THE TUANZ TELECOMMUNICATIONS DAY

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Introduction

I'm grateful to TUANZ for the opportunity to speak to you today. As the industry regulator, my focus is on the development of the regime as a means of promoting competition in telecommunications for the benefit of consumers. The regulatory goal is therefore entirely consistent with the vision expressed for this conference of telecommunications as a competitive advantage for New Zealand. I include Australia also, in that the Australian regulatory regime has the same goal of promotion of competition.

As we have worked through the early stages of the development of the New Zealand regime, we have looked closely at the Australian regime. There are obvious reasons for doing so, apart from the commonalities of the governmental, business, legal and social environments. To mention two: the Fletcher Committee drew on the Australian experience in making its recommendations for the design of the NZ regime – sometimes to borrow ideas that were thought to have worked well, and other times to reject approaches that seemed to have caused delay or unnecessary cost.

We have also used Australia as a reference point in activities such as benchmarking of interconnection prices, and in examining overseas experiences in local loop unbundling.

What I want to discuss with you today is some comparisons between the two regimes. This may be helpful in thinking about whether there are different ways we could do things in the future - in other words more actively promoting convergence. And it may

help in understanding why our decisions are sometimes similar, and sometimes different to those reached in Australia.

The Regulator

The Australian Competition and Consumer Commission (ACCC), which Allan headed until the end of June, is responsible for both general competition issues and telecommunications regulation. However, unlike our Commerce Commission, the ACCC has a specific set of powers dealing with anti-competitive behaviours in the telecommunications industry. In NZ, we rely on the general market behaviour rules, so that telecommunications is dealt with in the same way as other sectors.

Both Commissions have one commissioner with primary responsibility for telecommunications. I am able to spend almost all my time on this industry, unlike my ACCC counterpart, who also has responsibilities for other industries.

One major difference in regulatory structure is that the ACCC has a companion body, the Australian Communications Authority (ACA). In terms of its telecommunications functions, the ACCC arbitrates access disputes and designates services to be regulated, while the ACA is responsible for the Australian USO scheme and for ensuring the production of access codes. In NZ, we do all this in one body, though to be fair the Australian institutions are much more heavily involved in administering industry-specific consumer protection rules (there is also has a Telecommunications Industry Ombudsman who investigates complaints from the public concerning breaches of those rules), setting technical standards, managing the numbering plan and spectrum management.

There is one other important difference, and this is an area where the Fletcher Committee aimed to simply the Australian approach, increase certainty and reduce costs. Decisions of the ACCC on access disputes have been, until the end of last year, subject to appeal to the Australian Competition Tribunal, a separate specialist appeal body, which could reconsider any aspect of the decision and substitute its own conclusions. Major cases

appear to have been quite routinely appealed, with resulting lengthy delays in reaching a final outcome. There is no such intermediate appeal body in New Zealand. Our decisions on access disputes are not subject to appeal on the merits. The only appeal is to the High Court if we have made a mistake in interpreting or applying the law. Even then, our decision continues to have effect pending the hearing of the appeal. So there are not the same incentives for tactical appeals which prolong uncertainty. Whatever the pros and cons of additional appeal rights, it is already clear that the NZ approach has meant that disputes are resolved much faster and at lower cost.

With the changes to the Australian legislation last year to remove merit appeals, the two systems are now in sync on this point.

There is a great deal of stress in the New Zealand legislation on the importance of quick regulatory decisions. There are quite short deadlines given for most steps in the process. While we have the power in most cases to extend the deadline, and have done so where we felt that more time was essential, there is a clear message – uncertainty has a cost. We have taken that message to heart. While we will never compromise on the need for a fair process that gives the parties the chance to have their say, and for high quality analysis, we have worked hard to get our views out quickly and to avoid over-refined and interminable debates.

Another important design feature of the New Zealand regime aimed at enhancing predictability and speeding up dispute resolution is the use of interim pricing principles reliant on benchmarking prices against overseas prices. The Fletcher Inquiry Report put it this way:

> The initial determination would ideally get sufficiently close to the “efficient” price so that both parties accept the determination and decide not to progress to the (longer and more costly) pricing review determination.

Since the initial price takes effect immediately, the access decision provides a workable level of certainty from day one. The parties have a small window of time to ask the

Commission to move from the initial price to a more elaborate investigation into a final price. So far, the hopes of Fletcher haven't been realized, as our initial decisions on interconnection and wholesale pricing have both triggered requests for a final price determination. Even so, the parties to those disputes have been able to get on with business in the meantime, using the interim prices and the non-price terms (which aren't subject to review).

Commercial Solutions

Both regimes anticipate that regulation will be a backstop for access disputes, though the Australian regime allows the ACCC to set model price and non-price terms for access, whereas we only decide terms when asked to do so by a party to the dispute.

The Australian approach therefore results in standard access terms and conditions, binding on the access provider. So once a service is "declared" by the ACCC or the legislation, there is a uniform framework. In New Zealand, we do not have the power to set standard terms. While our decisions on each access dispute, particularly the "headline" early cases, show the Commission's thinking, and signal that a similar result is likely in future cases on similar facts, the fact remains that the decision is binding only on the direct parties.

Coupled with this is the question of the effective date of the regulatory decision. In New Zealand, we have decided that because a dispute is a bilateral proceeding, our decisions will be effective from the date of the application for a determination. The ACCC, on the other hand, has power under its legislation to backdate a determination to the date on which negotiations between the parties began. It will also generally award interest on the backdated amount, with the result that if the access price set by the ACCC is lower than the price charged for the backdated period by the access provider, the access provider would typically be required to refund the over-recovery, together with interest.

Self Regulation

Both regimes encourage a degree of self regulation, through the development of industry codes by an industry forum for carriers. These codes must be approved by the regulator, and once approved are binding, thereby reducing the need for regulatory decisions. ACIF, the Australian Forum, has produced 24 codes and a number of technical standards. Even so, it has been criticized both by industry and consumer groups. The New Zealand equivalent, the Telecommunications Carriers' Forum, has made a slow start and has yet to deliver any outcomes. The Forum may suffer from the lack of a sufficiently clear common interest.

Wholesaling

The scope of regulated wholesaling in Australia is much narrower than in New Zealand. Though the ACCC has wide powers to introduce an extensive wholesaling regime, it has to date only regulated the local carriage service (the carriage portion of a local call). In contrast, any service provider in New Zealand can apply to the Commission for an order requiring Telecom to resell to it a retail telecommunications service at a price discounted by the avoided retailing costs. Recently, we issued the first such order, which will allow TelstraClear to resell a large number of business services and also residential DSL outside the Wellington and Christchurch metro areas.

The differences may not in practice though be as great as they appear, as Telstra in Australia has made a commercial offer to resell both retail services and also some input wholesale services. Competing carriers in both countries can therefore build a retail business model around obtaining services from the incumbent through a combination of the regulatory and commercial routes and adding value through pricing or bundling. Australia also regulates a much larger group of inputs to services than we do in New Zealand., which is arguably a different way of attacking the same problem of leveraging market power into downstream markets. In addition, many of the actions to address anti-

competitive behaviour in Australia under the telecommunications-specific regime have been targeted at behaviour by the incumbent at the wholesale level.

It is still too early to say what will be the impact of wholesaling in New Zealand – our decision came out in late May, and there are still significant implementation issues under discussion between the carriers. If Australia is anything to go by, we can expect to see significant take-up of the resale option, with benefits to consumers in the form of added choice of supplier, new forms of packaging, and competition in price and service levels.

I don't intend today to reopen the debate as to the impacts of wholesaling on incentives for carriers to invest in network infrastructure. There are strong arguments on both sides. However, policymakers in New Zealand have largely settled the issue by including wholesaling in the list of regulated services for which Telecom's competitors can apply. Provided we are satisfied that the services are supplied in a market in which competition is limited or likely to be lessened, we are required to order that resale be allowed.

TSO/USO

Both countries have explicit social policy objectives relating to universal and price-capped residential access and calling services and dial-up internet access. However, there are significant differences in the manner in which the cost of these policies is fixed by the regulator and apportioned across the industry. The most striking difference is that in Australia, the USO levy is ultimately a political decision – the Minister for Communications fixes the USO levy after receiving advice from the ACA. The Minister is not required to give reasons and there is no appeal. In New Zealand, the Commission makes the decision, following full consultation with the industry and consumer groups. As those of you will know who have waded into our recent draft determination, the issues have been fully debated, the modeling tools used to derive the TSO cost and the inputs used in the models have been released to the industry, and the reasoning for our decision is fully set out.

Personally, I strongly favour the transparency of the New Zealand process and its replicability.

Local Loop and PDN Unbundling

There is not much I want to say about unbundling at this time, since we are in the middle of an inquiry into the case for regulation. We have put out an issues paper and have received comments from the industry, business and user groups and individual consumers. I'd encourage you to read the issues paper and the submissions available on the Commission's web site. There are sharp differences of view, not only between Telecom and some of its competitors, but also between TUANZ, Business New Zealand and the Business Roundtable.

We expect to release a draft report in the next few weeks and to present our final recommendations to the Minister by the end of the year. The Minister will decide whether or not to act on our recommendations. Australia has regulated LLU for some years and there are obvious similarities in the telecommunications environments in both countries and in the consensus that increased broadband uptake is important to economic growth prospects and to social cohesion. Both countries lag in the OECD tables, and there is a demand to do better.

TUANZ has been a consistent advocate for the view that Telecom's local loop needs to be opened up to competitors. The TUANZ National Broadband Applications Project has done a great job of promoting ideas for the effective use of broadband and the "Survival of the Fastest" provides a vision of improved service and productivity through the use of broadband applications across social services, education, health, business and government services.

Regulatory Convergence

Given that this is the 20th anniversary year of CER, it is perhaps a suitable time to think about the scope for regulatory convergence, particularly in the light of the extensive transtasman links in this industry.

There has for some years been a program of coordination of business laws, including competition law. For example, New Zealand has adopted the core test of substantial lessening of competition, as used in Australia, for assessing business combinations and anti-competitive behaviour. The recent Dawson Committee Report has considered New Zealand's experience and has recommended changes to Australia's competition law that will improve consistency with the New Zealand legislation.

At a practical level, both Commissions work closely together on transtasman mergers and other issues of joint interest. Staff exchanges take place and Commissioners from both organizations meet frequently. In telecommunications, we have largely been in listening mode, given the newness of our regime.

So there is already a substantial level of commonality between the two regulatory regimes, both in terms of the deliberate borrowing of the best and worst of Australian experience in the design of the New Zealand regime, and in the quite similar competition frameworks that underlay them. We watch closely the major Australian regulatory decisions, and increasingly I expect that our decisions will be looked to as a source of analysis when similar issues arise in Australia.

Where we feel that there are changes that could be made to the New Zealand list of regulated services, either by adding, removing or modifying services, or changing the access or pricing principles or adding additional matters to be considered in the application of the purpose statement of the Act, we may launch an inquiry and recommend changes to the Minister. This is a powerful tool to sharpen up the regime in the light of changes in technology and competitive conditions.

Conclusion

The two regulatory regimes are quite similar in many respects. Both have adopted efficient cost pricing methodologies for access pricing. Most importantly, both have the same purpose – promoting competition in telecommunications markets for the long term benefit of end-users. The two commissions draw on similar competition policy approaches and principles of economic regulation.

The New Zealand jurisdiction is in some senses narrower, with the universe of regulated services being pre-determined and quite closely defined. However, at least in regard to resale of retail services, we have a more expansive regime.

There is a close working relationship between the Commission, the ACCC and the ACA. We can and do learn from each other and I expect that to continue. In that sense, the benefits of convergence are already largely captured, though we will keep looking for regulatory gains through building on best practices both from Australia and other OECD countries.

Thank you.