

The development of a telecommunications network rollout regime in New Zealand

Shane Barber and Bridget Edghill critique New Zealand's developing approach to telecommunications network rollouts.

Introduction

Until relatively recently, New Zealand had not adopted a telecommunications specific regulatory regime, but rather relied on broader competition legislation.

Since the introduction of its industry specific regime in 2001, the New Zealand government has been slowly building its telecommunications industry arsenal of legislation, regulation and codes, no doubt with an eye on developments not only across the Tasman in Australia, but in Europe and the United States.

During the course of 2005, a number of new entrants have expressed interest in rolling out new GSM and 3G mobile networks throughout New Zealand to compete with the relatively small numbers of existing networks (for example, Telecom NZ's CDMA network, Vodafone NZ's GSM network and the network of Telstra Clear).

These new participants are currently putting pressure on the New Zealand government and its regulatory authorities to ensure that the regulatory regime is responsive to the needs not only of these new entrants, but also the consumers they seek to serve. What has become apparent is that considerable development is still required in the fledgling New Zealand regulatory regime in order to meet these goals.

In this article, we critique just one essential element of a successful telecommunications regulatory regime, being the ability to foster the rollout of competitive networks in a manner which encourages co-location of infrastructure to avoid both the proliferation of facilities and the community backlash which same inevitably creates.

The existing New Zealand regulatory framework in relation to co-location

No price regulation

The *Telecommunications Act 2001 (NZ)* ("**Act**") establishes the regulatory regime applicable specifically to telecommunications in New Zealand. An access system is set out in Part 2 of the Act and is based on the concepts of Designated Services and Specified Services, which are described in Schedule 1 of the Act.

Pursuant to Part 3 of Schedule 1 to the Act, the co-location of mobile network infrastructure is currently a Specified Service.

The Act does not stipulate all terms of access to be adhered to when a party seeks access ("**Access Seeker**") to another party's Designated or Specified Services ("**Access Provider**"). Rather, the Act allows for Access Seekers and Access Providers to make their own arrangements in relation to access to Designated or Specified Services.

In the event that parties cannot reach agreement regarding the terms of access then, pursuant to section 20 of the Act, a party may make an application to the Commerce Commission to make a determination within specific timeframes. However, that determination will relate to both price and non price terms and conditions in the case of Designated Services only. The Act specifies initial and final pricing principles for each Designated Service.

Therefore, unless a service is a Designated Service, the Commerce Commission has no power under the Act to control the price of access.

This in effect means that there is currently no regulatory pricing mechanism regarding co-location of mobile network infrastructure in New Zealand.

The process for ensuring a service is re-categorised as a Designated Service (including changing its categorisation from a Specified Service to a Designated Service) is complex and lengthy as it involves investigation by the Commerce Commission, a draft report, conferences or a public hearing, a final report and a decision by the Minister. Time estimates for such a process are 8-12 months.

In undertaking the process of amending Schedule 1, the Commission may make recommendations for same for purposes of promoting:

“... competition in the telecommunications market 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.”

The Act goes on to state that:

“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 the telecommunications market 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.”

No encouragement of network wide co-location by all carriers

A *Draft Code for Co-location of Radiocommunications Services Regulated under the Telecommunications Act 2001* (“**Draft Code**”) was prepared by the Radiocommunications Co-location Working Party of the Telecommunications Carriers Forum. Presumably the Draft Code was made pursuant to section 7 of the Act. Once approved by the Commerce Commission, the Draft Code purports to be binding on Access Providers and Access Seekers. However, as the Act is currently drafted, the Draft Code and other telecommunications access codes approved by the Commerce Commission do not appear to be enforceable under the Act.

The Draft Code sought to provide the framework for co-location on a site-by-site basis, but was not intended to provide a regime for operators to gain more extensive access to another operator's infrastructure.

Further, even where an Access Provider must comply with the Draft Code, clause 7 of the Draft Code stated that *“Pricing and commercial issues are specifically excluded from the Code. Such issues should be addressed under a co-location agreement...”*

Clause 10 of the Draft Code provided that;

“The Access Provider and the Access Seeker shall make reasonable attempts to negotiate and agree on a co-location agreement, which will specify the terms and conditions of co-location between them.”

In relation to the co-location agreement, the Draft Code did not impose any obligation upon Access Seekers or Access Providers other than to “make reasonable attempts” to negotiate and agree on a co-location agreement. The only requirement for a co-location agreement was that it address the liability of the two parties for damage to the facilities and/ or equipment “in a balanced way”, taking into account the levels of risk associated with the respective parties’ networks and operations.

The Draft Code also set out further guidelines for the co-location agreement relating to the inclusion of a process for dispute resolution and the suspension or termination of access and/or operation.

The Draft Code did however purport to place a number of other binding obligations on Access Providers, including that an Access Provider must:

- have a queuing policy for co-location applications for the same site that addresses certain criteria;
- provide reasonable information upon request by an Access Seeker who requires coverage from a site in a specific Search Ring in relation to the location and the type of the Access Provider’s relevant facilities;
- upon receipt of a request to co-locate, conduct a desk study to determine whether the Access Seeker’s request has acceptance-in-principle or is rejected; and
- after the Access Provider has given approval for the request to proceed past the desk-study stage, undertake a detailed feasibility study of the application taking into consideration specific issues and communicate the decision within a certain timeframe.

While the Draft Code purported to provide a binding process for site selection and a high level process for cooperation in co-location matters, such processes will not be binding unless the Commerce Commission has authority to enforce the Code, which in the authors’ view it currently does not. The process involves a number of steps and appears, on first review, to be both time consuming and lacking in compulsion on the Access Provider to ensure conclusion of each step. This includes the steps described above relating to an Access Seeker making a request to co-locate and the Access Provider conducting a desk study to determine whether the Access Seeker’s request has acceptable-in-principle or is rejected.

Notwithstanding this, even once finalised until such time as the Act is amended to provide for the enforceability of telecommunications codes, any code will merely be a guideline with which carriers may voluntarily comply. While the Minister of Communications has indicated he will consider addressing the enforceability issue, at this date of this paper, the flaw in the Act has not been corrected.

No provision for liaising with the land owners and occupiers

The Draft Code only applied to Access Providers and Access Seekers as defined in the Draft Code or the Act. That Draft Code did not apply to other persons, such as property owners or

occupiers who may lease or licence property the subject of a co-location site but who do not themselves provide regulated service. Such other parties were not required by the Draft Code to promote co-location services or to grant co-location rights to any person, and were not required to comply with the Draft Code.

Rejection of Draft Code

In June 2005, the Commerce Commission formally rejected the Draft Code. The Commerce Commission returned the Draft Code to the Telecommunications Carrier's Forum setting out its reasons for rejection. These reasons for rejection included:

- The Draft Code was not consistent with the purposes set out in Section 18 of the Act. The restrictions in the Draft Code resulted in it being a framework for co-location only on a site by site basis. This was not consistent with the promotion of competition in the telecommunications market in New Zealand. Presumably any new code will now make provisions for multi-site applications from an Access Seeker to an Access Provider. In addition, the Commerce Commission did not approve of a provision in the Draft Code pursuant to which Access Providers could prevent the code from applying to any co-location agreement unless both parties agreed that the code applied;
- The Commerce Commission was of the view that a number of important elements were missing from the Draft Code. In this regard, it noted that the Draft Code only contained the framework for negotiating co-location agreements, not for the implementation of same. Further the Draft Code did not deal with parties' rights and obligations in relation to relocation of the Access Seeker's equipment and physical access to the sites.

No immunity from land use laws

No immunities are provided to carriers in the Act from the application of some or all land use laws in New Zealand when either rolling out a network, or to encourage co-location with existing networks.

By way of contrast, extensive powers and immunities are granted to Australian telecommunications carriers when rolling out their network generally. This has proved essential to encourage competition at the network level in the mobile telecommunications industry in Australia. In the Australian experience true service differentiation and the most aggressive competition is encouraged by the availability of a number of same technology networks, albeit that must be balance with environmental controls.

The Australian Regulatory Regime v the New Zealand Regulatory Regime

The New Zealand regulatory regime as described above operates in a significantly different manner to the Australian regulatory regime. The Australian regulatory regime has by and large resulted in timely, efficient and cost effective network rollout and co-location, and has engendered a spirit of co-operation between carriers. Its emphasis on co-location has resulted in a significant decrease in the proliferation of tower infrastructure for the benefit of the community as a whole.

This is not to say that the Australian regulatory regime in relation to network rollouts is without its issues. In recent years there has been a number of cases brought against

carriers, usually by local Councils with the support residents action groups, seeking to limit the powers and immunities enjoyed by Australian carriers. An example is the decision in *City of Mitcham V Hutchison 3G Australia Pty Limited [2005] SASC 78* reviewed earlier in this edition of the Communications Law Bulletin.

The Australian regulatory regime in relation to the rollout of networks and the co-location of mobile telecommunications infrastructure is comprised of four key instruments:

- *Telecommunications Act 1997* (Cth) (“**Telco Act**”)
- *Telecommunications Code of Practice 1997* (“**Code**”)
- *Telecommunications (Low Impact Facilities) Determination 1997* (“**Determination**”)
- *Deployment of Mobile Phone Network Infrastructure ACIF 564:2004* (“**ACIF Code**”)

The *Trade Practice Act, 1974 (Cth)* also contains provisions that are relevant to the competition issues involved in the co-location of mobile telecommunications infrastructure.

Importantly, the Australian regulatory regime provides for the following:

Regulation Provision	Australian Regulatory Regime	New Zealand Regulatory Regime
1. Power to enter on and inspect public or private land and do anything necessary or desirable in relation thereto.	CI 5 of Sch 3 Telco Act	
2. Power to install a facility which is “low impact” on public or private land and do anything necessary or desirable in relation thereto.	CI 6 of Sch 3 Telco Act	
3. Power to install ancillary facilities to low-impact facilities for the protection of people and the facility	CI 3 of Determination	
4. Ability to acquire a facility installation permit from the communications regulator to install certain other facilities on public or private land.	CI 6 & Division 6 of Sch 3 Telco Act	
5. Statutory right of perpetual tenure.	CI 6 of Sch 3 Telco Act, as interpreted by the Victorian Court of Appeal ¹	
6. Extensive rights to maintain a facility and do anything necessary or desirable in relation thereto.	CI 7 of Sch 3 Telco Act	
7. Statutory conditions to be complied with by carriers when exercising those powers, including compensation.	Division 5 & cl 42 of Sch 3 Telco Act, and Code	
8. Extensive exemptions from State and Territory laws in relation to exercising those powers and	CI 37 of Sch 3 Telco Act	

immunities		
9. Ability to empower employees and contractors to exercise those statutory powers.	Cl 43 of Sch 3 Telco Act	
10. Protection from discriminatory State and Territory laws	Cl 44 of Sch 3 Telco Act, as interpreted by the High Court of Australia ²	
11. Statutory confirmation of ownership of facilities even after same becomes a fixture	Cl 47 of Sch 3 Telco Act	
12. Obligation on incumbent carriers to provide other carriers with access to facilities for the purpose of enabling the other carrier to: (a) provide competitive facilities and competitive carriage services; (b) establish their own facilities.	Part 3 of Sch 1 Telco Act Part 3 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.
13. Designation of competition regulator as arbitrator of disputes in relation to 12 above.	Cl 18 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.
14. Provision for Ministerial pricing determinations in relation to 12 above.	Cl 19 of Sch 1 Telco Act	
15. Obligation on carriers to provide other carriers with access to: (a) telecommunications transmission towers; (b) the sites of telecommunications transmission towers; and underground facilities that are designated to hold lines	Part 5 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.
16. Designation of competition regulator as arbitrator in disputes in relation to 15 above.	Cl 36 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.
17. Provision for competition regulator to make code setting out base terms & conditions for 15 above, and obligations on carriers to comply with same	Cl 37 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.

18. Obligation on carriers, in planning the provision of future carriage services, to co-operate with other carriers to share sites and other eligible underground facilities	CI 38 of Sch 1 Telco Act	To an extent dealt with in rejected Draft Code.
19. Obligation on carriers to maintain records regarding their facilities	Parts 4 & 6 of Sch 1 Telco Act and Code	
20. Establishment of efficient objection process for landowners and occupiers	Code, Telecommunications Industry Ombudsman Scheme	
21. Obligation on carriers to seek co-location with other carriers and public utilities	CI 4.13 Code	
22. Obligation on carriers to liaise with other carriers and public utilities regarding other conduct on the same land	CI 4.14 Code	
23. Regulation of volume and noise levels from any co-located facilities	Part 7 of Sch to the Determination	
24. Industry Code of Practice in relation to community consultation and the provision of information in relation to electro magnetic emissions	ACIF Code	
25. Telecommunications industry specific anti-competitive conduct and record keeping rules, including provisions dealing with the "effect or likely effect" of conduct substantially lessening competition in a telecommunications market, with a regime of competition notices reversing evidential onus	Part XIB <i>Trade Practices Act</i> 1974 (Cth)	Clause 36 of the <i>Commerce Act</i> . However, a party will only be taken to have breached this provision if it can be demonstrated that it has done so for the <u>purpose</u> of lessening competition, not with the <u>likely effect</u> of lessening competition.

Conclusion

In a market where there is very little regulation over, or encouragement of, the co-location of mobile telecommunications infrastructure, difficulties may arise for new entrants in New Zealand in respect of 3 key issues:

- Carriers are neither compelled nor provided incentives, to co-locate telecommunications infrastructure. The likely result is a proliferation of infrastructure, extra cost and delay in rolling out competitive networks, and as a result a delay in providing competitive services to New Zealand telecommunications consumers.

- There is nothing in the New Zealand regime which impacts the way carriers, seeking to either rollout a network or to co-locate with other carrier, may efficiently and quickly come to agreements with land owners and occupiers. The likely impact of this is similar to that described above.
- Finally, in rolling out their networks, carriers in New Zealand have no powers and immunities (counter balanced by specific national government regulation on exercising those powers and immunities) from the myriad of local land use laws, nor any powers and immunities applicable to situations where carriers seek to co-locate with other carriers, thus providing an incentive to co-locate rather than duplicate infrastructure.

In rejecting the Draft Code, it appears that the Commerce Commission in New Zealand is alive to the issues confronting new entrants and has placed considerable pressure on the Telecommunications Carrier's Forum to address these issues. It may be that if any new code produced by the Telecommunications Carrier's Forum does not go a significant way to rectifying these problems, amendments to the Act may be called for, with the New Zealand government needing to abandon its limited intervention policy to push along key competition reforms in its telecommunications market.

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¹ *Hutchison 3G Australia v Director of House & Anor [2004] VSCA 99*

² *Bayside City Council v Telstra Corporation Limited [2004] HCA 19*