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Telecom New Zealand Limited

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Douglas Webb  
Telecommunications Commissioner  
Commerce Commission  
**WELLINGTON**

Dear Commissioner Webb

### **SECTION 64 UNBUNDLING REVIEW**

1. Please find **attached** a paper prepared by Professor Philip Joseph of the University of Canterbury on the legal and interpretive issues governing the Commission's forthcoming investigation into local loop unbundling.
2. The paper explores the statutory and common law constraints on the Commission in regard to its unbundling review, and elaborates on several of the points raised in a paper that was to you earlier this month entitled *The Public Policy Framework for the Consideration of Local Loop Unbundling*, prepared by Professor Neil Quigley of Charles River Associates (Asia Pacific) Limited. We believe these issues may be of interest to the Commission.
3. The paper focuses on the following broad issues of statutory interpretation in relation to section 64:
  - (a) the regard that must be had by the Commission in the course of the investigation to the statutory purpose set out in section 18 of the Act, and the determinative nature of section 19;
  - (b) the interpretive responsibilities imposed on the Commission by the long-standing common law principle in favour of preserving established property rights;
  - (c) the importance of the parliamentary history of section 64 to the Commission's interpretation of that section; and
  - (d) the binding nature of the Commission's published guidelines and policies which must be adhered to by the Commission during the unbundling review.
4. I trust you will find Professor Joseph's paper of help to you in determining the course of the unbundling review, and hope that you consider it useful in formulating the Commission's issues paper. Please contact me if you wish to discuss this paper, or any of the issues raised in it, further.

Yours faithfully



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# **LOCAL LOOP UNBUNDLING REVIEW**

**The Legal and Interpretive Issues  
Governing the Commerce Commission  
Review under Section 64 of the  
Telecommunications Act 2001**

**By**

**Professor Philip Joseph**

**March 2003**

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## Introduction

1. I am asked to explore issues of statutory interpretation involving the investigation of the Commerce Commission (“**the Commission**”) under section 64 of the Telecommunications Act 2001 (“**the Act**”) into the question of whether access to the unbundled elements of Telecom’s local loop and/or fixed public data network should be a designated or specified service (“**LLU review**”). This commentary addresses the principles of statutory interpretation and common law that bear on the construction to be placed on the Commission’s statutory mandate.
2. This commentary has arisen because of the references to legal issues in Professor Neil Quigley’s report, *The Public Policy Framework for the Consideration of Local Loop Unbundling*<sup>1</sup>, in particular part 2, entitled “Defining Unbundling” (pp 3- 6), and part 5.3, entitled “Private Property and Investment Incentives” (pp 18-20). Part 2 identified layers of uncertainty as to the scope of the mandated LLU review, and Part 5.3 observed the impact of LLU on private property rights and investment incentives. Telecom considers it may assist the Commission to have those legal issues more fully elaborated, as the Commission seeks itself to identify all issues which may be relevant in its forthcoming issues paper. Telecom has asked me to prepare this paper to provide that assistance.

## Issues

3. The Commission will be required to have regard to four broad issues of statutory interpretation. The Commission must:
  - Understand and apply correctly its powers of investigation and recommendation under section 64. The Commission must interpret the Act so as to promote the statutory purpose set out in section 18. Statements in the parliamentary debates on the objects of telecommunications regulation elaborate the statutory purpose under section 18 and should be taken into account.
  - Resolve ambiguities and uncertainties in the Act in accordance with the long-standing common law principle in favour of preserving established property rights. In theory this principle operates as a presumption of statutory interpretation, that Parliament does not intend the abrogation of property rights in the absence of unambiguous or express statutory language. In practice, however, the “presumption” operates as a constitutional principle that will yield only where Parliament uses emphatic statutory language.
  - Have regard to the parliamentary history when resolving uncertainties in the scope of LLU review under section 64. A Supplementary Order Paper moved by Green Party member Ms Sue Kedgley sought to clarify uncertainties in the scope

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<sup>1</sup> Report dated 7 March 2003, prepared for Charles River Associates (Asia Pacific) Ltd.

of LLU review but the amendment was voted down in the House by 72 votes to 38.

- Have regard to and apply correctly the guidelines and policies the Commission has published for conducting its unbundling review, as bearing on the exercise of its statutory powers. Published policy guidelines may give rise to legitimate expectations as to the manner of exercise of powers. A decision-maker that misconstrues or fails to apply its policy guidelines invites challenge in the courts.

## The statutory purpose

4. Section 5 of the Interpretation Act 1999 mandates the purposive approach to statutory interpretation. Section 5 reads:

**“5      Ascertaining meaning of legislation – (1) The meaning of an enactment must be ascertained from its text and in light of its purpose.”**

5. Section 18 of the Act specifies the statutory purpose to which the Commission and the Minister (respectively) must have regard in discharging their functions. Section 18 reads:

**“18      Purpose**

- (1) The purpose of this part and Schedules 1 to 3 is 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.
- (2) 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.”

6. Section 19 requires the Commission and the Minister to consider the purpose set out in section 18 when making any recommendation, determination or decision under Part 2, dealing with designated and specified services. The provision reads:

**19.      Commission and Minister must consider purpose set out in section 18 and additional matters.**

If the Commission or the Minister (as the case may be) is required under this Part or any of Schedules 1 to 3 to make a recommendation, determination, or a decision, the Commission or the Minister must –

- (a) consider the purpose set out in section 18; and  
 (b) if applicable, consider the additional matters set out in Schedule 1 regarding the application of section 18; and

(c) make the recommendation, determination, or decision that the Commissioner or Minister considers best gives, or is likely to best give, effect to the purpose set out in section 18.

7. Section 19 makes explicit what is required of statutory decision-makers at common law. Statutory powers are never “at large” but are constrained by the statutory purpose(s): *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). A power granted for one purpose must be used for that purpose and not for some unauthorised or collateral purpose: *Municipal Council of Sydney v Campbell* [1925] AC 338 (PC). Even in the absence of section 19, the courts would insist that the Commission and the Minister discharge their functions under Part 2 to promote the statutory purpose expressed in section 18. Nevertheless, section 19 should not be viewed as superfluous.
  
8. Section 19 supports a statutory inference that section 18 exhausts the matters that may be considered by the Commission and the Minister. The section 18(1) purpose is to “promote competition ... for the long-term benefit of end-users of telecommunications services”. Section 18(2) provides that the Commission and the Minister must have regard to *the efficiencies* that will result. This stipulation imposes a *mandatory* (as distinct from *permissible*) relevant consideration. While failure to consider permissible considerations cannot ground judicial review, a decision-maker must consider and accord appropriate weight to mandatory considerations, or risk challenge in the courts. “The more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account”: *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 183 per Cooke J.
  
9. Two features of sections 18 – 19 warrant mention. First, section 19 employs imperative language: “... the Commission or the Minister *must* ... consider the purpose set out in section 18” and “make the recommendation, determination or decision that the Commissioner or Minister *considers best gives, or is likely to best give*, effect to the purpose set out in section 18.” The italicised words are words of legal obligation. Secondly, the positioning of section 18 at the commencement of Part 2, under the heading “Subpart 1 – Preliminary”, confirms the centrality of the statutory purpose. The organisation and format of an enactment are matters that may be taken into account in ascertaining its meaning.<sup>2</sup> The positioning of section 18 confirms Parliament’s intention to circumscribe the LLU review. The following considerations listed under that section exhaust the matters that the Commission or Minister may take into account:
  - Promotion of competition in telecommunications markets
  - The long-term benefit of end-users of telecommunications services
  - Efficiencies to be had.

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<sup>2</sup> Under section 5 of the Interpretation Act 1999, the organisation and format of an enactment are considered part of the Act’s internal context and are indications that may be taken into account in ascertaining its meaning.

10. Statements in the parliamentary debates on the Telecommunications Act 2001 are addressed below (see para 31). These statements emphasise the need for regulatory incentives that will encourage investment in the telecommunications industry for the long-term benefit of end-users. They endorse the need for *dynamic* (as distinct from *static*) efficiencies that will promote the development of services and infrastructure. These statements bear on the meaning to be given the term “efficiencies that will result, or will be likely to result” under section 18(2). The courts will admit in evidence the legislative history of a Bill, if to do so throws light on the parliamentary purpose. In one case Cooke J said it would be “unduly technical” not to refer to *Hansard*,<sup>3</sup> and in another that it would be “irresponsible” not to do so.<sup>4</sup>
11. Decision-makers should pay due regard to statements made in the parliamentary debates, where such statements explicate the statutory purpose. The parliamentary statements on telecommunications regulation inveigh against intrusive regulatory interventions that would frustrate the underlying and express statutory purpose. This purpose is to promote a dynamically efficient environment in the industry to the benefit of end-users. The Commission has acknowledged the capital-intensive nature of the telecommunications industry and the need to foster investment strategies (see paras 41 – 46). Parliament devised the regulatory framework to encourage research and innovation (and thereto long-term benefits to end-users) through reasonable returns on investment capital.<sup>5</sup>
12. Mandatory sharing or leasing arrangements with competitors encroach on the incumbent’s property rights and negate investment strategies for new technologies, services, and infrastructure. The Quigley Report (para 61) identified the costs of “regulatory takings”: “If property rights get undermined, such as through legislation mandating open access to a privately-owned network facility, there may be substantial efficiency and welfare losses (with little or no countervailing benefits) in the long run.” Given this, the Commission may resolve that unbundling would frustrate the statutory purpose, not promote it.

## Legislative uncertainties

13. The provisions of section 64 of the Telecommunications Act 2001 are inconclusive and uncertain. The Quigley Report observed that the term “local loop unbundling” was capable of bearing a range of meanings and that various jurisdictions had interpreted the term differently (see paras 6 - 16 of the Report). The Report identified various ambiguities in the statutory language and noted that the nature of the section 64 review was uncertain. These matters leave choices that may have a significant impact on Telecom.
14. The Commission and Minister should apply the legislation in a way that least impacts on Telecom’s operations and services. The courts will “read down” inconclusive or

<sup>3</sup> *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 at 701 (CA).

<sup>4</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 658 (CA).

<sup>5</sup> See para 31 below for *Hansard* statements.

ambiguous statutory words where such words are capable of authorising action that would impair property rights or economic interests. The courts strictly construe general or ambiguous words so as to avoid abrogating private rights (see paras 18 - 29).

15. The Quigley Report (para 6) identified four layers of uncertainty within the definition of LLU. These concerned:
  - The boundaries defining the portion of the physical network to which unbundling may be applied;
  - The inclusion or exclusion of services in the definition of the network elements available for unbundling;
  - The rights and obligations imposed on the user of any unbundled element of the network;
  - The choice between regulated and commercially negotiated prices for any unbundled network elements.
  
16. The uncertainties identified present three sets of choices. First, LLU may make available individual unbundled elements of the local loop network for lease by new entrants (exclusive possession and use), or for sharing as between the incumbent (Telecom) and new entrants. The unbundled elements may include physical or logical components or operational processes. Secondly, LLU may allow an entrant to share or lease the access distribution technology of the incumbent service provider. Exclusive use under lease would enable the new entrant to deliver services to end-users by locating its own technology on the ends of the incumbent's distribution network. Thirdly, LLU may provide for designated or specified services. If the service is specified, the price is not regulated but is fixed by commercial negotiation. If the service is designated, then the Commission must determine the pricing principle to be applied.
  
17. In resolving the options, section 19 requires the Commission and Minister to make choices that are calculated to best achieve the statutory purpose in section 18 (see above). However, the matter is legally more complex. The Commission and Minister must also opt for solutions that comply with established principles of statutory interpretation. These principles operate so as to preserve Telecom's interests against legislative encroachment, so far as the statutory purpose allows.

## **Protection of property rights**

18. Unbundling requires the network owner to share with or lease to competitors individual elements of the incumbent's network. Whatever form LLU may take, unbundling represents State-sanctioned intervention amounting to a "regulatory taking".<sup>6</sup> When

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<sup>6</sup> See below paras 32 – 36 for discussion of American "takings" jurisprudence.

faced with intrusive regulatory regimes, the courts are astute to protect private rights, including rights of property. The courts presume that, unless Parliament uses unequivocal and emphatic language, it does not intend to abrogate property rights or other economic interests. The following House of Lords dictum encapsulates the “umbrella presumption” that, in practice, operates as a silent constitutional principle:<sup>7</sup>

“[T]here is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a ‘strict’ construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means ... that, where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed.”

19. The courts ascribe to legislation meanings that conform to the institutional values of the legal system. These meanings depend, “not solely on the black letter of Parliament’s language but also upon other considerations of public policy which it is the duty of the court to consider” (*Savril Contractors Ltd v Bank of New Zealand* [2002] NZAR 699 at 704-705). In *Savril* the High Court declared (at 704-705): “It [the court] must decide what construction will best conform with the settled precepts by which the Courts determine the meaning of statutory language.” The court emphasised the “judge-made precepts” and “considerations of public policy” that colour the meaning of statutory language (at 704 – 705). These “precepts” or “considerations” include the presumption against the statutory abrogation of property rights. All of the (so-called) presumptions of statutory interpretation are, in truth, statements of judicial policy – the “judge-made precepts” or what Sir Rupert Cross and Lord Hoffmann termed “principles of constitutionality”.<sup>8</sup>
  
20. The courts have applied these “presumptions” even where there has been no linguistic ambiguity in the statutory wording under construction. Sir Rupert Cross wrote that:<sup>9</sup>

“[T]hese presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles.”
  
21. The courts will mould Parliament’s language so as to preserve access to the courts, uphold the presumption of innocence, protect the liberty of the individual, give statutes prospective rather than retrospective effect, and preserve intact citizens’ property rights and economic interests. In *R v Secretary of State for the Home Department; Ex p Simms* [2000] 2 AC 115 at 131, Lord Hoffmann declared: “Fundamental rights cannot be overridden by general or ambiguous words”. For another judge: “General words would not suffice”.<sup>10</sup> The Court of Appeal has likewise emphasised the need for emphatic

<sup>7</sup> *General (Canada) v Hallet & Carey Ltd* [1952] AC 427 at 450 per Lord Radcliffe.

<sup>8</sup> See respectively J Bell and G Engle (eds), *Cross on Statutory Interpretation* (3<sup>rd</sup> ed, 1995) at 166; *R v Secretary of State for the Home Department; Ex p Simms* [2000] 2 AC 115 at 131.

<sup>9</sup> *Ibid*, at 166.

<sup>10</sup> *R v Lord Chancellor; Ex p Witham* [1998] QB 575 at 586 per Laws J.

words in order to override basic rights. Parliament, it said, “*must speak clearly* if it wishes to trench on fundamental rights”.<sup>11</sup>

22. Parliament failed *to speak clearly* when it enacted section 64 of the Telecommunications Act 2001. The Commission and Minister must interpret section 64 in accordance with the courts’ statements of principle in the foregoing paragraphs. They must apply section 64 in the way that least intrudes on Telecom’s property rights and economic interests. The uncertainties in the statutory language must be resolved by limiting the potential of LLU review to disadvantage the incumbent network owner.
23. The Commission and Minister must resist any temptation to conflate the statutory purpose (section 18) and power in question (section 64). It is not permissible to approach section 64 by saying: “The language of section 64 is uncertain and there is no agreement about the nature and scope of the unbundling review. Nevertheless, whatever section 64 may propose, the economists are agreed that recommendation X would best promote the statutory purpose of securing long-term benefits to end-users”. On this approach, it could not be discerned whether recommendation X was within the mandated scope of LLU review. The primary responsibility of ascertaining the scope of the review power is abdicated in deference to a broadly framed statutory purpose.
24. Purposes and powers are distinct. A statutory purpose (or object) cannot enlarge the *scope* of a power legally conferred. *In re Introductions Ltd* [1970 1 Ch 199 at 210, a general power to borrow in a company’s memorandum did not authorise borrowing beyond the company’s objects. Harman LJ stated: “[Y]ou cannot convert a power into an object merely by saying so.” So, too, the reverse: one cannot treat an object/purpose as though it were a power. Every statutory power has legal limits; there is no such thing as an unfettered power.<sup>12</sup> The limits of a power must be ascertained *before* it can be employed to promote the statutory purpose. A decision-maker may not reverse the interpretive sequence and use the statutory purpose to amplify a power beyond its lawful scope.
25. The nature and scope of the LLU review must be settled *before* consideration is given to what recommendation would best promote the statutory purpose (section 18). Delineating the scope of the LLU review would, in turn, determine the range of recommendations that may be made. The uncertainties in section 64 must be resolved in accordance with the common law principle that protects property rights against legislative invasion.

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<sup>11</sup> *R v Pora* [2001] 2 NZLR 37 at 50 per Elias CJ and Tipping J (emphasis added).

<sup>12</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1060 (HL); *Wellington CC v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 at 545 (CA).

## The authorities

26. Numerous authorities illustrate the principle that the courts will read down general or ambiguous legislation for protection of property rights. In *Ashburton Borough v Clifford* [1969] NZLR 446 at 448, the court stated:
- “In construing [the statute’s] terms, the Courts, in accordance with established principles, will not adopt a meaning which takes away existing rights of property owners further than the plain language of the statute, or the attainment of its object according to its true intent, meaning and spirit, requires.”
27. In *American Dairy Queen v Blue Rio* (1981) 37 ALR 613, the High Court of Australia affirmed the orthodox approach to statutes that might trench on property rights. The court stated:
- “The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute ... This rule certainly applies to the principles of the common law governing the creation and dispossession of rights of property. Indeed, there is some ground for thinking that the general rule as added force in its application to common law principles respecting property rights.”
28. In *Centronics Systems v Nintendo* (1992) 111 ALR 13, the court followed *American Dairy Queen* and held that statutes must be construed in favour of protecting common law property rights, unless the statute expresses an unequivocal intention to alter those rights. The court stated:
- “Bennion ... observes that the presumption against imposition of a statutory detriment to a person’s property or other economic interests without clear words is an aspect of the general principles against ‘doubtful penalisation’, that is, a person should not be penalised under a doubtful law if the right of the owner of property to dispose of it is protected by this presumption.”
29. The term “property” has a broad connotation. In *Glogau v Land Transport Safety Authority* [1997] 3 NZLR 353 the court applied the presumption in favour of private rights in interpreting the Copyright Act 1962 and construed ambiguous words so as to avoid an expropriation of the plaintiff’s copyright. In *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 at 374, it was said that “property” in this context was to be given a wide meaning. For purposes of LLU review, the term covers Telecom’s intellectual property, its telecommunications infrastructure, and its telecommunications services and market-share.

## Parliamentary debates

30. The courts presume in favour of preserving property rights in the absence of a clear legislative mandate. The parliamentary debates on the Telecommunications Act 2001 confirm it was Parliament's intention to withhold any mandate from the Commission or Minister. The Minister and members emphasised the need to stimulate competition, investment and innovation in the industry, and to protect against "unnecessary regulation". The debates identified Parliament's dual purpose:

- That regulatory intervention would be a "last resort" where market regulation was shown to have failed; and
- That the regulatory regime was to encourage industry investment "not because of regulation, but because of return on capital" (Hon Paul Swain, Ministerial statement, 20 December 2000).

31. The following statements affirm the need to preserve Telecom's telecommunications infrastructure and services, subject to the statutory purpose in section 18:

"[The Bill] follows the basic principle of as much market as possible and as much Government regulation as necessary ... It encourages and promotes commercial arrangements wherever possible" David Cunliffe, *Hansard* 9 May 2001

"The dispute resolution procedure in the bill is designed to provide a backstop that will enable disputes ... to be resolved quickly" (Hon Paul Swain, *Hansard* 9 May 2001).

"The measures in this bill are not light-handed or heavy-handed, they are even-handed ... It is a fine balance between commercial imperative in the first instance, and Government intervention when the need arises" (Hon Paul Swain, *Hansard* 9 May 2001).

"The role [of the Commissioner] will be more facilitative [than that of other Commerce Commissioners], and will try to resolve issues before they become major problems ... As the Minister has said many times, we are looking for an outcome that will encourage companies to sort out their problems for themselves, with the Government getting involved only as a last resort" (Kevin Campbell MP, *Hansard* 27 November 2001).

"One of the key planks to our policies has been allowing the industry to work out its problems itself, if at all possible ... The best sort of regulatory framework is the one that is never used. The threat of Government action is enough to encourage the parties to come to a commercially sensitive arrangement" (Kevin Campbell MP, *Hansard* 18 December 2001).

"This bill ... has come up with a new framework for careful and moderate industry-specific regulation. Where the market is competitive there is no regulatory intervention" (David Cunliffe MP, *Hansard* 18 December 2001).

“In a highly competitive market like [telecommunications] we need as much market as possible, as much government as necessary. ... [The regime] is designed to promote investment in, and competition in such a way that people decide to invest in, telecommunications in New Zealand, not because of regulation, but because of return on capital” (Hon Paul Swain, Ministerial Statement, 20 December 2000).

## Regulatory takings law

32. The Quigley Report (para 62) raised the concept of a “regulatory taking” which occurs “where government or its agent limits the nature of a property right by means of legislation and regulation”. This concept reinforces the constitutional imperative of protecting property rights. Unlike in other jurisdictions, New Zealand lacks any constitutional guarantee to compensation for expropriation of private property. This lack of constitutional protection strengthens the common law presumption against the abrogation of property rights, in the absence of a clear legislative direction to the contrary.
33. In the United States, the 5th Amendment “takings clause” guarantees the right to compensation for the State’s exercise of eminent domain (compulsory acquisition of private property for public purposes). American takings jurisprudence treats eminent domain and the right to compensation as inseparable: “that the one [the power to take] was so inseparately connected with the other [the duty to compensate] that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle”.<sup>13</sup>
34. The right to compensation is a universal or international constitutional norm. In *Chicago, Burlington, the Supreme Court held that the right to compensation was one “founded in equity” and “laid down as a principle of universal law”* (at 236 per Justice Harlan). The right can be traced to the Magna Carta guarantee that “[n]o freeman shall be ... disseised of his Freehold ... but by the ... Law of the Land”. Not to make reparations for the exercise of eminent domain would offend the basic notion of fairness embodied in the concept “the law of the land”/ “due process of the law”. Many countries guarantee the right to compensation for compulsory acquisition of the citizen’s property. Blackstone’s writings elevated English parliamentary practice into a binding constitutional principle. He wrote that the English Parliament “indeed frequently does” pass statutes to expropriate property, but only “with caution”, and with “a full indemnification and equivalent”, or “a reasonable price”, to compensate for the subject’s loss (*Commentaries on the Laws of England* (1765), Vol 1, at 139).
35. In the United States a “taking”, when exercised for public purposes, triggers rights to compensation. In 1922 Justice Holmes conceived the concept of a *regulatory* taking (*Pennsylvania Coal Co v Mahon* 260 US 393 (1922)). Regulatory takings law draws on

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<sup>13</sup> *Chicago, Burlington & Quincy Railroad Co v City of Chicago* 166 US 226 (1896) at 238 per Justice Harlan delivering the opinion of the Supreme Court.

Hohfeld's concept of property, as comprising a bundle of abstract interests.<sup>14</sup> For Hohfeld, a taking was the deprivation of the rights that attached to the object, rather than the physical acquisition of it. Deprivation of a property right need not be "physical" to be a taking under the 5th Amendment. The rights of exclusive use, enjoyment and conveyance of the object is the asset (the property right), rather than the object itself. Thus regulatory interventions that destroy or impair the practical utility of the object will constitute a *taking*. In *Pennsylvania Coal* the Supreme Court held that, if a regulatory intervention "goes too far", it will amount to a taking (at 415 per Justice Holmes).

36. Section 64 of the Telecommunications Act should be restrictively construed in light of the judge-made precepts and presumptions discussed above. Local loop unbundling (mandatory lease or sharing arrangement) encroaches on economic and property interests and would constitute a "taking" under American takings law. In the United States Telecom would have the constitutional right to offset its losses through compensation. In the absence of compensation, Telecom could expect the uncertainties under section 64 to be resolved in its favour.

## Parliamentary history

37. It is unclear what unbundled elements of Telecom's services may be subject to LLU review. Section 64 does not stipulate whether it includes the shared loop (Telecom's fibre optic lines) within the local loop network review. However, the parliamentary history indicates that it was not Parliament's intention to include the shared loop.
38. The Government opposed introducing mandatory unbundling under the Telecommunications Act. The Green Party, on the other hand, promoted it. The following exchange occurred in the parliamentary debates between Green Party member, Sue Kedgley, and the Minister (*Hansard* 2 May 2001):

**"Sue Kedgley:** "Given that most developed countries are introducing local loop unbundling ... why is the Government allowing Telecom to maintain its monopoly within the copper wire telecommunications network, rather than allowing access to new entrants, which would increase the level of competition and technological innovation in the local access network?"

**"Hon Paul Swain:** "The question of local loop unbundling was one of the key decisions that had to be made during the inquiry ... I am still convinced that requiring local loop unbundling at this time is not the right thing to do. That does not mean to say the Government will not consider it at some later time."

39. Ms Kedgley's question to the Minister was directed at Telecom's monopoly "within the copper wire telecommunications network". To Kedgley's question, the Minister replied: "That does not mean to say the Government will not consider *it* at some later time." "It"

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<sup>14</sup> WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919), pp 71 et seq.

referred to Kedgley's reference to unbundling Telecom's *copper wire telecommunications network*.

40. Subsequent developments confirmed that it was Parliament's intention to confine the LLU review. Ms Kedgley moved amendments through Supplementary Order Paper at the committee stage to define "local loop unbundling" (*Hansard* 5 December 2001). The SOP identified expressly Telecom's copper local loop, copper local sub-loop and shared loop facilities as being subject to LLU review, and defined the terms, "local loop", "local sub-loop" and "shared loop". The amendment was voted down by 72 to 38 votes in the House. The courts will reason inferentially from amendments (or attempted amendments) to Bills, where such amendments confirm the parliamentary legislation.

## Published policy guidelines

41. The writer's text, *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001 at 797 identifies the duty to act consistently as a discrete principle of judicial review: "Inconsistency of treatment or substantive outcome may amount to an abuse of discretion." A decision-maker may err for inconsistency if it misconstrues or fails to apply policy guidelines that it has voluntarily adopted. Misconstruing or failing to comply with published policy guidelines raises issues of legitimate expectation, public law estoppel, material error of law, and substantive unfairness.<sup>15</sup> The courts have held that "strong grounds" will be needed to justify a departure from published criteria.<sup>16</sup> For the Court of Appeal, the consequence of misconstruing a policy rule or guideline will usually vitiate the decision.<sup>17</sup> The English courts have held that the construction given by the decision-maker must be one that the words contained in the policy statement can reasonably bear.<sup>18</sup>
42. The commission has published policy guidelines on the long-term benefits of end-users of telecommunications services.<sup>19</sup> In assessing these benefits, the Commission must consider the efficiencies that will result from recommended action (section 18(2)). In its published guidelines, the Commission identified likely outcomes in trade-offs between three forms of efficiency (para 64):
- **allocative efficiency** – where service providers use their resources to produce telecommunications goods and services most valued by end-users;
  - **productive efficiency** – where service providers produce telecommunications goods and services at least cost (and to minimise industry-wide costs);

<sup>15</sup> See Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001 at 797-798

<sup>16</sup> *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 at 754-755 (HC).

<sup>17</sup> *Chiu v Minister of Immigration* [1994] 2 NZLR 541 at 550 (CA).

<sup>18</sup> *R (Nadarajah) v Secretary of State for the Home Department* [2002] All ER (D).

<sup>19</sup> *A Guide to the Role of the Commerce Commission in Making Access Determinations under the Telecommunications Act*, 28 May 2002, paras 62 – 69.

- *dynamic efficiency* – where service producers invest, innovate and improve telecommunications services, increase productivity and lower costs through time.

43. The Commission anticipated likely tensions between static efficiencies (allocative and productive) and dynamic efficiencies. It observed that dynamic efficiency will occur where providers are “able to achieve a reasonable risk-adjusted return on the capital they invest in the industry” (para 64). The Commission concluded that it would promote the statutory purpose (section 18) to determine terms of supply that (para 115):

“... encourage efficient investment in infrastructure over the medium to long-term by giving a reasonable return on the capital invested in networks and for the production of services.”

44. Investment needs in a capital-intensive industry may compromise short-term allocative efficiencies, necessitating trade-offs to ensure long-term benefits to end-users. To resolve such tensions, the Commission published the following policy guideline (paras 68 and 113):

“Where there are tensions between short-term allocative efficiency and long-term dynamic efficiency, the Commission takes the view that the latter will generally better promote competition for the long-term benefit of end-users.”

45. This policy guideline commits the Commission to a course of action from which it may not waver. When making the necessary trade-offs, the Commission must recognise the need for dynamic efficiency and accord due weight to it. Evidence that the Commission had failed to do so but rather was drawn by short-term expediencies (allocative/productive efficiency) would invite challenge in the courts under the grounds identified in para 41.

46. In its policy publication, the Commission adopted positions on various matters concerning its section 64 review. The Commission has two options: comply with its policy choices, or revoke them and/or adopt alternative policies (a possibility the Commission noted in para 114 of its publication). However, any alternative policies the Commission adopts must promote the statutory purpose in section 18.

47. The broader the statutory discretion conferred on decision-makers, the greater the freedom to adopt policy guidelines.<sup>20</sup> Conversely, the more specific the statutory power and/or purpose, the less manoeuvrability decision-makers have to adopt policy guidelines. A policy guideline that enlarged the statutory power or failed to further the statutory purpose would be challengeable through judicial review. Here, the specific elements of the statutory purpose in section 18 leave the Commission little (if any) room for manoeuvre. The Commission’s current policy of promoting dynamic over static

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<sup>20</sup> Provided such guidelines do not lapse into binding rules of application and destroy the element of independent judgment. See Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001 at 801 – 804 (discretion must be brought to bear in every case).

efficiencies is consonant with the statutory mandate: to promote the “long-term benefit of end-users of telecommunications services” (section 18).