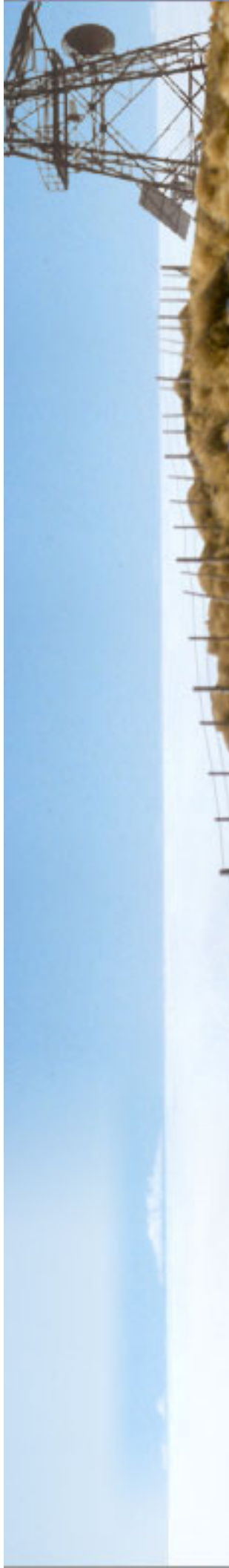




Legal issues – interpretation and definitions

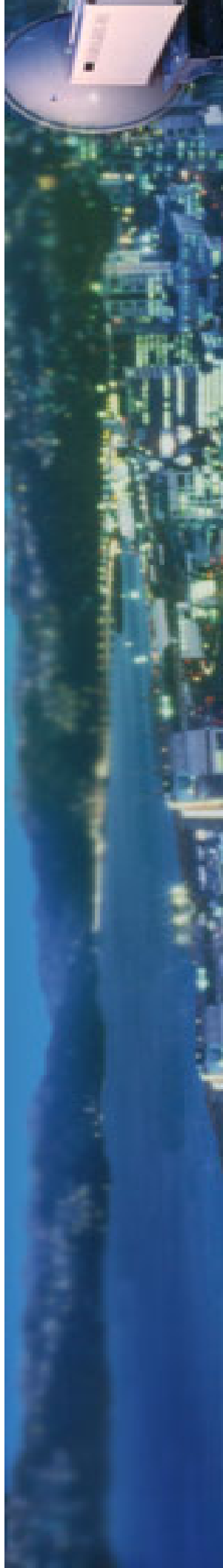
To the Commerce Commission's Draft Report
on unbundling the local loop
and the fixed public data network



Introduction



- If (contrary to BCL's submissions) the Commission concludes that it should recommend that 'unbundling' proceeds now, the question then is: What may be lawfully 'unbundled'?
- The answer to this question depends upon the interpretation of the Telecommunications Act (Act).



Section 5 (1) Interpretation Act 1999



Ascertaining the meaning of legislation

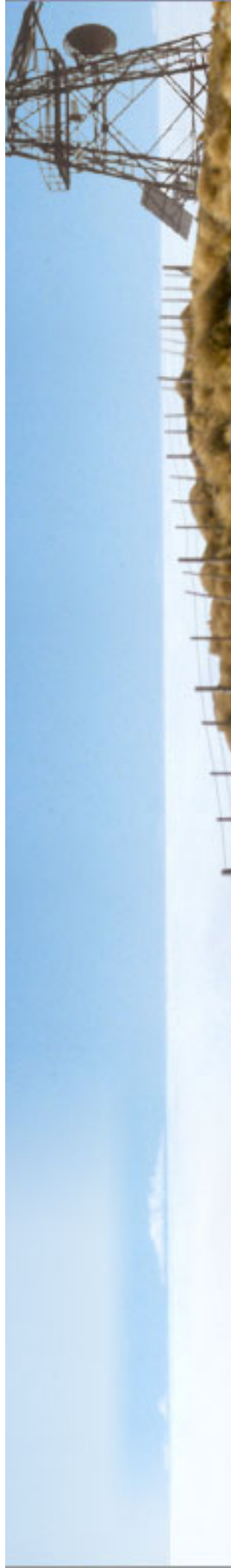
The meaning of an enactment **must** be ascertained from its **text** and in the light of its **purpose**.

[Emphasis added]

However, **‘[the] interpretation is confined by the text that Parliament has enacted. A judge or other interpreter is not entitled to legislate, or to go beyond the text and impose solutions simply because they seem fair and just’**.

[Burrows, Statute Law in New Zealand, page 115]

Slide 3

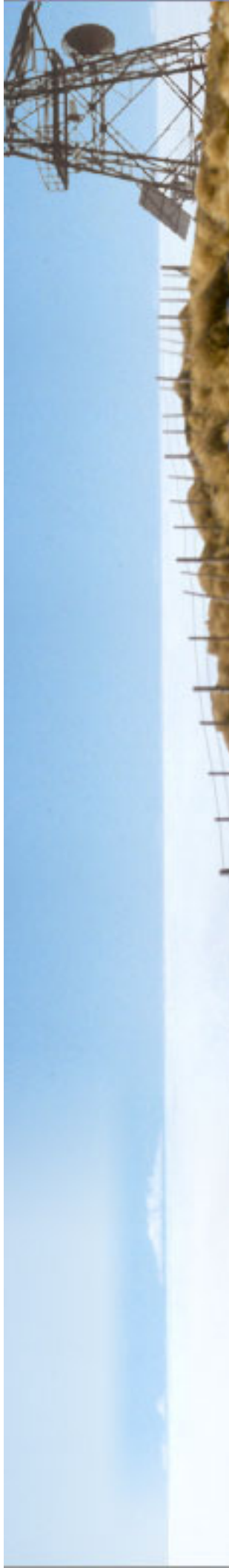


Interpretation (cont/d)



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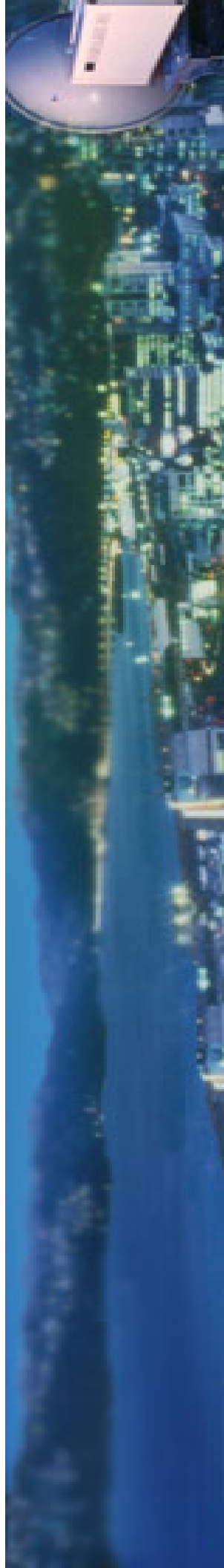
Interpretation cont/(d)



Contrast paragraph 261 of the amended Draft Report:

‘The definitions within the Act **provide some direction** as to the limitations of the data network review required under section 64. However, the Commission also considers that such definition [i.e. the statutory definitions] must not undermine any practical implementation or effectiveness of unbundling. To do so would be inconsistent with section 18(1) [the purpose of Part 2 of the Act].’

[Emphasis added]



BCL wishes to focus on the following:

1. The definition of 'lines' for the purposes of the definition of Telecom's local loop network.
2. The definition of 'Telecom's fixed PDN'. This has two main elements that BCL objects to:
 - a) The inclusion of third party's elements within this definition.
 - b) The potentially narrow definition of 'private' and hence broad definition of 'public' for the purposes of defining the 'public data network'

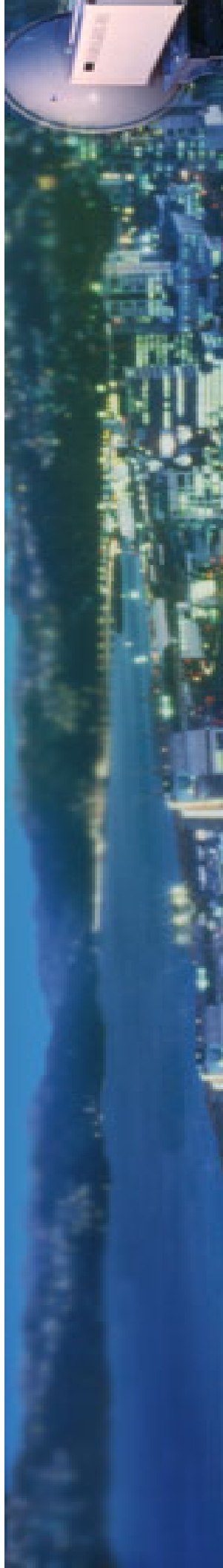


Definitions



BCL also wishes to comment briefly on:

3. The definition of 'backhaul'; and
4. The definition of 'bitstream' access



1. 'Lines'



Paragraph 193 of the Amended Draft Report states:

‘Telecom also argues that the definition of “lines” in the Act is confined to physical lines rather than logical paths or derived channels. The Commission does not agree that the definition of lines in the Act is limited in this way and considers that it can include logical paths and derived channels. The wording of the definition of ‘line’ in the Act is not limited to physical lines and is written in terms of conductors used or intended for use for transmission or reception of signs’.



2. 'Lines' (Cont/d)

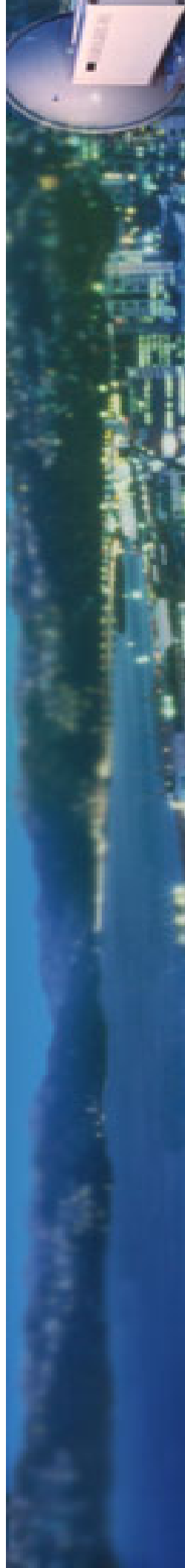


BCL strongly disagrees with the Commission conclusion on this point.

'Line' is defined in the Act to mean:

'a wire or a conductor of any other kind (including a fibre optic cable)...', and includes:

'any pole, insulator, casing, fixture, tunnel, or other equipment or material used or intended to be used for supporting, enclosing, surrounding or protecting any of those wires or conductors....'

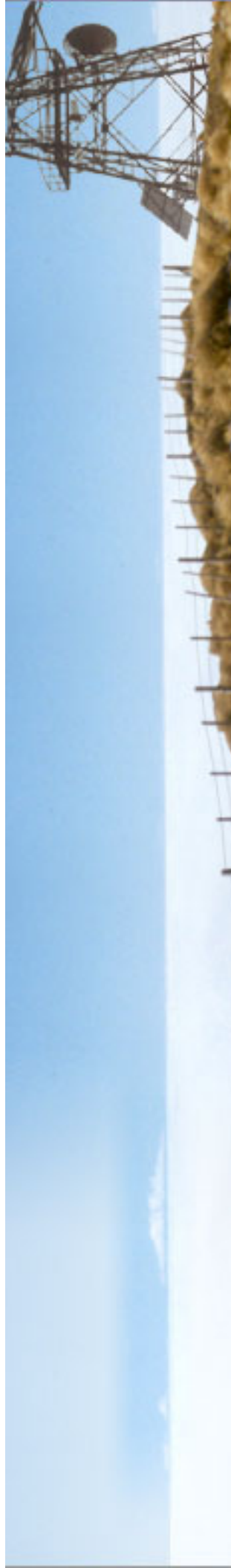


2. 'Lines' (Cont/d)



BCL submits that the definition contemplates physical conductors only and not logical paths or derived channels

- In the Act 'line' is clearly and consistently used in contrast to 'radio frequency', for example 'telecommunications link' means a 'line, radio frequency or other media'.
- 'Radio frequency' means electromagnetic waves ...propagated in space without artificial guide.'

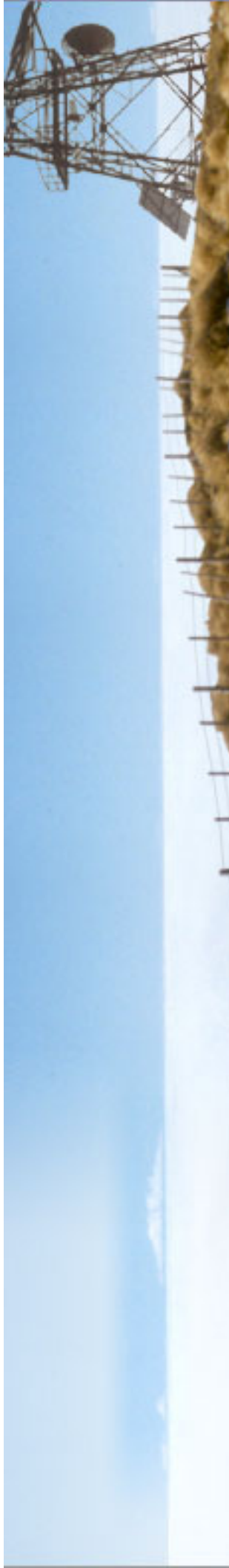


2. 'Lines' (Cont/d)



BCL submits that the definition contemplates physical conductors only and not logical paths or derived channels

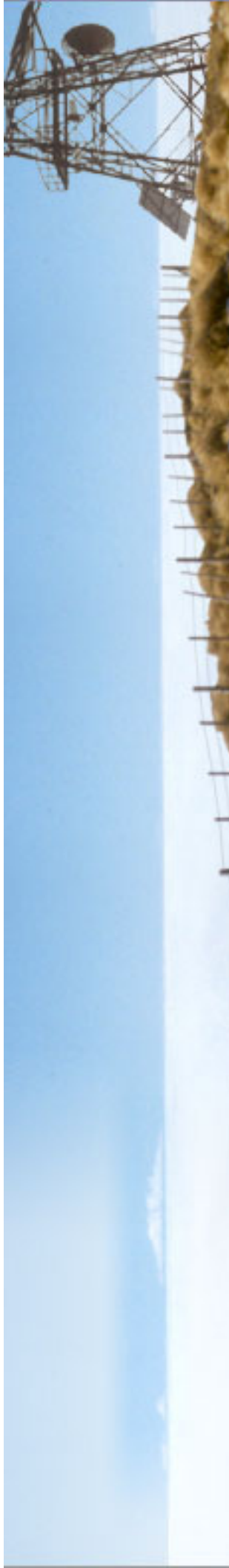
- 'blurring' the careful and consistent distinction in the Act between 'lines' and 'radio frequency', or 'wireline' and 'wireless'.
- 'pulling a thread' in the scheme of the Act without having fully analysed the consequences: for example, the definition of 'lines' is important in the definition of 'existing works' used in Part 4 of the Act, and similar wording is used in a similar context in the Electricity Act.



2. 'Lines' (Cont/d)



- Allowing bitstream access in through the 'back door', rather than transparently through the Schedule 3 investigation.
- Departing from usual established industry meaning, which reflects the natural and ordinary meaning of the words in the context in which they are used in the Act.



2(a). Telecom's fixed PDN



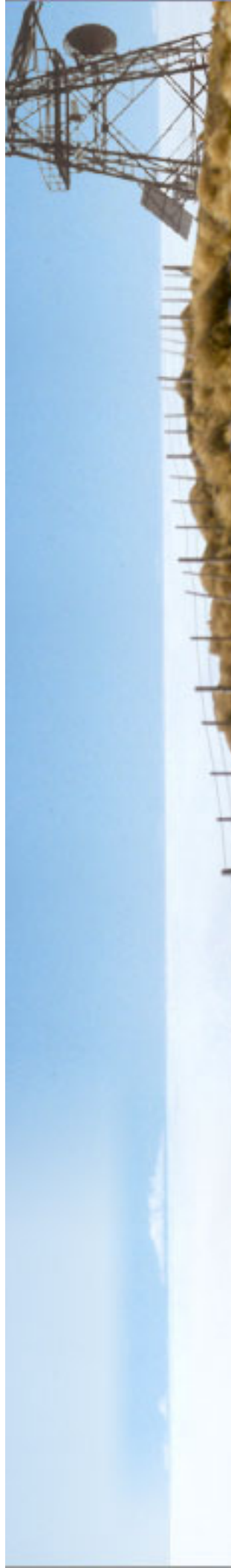
- Section 64 prescribes what may be lawfully unbundled: ‘the unbundled elements of ...Telecom’s fixed PDN’.
- BCL submits that there is no statutory authority for reading this as extending to elements of fixed PDN’s belonging to any third party. To do so is arguably unlawful or *ultra vires*.



2(a). Telecom's fixed PDN (Cont/d)



- 'Telecom' is defined in the Act = TCNZ and includes its subsidiaries. The Companies Act definitions of 'subsidiary' apply.
- 'Fixed PDN' is defined in the Act = a PDN or that part of a PDN that connects an end-user's building to a data switch or equivalent facility.
- 'PDN' is defined in the Act = a data network used, or intended for use, in whole or in part, by the public.



2(a). Telecom's fixed PDN (Cont/d)



- The Commission should not try to extend the ambit of the Act by adopting broader definitions than those specified in the Act.
- It is unlawful for the Commission to do so, even on the basis that it would (in the Commission's opinion) better give effect to the purpose of the Act.



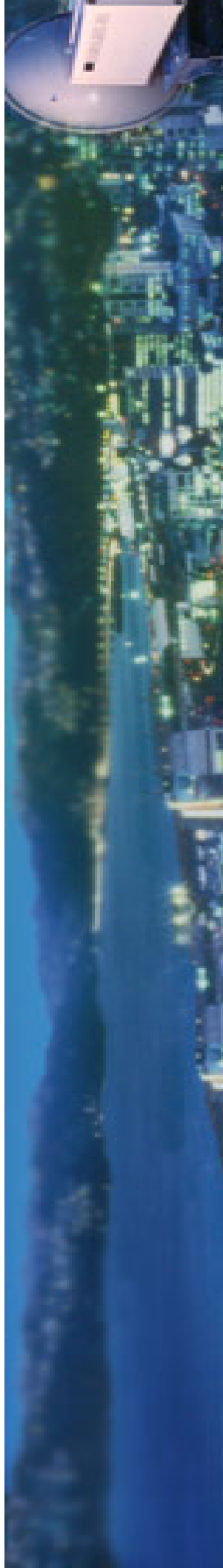
2(b). 'Private vs Public' data network



In the Act:

'PDN or **public data network** means a data network used, or intended for use, in whole or in part, by the public.'

BCL agrees with the Commission that 'public' services are those that are offered to the public, rather than necessarily those being used by the public.

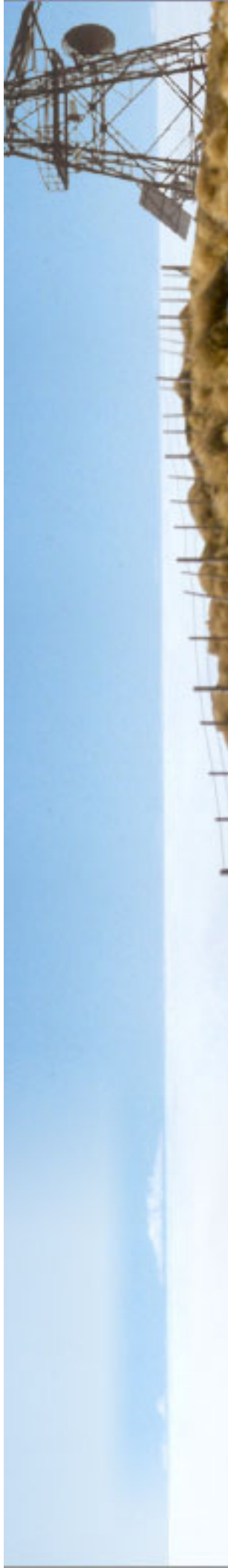


2(b). 'Private vs Public' data network



Thus there is a distinction between wholesale networks that are not offered to, or directly accessible by, the public, and retail networks that are offered to the public.

BCL submits that in the Draft Report the Commission's distinction between 'public' data networks and 'private' data networks, and its treatment of wholesale networks, is unclear.



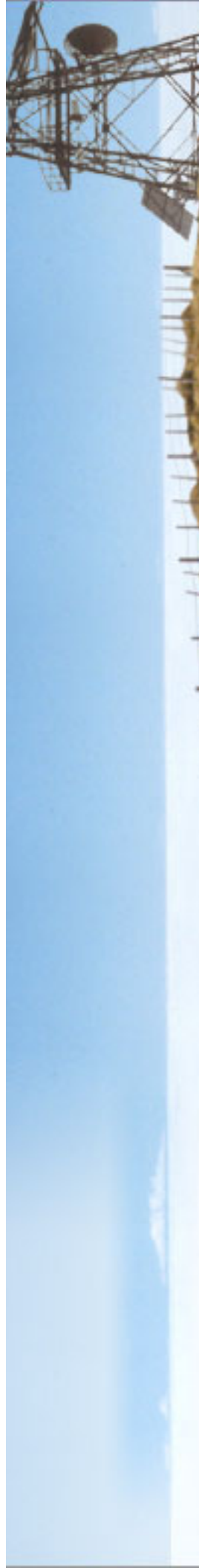
2(b). ‘Private vs Public’ data network



At para 295 of the amended draft Report the Commission states:

‘The Commission considers that a **private** data network must be **built** exclusively for an individual customer. The Commission notes that a [PDN] may be application specific. For the purposes of determining the end-user of a service, the Commission does not consider that, in all instances, it will be the physical user of the service, but rather **the provider of the service**, e.g. the EFTPOS network.’

[Emphasis added]



2(b). 'Private vs Public' data network



If in para 295:

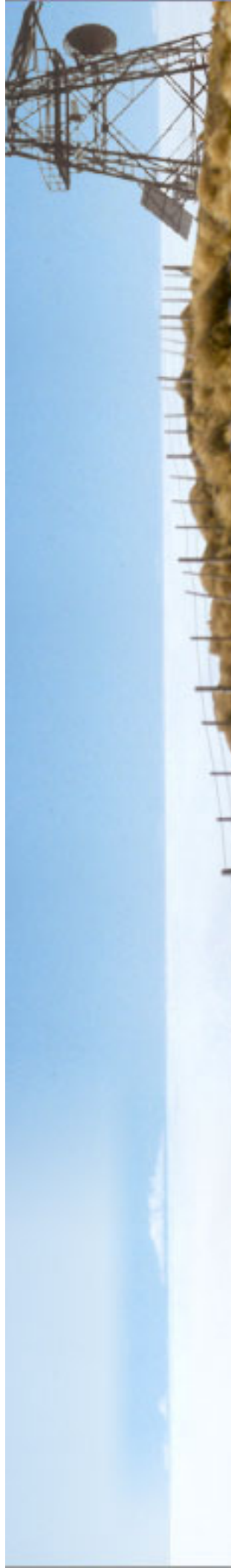
- 'Built' means either physically built or 'virtually built'

And:

- 'provider of the service', where there is a wholesaler and a retailer, means the retailer of the service and not the wholesaler,

Then:

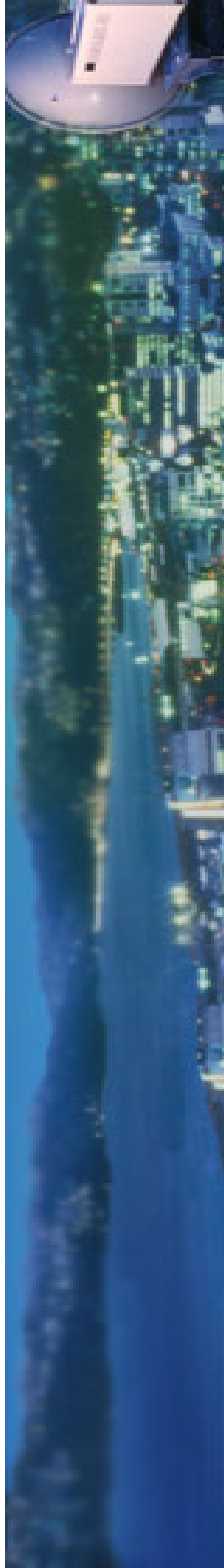
- BCL considers that this definition of 'private data network' **will** properly take account of wholesale networks and will not be too narrow.



2(b). 'Private vs Public' data network



- Therefore the definition of 'public data network' adopted by the Commission will be too broad.
- If either 'built' or 'provider of the service' are to have narrower meanings, the definition of 'public data network' will be broader than that contemplated by the Act.
- BCL submits that the Commission should make its intended interpretation of these definitions clearer and more explicit.



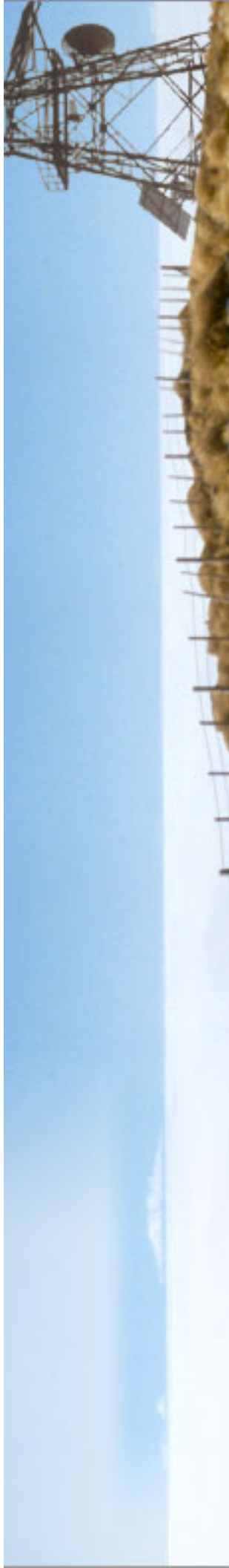
3. Definition of ‘Backhaul’



At paragraph of 244 of the Draft Report the Commissioner states:

‘Backhaul refers to the transmission from the access provider’s exchange to the access seeker’s premises. Backhaul transmission should be provided by the access provider to the access seeker to provide access to unbundled services. This service is a wholesale service which provides transmission capacity between an access provider’s exchange and an access seeker’s nominated site’.

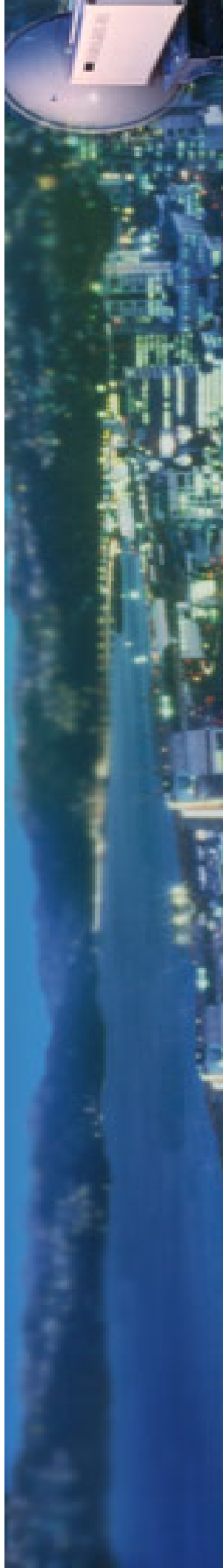
[Emphasis added]



‘Backhaul’



- BCL submits that an alternative definition of backhaul used in the industry is:
- ‘transmission from the access provider’s exchange to the nearest connection point to the spur or backbone’



4 Definition of 'Bitstream' access



- BCL agrees with that bitstream access should not be recommended for regulation, but if it is, BCL submits that a more appropriate definition is:
- ‘The delivery of the bitstream service to the closest aggregation point to the end-user and delivery of the bitstream traffic to the access seeker’s chosen backhaul supplier’.

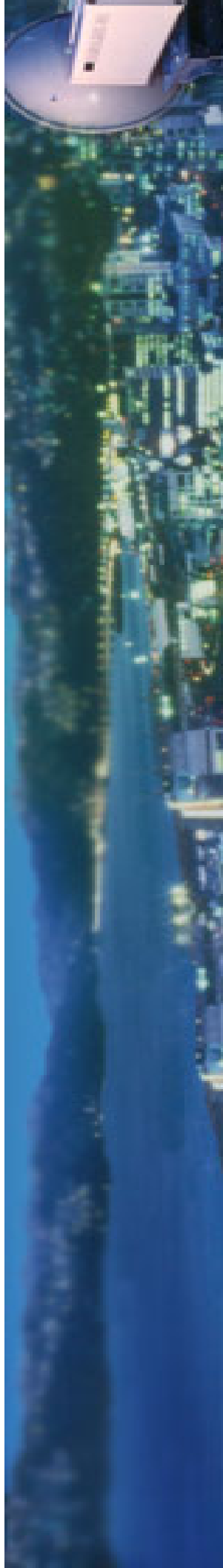


Final comments



BCL :

- Reserves its position on matters not commented on
- Reserves its position on the Schedule 3 investigations
- Refers in passing to Clause 4(2)(b) of Schedule 2 and reserves its position on it.



Clause 4(2)(b) of Schedule 3



4 (2) In preparing the final report, the Commission **must consider:**

- (a) All submissions on the draft report; and
- (b) All information and opinions presented or expressed at the public hearing (if any) on the draft report.**

[Emphasis added]

