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Wigley & Company

BARRISTERS *and* SOLICITORS

**LEGAL HURDLES TO TELECOMMUNICATIONS  
CHANGE**

**April 2006**

Unless the Minister of Telecommunications accepts a commercial solution from Telecom, a key issue facing him in the coming months will be how to implement any change in our regulatory environment. This is far from an overnight affair unless he takes the unlikely step of acting unilaterally on all issues. This is an article from April's Telecommunications Review (for more details about the Review, see [www.ttr.co.nz](http://www.ttr.co.nz)) about issues in this controversial area. The article was written by Michael Wigley, who acts for Internet and ISP interests in the regulatory space.

There are many options available to the Minister. No one solution will be adequate. For example, there's a lot of talk about local loop unbundling (LLU). But this freeing up of access for other suppliers to Telecom's local access network is not a magic bullet by itself. Plus, the story is more complicated than just "LLU". Telecommunications regulation is complex and does not lend itself to a sound-bite approach.

There's been an important commercial change since the Commission's decision in 2003 not to have LLU. A key reason for the decision not to unbundle was that, even though LLU is ubiquitous overseas, it was not being used in practice by incumbent's competitors (so there was not a lot of point in having LLU). That's all changed. For example, Telstra's and BT's competitors, using LLU, are installing their own DSLAMs in the incumbents' facilities, to supply services more directly to customers over the local access network. This is starting from a nil base and is increasing rapidly.

Important is that competitors' installation of DSLAMs in incumbent exchanges and road-side cabinets is different from what is happening here. The regulated service called UBS (with its maximum uplink speed of 128 kbps) is supplied by Telecom over its own DSLAMs, as is the new commercial service provided by Telecom from this month (with an uplink of 512kbps).

UBS has advantages and disadvantages compared with competitors using their own DSLAMs. A key disadvantage is that UBS still has features more akin to wholesale services, with Telecom having greater control. However, priced appropriately, it enables ISPs and telcos to extend their networks more economically to customers who would not otherwise get access to services from multiple suppliers (many in the rural community for example).

If permitted to do so, suppliers could also install their own DSLAMs in Telecom's facilities, where this is viable (that's part of the LLU concept). Having both this and UBS is a highly desirable outcome so long as this meets long term needs of the New Zealand economy.

There are various refinements on the options. For example, should Telecom's competitors be able to use either or both UBS and their own DSLAMs (with higher uplink speeds and better quality of service) to provide VoIP? Should they get access to lower frequencies so they can provide "normal" PSTN telephony to customers?

All of these options are achievable, in various combinations, without eroding Telecom's legitimate needs such as to return appropriate profits and to have sufficient incentive to invest in new infrastructure. But getting to the right product combinations, pricing and other terms is an extremely important and complex process. So complex that it is unlikely that the Minister would unilaterally impose a total regime on the industry in June. The most likely scenario is that, at the very least, the Minister would decide what options to implement from the range of choices, and ask the Commission to sort out the all-important detail around pricing etc.

If the Minister unilaterally decides what options to implement (e.g.: LLU, improved UBS etc) Government would have to amend the Telecommunications Act. If he follows the normal legislation path, that would take months. That would be followed, probably, by the Commission fixing price etc. All up, that would take many months.

That option is outside the way in which the regulatory regime is currently structured. Faced with the options above, the regime would have the Minister asking the Commission to consider whether to introduce new regulated services and options such as LLU, better UBS, etc. The Commission would then hold hearings and decide whether to have new regulated services. Following that, the Minister decides whether to adopt the recommendations (by way of adding to the list of services covered by the Telecommunications Act). The next step is for suppliers, such as ISPs and telcos, to apply to the Commission for implementation of services including fixing of price.

All of these steps will have the Commission weighing up economic interests (particularly the long term interests of users of services) to arrive at an optimal outcome. There are solutions that meet the legitimate needs of all stakeholders including Telecom, its competitors and the New Zealand economy.

Whichever path the Minister decides to adopt will take many months to implement (assume at least a year), unless he decides to take the strong step of proceeding unilaterally and boldly on all issues.

A key basis on which the Minister did not, in effect, overrule the Commission's decision against LLU was that to do so would introduce further delay in broadband implementation, and the Minister relied on reassurances from Telecom as to future developments. Even if there could be a delay of over a year this time around, it is far better to have a strong outcome than an overly soft negotiated solution.

The regulatory regime is built on the idea of primacy of commercial resolution with a regulatory backstop. That's why we'll see a lot of movement over the coming months by industry players (particularly Telecom). Other things will happen also in direct discussions between the participants and Government. The "threat" of regulation will focus minds, and that is a legitimate part of the way the overall regime works..

So far we've dealt with options that fit around the current regulatory structure (UBS, LLU, etc). Other steps, such as operational or structural separation of Telecom's operations, call for very different measures.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on "both sides of the fence", and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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