

New Zealand

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COMMUNICATIONS POLICY

1 Policy

How would you summarise government and regulatory policy for the telecoms and media sector? What is the policy-making and policy development procedure?

Since industry deregulation in the mid-1980s until the end of 2001, successive governments have kept telecoms-specific regulation to a minimum and relied on generic legislation and recourse to the courts (so-called 'light-handed' regulation). Regulation of the dominant incumbent network operator, Telecom Corporation of New Zealand Limited and its subsidiaries (Telecom) was achieved by the creation of a 'Kiwi share' (which enshrined certain universal service obligations) and by an obligation for Telecom to publicly disclose certain information.

The current government's telecoms policy represents a significant departure from the light-handed regulatory approach. The current government's telecoms policy is to promote cost-effective, timely and innovative telecoms services on an on-going, fair and equitable basis to all New Zealanders. To achieve this goal, the government aims to employ a general principle of 'as much market as possible and as much government as necessary'.

Based in part on the recommendations of a ministerial inquiry into telecommunications during 2000, the Telecommunications Act 2001 (the Telecommunications Act) was enacted on 20 December 2001.

The Telecommunications Act:

- establishes a telecoms-specific regulator known as the telecommunications commissioner who is a member of the Commerce Commission (Commission), a quasi-judicial body established to administer the Commerce Act 1986;
- regulates certain services being 'designated services' and 'specified services' and provides a framework for determination of disputes in relation to the regulated services;
- provides a framework for the declaration of 'telecommunications service obligation instruments' (TSO instruments). TSO instruments are a type of universal service obligation and 'liable persons' are required to contribute to the service provider's net costs of providing the service.

When an 'access seeker' and 'access provider' cannot agree on the terms of access for a designated service or a specified service, either can apply to the telecommunications commissioner (in some circumstances acting with other members of the Commission) to make a 'determination'. The determination will set out the terms upon which the service must be supplied. Determinations on designated services can include both price and non-price terms. Determinations on specified services can only include

non-price terms. The procedure for obtaining a determination is discussed in 21 below.

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

The Telecommunications Act is telecoms-industry specific, and has not taken into account the convergence of telecoms, media and IT. The Telecommunications Act applies only to telecoms services and, reflecting the general approach, the commissioner is named 'telecommunications commissioner'.

The government has said that the new regime might be extended to cover a broader range of services than initially proposed if that proves to be necessary.

Immediately after the Telecommunications Act became law, the government released a discussion document on digital broadcasting which, among other matters, addressed the policy implications of convergence. However, awareness of convergence has not yet flowed through into legislation.

3 Broadcasting sector

Are the broadcasting sector and/or content regulated separately from telecoms?

The Telecommunications Act applies only to telecoms, and expressly excludes from its scope telecommunication that comprises 'broadcasting' under the Broadcasting Act 1989 (the Broadcasting Act).

Broadcasting in New Zealand is regulated by the Broadcasting Act. However, that regulation is limited to matters such as the establishment of the Broadcasting Standards Authority (see below) and the Broadcasting Commission (which is responsible for promoting and funding local content programming).

Broadcasting content is regulated by codes published by the Broadcasting Standards Authority, a body established under the Broadcasting Act. Additionally, the acquisition and use of radio spectrum used in broadcast transmissions are governed by the Radiocommunications Act 1989 (the Radiocommunications Act).

The broadcasting sector is also subject to generic competition legislation (the Commerce Act 1986) and restrictions on overseas ownership (the Overseas Investment Act 2005).

TELECOMS REGULATION

4 WTO Basic Telecommunications Agreement

Has your country committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

New Zealand has committed to the WTO Basic Telecommunications Agreement. This is subject only to the limitation that a person who is not a New Zealand national cannot acquire a relevant interest in more than 49.9 per cent of the voting shares of Telecom without the prior written approval of the government.

5 Public/private ownership

What, if any, proportion of the stock of any incumbent operator is in the ownership of the public or of private enterprise?

The incumbent fixed line and cellular network operator in New Zealand is Telecom. Telecom (formerly state-owned) was privatised in 1990 and its shares are listed on the New Zealand and some foreign stock exchanges. Apart from one Kiwi share held by the minister of finance on behalf of the government, its shares are held entirely by the private sector. The Kiwi share is essentially a contract between Telecom and the government to ensure certain universal service levels are maintained.

Apart from Telecom, the other major operators in New Zealand are TelstraClear Limited (TelstraClear) and Vodafone New Zealand Limited (Vodafone).

Vodafone is ultimately owned by Vodafone Group plc.

Telstra Holdings Pty Limited (a subsidiary of Telstra Corporation Limited) owns all of TelstraClear. Telstra Corporation Limited is the publicly listed Australian telecoms incumbent, now 50.1 per cent government-owned with the balance held by the public.

6 Foreign ownership

Are there any foreign ownership restrictions applicable to authorisation to provide any telecoms services?

The Telecommunications Act does not contain any foreign ownership restrictions. New Zealand relies on generic foreign ownership restrictions which are set out in the Overseas Investment Act 2005 (the Overseas Investment Act) and in the Overseas Investment Regulations 2005 (the Overseas Investment Regulations).

Under the Overseas Investment Act and Regulations, an 'overseas person' must obtain authorisation in order to acquire or take control of a 25 per cent or more interest in:

- non-land assets worth more than NZ\$100 million;
- land over 5 hectares;
- any land on most offshore islands;
- certain sensitive land over 0.4 hectares; or
- land over 0.2 hectares which includes or adjoins the foreshore.

An 'overseas person' must also obtain authorisation in order to establish a business when the cost of establishing that business is expected to exceed NZ\$100 million or to acquire business assets costing over NZ\$100 million.

The ministers of finance and Land Information are responsible for ruling on applications made under the Overseas Investment Act and Regulations following the disestablishment of the Overseas Investment Commission in August 2005. The ministers have delegated much of that role to the Overseas Investment Office (a division of Land Information New Zealand, which is a government department).

Telecom is subject to foreign ownership restrictions. The Kiwi share provisions of Telecom's constitution provide that a person cannot acquire a 'relevant interest' in 10 per cent or more

of the voting shares of Telecom without prior written approval of the government and Telecom's board of directors.

A person who is not a New Zealand national cannot acquire a relevant interest in more than 49.9 per cent of the voting shares of Telecom without the prior written approval of the government.

7 Operator exclusivity

Does any operator have exclusivity, and, if so, for which service(s), and for how long?

New Zealand law does not restrict the number of operators in the telecoms market, the services they provide or the duration of such services. This is subject to the telecoms legislation mentioned in 1 above, foreign ownership restrictions (see 6), radiocommunications legislation (see 10), and competition legislation (see 42).

8 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated? Under what conditions may publicly available telephone services be provided?

New Zealand does not have separate regulatory regimes for fixed, mobile and satellite services. Certain fixed and mobile telecoms services are regulated as designated services or specified services under the Telecommunications Act.

If radio frequencies are used to provide telecoms services (including mobile and satellite services), New Zealand's radiocommunications legislation also applies. The radiocommunications legislation is discussed in 10 below.

9 Satellite facilities and submarine cables

In addition to the requirements under question 8 above, are there any other rules applicable to the establishment and operation of satellite earth station facilities and, where applicable, the landing of submarine cables?

There are currently no specific regulations regarding the provision of satellite services in New Zealand other than a general requirement to obtain a radio licence or spectrum licence (depending on the frequency being used) if the facility is to transmit radio waves. From a legal perspective, it is unnecessary to obtain a radio licence or a spectrum licence in order to receive radio waves. However, it is possible to obtain radio licences or spectrum licences to protect against harmful interference from co-channel emissions.

The issuing of radio licences is subject to criteria under the Radiocommunications Regulations 2001 (the Radiocommunications Regulations), international agreements under the auspices of the ITU and, in respect of broadcasting, bilateral ministerial arrangements with Australia.

Certain generic legislation such as the Resource Management Act 1991 is particularly relevant to the establishment and operation of satellite earth station facilities. Apart from the need to comply with certain generic legislation such as the Resource Management Act 1991, there are no specific rules applicable to the landing of submarine cables.

10 Radio frequency (RF) requirements

For wireless services (eg, mobile), are radio frequency (RF) licences/permits required in addition to any telecoms services authorisations and is an RF licence available on a competitive or non-competitive basis?

Are RF licences allocated using auctions or other procedures? Is licensed spectrum tradable in any circumstances?

RF licences/permits are required for wireless services. Spectrum management rights and spectrum licences tend to be issued on a

competitive basis. These rights and licences are tradable. A more limited and restrictive regime applies to radio licences.

New Zealand has a licensing regime for radiocommunications set out in the Radiocommunications Act 1989 (the Radiocommunications Act) and the Radiocommunications Regulations. The regime consists of two mutually exclusive licensing systems as follows:

- **Spectrum management rights system** This creates long-term registrable property rights which may be traded. The right-holder has the exclusive right to manage a band of frequencies (a management right) and to grant a 'spectrum licence' to third parties who wish to transmit and/or receive within that band. A public register of management rights and spectrum licences is maintained. In some circumstances, the government has created and retained a management right and issues spectrum licences directly to operators (for example, this is the approach taken with spectrum suitable for UHF and VHF television broadcasting). The spectrum management rights system creates tradable property rights which remain valid for 20 years.
- **Radio licence system** This creates short-term registrable property rights which may not be traded. It provides for the licensing of transmission and/or reception on a given frequency within defined technical parameters. The radio licence system applies in respect of frequencies where no spectrum management rights have been created or where transmission involves very low power emissions. Any person who wishes to obtain a radio licence must apply to the chief executive of the Ministry of Economic Development.

Initially, allocations of radio spectrum management rights were by public tender. However, since mid-1995, an electronic auction format has been preferred. An auction of 3G spectrum concluded in January 2001, raising NZ\$133 million. Two further auctions of spectrum suitable for LMDS, cellular and internet services were successfully completed in August and December 2002, each raising NZ\$9 million.

11 Third generation services

Is there any regulation for the specific roll-out of third generation mobile services (eg, in terms of licences, geographic coverage, national roaming for new entrants, etc)?

There is no regulation in New Zealand for the specific roll-out of 3G mobile services. Although national roaming is a specified service under the Telecommunications Act, it relates only to the provision via roaming to end-users of second generation cellular mobile services and expressly excludes roaming onto an operator's 3G cellular network.

As with other cellular services, radio spectrum licences are required for the provision of 3G mobile services, and these are governed by the Radiocommunications Act and Regulations.

12 Fees

What fees are payable for each type of authorisation?

Radio licence fees depend on the class of licence applied for and the number of transmitters and receivers under the licence.

No fee is payable on an application for registration as a network operator under the Telecommunications Act.

The standard fees payable for an application for authorisation under the Overseas Investment Act are NZ\$2,100 (for applications not involving land) and NZ\$8,200 (for applications involving land). The maximum fees payable in respect of a sin-

gle transaction (which may require multiple authorisations) are NZ\$5,300 and NZ\$21,800 respectively.

13 Authorisation timescale

How long does the licensing authority take to grant of licences or other necessary authorisations?

There is no specified timeframe for the granting of radio licences. In practice, the Ministry of Economic Development endeavours to process applications within two to six weeks. The timeframe varies depending on the relevant spectrum band and location of the apparatus.

To be declared a network operator, an application must be made to the minister of communications. Generally, obtaining registration as a network operator takes eight to 10 weeks.

The Overseas Investment Office is not required to determine applications within a specified timeframe. It has only been operating since August 2005 and does not give applicants any indication of how long it will take for an application to be determined.

14 Licence duration

What is the normal duration of licences?

The radiocommunications regime is summarised in 12 above. Radio licences must be renewed annually. Spectrum management rights are valid for a maximum of 20 years. The New Zealand government announced in December 2004 that upon expiry of management rights, the existing holders will be offered a right of renewal for a further 10 years. The duration of spectrum licences (being licences issued by the holder of the related management right) is a matter of negotiation between the management right-holder and the licence-seeker.

There is no fixed duration of network operator status. Network operator status is reviewed annually and the minister of communications may revoke the status if the minister is no longer satisfied that a network operator meets the criteria or that the status is necessary.

There is no express time limit on an authorisation under the Overseas Investment Act. However, the predecessor to the Overseas Investment Office usually required the transaction to be completed within 12 months of consent being given.

15 Modification/assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

Radio licences can be revoked or modified by the chief executive of the Ministry of Economic Development. The relevant legislation does not provide for the transferring or pledging of radio licences. In practice, where a business has been sold, the Ministry of Economic Development will usually re-issue licences in the name of the new owner.

Management rights and spectrum licences are transferable and are able to be pledged as security. Management rights and spectrum licences can be modified with the approval of the right-holder.

Network operator status is not transferable.

16 Radio spectrum

Is there a regulatory framework in your country for the assignment of unused radio spectrum (so-called refarming)?

There is no regulatory framework in New Zealand for refarming

of radio spectrum.

17 Cable networks

Is there any restriction in your country regarding ownership of cable networks, in particular by telecoms operators?

There are no regulatory restrictions in New Zealand regarding the ownership of cable networks.

18 Local loop

Is there any specific rule in your country regarding access to the local loop or providing for local loop unbundling?

Telecom owns the local loop in New Zealand.

There are no specific rules in New Zealand regarding access to the local loop or providing for local loop unbundling. Local loop unbundling is not a designated service or a specified service under the Telecommunications Act.

In a report to the minister of communications in December 2003 the Commission recommended the unbundling of Telecom's fixed public data network in the form of access to an asymmetric digital subscriber line (DSL) bitstream access service and access to a backhaul transmission service used in conjunction with an asymmetric DSL bitstream service. The Commission stopped short of recommending the unbundling of Telecom's local loop based on the fact that Telecom had announced an unbundled partial private circuits services offer and the Commission's preference for a market-led solution.

The minister of communications announced in May 2004 that he had accepted the Commission's recommendations in full.

While not local loop unbundling as such, initial designated services under the Telecommunications Act include retail services, residential local access and calling services and bundled retail services (all when offered using Telecom's fixed telecoms network). TelstraClear has applied to the telecommunications commissioner for a number of determinations in respect of these services. The Commission ruled that, in respect of a total of 32 services in the retail market, Telecom faced limited competition and should therefore be required to wholesale those services to TelstraClear.

On 3 May 2006, the minister of communications announced that the government would introduce local loop unbundling. Legislation providing for the unbundling of the local loop is expected to be passed before the end of 2006.

19 Internet

How are internet services, including voice over the internet, regulated?

The network elements of internet services are regulated in the same way as other telecoms services – that is, by the Telecommunications Act and the Radiocommunications Act. As with those other services, internet services are also regulated by generic legislation, such as the Copyright Act 1994 and the Defamation Act 1992.

There is no specific licensing regime for internet service providers (ISPs). Some ISPs are party to interconnect agreements with Telecom. Interconnection with Telecom's fixed PSTN is a designated service.

20 Broadband

Is there a government financial scheme in your country to promote broadband penetration?

In 2002, the government launched Project Probe – Provincial Broadband Expansion. The project was a joint venture between the Ministry of Education and Ministry of Economic Development to roll out broadband to all schools and provincial centres, where the financial incentive may not have otherwise existed for private operators.

The government tendered the contracts for each of 14 provincial regions around New Zealand. The majority of the contracts were awarded to a Telecom-led joint venture.

Project Probe was completed in mid-2005.

21 Interconnection

How is interconnection regulated? Can the regulator intervene to resolve inter-operator disputes? Are wholesale (interconnect) prices controlled and, if so, on what basis? What are the basic interconnect tariffs?

Interconnection with Telecom's fixed PSTN and interconnection by Telecom with another operator's fixed PSTN are two of the designated services that are regulated under the Telecommunications Act. Therefore, an access seeker can apply to the telecommunications commissioner for a determination allowing the access seeker to interconnect with Telecom's fixed PSTN (and vice versa). The determination can include both price and non-price terms and, as such, provides a mechanism for controlling some interconnect prices.

The prerequisites and procedure for obtaining a determination in respect of interconnection are similar to the prerequisites and procedure for obtaining a determination in respect of other designated services.

The telecommunications commissioner can only intervene if an application is made by an access seeker or an access provider. An access seeker must be a person who provides telecoms services (being any goods, services, equipment and facilities that enable or facilitate telecommunication – this does not include broadcasting). Neither an access seeker nor an access provider can make an application to the telecommunications commissioner regarding a designated access service (such as interconnection) or a specified service if:

- an agreement is already in place for all or part of the specified period of time;
- the parties have previously agreed not to have any term determined by the Commission;
- the applicant 'has not made reasonable attempts to negotiate the terms of supply of the service' with the other party; or
- any applicable conditions in relation to the service have not been met.

The telecommunications commissioner has indicated that, in assessing whether 'reasonable attempts' have been made to negotiate access it will take into account whether or not:

- a reasonable commercial proposal is put to the other party;
- the other party was given sufficient time and opportunity to respond to the proposal.

The Telecommunications Act specifies a series of steps (within defined time limits) that the telecommunications commissioner must take upon receiving an application in relation to a designated service or a specified service. After investigation, the telecommunications commissioner must prepare and give public notice of its determination. In most cases, the telecommunications commissioner must make reasonable efforts to prepare determinations within 50 working days. In practice, most determinations are not made within this timeframe.

Determinations must be made in accordance with applicable access principles and initial pricing principles set down in the Telecommunications Act (including benchmarking, bill and keep, and TSLRIC (total service long-run incremental cost)).

On 5 November 2002, following an application by TelstraClear in May, the Commission released its first access determination, which related to price and non-price terms for interconnection between the networks of TelstraClear and Telecom. The interconnection price determined was NZ\$1.13 cents per minute, effective for 12 months from the date of the determination. In addition, the parties agreed to backdate the price to 1 June 2002.

Both TelstraClear and Telecom applied to have the Commission review the price of interconnection and set a new price on a TSLRIC basis. In April 2005 the Commission released its draft determination. It suggested a price of NZ1.00 cents per minute. Due to a settlement between TelstraClear and Telecom, the application was withdrawn and no final determination of the interconnection price was made.

22 Mobile call termination

In your country, does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Are calls to mobile networks regulated, and, if so, how?

In New Zealand, the originating calling party pays for the charges to terminate a call on a mobile network.

Calls to mobile networks are not currently regulated. However, in May 2004, the Commission commenced an investigation into whether or not mobile termination should be regulated by including it in the Telecommunications Act as a designated service. The decision to investigate followed complaints that lack of competition in the mobile termination market was resulting in unreasonably high charges for fixed-to-mobile calls in New Zealand.

In June 2005, the Commission recommended to the minister of communications that mobile termination on existing networks (but not future 3G networks) should be regulated as a designated service. The Commission's reasoning was that mobile network operators are subject to limited competition in the wholesale market for termination services on their respective networks and that its cost-benefit analysis indicated that substantial net benefits to end-users of fixed-to-mobile services would be likely to arise from regulating mobile termination rates. The Commission felt that such regulation of mobile termination on 3G networks would be likely to increase the risk of delay or restrict investment in those networks.

In August 2005, the minister of communications asked the Commission to reconsider its recommendations. In particular, the minister asked the Commission to reconsider the problems caused by regulating 2G and 3G differently, commercial offers made to him by both telecom and Vodafone and the passing-through of reductions in wholesale mobile termination rates to end-users.

The Commission's final report on the reconsideration was released in May 2006. The Commission concluded that mobile termination on all networks should be regulated. The Commission's reasoning was that there was a benefit to regulation compared with the commercial offers from Telecom and Vodafone. As both Vodafone and Telecom had largely completed their 3G rollouts, the Commission considered that the likelihood of regulation limiting investment in 3G services to be small.

The Commission proposed that the initial pricing principle

by which mobile termination rates would be regulated be based on benchmarking with termination rates in comparable jurisdictions, and that the final pricing principle be TSLRIC.

The minister of communications can accept or reject the Commission's recommendations.

23 International mobile roaming

Are charges for international mobile roaming regulated in your country?

Charges for international mobile roaming are not regulated in New Zealand.

24 Retail tariffs

Are retail tariffs regulated? If so, which operators' tariffs are regulated and how?

Telecom's local call charges are controlled by the Kiwi share arrangement. When the government privatised Telecom in 1990, it retained the Kiwi share which granted the government control over components of Telecom's pricing of residential local services. The Kiwi share guaranteed free local calls and froze Telecom's domestic line rental charge in real terms.

As part of the telecoms regulatory reform, the government and Telecom agreed, in December 2001, to extend and clarify the Kiwi share obligations. Telecom is now required to maintain a 'free local residential telephone service', which includes local free-calling for standard facsimile calls and standard internet calls. Telecom must maintain universal service at December 2001 levels.

The Telecommunications Act provides for 'liable persons' to contribute towards losses suffered by a service provider in providing telecoms service obligations (TSO) services. This mechanism was designed primarily to deal with the Kiwi share losses suffered by Telecom. However, other contracts, arrangements or understandings between the government and a service provider may become a TSO. One such contract is the agreement between the Crown and Sprint for the provision of Telecommunications Relay Services for the hearing impaired.

The Telecommunications Act provides for the governor-general, on the recommendation of the minister of communications, to declare an instrument between the government and a service provider to be a 'TSO Instrument'. Before such a declaration is made, consultation with industry participants is necessary.

The Telecommunications Act provides a mechanism for determining the net cost to the service provider of providing the TSO services and the contribution of each liable person. Contributions are based on a liable person's weighted revenues as a proportion of the weighted revenues of all of the liable persons and Telecom.

'Liable persons' are those whose network is interconnected with a fixed PSTN operated by Telecom and who provide a telecoms service in New Zealand to end-users by means of some component of a PSTN that is operated by the person. This definition captures all of the major carriers in New Zealand.

'Interconnected with' is not defined and 'PSTN' is broadly defined. In its initial TSO Determination in December 2002 (relating to meeting the costs of Telecom's Kiwi share obligations, see above), the Commission concluded that 'interconnected' should take its ordinary meaning, and that accordingly, a carrier with some form of interconnection agreement with Telecom would be likely to be a 'liable person' for the purpose of the TSO provisions of the Telecommunications Act.

25 Customer terms and conditions

Are customer terms and conditions required to be filed with and/or approved by the regulator or other body?

Customer terms and conditions are not required to be filed with and/or approved by a regulator, unless the services are 'designated services' or 'regulated services' as defined by the Telecommunications Act. If the services come within either of these two categories, then subject to certain conditions being satisfied, the telecommunications commissioner can set the terms of access for these services. To this extent these terms and conditions will be approved by the regulator.

26 Changes to telecoms law

Are any major changes planned to the telecoms laws of your country?

In August 2005, the minister of communications announced proposed changes to the Telecommunications Act following an Implementation Review of the Telecommunications Act set up by the Ministry of Economic Development. Those changes include:

- providing for key access terms and conditions to be set upfront by the Commission on a multi-company basis;
- enabling telecommunications companies to get quick access to regulated terms and conditions set by the Commission where existing contractual arrangements are not as good as the regulated service;
- enabling the minister of communications to accept, reject or call for reconsideration of part of a Commission recommendation;
- improving the ability of the Commission to take enforcement action in the High Court where required;
- making more flexible the time period during which particular services, like interconnection, may be regulated;
- enabling the minister of communications to make network interoperability standards mandatory where the majority of industry agrees; and
- enabling the minister of communications to set standards for the availability and service quality of emergency services, including on mobile networks.

On 3 May 2006 the minister of communications announced a further package of changes to telecommunication regulation following a government 'stocktake' of the telecommunications sector. The package includes:

- the introduction of local loop unbundling;
- the removal of speed constraints on the regulated unbundled bitstream service and requiring the provision of naked DSL;
- requiring the accounting separation of Telecom's wholesale business;
- reviewing public sector investment in telecommunications infrastructure;
- reviewing whether Telecom's ability to reduce local prices in response to competing infrastructure investment should be constrained;
- developing a rural package and expanding the Digital Strategy Broadband Challenge fund;
- ensuring competitive access to spectrum for new wireless applications;
- empowering the Telecommunications commissioner to undertake strategic reviews of sector performance;
- reviewing the telecommunications service obligations, with a focus particularly on delivery of rural services; and
- undertaking further analysis on the desirability of structural and operational separation options.

The government intends to pass legislation amending the Telecommunications Act to incorporate these changes, and the changes announced in August 2005, by the end of 2006.

27 Next generation networks

How are next generation networks (NGN) regulated?

NGNs are regulated by the Telecommunications Act regime discussed above. There is no additional regime specifically directed at NGNs.

MEDIA REGULATION**28 Ownership restrictions**

Are there any restrictions on the ownership and control of broadcasters?

Can foreign investors participate in broadcasting activities in your country?

There are no restrictions on ownership or control relating specifically to broadcasters in New Zealand. However, foreign investors in broadcasting remain subject to the generic restrictions of the Overseas Investment Act and Regulations.

Foreign investors are able to participate in broadcasting activities in New Zealand. Currently, one of the four main free-to-air television broadcasters are owned by foreign companies (TV3 is owned by Canadian operator Canwest Networks). TV One and Two are operated by state owned broadcaster TVNZ. Prime TV is owned by the publicly listed SKY Network Television (New Zealand's largest pay television operator).

29 Cross-ownership

Are there any regulations in your country in relation to the cross-ownership of media companies, including between radio, television and newspapers?

There are no specific regulations relating to cross-ownership of media companies. However, media companies are subject to the generic competition provisions of the Commerce Act 1986 (Commerce Act). Those provisions prohibit, among other things, acquisitions of businesses (for example, an acquisition of a competitor) that would have, or be likely to have, the effect of substantially lessening competition in a market.

30 Licensing requirements

What are the licensing requirements in order to be able to broadcast in your country, including the fees payable and the timescale for the necessary authorisations?

As with any other operator wishing to transmit radio waves, broadcasters are required to obtain and adhere to radio spectrum licences, issued under the Radiocommunications Act. There are no additional licences or authorisations required for broadcasting in New Zealand.

The fees payable and timescale for authorisations in respect of radio spectrum licences are set out in 12 and 13 respectively.

31 Broadcast of foreign-produced programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Are there any rules requiring a minimum amount of local content?

There are no regulations concerning the broadcasting of foreign-

produced programmes in New Zealand.

The amount of local content on New Zealand television is influenced by two factors. First, NZ On Air – a government body managed by the Ministry of Culture and Heritage – funds the production and development of New Zealand made programming. NZ On Air (also known as the Broadcasting Commission) was established under the Broadcasting Act. The aim of NZ On Air funding is to fund programmes which would not be able to be produced in a wholly commercial broadcasting environment. Until 2000, NZ On Air was funded by a Public Broadcasting Fee. Now, it is funded by government.

Second, New Zealand's main free-to-air channels have entered into a local content agreement which sets out local content targets for each. In 2004, TV One (the flagship channel of state-owned broadcaster TVNZ) had a local content target of 52 per cent. TV 2 and privately-owned TV3's targets were approximately 20 per cent.

In addition to the local content requirements above, state-owned broadcaster TVNZ is required to adhere to the TVNZ Charter. The Charter was introduced in March 2003 and sets out obligations on TVNZ to broadcast educational, cultural, indigenous and locally-produced programming. The Charter does not provide a quota for such programming, but sets out guidelines and principles for programming which TVNZ must abide by.

32 Advertising

How is broadcast media advertising regulated?

Principally, broadcast media advertising is regulated by the Advertising Standards Authority. The Advertising Standards Authority is a self-regulated industry body and has no statutory powers. However, it publishes codes of practice which are binding on its members. The codes are mainly concerned with ensuring that advertising is not misleading or deceptive, but specific codes have also been published relating to advertising standards for particular goods or services, such as alcohol, financial products and advertising aimed at children.

Its members include broadcasters and other media groups and advertising industry bodies. A division of the Advertising Standards Authority, the Advertising Standards Complaints Board, hears and rules on alleged breaches of the codes of practice. Members are bound by the decisions and sanctions of the Board.

The Television Commercial Approvals Bureau (TVCAB) is responsible for monitoring the content of advertisements prior to first telecast. Established in 1989 as a self-regulatory initiative by the major television broadcasters, TVCAB provides a service independent of any particular broadcaster. Major television broadcasters in New Zealand make it a condition of broadcast that all advertisements are accepted and classified by TVCAB before they are supplied for broadcast.

The Association of New Zealand Advertisers is responsible for administering the advertising industry's voluntary system of pre-vetting all liquor and therapeutic advertisements.

In addition, the Fair Trading Act 1986 (the Fair Trading Act) provides penalties for any person or business which commits misleading or deceptive conduct in the course of trade. This applies to advertising, and is enforced by the Commission.

The Broadcasting Act also restricts the broadcasting of advertisements on certain days of the year, such as Christmas Day and Good Friday.

33 Must-carry obligations

Does your country have regulations which specify a basic package of programmes that must be carried by operators broadcasting distribution networks, ie, 'must-carry obligations'? Is there a mechanism for financing the costs of such obligations?

There are no must-carry obligations for New Zealand broadcasters generally. The only exception applies to state-owned TVNZ and Radio New Zealand, which, pursuant to the Broadcasting Act, are required to broadcast party political statements before a general election. Political parties are awarded funding by the Electoral Commission for such statements, and pay normal costs to the broadcasters for their placement.

34 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws of your country?

There are no significant changes planned to broadcasting law in New Zealand.

REGULATORY AGENCIES

35 Regulatory agencies

Which body or bodies are regulatory agencies for the communications sector? Is the body that regulates telecoms separate from the one that regulates broadcasting?

The telecoms sector is regulated by the telecommunications commissioner. Other than the Broadcasting Standards Authority, there is no broadcasting-specific regulatory authority.

The telecommunications commissioner is a telecoms-specific regulator established under the Telecommunications Act.

The governor general is empowered under Part I of the Telecommunications Act to appoint the telecommunications commissioner on the advice of the minister of communications. The telecommunications commissioner is a member of the Commission.

Certain key decisions and determinations under the Telecommunications Act must be made by the commissioner in combination with two other members of the Commission. Other telecoms functions are performed by the commissioner alone.

The Telecommunications Act provides for 'access seekers' or 'access providers' of designated services or specified services to apply to the Commission for a determination of all or some of the terms on which the service must be supplied. Applicants must first make reasonable attempts to negotiate the terms of supply of the service. The essential difference between designated services and specified services is that determinations on designated services can include both price and non-price terms, whereas determinations on specified services can only include non-price terms.

Initial designated services relate to interconnection with Telecom's fixed PSTN, wholesaling of retail and residential services offered by means of Telecom's fixed PSTN, number portability and fixed-to-mobile carrier pre-selection services.

Initial specified services relate to national roaming on mobile networks and co-location of transmission equipment.

The Radiocommunications Act and Radiocommunications Regulations are administered by the chief executive of the Ministry of Economic Development.

New Zealand also relies on the regulatory agencies established under generic legislation. These include the Commission for competition-related issues, and the ministers of finance and Land Information and the Overseas Investment Office for foreign ownership-related issues.

36 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

The telecommunications commissioner is a member of the Commission. The telecommunications commissioner is funded by a levy imposed on telecoms operators under the Telecommunications Operators (Commerce Commission Costs) Levy Regulations 2002 (the Levy Regulations). Essentially, the Levy Regulations provide for the commissioner's annual estimated costs to be met by telecoms operators, apportioned with reference to each operator's annual revenues attributable to services offered by means of a PSTN. Under-payments must be met by each telecoms operator, and over-payments are repaid, once the commissioner's actual costs are identified in annual audited financial statements.

The telecommunications commissioner is required to make determinations in accordance with any relevant 'approved codes'. An approved code is a telecoms access code that is approved by the telecommunications commissioner after being developed by the Telecommunications Industry Forum (comprising mainly of service providers who provide telecoms services by means of some component of a PSTN). Apart from this requirement, the telecommunications commissioner acts independently of network operators.

In the case of the other regulators:

- The Commission is established under the Commerce Act and is appointed by the governor general on the recommendation of the minister of commerce.
- The Ministry of Economic Development, being responsible for the Radiocommunications Act, is a government department.
- Under the Overseas Investment Act, the minister of finance and the minister of Land Information decide sensitive land applications, although some decisions are delegated to the chief executive of the Land Information New Zealand (a government department) or staff within the Overseas Investment Office. The chief executive of Land Information New Zealand (or his or her delegate) decides business (non-land) applications under delegation from the minister of finance.

Each operates independently of network operators.

The Commission is required to have regard to the economic policies of the government transmitted to it in writing.

Government ministers decide some applications for consent under the Overseas Investment Act. In other cases, the chief executive of Land Information New Zealand and Overseas Investment Office are required to comply both with government policy transmitted to them in writing and with general or special written directions given by the relevant ministers.

37 Appeal procedure

How can decisions of the regulator(s) be challenged or appealed and on what basis – merits, law and/or procedure?

The Telecommunications Act provides for limited rights of appeal to the High Court against determinations by the telecommunications commissioner.

Appeals are only allowed on questions of law. A party can obtain leave to appeal a decision of the High Court to the Court of Appeal. Determinations are binding while appeals are being heard in order to prevent parties from using the appeal process as a delaying tactic.

The Commerce Act provides for a statutory right of appeal to the High Court against decisions of the Commission. A notice of appeal must be given within 20 working days after the date of the decision. The decision may be challenged on the basis of its legal merits or on procedural grounds.

The Overseas Investment Act and Regulations do not allow appeals in relation to applications for authorisation.

New Zealand also recognises administrative law claims, which could apply to decisions of each of the above bodies.

38 Competition and telecoms/broadcasting regulation

To the extent that there are separate national regulatory bodies for the telecoms and broadcasting sectors responsible for sector-specific regulation and a national competition authority responsible for general competition rules, what is the respective scope of their jurisdiction in the telecoms and broadcasting sectors? Are there any mechanisms under national law to avoid conflicting exercise of jurisdiction by the various authorities? Is there a specific mechanism to ensure the consistent application of competition and sector-specific regulation?

As discussed, there is no broadcasting-specific regulatory authority in New Zealand.

With regard to the telecoms sector, the Telecommunications Act creates a regulatory framework within which the telecommunications commissioner and the Commission have clearly defined roles in respect of specific aspects of certain prescribed telecoms services.

The Commission acting under the Commerce Act has responsibility for generic antitrust matters and under the Commerce Act and the Fair Trading Act for generic anti-competitive behaviour.

New Zealand does not have under the Telecommunications Act a specific competition law regime for telecoms. General competition rules set down in the Commerce Act continue to apply. The Telecommunications Act specifically excludes operation of the Commerce Act in respect of determinations made by the telecommunications commissioner. In certain circumstances, an aggrieved party may have separate and different options available to it when considering how to pursue a complaint.

The telecommunications commissioner is a member of the Commission.

39 Interception

Are there any special rules requiring operators to assist government under certain conditions in the interception of telecommunications messages?

The Telecommunications (Interception Capability) Act 2004 requires telecoms operators to ensure that their networks are interception capable and to provide reasonable assistance to police and surveillance agencies if they have a warrant to intercept telecoms. The Act applies to both the interception of telecoms and obtaining call associated data and content.

Government agencies must first obtain a High Court warrant or be acting under other lawful authority before intercepting telecoms.

Agencies may obtain interception warrants under provisions in the Crimes Act 1961, the Misuse of Drugs Act 1978, the New Zealand Security Intelligence Service Act 1969 and the Government Communications Security Bureau Act 2003. The relevant provisions in the Crimes Act were amended in 2003 so that interception warrants could be applied for in respect of any private communication, rather than just oral communications. In addition, call data warrants may be issued under the Telecommunications (Residual Provisions) Act 1987.

Update and trends

The M&A market is currently buoyant and is expected to remain so over 2006, particularly given the significant inflow of private equity into New Zealand from Australian superannuation funds.

The Commerce Act prohibits acquisitions that have the

effect or likely effect of substantially lessening competition in a market, and provides for a voluntary pre-transaction notification regime that allows an acquiring firm to seek 'clearance' or 'authorisation' of a merger or acquisition. There is no impending legislation which will change this framework.

40 Data retention obligations

What are the obligations for operators and service providers to retain the data of its customers? Will they be compensated for their efforts?

There are no obligations on operators and service providers to retain their customers' data (other than those in the contract between the operator or service provider and its customers).

41 Unsolicited communications

Is there any legislation in your country prohibiting unsolicited communications (eg, by e-mail, SMS)? Are there any exceptions to the prohibition?

In February 2005 the government announced the Unsolicited Electronic Messages Bill, which will apply to e-mails, text messaging (SMS) and instant messaging services.

The Bill requires that commercial electronic messages of a marketing nature be sent only to recipients who have opted in to receive such messages. Senders of non-commercial electronic messages of a marketing nature will be required to abide by requests from recipients to opt out of further mailings. The Bill requires the sender of an electronic message of a marketing nature to include accurate sender identification and a functional unsubscribe facility. The Bill also prohibits the supply or acquisition of address-harvesting software.

The Bill creates a civil penalty regime, with the emphasis being on internet and telecommunications service providers taking action in response to customer complaints, and with a government enforcement agency acting as the overseer and back-stop.

COMPETITION AND MERGER CONTROL

42 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation and/or general competition law. Which regulator and/or competition

authority control such practices?

Through the regulation by the telecommunications commissioner of access terms for 'designated services' and 'specified services', the telecommunications commissioner has a degree of de facto power to control certain potential anti-competitive practices. In addition, the Telecommunications Act includes a mechanism for new services to be regulated. Consequently, a complainant concerned about anti-competitive practices in the telecoms sector can make submissions to the telecommunications commissioner in an attempt to have the service regulated.

Apart from these de facto controls under the Telecommunications Act, New Zealand does not have a specific competition law regime for telecoms. New Zealand relies on generic competition legislation in the form of the Commerce Act and the Fair Trading Act which cover anti-competitive practices and misleading and deceptive conduct in trade. The Commission administers both the Commerce Act and the Fair Trading Act.

43 Regulatory thresholds for the review of telecoms and broadcasting mergers, acquisitions and joint ventures

What are the jurisdictional thresholds and substructure test for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting sector?

Mergers, joint ventures and acquisitions in the telecoms and broadcasting sectors are not separately regulated; they are covered by the generic Commerce Act, business acquisition provisions. The relevant provision prohibits a person (including a company) acquiring shares or the assets of a business if the acquisition would have the effect of substantially lessening competition in a market. The Radiocommunications Act expressly provides that spectrum management rights and licences are 'assets' for the purposes of this test.

Arrangements that do not amount to the acquisition of assets of a business are regulated by the restrictive trade practices provi-



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sions of the Commerce Act, which prohibit arrangements substantially lessening competition. The restrictive trade practices provisions also apply to persons who 'take advantage' of a 'substantial degree of power' in a market.

The Commerce Act applies to offshore transactions to the extent those transactions impact on a market in New Zealand.

When it auctioned 3G spectrum in January 2001, the government capped at 15MHz the amount of spectrum that could be acquired by any one bidder. After TelstraSaturn Limited acquired CLEAR Communications Limited in 2001, TelstraClear was required to divest some of the 3G spectrum it held because its combined holding exceeded the cap.

obtaining these approvals and normal commercial considerations will apply.

44 Regulatory authorities for the review of telecoms and broadcasting mergers, acquisitions and joint ventures

Which regulatory and/or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms and broadcasting sectors?

There are no telecoms-specific regulatory and/or competition authorities responsible for telecoms or broadcasting M&A.

Telecoms or broadcasting M&A, like any M&A transactions, are regulated by the Commerce Act. The Commerce Act has a voluntary system of notification in place for mergers and acquisitions. An acquirer need not notify the Commission if it considers a merger or acquisition will not have the effect of substantially lessening competition in a market in New Zealand. However, an acquirer may obtain clearance from the Commission to the effect that the proposed acquisition or merger will not result in a substantial lessening of competition. Obtaining clearance protects an acquirer from any later challenge to the acquisition by the Commission or a third party. If the proposed acquisition or merger will clearly result in a substantial lessening of competition, the acquirer can obtain an authorisation if it can demonstrate that the public benefit (efficiencies) of the proposed acquisition outweighs any anti-competitive detriment.

45 Procedure and timescale for the review of telecoms and broadcasting mergers, acquisitions and joint ventures

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

There is no telecoms- or broadcasting-specific approval regime for mergers and acquisitions in those sectors. The Commerce Act, which regulates all mergers and acquisitions may apply.

If an applicant applies for clearance from the Commission, the statutory time limit is 10 working days.

However, in more complex matters the Commission often requests a longer period before making a decision (approximately 15–20 working days). If an applicant applies to the Commission for an authorisation, a decision can be expected within 60 working days.

In both instances an application may be made to the Commission in the prescribed form, containing particulars specified in the form together with payment of a prescribed fee.

As mentioned in 7 above, the Kiwi share provisions of Telecom's constitution provide that a person cannot acquire a 'relevant interest' in 10 per cent or more of its voting shares without prior written approval of the government and Telecom's board of directors. In addition, no person who is not a New Zealand national can acquire a 'relevant interest' in more than 49.9 per cent of Telecom's voting shares without prior written government approval. There are no set procedures or timescales for