Trading in the radio spectrum: A new management rights approach

Bruce Slane examines the final legislative stage in New Zealand's program of telecommunications and broadcasting deregulation which became law this month

Introduction

As part of its reform of telecommunications including regulation of broadcasting in New Zealand, the third stage of the government's legislative programme was reached with the passage of the Radiocommunications Act. It covers both telecommunications and broadcasting and has the following purposes:

(a) to establish a management regime for the radio frequency spectrum which will facilitate the opening up of commercial telecommunications and broadcasting and the introduction of new services; and

(b) to maintain within the new management system allocation of radio frequency spectrum for non-commercial social purposes such as public safety, defence and security and for some non-commercial broadcasting services.

Background

Formerly a telecommunications monopoly was maintained by the New Zealand Post Office with some exceptions, notably for the Broadcasting Corporation of New Zealand in respect of television networks. Sound-radio and television broadcasting was licensed by the Broadcasting Tribunal. The industry was dominated by services operated by the Broadcasting Corporation which had inherited a former state monopoly. A few sound-radio services had been licensed by the former Broadcasting Authority prior to 1972 and many by the Broadcasting Tribunal since 1977.

In the first wave of deregulation the Post Office's telecommunications operations became a state owned enterprise (Telecom) and its monopoly powers were whittled away. In the second stage decisions were made to abolish the Broadcasting Tribunal and substitute a Standards Authority, a Broadcasting Commission and a spectrum management regime.

The Commission and the Authority came into being on 1 July 1989. The Commission's responsibility is to collect a public broadcasting fee paid by households using television receivers and to distribute the proceeds for the purpose of maintaining non-commercial services, services to remote areas and to subsidise indigenous television programming.

Late in 1988 the Broadcasting Corporation was split into two organisations, Television New Zealand Ltd and Radio New Zealand Ltd. Both state owned enterprises, which were given commercial objectives.

In August 1989 the Tribunal licensed a third television service. Attempts at judicial review failed and appeals were withdrawn. A modified version of the proposal approved by the Tribunal commenced transmission at the end of November 1989.

The Broadcasting Standards Authority has taken over the Broadcasting Tribunal's complaints functions but has in addition been required to set or approve industry standards in accordance with statutory requirements. It has more extensive powers to legislate as to programming standards. Its decisions on complaints are subject to an appeal to the High Court. The Authority has strong powers of enforcement including a power to close down radio and television services for up to 24 hours in respect of each complaint upheld.

The Standards Authority also has the right to award compensation of up to $5,000.00 for breach of privacy.

The present scheme of licensing is established under Part 2 of the Telecommunications Act 1987 and the Radio Regulations 1987. Licensing of broadcasting derived from decisions of the Broadcasting Tribunal which went out of existence on 31 December 1989.

The policy decision taken by the Government was that, to achieve greater efficiency, economic growth and choice, barriers to new entrants should be abolished.

The government commissioned a report from National Economic Research Associates (NERA) of London to conduct a review. It recommended spectrum management mechanisms for the new economic environment. Before the report was published the recommendations were adopted by the government.

Radiocommunications Act

The main features of the NERA report have been incorporated in the Act. It is clear however that they have been subject to considerable refinement by the officials of the Ministry of Commerce who in an extremely technical field have produced a complex piece of legislation after individual consultations with major frequency user groups but with little public debate. This legislation was passed into law in December but the text of all the changes from the Bill which was introduced into Parliament in August 1989 are not available for comment at the time of writing.

The Act is complex and detailed and not easy to absorb. In a sense it creates something comparable to a land registry for the spectrum. In particular:

1 Rights to spectrum use within defined radio engineering parameters are created in the form of management rights with an intended life of 20 years. The rights are accorded certain attributes of property under the Act including a right of transfer, aggregation or division. They may be pledged for borrowing purposes.

2 The holders of such management rights, called managers, may confer licences on others or on themselves for the use of the management rights within the parameters of those rights. In other words, the holder of the management rights of a frequency may confer licences on others to use that frequency in particular circumstances in particular places. The management rights are subject to statutory obligations and minimum standards designed to avoid radio interference. In addition to enforcement by the Secretary of

Commerce of statutory prohibitions against certain unlawful exercise of rights, the Act also give others a right to seek remedies.

A computerised registration scheme will be established for the recording of details of management rights and the licences as well as other transactions such as transfers, aggregations and mortgages.

The intention is that, where demand for spectrum is less than spectrum availability, allocations will largely be made as required.

To establish whether or not there is more demand than spectrum availability the Secretary will call for expressions of interest in parts of the spectrum and will then technically define the rights in accordance with perceived demands arising from the expression of interest and subsequent consultations. This planning role will have a profound effect on the future development of the use of the frequencies in the medium term. The process by which it decides how to tailor what is made available as it sees the needs of users, includes more extensive powers than any held previously by the Broadcasting Tribunal.

Following the definition of those rights a sealed bid "second price" tender arrangement will be used. The successful tenderer will be the party bidding the highest sum for the management right but the price paid will be that bid by the second highest tenderer.

The crown will be likely to retain a major role as a manager of some spectrum. The use of some frequencies will be constrained by international convention or agreement and may, in some instances, require management by the radio frequency service. Frequencies for defence, national security and public safety uses by government agencies will have to be protected and will most likely be dealt with by radio frequency service licences.

It is expected that it will take about 5 years before the commercially used spectrum is entirely moved into the new regime.

Transitional rights

All incumbent users will have the right to a minimum three year use of the frequency without rental from the date when management rights have been transferred under the tender system. Commercial broadcasters will also have incumbency rights for 20 years in return for a rental of 1.5 per cent of gross revenue. This can be discounted on favourable terms to a lump sum payment.

In the mobile telephone bands New Zealand Telecom will be treated (for the purpose of exercising transitional rights) as having management rights in the whole band. Telecom's three year incumbency right will therefore give reasonable expansion of business within the band and Telecom will also be able to match and pay any tender price that would otherwise succeed in displacing its operation after the thtree years.

The matching bid for historical reasons is not considered appropriate for the two frequency land mobiles.

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A real problem has occurred in relation to non-commercial broadcasting services. Some existing sound radio warrant holders, both commercial and non-commercial, have been selected by the government to be entitled to incumbency rights in respect of short-term broadcasting authorisations granted by system of licensing short-term broadcasting stations for specific events or for holiday periods or for recreational winter stations in mountain areas.

The government also licensed some student stations under this provision for ten months of each year to broadcast from usually lower powered transmitters to the student audience. The student stations filledl a minority interest market niche. A pragmatic decision to continue those rights in the Act for 20 years was controversial. A major Christian broadcaster with an expanding network acquired under the Tribunal system was excluded although it is non-commercial. Later, under electoral pressure, the broadcaster gained rent-free incumbency. Some of those obtaining incumbency rights under the special provision which will give them the use of the frequencies free of rental, accept advertising although not with profit-making motives.

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Significantly, the government has retained the right to allocate specified frequencies by any means it chooses. This patronage by the Minister of Broadcasting would appear to be a reversal of the previous policy over a number of years to take the government out of any direct control in relation to broadcasting and to provide for its operating independence from the government. It appears that during the "expressions of interest" period the government could assess non-commercial needs and provide for them. But in the event of competing claims no independent system for resolving conflicting interests is provided.

The previous licensing system provided a regulatory code limiting the aggregation and the ownership of stations and this has been abolished. Although the provisions of the Commerce Act and specific provision in the Broadcasting Act are intended to avoid domination of particular markets, it is likely that there will be no effective control of aggregation of ownership or control of broadcasting stations unless there is domination or market competition rules are breached. In a small country, with nearly all the daily newspaper circulation in the hands of two companies (one a multi-national news group), it might have been expected there would be concern at aggregation of ownership or control for social policy reasons.

Regulations similar to the existing code were included in earlier legislation to restrict overseas ownership which is limited to 15% in the case of television and with the consent of the Minister up to 25% in the case of soundradio.

Conclusion

The proposals are radical. They will be implemented and will be watched with interest by the communications industry, broadcasters and the lawyers who service them.

The system has been made possible partly because of New Zealand's remote location which gives it a freedom to deal with VHF and UHF spectrum without reference to other jurisdictions.

The Broadcasting Commission has a resemblance to the proposals of the Peacock Committee in Great Britain and will be watched with interest by those concerned to ensure public service elements of broadcasting continue in a commercial environment.

The legislation is interesting for lawyers because it puts into effect many of the ideas of the Torrens land title system but accepts and attempts to deal with the extraordinary complications and complexities which arise from the use of the radio spectrum which do not arise from the use of land.

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