensing in circumstances specified by the ACA in a disallowable instrument. An example of the sort of class licence that could perhaps be issued in spectrum space specified for spectrum licensing is one for mobile telephone handsets currently required to be operated under spectrum licences.

4. Other matters concerning the merging of apparatus licences and spectrum licences

I understand that, in some quarters, there has been consideration of the desirability of removing the "distinction" between apparatus licences and spectrum licences.

In any merging of apparatus and spectrum licensing under the Radcom Act, various matters in relation to each kind of licensing would need to be addressed in addition to those already mentioned. These matters would appear to include:

- (a) licence period: The maximum period for which an apparatus licence may be issued is 5 years (section 103 of Radcom Act), with the maximum period for a spectrum licence being 15 years (section 65 of Radcom Act). There may be grounds for extending licence periods to provide licensees with greater security of spectrum tenure. In any merger of apparatus and spectrum licences, an option might be for the Radcom Act to set a maximum period (eg 10 years) for a radiocommunications licence, subject to it being extended either generally or for particular licences by way of an ACA determination (disallowable instrument). The Act could specify matters required to be taken into account in deciding on the extension period (eg amount and value of spectrum covered by the licence and the purpose for which it is to be used) and that public consultation on the extension should occur. **In** the case of area based licences comparable to existing spectrum licences, it would be expected that the period would be extended to at least 15-20 years.
- (b) licence conditions/technical framework: The Radcom Act could provide for certain of its provisions currently applying to spectrum licences (eg section 66) to apply to "area based" transmitter licences as appropriate. Alternatively it could empower the ACA to make them so apply at its discretion, having regard to certain matters, by way of a determination (disallowable instrument). This latter approach would be appropriate where the ACA determined an "area based" transmitter licence under section 98 of the Radcom Act instead of the Act itself being amended to allow such licences to be issued.

The Act could also require the ACA to determine certain restrictions to apply to the operation of transmitters outside of the area and spectrum specified in the "area based" transmitter licence to provide protection for receivers in the area and spectrum covered by the licence. The *Radiocommunications (Radiocommunications Receivers) Determination 2000* could make it clear that receivers operated within the spectrum and area of an "area based" transmitter licence do not require licensing, notwithstanding ACA measures to protect them from interference.

- (d) transfer/assignment of licences to other persons: Part 3.3, Division 8 of the Radcom Act provides for the transfer of apparatus licences, while Part 3.2, Division 5 provides for trading in spectrum licences. In any merger of apparatus and spectrum licences, the "transfer" provisions of the Act (for apparatus licences) could be amalgamated with the "trading" provisions (for spectrum licences), with trading rules covering a range of licence types. For example, the trading rules might allow the holder of a radiocommunications licence authorising the operation of equipment from a site using two frequencies to assign the licence to operate from the site using one of the frequencies to another person, who would be able to use their own equipment. Also, in the case of area based transmitter licences, the trading rules could be similar to existing ones (involving "standard trading units").

- (e) authorisations: Under section 68 or 114 of the Radcom Act, a spectrum licensee or an apparatus licensee respectively may authorise a third party to operate radiocommunications devices under the spectrum or apparatus licence. In appropriately amalgamating these provisions, the Radcom Act could be amended to allow the ACA to determine rules (disallowable instruments) in relation to limits concerning such authorisations (eg in terms of who may be authorised and what an authorisee may do).
- (f) cancellation and suspension of licences: Under Division 2, Part 3.2 and Division 6, Part 3.3 of the Radcom Act 3, the ACA may cancel or suspend spectrum or apparatus licences respectively in specified circumstances. These circumstances involve the licensee doing certain unlawful things. Also, Part 4 of the Radcom Act allows the Minister to prohibit or regulate the operation of radio communications devices in a period of emergency, while Division 6 of Part 3.2 provides for the resumption of spectrum licences. Where the Minister makes a section 153B re-allocation declaration, incumbent apparatus licences are automatically cancelled at the end of the re-allocation period specified in the declaration.

The Productivity Commission may want to consider whether or not there might be situations other than those specified in sections 74 and 125 where cancellation or suspension would be warranted. ACA guidelines (disallowable instruments) could perhaps be made specifying other situations in which cancellation or suspension could occur.

- (g) compliance with spectrum and band plans: Under Part 2.1 of the Radcom Act, the ACA may prepare spectrum plans (section 30) and frequency band plans (section 32).

In regard to spectrum licences, conversion plans (subsection 38(4)) and marketing plans (subsections 39(6) and 39A(8)) may not be inconsistent with the spectrum plan or relevant frequency band, with spectrum licences to be issued in compliance with relevant conversion or marketing plans (subsections 59(1) and (2) and subsection 63(1)). A provision of the Australian Radiofrequency Spectrum Plan effectively provides that generally applicable restrictions contained in the Plan on the use of certain parts of the spectrum do not apply in the case of spectrum licences. I understand that a similar approach would be taken in regard to frequency band plans to make sure they would not apply to the operation of equipment under spectrum licences.

In regard to apparatus licences, the ACA may only issue an apparatus licence that is inconsistent with the spectrum plan or the relevant frequency band plan in the circumstances set out in section 104 of the Radcom Act (for purposes relating to an event of international, national or regional significance or in the public interest).

Also, such a licence must not be issued for more than 30 days and must not be renewed more than once.

An alternative to exempting certain licences from the operation of spectrum or frequency band plans by including special provisions in these plans may be to amend the Radcom Act to allow the ACA to make a declaration exempting licences of the kind specified in the declaration (a disallowable instrument) from the operation of the spectrum plan or certain frequency band plans.

- (h) *radiocommunications licence taxes:* Apparatus licence taxes are set out in ACA determinations made under the *Radiocommunications (Transmitter Licence Tax) Act 1983* and the *Radiocommunications (Receiver Licence Tax) Act 1983*. Spectrum licence taxes are set out in an ACA determination made under the *Radiocommunications (Spectrum Licence Tax) Act 1997*. If spectrum and apparatus licensing were merged, this latter Act could be repealed.

The question arises whether ongoing annual licence taxes are needed in addition to prices paid at auction, given that bidders would be expected to take account of annual taxes in making their bids. In a broadcasting context, the Productivity Commission (Broadcasting Inquiry report, Productivity Commission 3 March 2000, pages 194-195) appears to support the payment of an upfront amount for spectrum, determined in a competitive process, combined with an ongoing annual fee, which could be adjusted from time to time to reflect changes in the value of spectrum.

- (i) *resumption of spectrum:* While the Radcom Act (at Division 6, Part 3.2) provides for the resumption of spectrum licences, it does not provide for the resumption of apparatus licences. In any merging of spectrum licences and apparatus licensing under the Radcom Act, it may be appropriate to amend the Act to provide that resumption would only apply to licences specified in an ACA determination (a disallowable instrument), with the Act specifying the matters to be taken into account in making the determination.
- (j) *renewal of licences:* The scheme for renewing apparatus licences (at Division 7, Part 3.3 of the Radcom Act) is quite different to that for re-issuing spectrum licences (at Division 4, Part 3.2). In any merging of spectrum licences and apparatus licensing under the Radcom Act, it may be appropriate to amend the Act to provide that re-issuing of licences in accordance with the sort of scheme set out at Division 4, Part 3.2 would only apply to licences specified in an ACA determination (a disallowable instrument), with the Act specifying the matters to be taken into account in making the determination;
- (k) *method of licence allocation:* The ACA may issue apparatus licences at its discretion or by a price-based system determined by the ACA under section 106 of the Radcom Act. The ACA may allocate spectrum licences by auction, tender, or

for a pre-determined or negotiated price in accordance with procedures determined by it under section 60 of the Radcom Act. In merging apparatus and spectrum licences, sections 60 and 106 could be amalgamated. In this regard, for example, the Act could provide for all radiocommunications licences to be allocated by auction, tender or for a pre-determined or negotiated price, with competition limits being able to be set in terms of numbers of licences or spectrum space.

5. Apparatus licence taxes - future changes

Apparatus licence taxes (set by ACA determination) are usually revised on an annual basis. It may be worthwhile for the ACA to consider issuing a directions paper on what its radiocommunications licence tax aims are for the longer term (eg 10 years time), indicating how it proposes to achieve these aims. In working towards a desired tax regime over an extended period, it would be a fairly straightforward exercise to raise some taxes and lower others each year to a reasonable extent, while maintaining revenue neutrality in real terms.

It would also be desirable for such an ACA directions paper to set out the justification for the amount which the ACA collects in licence taxes beyond the amount needed for cost recovery.

6. Radiocommunications licences - exclusive right to spectrum

Does the Radcom Act need to contain a provision which would generally provide a person with some guarantee of exclusive spectrum use where that person has been authorised on an individual basis to use a certain part of the spectrum? For example, where the ACA has issued a person with a land mobile licence involving certain spectrum and a certain transmitter location, should the Radcom Act prevent the ACA from issuing another person a licence which could lead to significant detracting from the first person's enjoyment of their licence (eg because the other person's licence had the same technical parameters as the first person's licence)?

7. Licensing of receivers

In the case of transmitter licensing, frequency coordination ensures that, in operating the transmitter, the licensee does not cause interference to other users. In the case of receiver licensing, frequency coordination is designed to protect the receiver from interference from other users.

It may therefore be worth considering whether or not the operation of receivers needs to be licensed (with heavy penalties for unlicensed use of licensable receivers), an alternative approach being for the ACA to *register* receivers requiring protection from interference and to charge the registrant for coordination arrangements and associated

spectrum denial (on the same basis as under the existing licence tax schedule). Care would be needed to ensure that any such approach took proper account of ITU provisions.

8. Licence tenure

As well as allowing for the extension of licence periods (referred to above at point 4(a)), a further approach to providing spectrum tenure for licensees would be to amend the Radcom Act to allow the ACA to issue for a fee (set out in an ACA determination [disallowable instrument] or determined by a price-based mechanism such as an auction) an option to renew a licence for a certain period. For example, a person might pay for a 5 year licence and an option to renew the licence for a further 5 years.

9. Extensions of time

In relation to the issue of radiocommunications licences, there are things that have to be done by a certain time (eg lodgment of application documents in the case of price-based allocation of licences). In some such cases a person, through no fault of their own, may not be able to meet the deadline. It may therefore be desirable for the Radcom Act to be amended to allow persons to apply for extensions of time in appropriate circumstances (as is the case under section 223 of the Patents Act).

10. Licence tax exemptions

Currently the Radiocommunications Taxes Collection Regulations provide for a transmitter or receiver licence tax exemption for the use of a transmitter or receiver solely or principally for the purposes of certain "emergency/safety of life" organisations. The exemption thus depends on the sole or principal purpose for which a transmitter or receiver is used. However, it might be fairer for the exemption to apply in respect of the tax attributable to each frequency used by the transmitter or receiver solely or principally for the exemption-related purpose. For example, if a licence authorises the operation of three frequencies, F1, F2 and F3 and the tax attributable to each frequency is T1, T2 and T3 respectively, and if only F1 is used solely or principally for an exemption-related purpose, then the tax for the licence would be reduced by T1.

Also, there may be value in amending the *Radiocommunications Taxes Collection Act 1983* to allow exemptions to be determined by the ACA (disallowable instrument) rather than to be made by regulations.

11. Instruments made by ACA: public consultation

It may be desirable, as a general rule, for the Radcom Act to require the ACA to consult publicly on disallowable instruments and other significant instruments which it proposes to make, and to specify what matters are to be taken into account by the ACA in making these instruments.

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