

TELECOMMUNICATIONS ACT 2001: MOBILE TERMINATION – “WEALTH TRANSFERS” – OUTLINE OF TELECOM NEW ZEALAND POSITION

- 1 These notes seek to outline the points which go to the submission for Telecom that the “wealth transfers” section of the Commission’s draft determination (paragraphs 59-70) requires reconsideration, and that the better analysis of the Act means that the prospect of a producer:consumer wealth transfer is an irrelevant consideration.
- 2 The Commission is of course engaged in an important task under Schedule 3 of the Act: to decide whether or not to affirmatively recommend that Schedule 1 should be altered under section 66. It goes without saying that the Commission must take a principled approach to this task, but it is an important part of Telecom’s submission that a precautionary approach is also required. On the latter point, in populist terms: “if it ain’t truly broke, don’t fix it”.

Sections 18 and 19

- 3 As everyone appreciates, the only direct statutory instructions to the Commission in its current task are those set out in section 19:
 - to consider the section 18 purpose; and
 - to make the recommendation that best gives effect to (or is likely to) the section 18 purpose.
- 4 The onus of proof point is relevant in providing context for the wealth transfer point. In the context of the Act, the Commission must be clearly satisfied that an amendment to Schedule 1 would provide an improvement, in terms of the section 18 purpose, over the status quo — that is, the medium term work that market forces do.
- 5 The Commission has now had numerous occasions on which to consider section 18, but Telecom’s essential point is that it is clearly not focussed on retail price control. If that were what Parliament intended, then there could have been a replication of (or direct link to) Part IV of the Commerce Act.
- 6 Rather, section 18 is focussed on promoting “competition” — that is, promoting the process whereby market forces determine outputs, prices and, indeed, commercial success and failure. The reference to “long term benefits of end-users” (of which there is more discussion below) clearly points away from short term retail price considerations.
- 7 Further, the limited scope of the Act is indicated by section 18’s specific focus on the ability to regulate the supply of “certain” telecommunication services *between* telecommunications service providers. This again points

away from a focus on retail impact. In the context of the history of the Act, this confirms the Fletcher report's recommendations for narrowly targeted legislation which enhances early access by new entrants to bottleneck facilities ("levelling the negotiating playing field", "light-handed nature of the regulation proposed": pp 56-57).

- 8 This approach to the Act is confirmed by the clear preference for private ordering which is explicit in section 22(a) to (c). It is also fair to attribute to these matters the kind of precautionary concerns expressed relatively recently by the US Supreme Court in *Trinko* (*Verizon Communications Inc. v Law Offices of Curtis V Trinko* 540 U.S. [1] (2004)), pp 14-15.

Schedule 1 irrelevant

- 9 The current provisions of Schedule 1 are irrelevant to the Commission's consideration of a potential section 68(2)/Schedule 3 recommendation. Firstly, the whole of Schedule 1 is subject to expiry or change under sections 65 to 67: they are not permanent provisions, nor a permanent regime, but consciously limited in scope and time. Thus, it is incorrect to conclude that the Act contains within it a simple endorsement of "cost-based" pricing across the telecommunications markets.
- 10 The second and related point is that, in considering whether Schedule 1 provisions are to be changed or extended, it must be sections 18 and 19 that provide the criteria. It cannot be the very provisions on which the question of change will be focussed — that is, the provisions of Schedule 1. In other words, it is perfectly conceivable for the Minister to request the Commission to consider whether the cost-based regime in Schedule 1 is appropriate to carry out the section 18 purpose; and it is not possible for the Commission to simply answer that Schedule 1 already contains requirements for cost-based pricing for designated services.

Commerce Act, sections 1A and 3A

- 11 The language of section 18(1) and (2) is consciously aligned with that in sections 1A and 3A of the Commerce Act. On the sections 1A and 3A language of the Commerce Act, the emphasis on "real resource impacts" in the recent High Court decision in *Air New Zealand/Qantas* is directly translatable because the references to "efficiencies" and "long term benefits" in both Acts are in fact of generalised effect. The legislative history on this is compelling: see Telecom submissions (paragraphs 71-74).
- 12 More generally, it is not the case that, if competition is limited (and there might be "monopoly profits" — not obvious here), the Act expects or requires regulation to the extent that competitive retail prices are achieved. In other words, that a producer: consumer wealth transfer is achieved. In the first place, that is not the position under the Commerce Act. Under that

Act, efficiencies may establish public benefits notwithstanding the prospect of ongoing limited competition (this is especially so in New Zealand's relatively small markets).

- 13 Secondly, any assumption that competitive retail prices must be achieved would move the Commission's role away from achieving the section 18 purpose, towards a concern with retail prices, contrary to what section 18 actually prescribes, and towards something which Parliament could have (but conspicuously has not) prescribed in this Act.
- 14 Thirdly, the Commission is not an expert body in relation to wealth transfer issues, which are the field in which taxation and social welfare policies play out. This is of course well stated in the Commission's own Commerce Act authorisation guidelines, section 5. Under the Act, it is the Minister who makes the "political" decision whether to cause an amendment to Schedule 1. The Commission is the statutory source of competition policy advice. But the Minister has access to the resources of central government for any social policy advice that might be relevant.

Summary

- 15 Thus, Telecom's position may be summarised as follows:
 - 15.1 The Commission's Schedule 3 task must focus on the specific criteria and purpose derived from sections 18 and 19 of the Act.
 - 15.2 The structural presumption of the Act is against extension of the regulatory scope of the Act.
 - 15.3 The Commission is clearly not empowered to engage in actual or de facto retail price control under this Act.
 - 15.4 The corresponding language in the Commerce Act requires focus on real resource impacts, not wealth transfer considerations.
 - 15.5 There are political and value judgements inherent in wealth transfer issues and, as the Commission is not expert in these, they are properly addressed by the political organs of Government, as contemplated by the role given to the Minister under Schedule 3.

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