



**FreeTV**  
Australia

**Submission by  
Free TV Australia Limited**

Australian Communications Authority

Private Management of Encumbered  
Spectrum Bands

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## Executive Summary

- The Broadcasting Services Bands are not suitable for management by the private sector.
- Free TV does not support the private band management scheme contemplated in the Discussion Paper.
- The starting point of any spectrum management must be maximising the overall public benefit derived from use of the spectrum. It can not be assumed that public benefit will flow from economic return or efficient use alone.
- The private band management scheme outlined in the Discussion Paper raises a range of public policy and legal issues.
- These issues should be considered by the Government following extensive consultation with incumbent spectrum users, before the ACA proceeds to canvass options for any private band management framework.
- International experience demonstrates that spectrum trading is in its infancy on a global basis. Further, the use of intermediaries as “shopping centre managers” in respect of spectrum is a novel concept which has only been tentatively addressed in the USA and New Zealand.
- Any proposal for the appointment of spectrum managers (other than the current regulator) should be treated with caution.

## Introduction

Free Television Australia (**Free TV**) is the peak industry body representing all 48 commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to comment in response to the discussion paper entitled “Private Management of Encumbered Spectrum Bands” (**Discussion Paper**) which was released by the Australian Communications Authority (the **ACA**) in February 2005.

The Discussion Paper seeks comment on a range of issues regarding the feasibility of private management of suitable encumbered spectrum. In the Paper, the ACA describes that a private band manager would operate like “a shopping centre owner sub-leasing the various units within the shopping mall to different businesses and retail tenants.”<sup>1</sup> Incumbent licensees would have the opportunity to become ‘tenants’ of the private band manager, via a contractual agreement negotiated between each tenant and the manager. The band manager would take on many of the roles currently performed by the ACA.<sup>2</sup> The Paper states that the “potential efficiency benefits within the managed bands could be significant.”<sup>3</sup>

The Paper states that the ACA recognises that not all bands will be suitable for inclusion in such a scheme. Amongst other issues, the Paper seeks comment on what bands should be considered for private management and what issues the ACA should address if it were to develop a private band management framework.

Free TV submits that the broadcasting services bands (**BSBs**) are not suitable for management by the private sector. Planning of spectrum for broadcasting services is subject to a system of detailed regulation set out in the *Broadcasting Services Act (BSA)* which is not comparable with most other spectrum bands. It requires wide public consultation to be undertaken and consideration of a wide range of economic, social and cultural objectives. Such a role can only be performed by a public planning body which is subject to a range of public accountability mechanisms.

Free TV’s members are also large users of radio spectrum outside the BSBs for supplementary uses to support the services provided by their use of the BSBs. For example, television broadcasters use spectrum for general mobile communications, television outside broadcast applications, interconnecting studio to transmitter microwave links for transporting television signals, national and international satellite connections, wireless microphones, weather radar and aeronautical communications for helicopters and others. Television broadcasters also use spectrum to deliver services from all over Australia to studio and distribution centres which are vital to regional broadcasting and dissemination of news and other content.

Free TV does not support the private band management scheme outlined in the Discussion Paper. The scheme is based on the premise that an ‘efficient’ market allocates spectrum to those that place the highest value on it. Free TV rejects this approach. The starting point of any consideration of spectrum management must be the overall public benefit derived from use of the spectrum.<sup>4</sup> It can not be assumed that public benefit will flow from economic return or “efficient use” alone.

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<sup>1</sup> Ibid, page 7.

<sup>2</sup> Ibid, page 8.

<sup>3</sup> Ibid, page 9.

<sup>4</sup> This approach is consistent with the leading object of the Radiocommunications Act which requires the ACA “to maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum”

The ACA's approach ignores the considerable public interest in broadcasters' use of non-BSBs spectrum for necessary supplementary uses, such as coverage of live news and emergency events, major sporting events and issues of local significance.

The ACA's approach also ignores the complex regulatory regime governing broadcasting which imposes a range of obligations on broadcasters designed to ensure that the Australian public receives the greatest possible benefit from use of the spectrum allocated for broadcasting purposes. It also ignores the considerable direct economic benefit provided to the community through broadcasting licence fees paid by commercial television broadcasters to the Government<sup>5</sup>. These licence fees are directly linked to the revenue-generating capacity of the spectrum, but are ignored by an 'shopping centre owner' model which looks only to maximising rent dollars for licensing of spectrum.

Further, the shopping centre analogy fails to appreciate that whereas a shop-front is largely homogeneous, spectrum is not. Many radio applications only work in one spectrum band, constrained by either technical characteristics or by the quantity of existing equipment.

Free TV submits that the private band management scheme outlined in the Paper raises a range of public policy and legal issues. These issues should be considered by the Government following extensive consultation with incumbent spectrum users, before the ACA proceeds to canvass options for any private band management framework.

This submission is divided into the following sections:

- Section 1:** outlines the reasons why the BSBs are not suitable for management by the private sector.
- Section 2:** raises some of the public policy and legal issues which need to be considered before proceeding with any private band management framework.
- Section 3:** comments on Australian experience to date and notes calls for caution overseas.

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<sup>5</sup> Commercial free-to-air television broadcasters paid licence fees of almost \$200 million in 2002-03 and have paid more than \$2 billion over the last 20 years, in addition to other taxes.

# 1 Broadcasting Services Bands

Free TV submits that the broadcasting services bands (**BSBs**) are not suitable for management by the private sector, for the reasons discussed below.

## 1.1 Detailed regulation of broadcasting planning and licence allocation

As the ACA is aware, the BSBs are subject to a system of detailed regulation which is not comparable with most other spectrum bands.

Under section 31 of the *Radiocommunications Act* the Minister designates spectrum for use primarily for broadcasting services and refers it to the Australian Broadcasting Authority (**ABA**) for planning under Part 3 of the BSA.

Part 3 of the BSA explicitly aims to achieve an open and accountable planning process. The ABA is required to undertake wide public consultation in preparing frequency allotment plans and licence area plans, and in determining planning priorities between different areas and different parts of the broadcasting services bands.<sup>6</sup>

The planning function is complex<sup>7</sup> and must take into account and balance the range of economic, social and cultural objectives set out in the BSA<sup>8</sup>. Planning establishes the “blueprint” for broadcasting services across all areas of Australia.

This planning function could not be undertaken by a private band manager. It must be performed by a public planning body which is subject to a variety of public accountability mechanisms, including a degree of Ministerial direction, as set out in the BSA.<sup>9</sup>

## 1.2 Link between broadcasting planning & licensing and broadcasting regulation

Broadcasting planning and licensing are fundamental elements of the scheme for broadcasting regulation.

Broadcasting planning effectively determines the style of content provided to audiences (depending on whether a national, commercial, community or narrowcasting service is planned), and where and how audiences can receive and decode that content.

Broadcasting licences operate under a framework designed to allow long-term investment decisions in broadcasting infrastructure (such as digital television technology) and continuous delivery of broadcasting services to the public. This

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<sup>6</sup> Section 27 of the BSA. Section 27 also provides that the ABA must records and make available for public inspection the advice and assumptions which it uses in performing these functions. Further, section 35 requires that any planning instruments made under Part 3 be notified in the Gazette.

<sup>7</sup> Planning for broadcasting services requires many more, and more complex, considerations than planning for other radiocommunications uses. Many other communications uses focus principally on the carriage of the service, or technical objectives, and the provider of the service is not expected to be responsible for fulfilling community or cultural objectives. For a detailed discussion of broadcasting planning and spectrum efficiency refer to Free TV’s submission to the Department of Communications, Information Technology & the Arts Review of the Broadcasting Services Bands Spectrum Identification and Allocation, February 2005.

<sup>8</sup> As explained in *The ABA’s General Approach to Analog Planning*, the ABA is required to balance objects including the promotion of economic and efficient use of the spectrum, the promotion of availability to audiences of a diverse range of radio and television services, the promotion of high quality and innovative programming, the encouragement of appropriate coverage of matters of local significance, and the facilitation of the development of a broadcasting industry that is efficient, competitive and responsive to audience needs.

<sup>9</sup> See, for example, section 25 of the BSA.

framework includes a long licence duration, a requirement on the ABA to renew a broadcasting licence except in certain circumstances, and a limited power to suspend or cancel a licence.

A broadcasting licence also has a range of conditions and obligations attached to it, including (in the case of commercial television) ownership and control restrictions, a requirement to meet minimum quotas of Australian content including sub-quotas applying to adult drama, children's programming and documentaries, local content requirements that apply to regional broadcasters, and the payment of annual licence fees. Broadcasters are also subject to other requirements concerning the content of programming delivered to children, restrictions on the types of programs that can be shown at certain times of the day, a requirement to deliver a minimum amount of closed captioning, limits on amounts and types of advertising and many others.

The detailed system of regulation to which broadcasting services bands licences of all types are subject, are such that they should be allocated and regulated only by a public authority answerable as appropriate to the Minister, the Parliament and subject to administrative law review. Free TV is not aware of any contrary view being put at any political or administrative level, noting that the ACA's discussion paper is directed to management of spectrum licences rather than broadcasting licences which are linked to apparatus licences for the operation of broadcast transmitters.

### **1.3 Integral relationship between broadcasting and related transmitter licences**

Importantly, a broadcasting services bands licence also has attached to it a right to a transmitter licence to be used for delivery of the relevant broadcasting service.

This statutory scheme flows from section 102 of the *Radiocommunications Act*, which requires the ACA to issue to a broadcasting services bands licensee a transmitter licence that authorises operation of one or more transmitters to transmit the broadcasting service. Transmitter licences used for broadcasting purposes within the broadcasting services band are also subject to slightly different conditions to other transmitter licences (see section 109 of the *Radiocommunications Act*).

A broadcasting services bands licence and the related transmitter licence must work "hand in glove", to enable continuous and appropriate delivery of the relevant broadcasting service. Furthermore, within this scheme the broadcasting services bands licence issued under the BSA is the dominant licence. It is issued on the basis of planning undertaken by the ABA. As noted above, once allocated, the ACA must allocate a corresponding transmitter licence or licences.

The integrated nature of broadcasting planning and licence allocation under the BSA and transmitter licence allocation under the *Radiocommunications Act* is expressly recognised by subsection 238(3) of the *Radiocommunications Act*. This section permits the ACA to delegate to the ABA a range of the ACA's powers, in relation to broadcasting services bands transmitter licences. In practice, the ABA has exercised these powers, because of the integral relationship between the two licences.

Free TV submits that it would be entirely inappropriate to seek to uncouple broadcasting regulation and regulation of the attendant transmitter licences by introducing private sector band management. This approach would be contrary to the planning regime in the BSA and the exercise by the ABA of the ACA's powers under delegation.

## 1.4 Sharing of the BSBs is already accommodated in certain circumstances

The BSBs are set aside for primary use by broadcasters. The BSA allows the ABA to authorise alternative temporary uses of the BSBs in circumstances where, in effect, a part of the broadcasting services bands would lie idle if it were not temporarily put to some other use.<sup>10</sup>

However broadcasting uses must have priority of access to BSB spectrum. Otherwise, interference would lead to a loss of quality and viability of existing television broadcasting services. Australian regulatory agencies have obligations under ITU Radio Regulations & Recommendations and DTTB planning methodologies to ensure that broadcasting is protected from any interference from secondary fixed and mobile services in the BSBs.

## 2 Public policy and legal issues associated with private band management

### 2.1 Economic return versus public benefit

Free TVs members are also large users of radio spectrum outside the BSBs for supplementary uses to support the services provided by their use of the BSBs.

Free TV is concerned that the private management scheme contemplated by the ACA assumes that leasing spectrum rights to those who are willing and able to pay the highest rent results in:

- the highest 'value' and best use for the spectrum;
- efficient use of the spectrum; and
- maximum public benefit from use of the spectrum.

Free TV rejects this approach. The starting point of any consideration of spectrum management must be the overall public benefit derived from use of the spectrum.<sup>11</sup> It can not be assumed that public benefit will flow from economic return or "efficient use" alone.

The ACA's approach ignores the considerable public interest in broadcasters' use of non-BSBs spectrum for necessary supplementary uses, such as coverage of live news and emergency events, major sporting events and issues of local significance.

The ACA's approach also ignores the considerable direct economic benefit provided to the community through broadcasting licence fees paid by commercial television broadcasters to the Government.<sup>12</sup> These licence fees are directly linked to the revenue-generating capacity of the spectrum, but are ignored by an 'shopping centre owner' model which looks only to maximising rent dollars for licensing of spectrum.

The ACA's approach also ignores the link between broadcasting licensing and the detailed regulation broadcasters are subject to (described in section 1.2 above) which

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<sup>10</sup> Section 34. Armstrong, Communications Law and Policy, Vol 1, para [5560].

<sup>11</sup> This approach is consistent with the leading object of the Radiocommunications Act which requires the ACA "to maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum"

<sup>12</sup> Commercial free-to-air television broadcasters paid licence fees of almost \$200 million in 2002-03 and have paid more than \$2 billion over the last 20 years, in addition to other taxes. Licence fees are set on a sliding scale with metropolitan licensees generally paying 9% of their gross receipts which in 2001-02 was equal to an average of 36% of profits

is designed to ensure that broadcasters receive the greatest public benefit from use of the spectrum for free-to-air broadcasting services.

Free TV submits that a private band management scheme of the kind contemplated by the ACA can not properly take account of overall public benefit.

## 2.2 Technical constraints

Unlike a shopping centre model, radio tenants are limited in their ability to move from one spectrum allocation to another. Australian radio communications operates with worldwide influences. Bands are allocated in the Australian Radio Frequency Spectrum Plan based on ITU Radio Regulations. The ITU Radio Regulations set out international agreements on spectrum use. These agreements are necessary for limiting interference between services. The allocations of bands in different regions for different purposes, also impact on the availability and design of consumer electronics equipment.

As a result, even where it is technically possible for a radio tenant to move to another spectrum band, availability of equipment and legacy issues with existing consumer equipment will generally mean that the costs far outweigh the benefit. In these circumstances, it is difficult to see how a private band manager can exercise any freedom to “decide on the best use of the band”.

## 2.3 Public law considerations

A further issue of concern to Free TV is the question of how a private band management scheme would ensure that the administration of spectrum is fair, transparent and accountable.

The ACA’s proposal envisages that “tenants” would hold tenure over spectrum on a contractual basis, in the same manner as tenants in a shopping centre. However, unlike a shopping centre, the source of the relevant regulatory framework for spectrum management is not private contractual law, but a statutory framework which flows from the Commonwealth’s constitutional power under section 51(v) of the Constitution (which refers to postal, telegraphic, telephonic and other like services).

Any private band management scheme would need to create an appropriate legal structure to ensure that the band manager is bound to accord procedural fairness and act in accordance with administrative law principles and that the tenant has rights which are similar to those already available under the *Radiocommunications Act*.<sup>13</sup> Such a structure is likely to be complex and subject to litigation.

Free TV notes that similar issues concerning imposition of public law obligations on private bodies which undertake regulatory or quasi regulatory functions have been the subject of litigation: see, for example, *R v Panel on Take-Overs & Mergers, Ex parte Datafin* [1987] QB 815, *Masu Financial Management Pty Ltd v FICS* (2004) 50 ACSR 554, *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242.

## 2.4 Competition and consumer issues

Any private band management framework would also need to deal with a range of complex competition and consumer issues. For example, a failure to create an appropriate legal structure to regulate the rights of the tenant will inevitably result in a

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<sup>13</sup> For example, the right of appeal available under section 285 of the *Radiocommunications Act*.

focus on the unconscionability and consumer protection provisions of the *Trade Practices Act*, in order for a tenant to address any perceived imbalance in bargaining position between the tenant and the private sector manager.

We note that in a shopping centre context, this perceived imbalance has given rise to litigation under the Trade Practices Act: see, for example, *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, *ACCC v Leelee Pty Ltd* [1999] FCA 1121 and the settlement reached in the matter of *Westfield Shopping Centre Management Co. (Qld) Pty Ltd*.

There are important issues of ensuring access to spectrum on non-discriminatory terms. Any private band management framework would need to regulate decisions on the granting and monitoring of spectrum made by a band manager which is a vertically integrated entity (for example, a band manager which is itself a spectrum user or technology supplier). In such a case a band manager would have an incentive to act as a monopolist, preferring some spectrum users or even technologies over others. Although competition limits exist under Part IV of the *Trade Practices Act* the expense delay and difficulty of enforcing competition limits would severely hamper efficient spectrum use and overall public benefit. It is important that spectrum management questions are able to be resolved in a very dynamic commercial environment.

These issues suggest to Free TV that the whole question of private sector band management needs much more detailed consideration, particularly in terms of legal and public policy. Ultimately, band managers are like shopping centre owners, entities for which the primary operating motive is profit. This is not inherently wrong – the commercial broadcasting sector is also based on this premise. However, as an imperative it is not necessarily consistent with the public obligations which a band manager would inevitably need to perform. While the public law issues are particularly acute in relation to broadcasting regulation, in Free TV's submission they arise generally in relation to spectrum management.

## **2.5 Interface with other spectrum users and agencies**

As the Discussion Paper notes, private sector band management will be undertaken only for parts of the spectrum. Key unresolved issues will be the method of interface and legal mechanisms for resolution of disputes between those band managers and users of other spectrum. For example, there will inevitably be spectrum interference issues between private sector band managers and users of spectrum outside those bands.

Protecting broadcasting services from interference is a paramount consideration. The long-standing regulatory policy concerning free-to-air television has focussed on protecting every Australian's right to receive high quality free-to-air television services, irrespective of who they are and where they live. As a result, the Australian public has high expectations about the quality of the television they expect to receive.

Any private band management framework would need to ensure that the public interest in interference-free broadcasting services is protected and mechanisms are in place for the rapid resolution of disputes.

The private band management scheme contemplated by the ABA may lead to forced sharing between incompatible users where efficient coordination of use can not be assured.

## 2.6 Incumbency issues

The Discussion Paper does not address the question of incumbents. Any private band management framework would need to preserve the rights of incumbents who have obtained these rights under a particular statutory framework. A loss of existing incumbent rights would give rise to questions of compensation under section 51(xxxi) of the Constitution. In addition, incumbents will usually have undertaken major investment in infrastructure and service delivery systems. At an economic level, questions of dislocation and inefficiency would arise if incumbent rights are not grandfathered.

## 3 Experience to date

### 3.1 Australia

Australia has auctioned spectrum in a number of bands and that spectrum has been available to trade on a secondary basis using Standard Trading Units. However, the practical outcomes of establishing a regime for spectrum trading (and implied spectrum management rights) has led to a number of results which indicate that enabling a secondary market in spectrum does not always lead to ideal outcomes.

#### The 3G auction in Australia

The auction for 3G spectrum in Australia was a multiple round, simultaneous ascending auction with a reserve price by lot. It concluded in March 2001, with the understanding of the overpayment for spectrum in Europe. In order to ensure that the reserve pricing was set so as to ensure that the auction winners paid the appropriate economic rent and that all of the prospective bidders would actually bid, the ACA engaged in significant consultation with the bidders.

As a result of this consultation, the reserve prices were set very close to the market prices and those lots which sold (and 17.5% of lots remained unsold) were priced within 10%<sup>14</sup> of the reserve for all lots<sup>15</sup> in an auction which lasted 19 rounds (and was resolved in 7 rounds)<sup>16</sup>.

#### Post auction trading in Australia

There has been little post auction trading in Australia. That which has occurred has been confined to:

- (a) trading in spectrum used for paging services; and
- (b) trading in isolated lots.

An example of the second form of trading is provided as a result of the first (2000) 3.4 GHz auctions where there was competition between AKAL, which is now associated with broadband wireless operator Unwired and pay television operator Austar. AKAL bought licences in all areas for \$A95 million and Austar's early auction bids were successful in acquiring some lots for \$A14 million.<sup>17</sup> Austar sold the spectrum it had acquired to Unwired in 2001.<sup>18</sup>

<sup>14</sup> [http://internet.aca.gov.au/ACAINTEER.9175330:STANDARD:1686532112:pp=DIR1\\_125,pc=PC\\_845](http://internet.aca.gov.au/ACAINTEER.9175330:STANDARD:1686532112:pp=DIR1_125,pc=PC_845)

<sup>15</sup> [http://internet.aca.gov.au/ACAINTEER.9175330:STANDARD:1686532112:pp=DIR1\\_125,pc=PC\\_842](http://internet.aca.gov.au/ACAINTEER.9175330:STANDARD:1686532112:pp=DIR1_125,pc=PC_842)

<sup>16</sup> [http://auction.aca.gov.au/auction\\_results/2ghz\\_results\\_page/auction\\_cycle\\_2ghz.asp](http://auction.aca.gov.au/auction_results/2ghz_results_page/auction_cycle_2ghz.asp)

<sup>17</sup> [http://internet.aca.gov.au/ACAINTEER.4259894:STANDARD:769721664:pp=DIR1\\_124,pc=PC\\_805](http://internet.aca.gov.au/ACAINTEER.4259894:STANDARD:769721664:pp=DIR1_124,pc=PC_805)

<sup>18</sup> [http://www.unwired.com.au/about/annualreports/Breathe\\_Group\\_Limited\\_Prospectus.pdf](http://www.unwired.com.au/about/annualreports/Breathe_Group_Limited_Prospectus.pdf)

### **Return to apparatus licences**

Outside of the capital cities in Australia (and, arguably only outside of Sydney and Melbourne), there is insufficient demand for spectrum in any bands to create a primary or a secondary market. Indeed, rather than using tradable spectrum licensing for broadband wireless access spectrum, the ACA has returned to apparatus licensing but with a “use it or lose it” condition on the licence.<sup>19</sup>

### **Effects of inflated auction prices**

Although Australia held its 3G auctions late enough to avoid the inflated prices paid in Europe, there was a degree of exuberance demonstrated in the 1800 MHz PCS auctions held in March 2000 where \$A1.327 billion was paid.<sup>20</sup> The bidding by One.Tel<sup>21</sup> at 15 times the price paid by incumbents just two years previously<sup>22</sup> was one of the causes of its failure.

Subsequently, the Receivers to the One.Tel spectrum have tried to sell that spectrum at prices similar to those obtained in 1998 – they have not found a single buyer.

### **Misreading the market**

The Australian system also allows for conversion of licences from apparatus licences to, tradable spectrum licences. This process has been used in the 2.3–2.4 GHz multipoint distribution service band. The conversions were done by TARBS and Austar. TARBS paid \$A45 million for the conversion rights and then sold the converted spectrum licences to Austar for \$A135 million. That is, the conversion process allowed TARBS to extract an economic rent of \$A90 million, rather than it being collected on behalf of the state. There is no inherent function of spectrum managers that would avoid this type of market error.

### **Development of a secondary market**

Free TV supports the conclusion in the Report of the Radiocommunications Review (June 2001) that *“Tradeability of licences, coupled with more flexible conditions for spectrum licences and longer licence terms open the possibility for licensees themselves to respond to changes in the market and in technology to change ownership and use ... The Review concluded that it was too early to consider additional legislative initiatives to encourage development of a secondary market, which if desirable, should be a natural development of a more market-oriented approach to spectrum.”*<sup>23</sup> (emphasis added).

## **3.2 Overseas**

International experience demonstrates that spectrum trading is in its infancy on a global basis. Further, the use of intermediaries as “shopping centre managers” in respect of spectrum is a novel concept which has been tentatively addressed in the USA and New Zealand. As a result, any proposal for the appointment of spectrum managers (other than the current regulator) should be treated with caution. Indeed, many of the respondents to the recent inquiry by Ofcom which addressed the same issue

<sup>19</sup> [http://internet.aca.gov.au/ACAINTER.4259894:STANDARD:769721664:pp=DIR1\\_128,pc=PC\\_2839](http://internet.aca.gov.au/ACAINTER.4259894:STANDARD:769721664:pp=DIR1_128,pc=PC_2839)

<sup>20</sup> [http://auction.aca.gov.au/auction\\_results/pcs\\_2000\\_results\\_page/index.asp](http://auction.aca.gov.au/auction_results/pcs_2000_results_page/index.asp)

<sup>21</sup> [http://auction.aca.gov.au/auction\\_results/pcs\\_2000\\_results\\_page/pcs\\_lot\\_prices.pdf](http://auction.aca.gov.au/auction_results/pcs_2000_results_page/pcs_lot_prices.pdf)

<sup>22</sup> [http://auction.aca.gov.au/auction\\_results/pcs\\_results\\_page/index.asp](http://auction.aca.gov.au/auction_results/pcs_results_page/index.asp)

<sup>23</sup> Report of the Radiocommunications Review, June 2001, page 6.

counselled against rapid moves in this direction until parallels could be drawn from overseas jurisdictions.

Free TV Australia concurs with the cautious approach on the basis that there has been no successful implementation of non-government spectrum management on a global basis to date. Further, those regimes which have authorised spectrum trading have, virtually universally, excluded spectrum used for broadcasting from such schemes.

The economic basis for the appointment of spectrum managers assumes a level of efficiency in the private sector that is not perfectly apparent. There is a significant risk that such appointment will lead to rents staying with spectrum managers which would otherwise be for the public good. Indeed, it is unclear as to why a rational firm would become a spectrum manager unless it believed that it could collect such rents.

The following sections discuss developments in the United Kingdom, United States and New Zealand.

### 3.2.1 United Kingdom

#### Introduction

Ofcom has adopted policy that will lead to the market managing the radio spectrum within the boundaries of terms in the licences as set by Ofcom. This is known as “market mechanisms” and was strongly recommended in the Review of Radio Spectrum Management (the **Cave Report**) that the UK Government commissioned on spectrum management in 2001.

#### Ofcom vision

In November 2004, Ofcom issued a discussion paper on spectrum trading entitled “Spectrum Framework Review”. This sets out Ofcom’s vision for spectrum management as follows:

- (a) Spectrum should be free of technology and usage constraints as far as possible. Policy constraints should only be used where they can be justified;
- (b) It should be simple and transparent for licence holders to change the ownership and use of spectrum; and
- (c) Rights of spectrum users should be clearly defined and users should feel comfortable that they will not be changed without good cause.

Ofcom foresees an environment (based on spectrum scarcity) where:

- 72% of spectrum is market managed and traded;
- 21% of spectrum (including broadcasting spectrum) is managed by Ofcom as it is currently (the “command and control” model); and
- 7% of spectrum will be licence exempt.

#### Spectrum trading in the UK

The responses to the Spectrum Framework Review were due on 15 February 2005 and there has been no final report by Ofcom at this stage. However, many of the respondents urged caution. An example, from Spectrum Trading Associates (which would benefit from a change to market mechanisms) was:

*“Although we are strongly supportive of spectrum trading and liberalisation as a means of encouraging fuller and more efficient use of spectrum we would stress*

*that it is still unproven on a large scale and it is essential that the effectiveness of using spectrum is continually tracked. Particular dangers are that the spectrum packages which are initially traded may be not well matched to future systems and applications in terms of bandwidths, paired band arrangements, geographic restrictions etc. How much intervention might be appropriate to aid such problems should be reviewed and considered further”<sup>24</sup>*

BT made similar comments:

*“Ofcom needs now to deliver greater clarity over such matters as what will or will not actually be allowed in particular bands; how spectrum rights and obligations will be defined; how interference management will be handled; whether or not full technology neutrality (within sensible technical constraints to protect other spectrum users) will apply; to what extent full liberalisation will be allowed in current and new licences; and if, how and for how long special measures will be in place to protect the 3G services. This list is not exhaustive, but these are some of the issues that should be resolved, in good time, prior to embarking on the award process.*

*Without such certainty and clarity it remains very difficult for existing and prospective players to explore potential markets; to devise innovative applications for the spectrum; to explore technologies and initiate dialogues with manufacturers; to build commercial propositions and business cases; to properly value the spectrum awards; to secure budgetary provisions for spectrum and hardware; to design customer support systems and to plan physical deployments”.*

Similarly, Vodafone stated:

*“It is therefore critical that, before taking any actions, Ofcom should decide on and publish a detailed policy statement explaining:*

- (a) what new spectrum is to be made available for use, and when;
- (b) what criteria will be applied in deciding to whom any new spectrum should be licensed;
- (c) when existing licensees of spectrum are to be released from existing restrictions on the use of such spectrum (and whether any restrictions will remain) and when they are to become tradeable;
- (d) any new arrangements for the termination, revocation or expiry of existing licences, and any licence fees required to be paid during any licence periods running on after any initial fixed term; and
- (e) the means by which, and extent to which, Ofcom will protect licensees from interference with the enjoyment of their spectrum arising from the exercise by other licensees of freedoms to use other bands of spectrum”.

This regulatory uncertainty analysis would apply particularly to broadcasting spectrum as set out in responses by the national and commercial broadcasters.

ITV:

*“the introduction of spectrum trading will be a complex process, particularly in sectors that are underpinned by extensive public policy objectives. Broadcasting is one such sector and the consultation document rightly acknowledges that this will necessitate a slightly different approach, taking particular account of the Government’s desire to sustain public service broadcasting”.*

<sup>24</sup> <http://www.ofcom.org.uk/consult/condocs/sfr/responses/sta.pdf>

*“It seems sensible not to rush into the introduction of trading in the broadcasting sector. However, the timing of any future trading should be dictated more by the level of certainty surrounding broadcasting spectrum issues in general, rather than the need to learn from the experience of other sectors”.*

BBC:

*“It will be essential that the UK’s future regulatory framework must be appropriate to promote competition while not losing sight of public interest objectives. Chief amongst these will be ensuring that, in a more competitive marketplace of converging services and service delivery, the universal service obligations of the existing public service broadcasters can continue to be met – and that future public services, including the Government’s e-services, will not be unduly denied access to radio spectrum as a result purely of competition concerns”.*

The Cave report proposed spectrum trading. In a subsequent consultancy<sup>25</sup>, Cave and his co-authors considered the introduction of administered incentive prices (AIP) as the basis for more efficient spectrum pricing. The same paper conceded that secondary trading in the presence of AIP would be a good indication of an inappropriate setting by regulators of the AIP<sup>26</sup>.

The consultancy noted that the UK Government response to the Cave report decided that AIP applied to analogue television should promote digital switchover and, in the case of digital terrestrial TV, AIP should also promote more efficient use of the spectrum. Cave then went on to report that the promotion of digital switchover and the objective of economic efficiency were likely to be inconsistent.

That is, the UK Government has separated out the regulation of the television broadcasting spectrum from the spectrum trading debate. Given that the UK commercial television licensing fees are significantly lower than those in Australia (see Table 1), these licensees are better able to bear a spectrum access cost.

Qualifying Revenue bands	Tariff for 2004/05
£0m – £10m	0.1408%
£10m – £35m	0.7843%
£35m – £75m	1.3904%
£75m – £400m	2.8520%
Over £400m	0.0000%

**Table 1 – Commercial television (Channel 3, Channel 4, Channel 5) licence fees in the UK**

### 3.2.2 United States of America

The Federal Communications Commission (FCC) has recently adopted new policies and procedures to facilitate broader access to spectrum resources through the use of spectrum leasing arrangements. As yet, there is no evidence of the success, or otherwise of the policies. However, there have been warnings from previous Commissioners of the FCC on the issues of regulatory uncertainty. When the proceeding was initiated in November 2000, then Commissioner Harold W. Furchtgott-Roth expressed reservations that remain largely unanswered:

<sup>25</sup> *An Economic Study to Review Spectrum Pricing*, Indepen, Aegis Systems and Warwick Business School, February 2004

<sup>26</sup> At chapter 5.

*“While the Commission today calls for a more active secondary spectrum market, it largely misses an opportunity to define the property, contract and liability rights associated with a spectrum license. Absent a clear definition of the rights of its licensees, secondary markets cannot reach their full potential...the Commission must accept as a consequence of increased regulatory uncertainty that secondary markets will not flourish. Few want to buy something that cannot be defined”.*

### 3.2.3 New Zealand<sup>27</sup>

New Zealand has shown that it is feasible to create tradable spectrum rights. However, there has been little secondary trading in licence rights and management rights have been acquired by the users of the spectrum. This creation of rights was largely accomplished through a three-tier system of rights:

- (a) **Management rights** bestow the exclusive right to the management of a nationwide band of frequencies for a period of up to 20 years. Within this band, the manager can issue licences. They are not constrained as to the uses for which licences are issued;
- (b) **Licence rights** are derived from spectrum licences that are issued by the management rights holder which allow licensees the right to use frequencies within their bands. Licences are use specific and defined in terms of transmitter sites. The management rights holder can issue licences to itself; and
- (c) In blocks of spectrum where management rights have not been created, the legacy regime of non-tradable **apparatus licences** continues.

The Government favoured a progressive conversion of licences to a spectrum rights regime. As the initial owner of all management rights, the Government has used auctions to make primary assignments of tradable management rights. There were 91 management rights as at February 2004, with the New Zealand Government retaining ownership of 15 of these rights, predominantly over spectrum used to provide public services.

Not all of the spectrum has been placed within the management rights regime. Most of the spectrum remains under the administrative scheme and the management rights approach has been applied primarily to high value commercial spectrum for the telecommunications sector, and using subordinate spectrum licences under Crown held management rights, to the broadcasting industries. The New Zealand Government has decided that the spectrum used by broadcasters in both the UHF and VHF spectrum will be available for renewal on the basis of an offer made by the New Zealand Government. If the offer is not accepted, the spectrum rights will be offered by on auction basis.

That is, by its decision in May 2003, and by the offers sent to UHF broadcasting incumbents in respect of spectrum rights from 2010–2020, the New Zealand Government has determined that there is no need for a “shopping centre manager” for broadcasting spectrum.

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<sup>27</sup> Ministry of Economic Development at <http://www.med.govt.nz/rsm> and <http://spectrumonline.med.govt.nz>