

An Overview of New Zealand's New Telecommunications Regulatory Regime

Seth Eeles examines New Zealand's new approach to telecommunications regulation.

OVERVIEW

Following the recommendations of the Ministerial Inquiry into Telecommunications, the New Zealand Government decided to establish a regulatory scheme specific to the telecommunications industry. This marked a shift away from New Zealand's previous reliance on general competition law for regulation of the industry.¹ While the scope of the new regulatory regime is carefully limited, its relative simplicity and specified decision timeframes may well produce more expeditious and efficient outcomes than more elaborate regulatory regimes.

The legislative basis for this scheme is the Telecommunications Act 2001 (Act). The Act has 5 primary components:

- The Telecommunications Commissioner;
- The Access System;
- The Telecommunications Service Obligations;
- General Network Regulation; and
- A System of Self Regulation.

THE TELECOMMUNICATIONS COMMISSIONER

The Act establishes the new office of the Telecommunications Commissioner.² The Telecommunications Commissioner is a member of the Commerce Commission³ who performs most of the new telecommunications-specific functions of the Commission under the Act. This new office and the additional functions of the Commission are funded by levy on industry participants.

THE ACCESS SYSTEM

Part 2 of the Act sets up an access system based on the concept of Designated and

Specified Services. These are the services regulated by the Act and are defined simply as those services described in Schedule 1 (see below for a list of initially Designated and Specified Services). In relation to Designated Services, the Commission has the power to determine both the price and non-price terms and the Act specifies initial and final pricing principles for each Designated Service. In relation to Specified Services, however, the Commission is restricted to determining the non-price terms of access. Schedule 1 of the Act provides a list of initial Designated and Specified Services along with various conditions and principles of access.

In addition, the Commission may make recommendations for the alteration of Schedule 1 which are in accordance with the purpose of this scheme which is stated to be:

*"to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers."*⁴

The Act goes on to state that:

*"In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered."*⁵

Designated Services are further split up into Access Services and Multinetwork Services. A Multinetwork Service appears to be a service that involves more than 2 access providers such as number portability, whereas an Access Service

appears to be a service provided bilaterally between an access provider and an access seeker (eg interconnection, retail services).

The list of initial Designated and Specified Services is set out below.

Designated Access Services

- Interconnection with Telecom's fixed PSTN;
- Interconnection with fixed PSTN other than Telecom's;
- Retail services offered by means of Telecom's fixed telecommunications network;
- Residential local access and calling service offered by means of Telecom's fixed telecommunications network;
- Bundle of retail services offered by means of Telecom's fixed telecommunications network; and
- Retail services offered by means of Telecom's fixed telecommunications network as part of bundle of retail services.

Designated Multinetwork Services

- Local telephone number portability service;
- Cellular telephone number portability service;
- National toll-free telephone number portability service; and
- Telecom's fixed PSTN to mobile carrier pre-selection service.

Specified Services

- National roaming;
- Co-location on cellular mobile transmission sites; and
- Co-location of equipment for fixed telecommunications services at sites used by Broadcast Communications Limited.

In addition to various conditions and principles for certain specific services, Schedule 1 also sets out the following standard access principles for each Designated Access Service and Specified Service:


- the access provider must provide the service to the access seeker in a timely manner;
- the service must be supplied to a standard that is consistent with international best practice; and
- the access provider must provide the service on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the service to itself.⁶

These are in turn subject to the following limitations:

- reasonable technical and operational practicability having regard to the access provider's network;
- network security and safety;
- existing legal duties on the access provider to provide a defined level of service to users of the service;
- the inability, or likely inability, of the access seeker to comply with any reasonable conditions on which the service is supplied; and
- any request for a lesser standard of service from an access seeker.⁷


Although the government has emphasised the importance of commercial negotiations for the resolution of access disputes⁸, the remainder of Part 2 of the Act provides for a determination process where these negotiations are not successful. There are separate determination processes for Designated Access Services/Specified Services, Multinetwork Services and the review of pricing determinations. The determination processes specify timeframes which the Commission must make "reasonable efforts" to comply with (for example, the Commission must make reasonable efforts to prepare a determination that includes the price payable for a Designated Service not later than 50 working days after giving notice of its decision to investigate⁹).

Since the commencement of the Act, the Commission has received applications for




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determinations from Telecom New Zealand in relation to interconnection services and TelstraClear and in relation to both interconnection and wholesale services. The Commission decided to investigate the interconnection service applications jointly and to limit the TelstraClear wholesale service application as it decided that TelstraClear had provided insufficient information to decide whether certain requested services fell within the definition of Designated Access Services. The Commission has also conducted consultations into the appropriate methodologies for the pricing of various designated services.

THE TELECOMMUNICATIONS SERVICE OBLIGATIONS

Part 3 of the Act sets up a new and more flexible universal service scheme to supplement or replace the existing Kiwi Share Obligation (KSO)¹⁰ called the Telecommunications Service Obligations (TSO). The KSO effectively required Telecom to provide a certain basic basket of services to residential customers at a fixed price (or at no per call charge, in the case of local calls) irrespective of the

location of the customer or cost of providing the service to the customer. KSO losses were then recovered through the interconnection fee.

The purpose of the TSO is to:

*"facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users"*¹¹

The TSO in New Zealand is broader and more flexible than the "loss making service area" model adopted in Australia. The USO fund in Australia is calculated purely on a geographic basis and is therefore limited to rural and remote areas where sparseness of density increases the costs per customer to such an extent that the customer becomes loss making. In New Zealand, while geographic proximity is recognised as a contributing factor towards the affordability of telecommunications services, there are other issues which also do so.

Like Australia, the New Zealand TSO is not limited to Telecom (although see below for comments regarding the roll-forward of the Kiwi Share scheme). Any "service provider" is able to meet the TSO, as described further below.

Legislatively, the TSO is established by a TSO instrument. In accordance with section 70(4) of the Act, a TSO instrument must:

- record a contract or arrangement or an understanding between the Crown and a service provider for the supply of a particular telecommunications service or range of telecommunications services;
- identify the group of end-users to whom the service must be supplied;
- define the geographical area within which the service must be supplied;
- specify the retail price at, or below which, the service must be supplied; and
- specify the criteria that must be met for the standard of the service to be supplied.

Sections 70-71 provide for the Telecom KSO to become a deemed TSO Instrument and for its replacement with a "new KSO". In December 2001, the Government and Telecom entered into a deed that operates in place of and in addition to the KSO. Despite this, the TSO system allows for TSO Instruments with service providers other than Telecom and section 70(3) requires the Minister to assess whether each of the obligations of a TSO Instrument is contestable.

Subpart 2 of Part 2 provides for contributions for the cost of compliance with the TSO from other operators based on revenue. Subpart 3 allows the government to enforce a TSO Instrument via the courts.

Since the commencement of the Act, the Commission has conducted a consultation process to determine the implementation and costing of the TSO.

GENERAL NETWORK REGULATION

Part 4 of the Act creates a system of voluntary registration as a network operator to "facilitate entry into, and competition in, telecommunications

markets"¹². Although telecommunications service providers need not apply for network operator status, such a declaration provides certain powers with respect to the entry of land and the construction/maintenance of a network. Part 4 also makes rules relating to networks generally including rules for connection to and the misuse of a network.

SELF REGULATION

Schedule 2 of the Act allows for the preparation of telecommunications access codes by an industry forum in relation to Designated and Specified Services and for the process of variation and/or approval of such codes by the Commission.

Telecommunications access codes can only provide for:

- procedures, requirements, and other matters, not inconsistent with the Act, in respect of the implementation of applicable access principles with respect to Designated Access Services or Specified Services; or
- the functions that must be performed by a system for determining the service and the standard to which those functions must be performed with respect to a Designated Multinetwork Service.¹³

Such codes cannot provide for the implementation of pricing principles in relation to designated access services or the apportionment of the cost of delivering a Multinetwork Service.

Although there appears to be nothing preventing the forum from creating codes relating to services that are not designated or specified, such codes would not be covered by the operation of the Act.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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1 For a discussion of this shift, see "Beginning of the End of "Light Handed" Telecommunications Regulation in New Zealand" by Tristan Gilbertson (<http://203.111.11.66/templates/publications/default.jsp?pubid=296>)

2 See part 1 of the Act
 3 The Commerce Commission is New Zealand's equivalent of the ACCC.
 4 Section 18(1)

5 Section 18(2)
 6 Schedule 1, Subpart 2, clause 5
 7 Schedule 1, Subpart 2, clause 6
 8 An indication of this is the requirement that any party applying for a determination for a designated access service must demonstrate that they have "made reasonable attempts to negotiate the terms of supply of the service".
 9 Section 28(1)(b)
 10 This was Telecom's existing universal service obligation.
 11 Section 70(1)
 12 Section 102(1)
 13 Schedule 2, clauses 2 & 3