

Trading in Radcom Licences: some future shocks

Paul Mallam examines the creation of a new spectrum licence and the tradeable nature of rights of access to the spectrum.

The Radiocommunications Act 1992 was a legislative response to the rapidly increasing technological and commercial demands being placed upon radiocommunications spectrum. Amongst other things, the Act creates a new spectrum licence, which involves tradeable rights of access to the spectrum for periods of up to ten years. Much of the new trading system is yet to be fleshed out by the newly created Spectrum Management Agency (the "SMA"), which has responsibility for administering the Act.

The purpose of this paper is to suggest that, whatever approach is adopted by the SMA, the new Act will inevitably lead to some policy and legal surprises in the future.

Trading in Licences

The provisions in the Act which deal with trading in spectrum licences are beguilingly simple. Section 85 of the Act provides for the assignment of licences. Any assignment must comply with section 88, pursuant to which the SMA may determine rules for the assignment of spectrum licences. But what are the consequences if a transferor fails to comply with the rules determined by the SMA? Is the assignment effective, notwithstanding any defect in the transfer? On one view, this is a matter for the parties to the transaction. However, that is not entirely so, because subsection 86(2) provides that the assignment cannot take effect until the Register of Licences is amended.

Where the SMA's rules have not been compiled with, should registration be effected? This in turn gives rise to an issue of whether the Act requires substantial or strict compliance with the rules regarding assignment. If strict compliance is required, then compliance with every aspect of the rules is necessary. Otherwise, the assignment will be ineffective.

Further, what if the rules are not complied with at all? In that case, is the assignment invalid? If so, is the SMA entitled to regard the purported vendor of the licence as continuing to be the licensee? If so, is the purported purchaser transmitting unlicensed radio-communications? At best, the purported purchaser might be regarded as a third party user.

The above examples highlight the importance of the SMA's rules for

assignment of licences, in the overall scheme of administration. Those rules must be clear and certain, but sufficiently flexible to cover the wide-ranging circumstances in which a licence might be assigned. For example, apart from a sale of the licence, assignment might occur by will, bankruptcy, winding-up of a company, court order or devolution of law. All of these examples give rise to their own issues.

Register of Licences

The concept of a tradeable licence also gives rise to questions regarding the status of the Register of Licences. The effect of section 85 of the Act appears to be that it is a register of title, somewhat similar to the Torrens system of land title. If so, then some questions must be raised regarding the effect of section 144, which provides for registration of the details of authorisations given by licensees to third party users to operate devices under their licences. If entry of a licensee on the Register provides proof of ownership of the licence, is registration of an authorisation given to third party users an act which confers some legal entitlement? If so, what is the result if a licence is transferred "under the feet" of a third party user? Will the third party user be able to claim continuity of tenancy, in much the same way that a lease runs with the land, when title to land is transferred? Or has the third party lost all rights under the licence, with her or his only action being against the licensee who sold the licence (possibly in breach of the third party user agreement)? Again, these are issues which the SMA may well be required to address, given the effects of registration.

As the value of the spectrum increases, lawyers and others will be advising on transactions which in some cases are worth very large amounts of money. The only verification of a transferee's title in a licence will be the Register of Licences. Accordingly, from a commercial user's perspective, it is essential that the Register is accurate and up to date.

Commercially valuable information

When purchasing spectrum licences, there are other kinds of information of which the SMA will be the only source. For example, the SMA may know of facts likely to result in consideration being given

to the suspension or cancellation of a licence. Indeed, it may even be in the process of suspending or cancelling a licence. Is this information which the SMA should provide to a potential purchaser when inquiry is made of it? Alternatively, there may be plans to resume part of the spectrum, which affect a licence about to be transferred. Ought the resumption proposal be disclosed by the SMA to the purchaser, upon inquiry? One solution would be to place relevant information on the Register of Licences. For example, it should be a relatively simple task to devise a software package which identified any correspondence relating to the possible suspension, cancellation or resumption of a licence and note it on an electronic register.

In relation to information dissemination, a further issue will be the extent to which section 2A of the Trade Practices Act renders the SMA liable for misleading or deceptive conduct under section 52 of that Act. Section 2A generally makes the Commonwealth and Commonwealth authorities subject to the Trade Practices Act in respect of the conduct of a business. Just what constitutes the conduct of a business is unclear, although the SMA arguably will be conducting a business when administering a price-based allocation system. If this is so, and statements are made in the course of administering that system, then the SMA will be under an obligation to ensure that the information is not misleading or deceptive under section 52 of the Trade Practices Act.

Of course, whether the SMA is subject to the Trade Practices Act or not, it could be liable for negligent misstatement, if it negligently provides information to a person who thereby suffers a loss. These considerations emphasise that the SMA must have an appropriate system to properly disseminate information and to ensure that it is accurate. The large sums of money involved in buying and selling the spectrum will mean that, inevitably, if information provided by the SMA is wrong and loss is occasioned, then the SMA will be asked to foot the bill.

All of these issues suggest that the SMA and administration of the spectrum is likely to be an area of increasing public and legal attention over the next few years.

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