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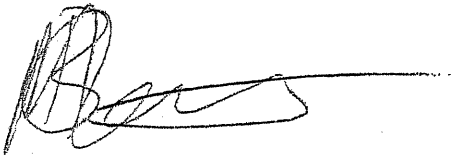
13 August 2001

The Chair
Commerce Committee

TELECOMMUNICATIONS BILL - PURPOSE CLAUSE

This Paper responds to the Committee's request for briefing on purpose clauses in the Telecommunications Bill. This paper is structured as follows:

- 1 **Clause 15 – Purpose of Part 2 and Schedule 1 to 3:** the Committee has indicated an interest in having clause 15 consistent with the purpose clause in the Commerce Act 1986.
- 2 **Purpose clause for social objectives:** the Committee has requested briefing on the merits of including a social objective purpose clause in the Telecommunications Bill.



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- How do these answers accord with submissions on the Bill?

COMMENT

What is the intent of each piece of legislation?

5 The primary intent of the Commerce Act and the Telecommunications Bill is the same – to maximise the net benefits to New Zealand in the relevant markets. The Commerce Act aims to achieve this end by applying rules for the operation of general markets. The Telecommunications Bill sets rules for the operation of a specific market, the telecommunications market.

6 The Commerce Act reflects this public benefit aim in the phrase “long term benefit to consumers”. The Telecommunications Bill uses the phrase “long term benefit of end-users of telecommunications services”. The two phrases are commonly accepted as a proxy for net benefit to New Zealand. Telecom in its submission to the Committee was concerned about the risk that “long term interest of consumers/end users of telecommunications services” might not be interpreted as a proxy for net benefit to New Zealand. Officials consider that this is not a likely outcome.¹ However, any risk can be addressed by also including the phrase “net benefit to New Zealand” in the purpose clause of the Telecommunications Bill.

What is the means by which each piece of legislation seeks to achieve its ends?

7 While the primary intent of the Commerce Act and the Telecommunications Bill is the same, the means by which this intent may be achieved is different.

8 The Commerce Act achieves its ends by promoting the competitive process (the Commerce Act uses the phrase “to promote competition”) in general markets. In essence, the Commerce Act assumes that there is competition in the markets and that competition should be facilitated to the greatest possible extent. In the vast majority of cases, this equates to promoting efficiency.

9 The Telecommunications Bill achieves its ends not by promoting competition per se but by regulating bottleneck services (“by regulating the supply of certain telecommunications services”) so that other telecommunications service providers can efficiently access those services. The Telecommunications Bill assumes that there are grounds on which disputes will arise because of the interconnected nature of networks and “natural monopoly” elements of them. Consequently, the Telecommunications Bill establishes a process for designation of services and determination on regulated services.

What are the criteria under each piece of legislation to determine whether a particular action will achieve the end?

10 When determining if a particular action will achieve net benefits to New Zealand, the Commerce Act is largely focused on competition but recognises that in some cases competition does not result in net benefit to New Zealand and here the Commerce Act

¹ Officials note however that in its first attempt at the interpretation of “long term benefit to consumers” the High Court noted as side comment that the term might be orientated to the interest of consumers. (*Foodstuffs (Auckland Ltd) v Commerce Commission* (2001)).

16 The Courts have interpreted "efficiencies" under section 3A of the Commerce Act as, allocative efficiency³, productive efficiency⁴ and dynamic efficiency⁵ (*Telecom v Commerce Commission* (1991)). Given this interpretation of efficiencies a specific reference to competition is not required, as competition is a part of the efficiency consideration.

Telecommunications Bill

17 The intent of the Telecommunications Bill is to maximise net benefit to New Zealand. It achieves this by regulating the telecommunications markets. In making a decision as to whether an action will result in net benefit to New Zealand, the Telecommunications Bill requires that consideration be given to efficiencies. The Bill states efficiencies as:

- whether or not the act or omission facilitates efficient competition in markets for telecommunications services;
- whether or not the act or omission promotes any-to-any connectivity to the extent that it is efficient; and
- whether or not the act or omission encourages the efficient use of, and efficient investment in, the infrastructure by means of which telecommunications services are provided.

18 Officials note that the above formulation may result in disputes over the exact meaning of the particular terms. Officials therefore consider that the term "efficiencies" be adopted as it will achieve consistency with the Commerce Act and is well developed in case law.

Given our answers to each question what should the purpose statement be?

19 The key conclusions are:

	Commerce Act	Telecommunications Bill
<u>Intent</u> of the legislation	To maximise net benefit to New Zealand in general markets.	To maximise net benefit to New Zealand in telecommunications markets.
Means by which this intent is achieved	By promoting competition in general markets, except in cases where competition may not result in net benefits to New Zealand.	By regulating bottleneck services so that other telecommunications service providers can efficiently access those services.

³ Allocative efficiency refers to the allocation of scarce resources among competing uses.

⁴ Productive efficiency is determined by the efficiency of production process within firms; in particular whether firms minimise production costs.

⁵ Dynamic efficiency refers to the efficiency of the framework for future decision-making (including investment decision making).

Criteria to determine whether a particular action will achieve the end	Efficiency criteria are applied in cases where competition may not result in net benefit to New Zealand	Efficiency is applied to determine if an action would achieve net benefit to New Zealand.
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20 In light of this analysis, officials consider that major changes are not necessary but some redrafting may be required. The redraft of Cl 15 (1) and (2) by PCO should capture the following principles:

- The purpose is to regulate the supply of certain telecommunications services to service providers for the long term benefit of consumers within New Zealand from the provision of telecommunications services;
- In determining whether anything is consistent with the long term benefit to consumers only the following matter must be considered:
 - whether or not the act will result in a net benefit to New Zealand having regard to any efficiencies that will result from that act.

HOW DO THESE ANSWERS ACCORD WITH THE SUBMISSIONS ON THE BILL?

21 Submissions to the Committee on the Part 2 purpose clause of the Telecommunications Bill are:

- that a reference to "net economic benefits to New Zealand" be included to better reflect the Cabinet agreed test and that "long term benefit to end users of telecommunications services" may not be interpreted as net benefit to New Zealand (Telecom New Zealand Ltd);
- that the Committee should satisfy itself that the words "long-term benefits 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 (United Networks Ltd); and
- that a reference to "efficient markets" results in potential inconsistency between the purposes of the Commerce Act (with a focus on competitive markets) and the purpose of the Bill (a focus on economic efficiency), and that "efficiency" test tends to focus on productive and allocative efficiency while a "competition" test tends to balance productive and allocative efficiency with consideration of dynamic efficiency. (Clear Communication).
- that a reference to "efficient markets" results in potential inconsistency between the purposes of the Commerce Act (with a focus on competitive markets) and the purpose of the Bill (a focus on economic efficiency), as competition does not necessarily lead to efficiency, the efficiency may in certain circumstances be in conflict with the purpose of achieving competition. (New Zealand Law Society)

22 Given the above, officials consider that: