ACA VENTURES INTO MARKET INTERVENTION

In December 2004, the ACA announced proposed reforms to its procedures for registering devices under spectrum licences, the implications of which go far beyond the esoteric world of device registration, and potentially contain warning signals to all in the radiocommunications community. This is because the reforms seem to represent a decision by the ACA to intervene in a market for communications-related services. The decision of the ACA to intervene, and the nature of that intervention, should be of vital concern to all radiocommunications users.

Radcom devices must be registered with the ACA before they can be operated under a spectrum licence, and all registrations are carried out by accredited persons (APs). Under the accreditation system spectrum licensees can use accredited engineers to develop innovative deployment methodologies, so maximizing the utility of their spectrum. The rationale the ACA has given for the reforms is to encourage more APs to offer device registration services because of growing interest in the allocation of new spectrum, and the increased deployment of services by licensees under their existing licences.

The ACA is apparently concerned that only 3 of the current 44 APs are active in device registration, attributing this to:

- the low level of registrations in recent years
- inflexibility in the registration process
- the perception that if APs register devices on the basis of methodologies they have they developed themselves, they are somehow at greater risk than if they issue an interference impact certificate under the *Radiocommunications Act 1992* ('the Radcom Act')
- a perceived lack of detail in current documentation about how to apply guard space

At a meeting of the ACA's Radiocommunication Steering Committee (RSC) which I understand was attended by the three full-time Authority members, the ACA approved a number the reforms announced on its website on 1 December 2004.

The paper presented to the RSC acknowledges that the existing registration process is already sufficiently flexible to allow APs to develop, and register devices on the basis of their own assessment methodologies. By contrast the ACA anticipates that once its reforms are in place, new methodologies would always go through a formalized, inevitably long and consequently expensive process of assessment by both the ACA and all relevant spectrum licensees. The policy objective is to reduce the potential legal risk to APs by providing first for the validation of their proposed methodologies by peer assessment and then, subject always to the agreement of relevant spectrum licensees, for incorporation of the methodologies in instruments made under the Radcom Act. However, it is difficult to see any commercial incentive for spectrum licensees to take part in such a process; the only direct beneficiary would be an AP with whom the licensee will probably have no relevant connection, and the only indirect beneficiary would probably be a competitor. On the contrary, if a proposed methodology would advantage a competitor by allowing for its network to be more efficiently deployed, there would appear to be every incentive for a spectrum licensee to first delay the process of peer assessment for as long as possible, and then ultimately to reject it, so delaying the roll-out of the competitor's network. Given the complexity of the technical issues involved, the chances of being able to show that this behaviour was anti-competitive in nature would be virtually nil.

It is also far from clear why any particular AP should receive the benefit of reduced risk at the expense of both the public purse, and of spectrum licensees to whom the AP provides no relevant services. Indeed, the ACA has apparently decided to implement these changes without having even quantified, let alone considered, the potential cost of the proposed process to spectrum licensees. Furthermore, it seems that the ACA has reached its decision without regard to the fact that, in practice, peer assessment of proposed methodologies would be conducted by other APs, who would invest their own intellectual property and skills in evaluating the proposals. While their costs may be borne by spectrum

licensees, that is not certain. Indeed, prudent APs may feel themselves compelled to take part in the assessment process so as to ensure their clients' interests are protected. It must also be of concern that the ACA appears to have given no thought to the fact that by the Commonwealth subsidizing the work of some APs in this manner, the ACA would be intervening in and potentially distorting the market for device registration services.

Another ACA proposal would require APs to issue a certificate under the Radcom Act for all registrations. At present, certification is not required when devices are registered under an AP devised methodology. The rationale advanced by the ACA for this change is, once again, that the level of risk to APs will be reduced. Unfortunately, the reality is that the change would make no difference at all to the level of risk to APs in undertaking device registration. This is because the administrative procedure followed to achieve registration is essentially irrelevant to the issue of risk. The potential liability of APs to the spectrum licensees for whom they provide device registration services is something that both can and should be simply managed by appropriate contractual arrangements - a view shared by the majority of the APs currently providing device registration services. This ACA proposal will, therefore, achieve no tangible benefit.

A quick 'ring around' of APs has revealed that the ACA's proposed changes are likely to have no impact at all on any decision as to whether to enter the device registration market. A common thread running through their comments is that the perceived failings in the device registration procedures do not present any real obstacle at all to undertaking device registration. The reason the APs contacted do not provide those services is that, as mentioned above, the market is simply not big enough to justify the startup costs, particularly software development. Software is essential both to achieve the technical 'result', and to handle the high volume of data that is the necessary consequence of spectrum licences being held predominantly by a small number of large players, with large networks to register.

The APs comments further contradicted the ACA's conclusion that the low number of APs providing device registration services is the result of the relatively low level of registrations under current spectrum licences in recent years. They pointed out that the relatively small number of spectrum licensees established firm and continuing commercial relationships with the current APs providing device registration services at a very early stage in the release of spectrum licences. Several APs expressed the view that the major reason why they could not break into the market was that there was simply no further demand. In other words, it was the number of spectrum licensees seeking device registration that was crucial, not the number of registrations that those licensees might require at any time.

The majority of the AP industry, therefore, seems to consider that the real barrier to the development of a healthy market in device registration services is neither the perceptions of a couple of APs, nor those contained in unsupportable assertions by the ACA. Instead, the real barrier to entry is the inactivity of the ACA itself in bringing bands under spectrum licensing. A broader market in device registration services will surely develop when there is sufficient spectrum licensed, and in the hands of a sufficient number of licensees, to support it. Such a market would also be facilitated by the introduction of private spectrum management, leading to improved spectrum efficiency and trading in the secondary market.

In the meantime, the ACA proposes to divert its scarce planning resources for some 6 months to the task of 'reworking' some of the spectrum licensing documentation. While this may deliver some benefits, one can only hope that it will not take place at the expense of other problems which some in the telecommunications industry undoubtedly regard as far more pressing, such as rectification of deficiencies in the existing technical framework developed by the ACA for the 2 GHz band. Resolution of these problems is holding up the deployment of broadband networks in both metropolitan and regional Australia – a major plank in the Government's communications policy, and

one supported by considerable Commonwealth funding. By contrast, players utilizing other spectrum continue to deploy services and obtain market share unhindered.

Further delays in resolving these issues would be insufferable for those whose networks have already been delayed while the ACA has ground through its process of consultation on the use of the bands in which they wish to deploy services. A process which, incidentally, is still not finalized as the ACA continues to agonize over how to impose 'use-it-or-lose-it' conditions, and to develop the necessary legal instruments – something which may become academic for those industry participants currently unable to even compete for market share gobbled up by their more fortunate competitors. The market distortion resulting from more than 12 months spent in variously developing or rectifying its regulatory frameworks, is apparently lost on the ACA.

While the actions of the ACA may be well intentioned, there would seem to be little real evidence that the device registration market is failing to such a degree that any action by the ACA is necessary. All device registrations are carried out by APs, as are the majority of apparatus licence frequency assignments. If the ACA wishes to have all frequency assignments carried out by the private sector, all it needs to do is to undertake a staged withdrawal from providing those services itself. Furthermore, some APs are currently providing device registration services notwithstanding the inflexibility and other problems apparently hampering their competitors, and there is no evidence whatsoever that they could not meet future demand. This begs the question of why the ACA feels a need to intervene - it is surely not to adjust market share, as the ACA has no competition policy role.

While some APs may feel that they are constrained by the ACA's procedures in obtaining the share of the device registration market that they desire, it behoves the ACA to exercise considerably more care than it has apparently demonstrated thus far in deciding first whether it is appropriate for the ACA to assist them in obtaining a greater share, and secondly what action it might take to do so. Only if the regulatory system actually tilts the playing field against any particular player should it be necessary for action to be taken to level it. Arguably regulatory action should not be taken on the basis of 'perceptions' of inadequacy, no matter how honestly held those perceptions might be. A quicker, economically more efficient and less interventionist route, and certainly one that would be far less expensive for industry, would be to lay any inaccurate perceptions to rest by appropriate education.

While it must be acknowledged that the ACA did consider the possibility of doing nothing, its analysis of that option was partially inconsistent with its own findings, and suffered from the same flawed reasoning that it followed in deciding to introduce the reforms. Unfortunately, it seems that the ACA did not sufficiently heed the warning of the UK regulator, Ofcom, whose Better Regulation Task Force pointed out in September 2003 that 'the option of not intervening...should always be seriously considered. Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effect of...regulation and its unintended consequences, may be worse than the imperfect market'.

The proposals for the reform of device registration, and the manner in which the ACA has come to develop them, apparently reveal that at some level the ACA understands neither its own technical framework for spectrum licensing, nor the way in which it interacts with the Radcom Act to establish the spectrum access rights that it auctions. If implemented as proposed these changes will reduce the existing rights of spectrum licensees for which some paid considerable sums at auction, ironically casting a shadow over the spectrum allocations foreshadowed by the ACA and apparently the genesis of the proposed reforms in the first place. Unintended consequences of this magnitude would, on any analysis, be far worse than perceptions of allegedly imperfect market in device registration.

A full legal analysis of the ACA's proposed changes to the device registration procedures is available here.

