Proposed Changes to Australia's Broadcasting Spectrum Licensing Framework

Joshua Gray examines the recommendations made by the Convergence Review panel in relation to the broadcasting licensing regime.

1. Introduction

A unified and flexible broadcasting licensing regime has long been on the policy agenda in many jurisdictions. The Convergence Review's Final Report (***Final Report***) proposes significant changes for the Australian broadcasting industry, including breaking the special case nexus between the activity of broadcasting and the use of the broadcasting services band, thereby potentially bringing broadcasting use of the radiocommunications spectrum back into the mainstream of radiocommunications licensing.

The broadcasting industry will find the recommendations mixed. On one hand, the licence fees they currently pay (based on a 48 year old legislative framework)[1] are likely to be significantly reduced. Broadcasters would also enjoy a new freedom to trade spectrum and thereby derive economic benefit from any spectrum efficiencies they are able to achieve. On the other, a more liberalised approach to the trading and management of spectrum capacity may increase competitive threats from new entrants making available creative new applications using the sixth multiplex – noting, however, the effects of such competition are likely be muted, given the Review's recommendation that such spectrum capacity be reserved for public interest broadcasting.

Spectrum licensing is a boon for governments. Speaking at the Australian Media and Communications Authority's annual Radiocommunications conference on 6 June 2012, the Secretary of the Department of Broadband, Communications and the Digital Economy (***Department***), Peter Harris, noted that spectrum renewals in the next four years are expected to raise approximately $3 billion for the government.[2] With budget discipline in mind, the government may find an increasing tension between achieving policy ideals reflected in the Final Report, such as the reservation of spectrum for particular uses, versus price maximisation through more pure market-based auctions. Spectrum policy will continue to be an area of great interest given the dynamic mix of politics, technological innovation and social values that feed into the debate of how to regulate an increasingly valuable and scarce resource.

2. Recommendations at a glance

The Final Report made the following three recommendations in relation to spectrum:

27. There should be a common approach to the planning, allocation and management of both broadcasting and non-broadcasting spectrum that includes:

    (a) a market-based pricing approach for the use of spectrum, and one that provides greater transparency when spectrum may be used for public policy reasons;

    (b) spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the *Broadcasting Services Act* 1992;

    (c) ministerial powers to reserve and allocate spectrum to achieve policy objectives considered important by the government and the Australian community, including public and community broadcasting, which have contributed to the diversity of the Australian broadcasting system; and

    (d) certainty for spectrum licence holders about licence renewal processes.

28. Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:

    (a) as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcasting use; and

    (b) commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.

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29. The new communications regulator should allocate channel capacity on the sixth planned television multiplex (known as the 'sixth channel') to new and innovative services that will increase diversity. The use of capacity on the sixth multiplex for the distribution of community television services should continue. Existing commercial free-to-air television broadcasters and the ABC and the SBS should be precluded from obtaining capacity on the sixth multiplex.

The Final Report notes that the current regulatory distinction between broadcasting spectrum and other forms of spectrum is no longer useful, and recommends that a unified and single framework for planning, management and regulatory oversight is adopted.

The new regulatory framework would mandate that spectrum planning take into account the public interest such as the social and cultural factors as currently exist in the *Broadcasting Services Act 1992* (Cth). The Review also recommends that the Minister be given powers to reserve categories of spectrum for public and community broadcasting. Some commentators have argued that this will allow broadcasters to retain significant political influence;[3] although, regulation of the media is always never far from politics.

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1 *Television Licence Fees Act 1964* (Cth); *Radio Licence Fees Act 1964* (Cth).

2 Geoff Long, 'Shakeup proposed for spectrum renewal fees' *CommsDay* (7 June 2012).

The Final Report recommends separating spectrum licences for broadcasters from other regulatory obligations such as content obligations. This approach is said to allow broadcasters greater flexibility to deliver content across different platforms and encourage more efficient spectrum use.

Broadcast planning in Australia reserved space for a 'sixth channel' (in addition to the current three commercial operators and two public broadcasters). The available capacity, 7Mhz, is capable of delivering a number of different channels and services. The Review recommends that this spectrum be not be allocated to existing operators (whether commercial or public broadcasters). Instead, this spectrum is to be allocated to a range of new content providers, with the objective of increasing diversity of Australian television services. The pricing of spectrum is discussed in more detail below. The Review also notes that the regulator should estimate and publish the value of this spectrum regularly.

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3. Implementation

The Final Report recommends a three-stage implementation of the proposed reforms:

1. replacement of existing apparatus licences with spectrum licences;
2. introduction of market-based pricing; and
3. spectrum licence reissue.

3.1 Licence transition

The Review recommends that existing commercial broadcasting apparatus licences are converted to spectrum licences, with tenure of 15 years (the standard spectrum licence period). Spectrum licences would be technologically neutral. To ensure that broadcasters continue to provide broadcasting services, the Review recommends that an initial licence condition be imposed on such converted licences so that the licence must be used to continue providing digital television services. No other licence conditions would be imposed.

Trading of spectrum rights, including agreements about leasing or sale of channel capacity, would be permitted under the proposed regime. Accordingly, so long as the licensee continued to provide digital television services using the spectrum, other parts of that spectrum could be traded and used for other uses. If voluntary and market based arrangements did not result in efficient use of spectrum by broadcasters then the Review suggests that the regulator should have the power to introduce a statutory access regime to allow new content providers access to unused capacity on reasonable terms and conditions.

3.2 Market pricing

Spectrum fees are proposed to be set based on the value of spectrum 'as planned for broadcasting use'. This is an important qualification on the licence fees that might otherwise be payable: note that this is not a pure form of market-based pricing, but rather one which seeks to achieve the particular policy objective of promoting diversity in television services, which may be lead to a lower price outcome than contending potentially higher 'value' uses.

The Final Report also notes that estimating spectrum value is problematic. The Review endorses the proposition that spectrum policy should err on the side of setting spectrum values lower rather than higher to ensure that spectrum is fully deployed and not wasted.

On 1 June 2012, the Department of Broadband, Communications and Digital Economy publically released a report commissioned by the Review on indicative pricing for broadcast spectrum (***Spectrum Pricing Report***).[4] The Spectrum Pricing Report adopts a net present value approach to estimating the 'unencumbered' value of a 7Mhz band of television broadcasting spectrum (i.e. without the attachment of any regulatory obligations). The Spectrum Pricing Report estimates that the annual value of this spectrum is $151.1-51.0 million – the range of which varies depending on whether the number of existing players in the market (3 versus 4). These fees are significantly less than the fees currently paid by television broadcasters in Australia.[5] The Spectrum Pricing Report also applies a similar analysis to radio broadcasting spectrum.

On 6 June 2012, the Secretary of the Department, Peter Harris announced that the Department wished to stimulate a discussion with stakeholders as to better ways to value spectrum licence grants and renewals, noting that all stakeholders had found the negotiation process around renewal of the mobile telecommunications spectrum licences as difficult and unsatisfactory. The Department has launched a new website, 'Spectrum Square' (http://s2.dbcde.gov.au/), as a forum for a continuing dialogue as to spectrum issues. It will be interesting to see whether this initiative creates broader and better engagement and new thinking as to spectrum pricing.

3.3 Spectrum licence reissue

Broadcasters will be given an opportunity to renew spectrum licences at market-based rates at the end of the proposed 15-year term. The Review adopted this approach to address concerns about regulatory certainty required for broadcasters to operate sustainable businesses. Only in limited circumstances, such as breach of a licence condition or overriding spectrum planning policy, would existing licensees not be given the opportunity to renew a spectrum licence.

4. Conclusion

The reforms proposed in the Review would achieve a 'converged' or unified licensing regime. However, these reforms would not truly de-couple spectrum from a particular use given the proposed requirement for licensees to continue to provide broadcast-like services. As technological innovation continues to develop and spectrum becomes increasingly valuable such policy objectives may come under increasing pressure.

The reforms to the spectrum licensing regime must also be read in conjunction with other proposed changes to regulatory obligations, such as Australian content requirements, of broadcasters as these obligations will impact the value of spectrum licenses.

Joshua Gray is a lawyer in the Corporate, Communications and Technology Group at Gilbert + Tobin Lawyers. The views expressed in this paper are those of the author.

3 Bernard Keane, 'Idiot's Guide to Convergence: spectrum in a post-broadcasting era' *Crikey* (10 May 2012).

4 Kip Meek and Robert Kenny (Communications Chambers), 'Indicative pricing for broadcast spectrum' (29 February 2012).

5 See, eg, FreeTV Australia, 'Submission by Free TV Australia Limited Convergence Review – Interim Report' (16 February 2012) 4.