

NZ Telco Act impacts content zero-rating?

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Speed read

Zero-rating of content and similar strategies have been a feature in New Zealand over the years, by which a carrier's content (or other content) is carried, effectively, at a lower price than other content. This is a limb of the net neutrality debate, and one on which differing views are held.



It seems, though, that concepts like net neutrality are too unreliable and simplistic for the Canadians (understandably, as the issue is more complex than some would make out).

A new decision from Canada has something to say for New Zealand as to:

- whether or not zero-rating and similar strategies come within our telco regulation; and
- the policy issues underlying zero-rating.

It seems that the Canada regulator's chairman Jean-Pierre Blais (pictured) also has a concern about using the "net neutrality" descriptor. He said at the time this decision was released:

"There is no different treatment between content you control and content you don't control. I don't like the phrase net neutrality, but it is similar to that, there aren't fast lanes and slow lanes."

The Detail

The Canadian Telco regulator, CRTC, on 29 January has [stopped](#) two mobile broadband providers zero-rating their own content service, relative to other content such as Netflix for which their customers pay usual broadband rates. A threshold question was whether this is broadcasting, so that the telco regulation does not apply, and instead the broadcasting regulation applies.

Even though their Broadcasting Act applied, so too, said the regulator, does the Telco Act as well. The Canadian Telco Act applies to the carriage layer of the services and the Broadcasting Act applies to the content layer on top of that carriage layer. They co-exist.

By giving its own content service preferential treatment, the non-discrimination requirements in the Telecommunications Act were breached.

What does that say for NZ?

Maybe quite a bit. What's in a NZ "telecommunication service" (to which our Telco Act applies) and a broadcasting service (to which our Broadcasting Act applies), and how they are delineated, are quite similar to the Canadian legislation.

Each case differs on the facts, as the regulator said, and also the law here needs to be carefully analysed, as it might end up having relevant differences. Significantly though, our Telco Act regulates all "telecommunications services" and that is very widely defined. Also, it might be that the Telco and Broadcasting Act regimes can co-exist and take the layered approach, as in Canada. But we only speculate at this early stage.

However, we don't automatically have a non-discrimination provision in our Act,

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unlike Canada. There are a few hurdles to face before getting to regulation impacting zero-rating and similar carrier strategies in NZ. At least one regulated service may be relevant (that is, a service specified in the Act ready for implementation), and there might be an investigation around adding services. (Note, there are non-discrimination provisions governing LFCs and Chorus, but they are probably not going to be relevant, at least to the immediate issue here).

Therefore, in terms of the legal approach, the Canadian position overlaps only as to the threshold decision of whether or not the circumstances around zero-rating of content are within telecommunications regulation.

Applies to fixed line too

The Canadian case involved wireless/mobile providers: for fixed line here, and there, the issue around broadcasting does not arise, that being a radio-communications issue only. Telco regulation is more likely to apply, therefore, in relation to zero-rating fixed line content.

Going too far?

That all may sound like it's pushing the margins, with telco regulation extending widely into content. But if problems become too great, leading to market failure, telco regulation might have a role.

After all, that is precisely what the Canadian telco regulator did under similar legislation.

Net neutrality policy issues

The decision is useful as to policy reasons underpinning zero-rating considerations (and similar carrier strategies). However, it is surprisingly light on detailed analysis, on an issue that in reality is complex. This is a far less "all or nothing" issue than some net neutrality advocates incorrectly think (there's a real "be careful what you wish for" aspect

to this, as net neutrality rules need to be very carefully structured so that consumers don't end up worse off). After all, there are likely to be at least some pro-consumer, pro-competition benefits of zero-rating (even if outweighed by the negative). But little is said on this.

Summarising the few paragraphs on this policy issue, the Canadian regulator said (with reasons applicable also to fixed line):

The Commission considers, however, that encouraging customers to access these data-intensive services is inconsistent with the carriers' approach in regard to other data services, which is to impose data caps in order to optimize the efficiency of these networks. If access to mobile TV services continues to grow, which is a reasonable expectation, the data charges for these mobile TV services, the disproportionately high data limits, and the encouragement for subscribers to use these services, might result in a degradation of other services by contributing to network congestion.....

The Commission also considers it significant that [the two mobile carriers] Bell Mobility and Videotron are in a position to treat the transport of their mobile TV services in such a significantly different fashion when compared to other audiovisual content services, given the leverage that comes from owning both the means of transport and the rights to the content.

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1. *Complaint against Bell Mobility Inc and Quebecor Media Inc, Videotron Ltd and Videotron GP (2015), Broadcasting and Telecom Decision CRTC 2015-26.*

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