

OFFICIALS' REPORT

CLAUSE BY CLAUSE ANALYSIS OF SUBMISSIONS ON TELECOMMUNICATIONS BILL – PARTS 1-5

This report includes:

- a points made in submissions on the clauses relating to Parts 1-5 of the Bill. It does not include commentary on the Schedules, which will be provided at a later date;
- b a small number of drafting improvements that officials wish to suggest (these are interspersed throughout the document); and
- c points made in general submissions not directed at particular clauses or parts of the Bill.

Note that, where officials have agreed to drafting suggestions made by submitters, drafting amendments need to be considered and approved by the Parliamentary Counsel Office.

23 July 2001

CLAUSE	SUBMISSION	SUBMITTER	MINISTRY COMMENT
“	The cost of the Telecommunications Commissioner's industry levy should be capped at \$2.6 million per annum for five years (until the first review period) to guard against "regulatory creep".	Business New Zealand [3W]	<u>Disagree</u> . It is impossible to predict over such a long period how industry will react to the new regime and the number of substantive issues the Commissioner will have to consider, given possible changes to telecommunications technology, industry ownership and industry behaviour.
12	Application of Commerce Act 1986 Support the Commission having the power to obtain information when necessary under section 98 of the Commerce Act.	TelstraSaturn Limited [17]	<u>Noted</u> .
14	Application of section 105 of Commerce Act 1986 Amend the requirement to obtain the Telecommunications Commissioner's consent in the exercise of s105 Commerce Act powers (powers of delegation) by replacing with a requirement to <u>consult</u> the Telecommunications Commissioner in the exercise of s105 Commerce Act powers. This is to make it clear that the Chair is able to exercise normal delegation responsibilities after consulting with the TC.	Commerce Commission [6]	<u>Disagree</u> . The purpose of this clause is to ensure that the Chairman cannot use his delegation powers under section 105 to circumvent the TC. The intent of the Bill is that if there is a TC, then he or she must perform his or her functions as set out in clause 10(1) (unless he or she consents to have those functions delegated to another Commissioner). If the TC consents to the delegation, clarify that he or she does not determine to which Commissioner(s) the power should be delegated.
PART 2	DESIGNATED SERVICES AND SPECIFIED SERVICES		
Subpart 1	Preliminary		
15	Purpose of Part 2 of the Bill Amend clause 15: (a) to include a reference to "net economic benefits to New Zealand" to better reflect the Cabinet-agreed test for the regulation of a service. (b) to include the following criteria for designation of a service: <ul style="list-style-type: none"> • the telecommunications service is of significance to the national economy • no substitute service is available that could be used by an 	Telecom New Zealand Ltd [20]	(a) <u>Disagree</u> . 'Efficient telecommunications markets for the long term benefit of end users (used in C1 15) is equivalent to 'net economic benefits'. (b) <u>Disagree</u> . A decision to regulate a service may only be made if regulation is more likely (than the status quo) to promote efficient telecommunications markets for the long-term

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	<p>There is potential inconsistency between the purposes of the Commerce Act 1986 (with a focus on competitive markets) and the purpose of the Bill (a focus on economic efficiency). The purpose statement of the Commerce Act should be adopted.</p> <p>The growth of e-commerce may be facilitated by a wider focus – broadband access may be in the long-term benefit of users but not economically efficient. Also, the same behaviour may be subject to different tests depending on which Act applies. [NZLS]</p> <p>In addition, the wider notion of 'competitive markets' is more consistent with the access regime under the Australian Trade Practices Act. New Zealand should seek to maximise consistency between NZ's regulatory regime and the regimes of key trading partners. [NZLS]</p>	<p>New Zealand Law Society [14A], Clear Communication Ltd [5]</p>	<p>governs legal issues relating to declaration of operator status, misuse of networks and maintenance of network.</p> <p><u>Disagree</u>. The current formulation of the purpose clause gives effect to the Government's objective of maximising net benefits to New Zealand from the provision of telecommunications services. These submissions misunderstand the intent of the Commerce Act purpose, which is not to favour competition where society does not benefit. However, officials support the objective of ensuring as great a level of clarity as possible on the objective and could report further on options if the Committee considers the present formulation is not clear.</p>
	<p>A definition of 'any-to-any connectivity' should be provided as it is not easily understood.</p> <p>Amend as follows:</p> <p>1) Replace the words "is consistent with" in Cl 15(2) with 'achieves' – the word 'achieves' seeks to ensure that any decision actually leads to achieving the purpose, rather than just being consistent with it.</p>	<p>New Zealand Law Society [14w]</p> <p>Vodafone New Zealand Ltd [9]</p>	<p><u>Agree</u>. This term should be clarified. In essence it means that any terminal on a dial-up network can communicate with any terminal on any other dial-up network.</p> <p>1) <u>Disagree</u>. Cl 15 applies to all decisions in Part 2, not just decisions to regulate services. There is scope for decisions in Part 2 where the use of the term "achieves" would create uncertainty. For example, a decision to investigate an application made under cl 21(a) will not achieve efficient telecommunications markets for the long term benefit of end users but may well be consistent with it.</p> <p>2) <u>Disagree</u>. As above, Cl 15 applies to all</p>

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2) Add the words "is necessary to" at the beginning of each subsection in Cl 15(2) – i.e. "whether or not the act or omission is necessary to promote" etc. This would provide for a causative relationship between what the Minister or Commission does and the outcome sought.

3) Cl 15(2)(c): while an act or omission may encourage investment in infrastructure across the industry as a whole, it could be detrimental to investment in the relevant part of the industry infrastructure and accordingly not in the interests of society. Add words to require the encouragement of investment under this criterion to relate to the particular infrastructure in question, e.g. mobile networks.

1) Amend Cl 15(1) by removing the words "by regulating the supply of telecommunications services to service providers", because regulation is a last resort and should not be assumed by law as promoting efficient markets.

2) The Committee should satisfy itself that the words "long-term benefit to end-users of telecommunications services" (Cl 15(1)) will not result in efficiency gains being measured only where they benefit one section of society.

3) Omit clause 15(2). The inclusion of the word 'efficient' in 15(1) will require the Commission to consider all aspects of efficiency (dynamic, allocative and productive) in any event.

SUBMITTER

UnitedNetworks Ltd [8]

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provisions in Part 2. Use of the phrase "is necessary to" implies that the purpose will not be met at all otherwise. This is not the intention. The current formulation, in conjunction with clause 16, ensures that a comparison is made between the status quo and other options, and that the option is chosen that best gives effect to the purpose, i.e. with the aim of providing greater net benefits than other options.

3) Disagree. Cl 15(2)(c) relates to allocation of resources among competing uses in telecommunications. It therefore aims to promote investment in telecommunications infrastructure where that would result in New Zealand being better off. It also discourages telecommunications investment that may be efficient in the relevant part of the industry infrastructure but is detrimental to New Zealand as a whole, e.g. promotes efficient fixed line investment at the expense of mobile networks. The current wording enables this approach to be taken.

1) Disagree. The Bill is about regulating access to services by service providers where this is necessary to achieve the purpose. It is not intended to presume that regulation is always necessary to promote efficiency.

2) Noted. The current purpose statement is intended to be a robust proxy for the whole of society. Consequently, efficiency gains would be measured for the whole of society.

3) Disagree. It is appropriate to have criteria that decision makers must specifically consider to minimise the risk of confusion about the meaning of efficiency.