

# Telecoms and Media

An overview of regulation  
in 47 jurisdictions worldwide

# 2010

Contributing editors: **Natasha Good and Laurent Garzaniti**



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# New Zealand

**Michael Wigley**

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## Communications policy

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### 1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure?

#### Introduction

In this answer, we provide an overview which applies to many of the remaining questions.

Despite the country's relatively small number of competitors, and therefore limited competition, New Zealand had largely ineffectual light-handed competition law and regulation in the telecoms and media sectors. This light-handed approach continues unchanged in the media sector, for which only the general competition law (the Commerce Act) applies.

In 2001, however, stronger telecoms regulation was implemented via the Telecommunications Act. This supplemented general competition law in the Commerce Act. Major changes to the Telecommunications Act were made in 2006, particularly to introduce functional separation (the second country after the UK to have substantial functional separation), upgraded regulated bitstream services, and unbundled local loops (New Zealand was one of the last countries to introduce ULL).

New Zealand is world leading with some telecoms innovations such as:

- functional (operational) separation of incumbent, Telecom (see question 33);
- mandated roll-out by the fixed-line incumbent of fibre to the node coverage (FTTN) to 80 per cent of the population, and associated regulation; and
- a public-private partnership (PPP) initiative, with substantial government funding, for fibre to the premises (FTTP).

(For a description of FTTP and FTTN see question 19.)

#### General competition law

Like many other OECD countries, there are general antitrust provisions in the Commerce Act. (All legislation is at [www.legislation.govt.nz](http://www.legislation.govt.nz).) The antitrust remedies are largely ex post. (There is provision in the Commerce Act to instigate price and other controls; however, this is unlikely to be applied in the telecoms and media sectors.)

The antitrust provisions and their enforcement are relatively light-handed. In particular, the monopolisation provision (section 36 Commerce Act) is relatively ineffective in view of court decisions. However, those decisions are under appeal. The approach is more akin to that of the US Supreme Court in *Trinko*, as opposed to the more intrusive approach in the European Union under article 102 of the Treaty of the Functioning of the European Union. A recent change in New Zealand's court structures means that there is a real prospect of the current restricted interpretation being overturned on appeal in 2010.

#### Media regulation

Almost uniquely among OECD countries, New Zealand has virtually no media-specific regulation (or a media-specific regulator) except in relation to content. There are no plurality requirements and only limited foreign ownership restrictions. For example, despite a single and dominant pay-TV broadcaster (Sky, which is part-owned by News-corp), only two major free-to-air (FTA) broadcasters and a small cable TV provider with a limited footprint, the pay-TV broadcaster was authorised by the regulator to acquire an FTA broadcaster. This is unlikely to have been permitted in many other OECD countries.

In April 2009, the incoming conservative government terminated a review addressing the prospect of broadcasting-specific regulation. Although the government will maintain a watching brief, general competition law is likely to continue to be the only media regulation for some time to come. This is so, despite the small size of the market and the limited number of providers.

#### Telecommunications

The failure of light-handed general competition law led to telecoms-specific regulation in 2001. The primary objective of this legislation is to encourage competition for the benefit of end-users. Therefore, it applies an approach common to many regulatory regimes. In contrast with general competition law, the telecoms regulatory regime is largely ex ante.

The Telecommunications Act focuses on wholesale regulation (there is only an isolated instance of retail price control). The Act lists a number of telecommunications services to be made available at wholesale, such as interconnection, local loop unbundling, mobile roaming, bitstream, etc). However, these services do not need to be wholesaled until and if the regulator makes a determination setting out non-price and (usually but not always) price terms. Generally that determination is only made after a market analysis demonstrates that there is inadequate competition.

New services can be added to the Act after a recommendation by the regulator which is accepted by the government. There is a system of formal and informal undertakings, as alternatives to formal regulation. Currently under review for addition to the list of regulated services is regulation of mobile termination rates.

#### Spectrum

Spectrum relevant to telecoms and broadcasting is governed by the Radiocommunications Act, and comprises tradable long-term rights which are now generally sold under auction conditions. Digital Switchover is expected to occur by 2015, releasing the digital dividend to broadcast and telecommunications uses.

#### The regulators

The general competition regulator is the Commerce Commission. It has decision-making power as to mergers and acquisitions. Many other decisions (eg, breach of the monopolisation provision) are for the courts. Usually the Commerce Commission litigates, rather than

adversely affected parties, even though they usually have the right to litigate too.

There is a telecoms-specific regulator: the telecommunications commissioner. Although that is a separate function, the telecommunications commissioner is also a member of the Commerce Commission. They operate from the same offices.

Commerce Commission members deal with telecoms regulatory matters too, often with two members joining the telecommunications commissioner when he is chair of a panel of three.

The government (within the Ministry of Economic Development) has responsibility for spectrum.

The Broadcasting Standards Authority deals with radiocommunication broadcast content regulation, under the Broadcasting Act. There is self-regulation of advertising through the Advertising Standards Authority, and of the print media by the Press Council.

### Who makes policy?

Policy-making generally lies ultimately with the government rather than the regulators (and spectrum is handled by the Ministry of Economic Development anyway). The Commerce Commission, courts and the telecommunications commissioner implement government policy, which is mostly enshrined in legislation, although policy generally follows an internationally typical approach. For example, the objective of meeting the long-term interests of end-users is pivotal, which means that the regulators are able to apply international regulatory and economic principles. In this way, the regulators operate largely independently of government.

Even though the telecommunications commissioner recommends whether a wholesale service should be regulated, the decision to do so is ultimately made by the government.

In summary, while ultimately most policy decisions are made by government, the reality is that the regulators (and, to some extent, the courts) have a significant input into what are really 'policy' issues.

### 2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

The Telecommunications Act has a telecoms-centric approach. In 2009, as outlined in question 1, the government ruled out an amendment to take into account the convergence of telecoms, media and IT. Beyond content regulation, there is no specific definition of 'media', but the Telecommunications Act contains a definition of 'telecommunications'. This limits the scope of that Act.

### 3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

Apart from content regulation there is no broadcasting-specific regulation of relevance. Therefore telecoms are regulated separately. General competition law applies to both, as do spectrum rights under the Radiocommunications Act. See question 1.

There are potential overlaps under general competition law. For example, triple and quad play bundles, which include IPTV, may attract the attention of the general competition regulator.

Within the telecommunications regulatory regime there is room for some action and review of broadcasting issues as, with convergence, what is within broadcasting is converging with telecoms; the telecommunications commissioner can monitor developments relevant to telecoms, which can include some aspects of content and broadcast; and under the Telecommunications Act, the regulator can regulate incumbent, Telecom's, bundled services, which could include content services bundled into more traditional telecommunication services.

## Telecoms regulation

### 4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

New Zealand has committed to the WTO Basic Telecommunications Agreement, subject to controls on non-resident shareholding in the fixed line incumbent, Telecom New Zealand, and compliance with New Zealand's antitrust legislation. New Zealand is party to both the GATS Annex on Telecommunications and the Reference Paper on Regulatory Principles.

### 5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

The fixed line incumbent is Telecom New Zealand. It was privatised in 1990. As a publicly listed company, its shares trade on the New Zealand, New York and Australian Stock Exchanges. The Crown, when it privatised Telecom, retained a single preference share, known as the 'Kiwi share'. This imposes some minimum obligations on Telecom. In particular, Telecom is required to provide free local calling for all residential customers and cannot withdraw residential telephone services in remote areas.

Mobile services are provided by three networks: Telecom, Vodafone and new entrant, 2Degrees. Vodafone in New Zealand is a wholly owned subsidiary of the international Vodafone Group.

New Zealand's second-largest vertically integrated fixed line provider (TelstraClear) is owned by Australia's incumbent, Telstra.

New Zealand's major international telecommunications link, the Southern Cross cable, connects New Zealand to Australia and the United States. It is 50 per cent owned by Telecom New Zealand.

The government has indicated that it is prepared to be an anchor tenant – via a company that it owns – in a new cable between New Zealand and Australia. This will provide competition for the Southern Cross cable. If the government follows through with this initiative, one of the contenders to provide the service, is the government-owned company, Kordia. Kordia, although government-owned, is required to operate commercially.

Kordia also provides the main broadcast transmission service in New Zealand.

### 6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

Other than a restriction on acquiring more than 49.9 per cent of the voting shares of Telecom, there are no foreign ownership restrictions, except as follows.

In some instances, overseas investors are required to obtain consent under the Overseas Investment Act 2005. Some land acquisitions require consent. Acquisition of significant business assets requires consent. That includes acquisitions over NZ\$100 million and acquisition of at least 25 per cent of the shares in companies worth NZ\$100 million.

### 7 Operator exclusivity and limits on licence numbers

Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

There is no legally sanctioned exclusivity in the telecoms and media sectors, apart from spectrum rights. New Zealand does not have a telecoms or broadcasting licensing regime.

**8 Fixed, mobile and satellite services**

Comparatively, how are fixed, mobile and satellite services regulated?  
Under what conditions may public telephone services be provided?

Fixed and mobile services are regulated by applying the general principles in the Telecommunications Act to the specific relevant services. Not all services are regulated. Mobile services rely on spectrum under the Radiocommunications Act regime.

Regulation of telecoms services that are provided over satellite is possible but unlikely. Other than as to spectrum, there is no specific satellite regulation, although New Zealand works within the ITU framework.

There is no restriction on providing publicly available telephone services. With the move toward the addition of VoIP services in addition to traditional PSTN telephony, the industry is endeavouring to agree standards such as in relation to emergency calls. Formal regulation is possible if acceptable agreement is not reached. Also under review at present is the numbering regime.

**9 Satellite facilities and submarine cables**

In addition to the requirements under question 8, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

There is no specific regulation as to establishment and operation of satellite facilities and landing of submarine cables.

However, both are likely to require resource consents under the Resource Management Act 1991, which deals with resource management and sustainable management of natural and physical resources.

**10 Radio frequency requirements**

For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

In practice, RF licences will be required for relevant wireless services. There are two separate regimes for spectrum. One is an administrative system which is unlikely to be used by broadcasters or telecommunication providers.

The other – and relevant – regime is based on tradable long-term leases of spectrum for periods up to 20 years. There is a system of management rights and spectrum licences.

New Zealand led the world with an auction system as a means of allocating spectrum to achieve optimal economic outcomes.

Although bidders are required to confirm that their acquisition would not breach the general competition law, aggregation of spectrum in certain bands (for example ranges suitable for cellular and WiMAX) has proven to be challenging. Therefore aggregation of spectrum under the control of too few providers during auction rounds has, for some ranges, been minimised by the way the auction is designed.

Additionally some spectrum has been allocated to Maori, as indigenous rights.

**11 Spectrum trading**

Is licensed RF spectrum tradable?

Assuming compliance with antitrust obligations and other requirements designed to avoid excessive aggregation of spectrum, spectrum rights relevant to telecoms and broadcast are tradable.

**12 Next-generation mobile services**

Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

Other than two potential services (and generic obligations such as interception capability, etc) there are no regulatory requirements around 3G roll-outs (or 4G roll-outs such as LTE).

The Telecommunications Act contains two relevant services which access providers such as Vodafone and Telecom must provide if the telecommunications commissioner so determines.

The first service is for provision of national roaming by mobile network operators (MNOs) to new entrants. This is particularly relevant for the third entrant, 2Degrees.

In 2008, the telecommunications commissioner made a determination by which new entrants such as 2Degrees could co-locate cellular transmission equipment on existing Vodafone and Telecom sites.

**13 Fees**

What fees are payable for each type of authorisation?

Fees applicable to various authorisations such as RF licences, Telecommunications Act applications, etc are relatively modest, except as to spectrum. 3G spectrum prices are low compared with many other countries.

**14 Authorisation timescale**

Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

As licences are not required for broadcast and telecommunications services, no issue arises as to timing on that aspect. (Wireless telecommunications providers and broadcasters, however, do need to get access to spectrum under the spectrum licensing regime.)

As to telecoms, the key issue is likely to be getting access to services that are or could be regulated. The process can be quick if the required services are already regulated or otherwise freely available on the market. Otherwise, depending on the steps involved and the complexity, getting to the point where a telco must provide a wholesale service to access seekers can take between six months and four years.

Issue of spectrum is not particularly time-bound, although the process of allocation, acquisition of rights from an existing owner, consultation, decision-making, and/or auction can take time: this is variable.

**15 Licence duration**

What is the normal duration of licences?

This is not an issue except as to spectrum (see question 14). Licences are not required.

**16 Modification and assignment of licence**

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

As noted at question 14, there are no licences, so this is not an issue, except as to spectrum. Spectrum rights that are relevant to broadcasters and telcos are tradable, and can be modified with the consent of the rights holder (and within the confines of the licence, or by the Ministry). They can be used as security for financing purposes.

**17 Radio spectrum**

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

In relation to spectrum rights relevant to broadcasters and telcos, there is an increasing trend towards a 'use it or lose it' approach. Generally the way in which spectrum can be used is unrestricted.

**18 Cable networks**

Is ownership of cable networks, in particular by telecoms operators, restricted?

Ownership of cable networks by telecoms operators is not restricted. There is only one cable network in New Zealand, operated by TelstraClear. The network is limited only to parts of two cities in New Zealand. Thus, cable does not provide material competition to broadcasters or telcos and is not a significant issue in New Zealand.

**19 Local loop**

Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

**Introduction**

While local loop unbundling (LLU) came late to New Zealand, the country now has one of the most advanced LLU regimes.

The major amendment – in late 2006 – to the Telecommunications Act introduced:

- local loop unbundling;
- enhanced wholesale bitstream (by which Telecom wholesales an xDSL bitstream service to other telcos and ISPs);
- operational (functional) separation (see question 33); and
- the NGN service, sub-loop unbundling (SLU) (explained below).

**Pricing**

LLU and associated backhaul has cost-based pricing. Bitstream between the exchange and the end-user has controversial retail-minus pricing (and cost-based pricing for backhaul).

**Sub-loop unbundling over FTTN**

New Zealand is one of the few countries to have a regulated SLU service, and one of the first to have an extensive fibre to the node (FTTN) service (also known as cabinetisation). That is because, as part of its operational separation commitments, Telecom agreed to roll out an extensive FTTN network to most of the population.

FTTN is a service by which end-users are supplied via xDSL over copper from numerous street side cabinets (nodes). There is fibre backhaul from the cabinets back to the traditional exchange. In this way, particularly with VDSL, end-users get much faster access speeds.

Telecom must provide unbundled access over FTTN to wholesale customers. There are three components in this sub-loop unbundling (SLU) service, which Telecom must provide:

- access to the fibre backhaul between the exchange and the cabinet;
- space in the cabinets for wholesale access seekers' equipment; and
- unbundled access to the copper between the cabinet and the end-user.

In 2009, the regulator, in one of the first SLU regulatory decisions internationally, decided the price and non-price terms for the three components of this SLU service. The pricing of this NGN service was one of the most complex faced by the regulator, given the difficulty of reconciling investment and competition incentives, when the addressable market at each cabinet is small relative to the cost of equipping an exchange.

**Fibre to the premises**

Government will contribute NZ\$1.5 billion to a fibre to the premises service (FTTP) available to 75 per cent of New Zealanders. FTTP largely eliminates traditional exchanges and copper access, and uses fibre all the way to end-users' premises.

As a condition of government funding, the FTTP service must provide at least layer 1 services to wholesale customers on an open

access and non-discriminatory basis. This is essentially a form of unbundling.

This is a public-private partnership type of initiative, involving companies with government (via a Crown company) and provider ownership, providing the service in each region. The role of Telecom is unclear at present: the design of the model is such that it is not particularly favourable to a nationwide solution involving Telecom. However, this is likely to be a matter of negotiation.

**20 Internet services**

How are internet services, including voice over the internet, regulated?

Other than the general law (for example, copyright) and regulation of underlying telecoms carrier services under the Telecommunications Act (such as LLU and bitstream) the internet is not regulated. There is no specific voice over the internet regulation, although numbering and issues such as emergency services calling are under review by telecoms industry bodies and by the telecommunications commissioner.

**21 Internet service provision**

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers?

There are no limits, except for:

- general competition law (which might apply if for example, an ISP anti-competitively exercised substantial market power); and
- requirements on the incumbent, Telecom, to supply services on equivalence and non-discrimination principles, under its functional separation obligations (see question 33).

It is unlikely that 'network neutrality' regulation will be introduced quickly as proposed in the United States, unless an ISP or telco abuses substantial market power, or this develops into a significant issue. So far this has not been a major source of contention but that is likely to change over time, particularly with the pressures of convergence and the interests of content providers.

**22 Financing of broadband and NGA networks**

Is there a government financial scheme to promote broadband penetration?

Yes. There is the NZ\$1.5 billion FTTP urban initiative (see question 19).

Additionally, there are a number of other initiatives including local government funding, and also the NZ\$300 million funding for rural broadband penetration. Both the urban and the rural initiatives have been put out to the market, and initial decisions as to funded services are likely in 2010, with subsequent funding decisions, and implementation, extending over several years.

There are demand-side initiatives by government including in the health, education and e-government areas. and some demand-side funding.

**23 Interconnection and access**

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? What are the basic interconnect tariffs? Are wholesale access services regulated, and, if so, which and how?

PSTN interconnection (that is, traditional switched circuit interconnection) is regulated under a determination pursuant to the Telecommunications Act.

For PSTN interconnection, wholesale prices are controlled. In some instances, the regulator can resolve disputes. Typically of interconnection agreements and decisions, there is a range of pricing

for various types of services and calls. Significantly, local calls are exchanged between carriers on a 'bill and keep' basis. The intention was to avoid gaming in relation to dial-up internet access.

New Zealand, ahead of other countries, commenced considering issues as to IP interconnection for NGNs. One reason, among others, is that IP interconnection issues must be handled as part of functional separation (see question 33). However, consideration of IP Interconnection has been largely on hold with industry and the regulator, but this may reactivate in 2010.

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#### 24 Mobile virtual network operator (MVNO) traffic

Are any mobile network operators expressly obliged to carry MVNO traffic?

No. It is anticipated that additional competition from the 3rd mobile network would lead to 'fatter' MVNOs although generally this has not happened as yet.

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#### 25 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

New Zealand has the internationally prevalent model. The calling party pays to terminate calls with a mobile network's customer (the calling party pays/calling party's network pays (CPP/CPNP) model).

Mobile termination rates from fixed to mobile are effectively regulated, as the government has accepted undertakings from the first two mobile network operators which fixed the per minute rates. The third mobile network operator (2Degrees) commenced operations after the undertakings were given.

The regulator, and government, are currently revisiting this, as well as mobile-to-mobile termination rates and text messaging.

The regulator (via a three-person panel) has recommended to government (by a two to one majority) that undertakings setting fixed to mobile, mobile to mobile and text message termination rates at lower prices be accepted. The minority recommended that termination is made a regulated service and the prices are regulated. In April 2010, the government sent the recommendation back to the regulator for reconsideration, based on the potential effects of a new retail package offered by Vodafone. These contentious issues will further develop during 2010.

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#### 26 International mobile roaming

Are wholesale and retail charges for international mobile roaming regulated?

No, although it would be possible to apply to make this a regulated service, subject to extra-territorial issues. The regulator has (especially in relation to Australia) identified that there are potential issues with international roaming, and this may get greater focus going forwards.

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#### 27 Retail tariffs

Are retail tariffs regulated? If so, which operators' tariffs are regulated and how?

With one exception, no. Regulation focuses on the wholesale not the retail market. However, the regulator effectively regulates retail price in relation to a unique service regulated in favour of Vodafone: interconnection between Vodafone's network and Telecom's fixed-line network.

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#### 28 Customer terms and conditions

Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

Retail customer terms do not have to be filed or approved. Wholesale customer terms may have to comply with a determination if the service is regulated.

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#### 29 Number portability

Is number portability across networks possible? If so, is it obligatory?

Yes and it is obligatory.

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#### 30 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

Yes, there is a universal service obligation on Telecom called the Telecommunications Service Obligation (TSO). Telecom must provide voice services into commercially non-viable areas, as well as free residential local calling (for example, there will be free local calls within a city). So far the cost of providing that service has been fixed by the regulator, and shared among telcos on a pro-rata basis.

However, government decided in early 2010 that the calculation of the cost takes insufficient regard of the benefits of being the national telco. During 2010, government will change the formula to include benefit. This is expected to lead to a reduction of the current TSO cost (around NZ\$70 million) to zero. In its place, government will start a Telecommunications Development Levy of around NZ\$50 million per annum (reducing sharply after several years), to be paid pro rata by telcos. This will be used to fund rural broadband (see question 22) and emergency phone service (and to pay Telecom in the event there is a net cost in providing universal TSO services). The government has decided that USO will not extend to broadband as other initiatives such as its rural funding will achieve largely ubiquitous broadband.

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#### 31 Changes to telecoms law

Are any major changes planned to the telecoms laws?

Generally, substantial changes to legislation during 2010 are unlikely, beyond the prospect that mobile termination rates will be added as a regulated service (question 25). For example, regulation of price and non-price terms in relation to the FTTP network (question 19) seems unlikely.

Instigating the addition of new regulated services such as IP Interconnection is possible.

The FTTP initiative will lead to pressure to remove or amend the functional separation legislated obligations on Telecom and/or legislation to facilitate Telecom's structural separation (if Telecom decides it should structurally separate to be able to take advantage of government's FTTP funding (see question 19).

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#### 32 Next-generation networks

How are next-generation networks (NGN) regulated?

Other than the potential for IP interconnection regulation (question 23), the focus of any fixed line NGN regulation is likely to be NGN access such as FTTN and FTTP access services (see question 19).

FTTN is already regulated as described at question 19. FTTP is unlikely to be regulated, as government is relying on other ways of encouraging competitive pricing and non-discrimination. However, the regulator can elect to make FTTP access a regulated service.

There are obligations on Telecom in relation to the NGN under its functional separation commitments (see question 33).

The telecommunications commissioner is currently undertaking a comprehensive NGN study, the outcome of which may be recommendations relevant to NGN regulation. However, that study has been in abeyance for over a year.

### 33 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

#### Structural separation

The FTTP networks (see question 19) will be structurally separated if the government's plans remain unchanged. There is one significant exception. A vertically integrated operator can be a provider for FTTP, but it would be required to have a minority of the directors of the jointly owned government and provider company providing the FTTP service in that region. In particular, this makes it difficult for Telecom to be involved in the FTTP initiative. One option is that Telecom may choose to structurally separate its network business, to be able to participate in the FTTP government initiative.

Legislation is not required for the government's FTTP separation model.

Forced structural separation is not currently available under legislation.

#### Functional separation

With the UK, New Zealand leads the world with fully-fledged functional separation. Functional separation legislation for Telecom was enacted in 2006. As a consequence, in 2008, Telecom was functionally separated into three divisions, still owned by Telecom: the network (called Chorus), wholesale, and retail.

These arrangements, set out in complex undertakings, are based on the UK regulator, Ofcom's, model for incumbent BT. The overriding principle is equivalence of inputs (EOI). Telecom must supply (and consume) certain services at the same price and non-price terms that they are supplied to Telecom's wholesale customers.

The wholesale division supplies services to both Telecom's retail units and to wholesale customers on an EOI basis. The network (Chorus, which is similar to BT's Openreach) also supplies services (in particular unbundled local loop service) to Telecom retail and to wholesale customers. Chorus, wholesale and retail divisions have Chinese walls between them, with obligations designed to behaviourally achieve EOI and non-discrimination.

Compliance is monitored by an independent oversight group and the regulator. There is an information reporting (accounting separation) regime.

There are commitments in the undertakings as to FTTN roll-out (see question 19) as well as commitments for migration to NGN including consultation on FTTP design and IP Interconnection (see question 23).

There have been a number of variations to the undertakings, as well as decisions and papers which clarify application of this complex model.

### Media regulation

#### 34 Ownership restrictions

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

There are no ownership or control restrictions (ie, there are no plurality obligations). Foreign investors may participate in broadcasting, although overseas investment regulation may apply (see question 6).

#### 35 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

No, not beyond general competition law. There is no plurality law and this is unlikely to change in the medium term (see question 1).

#### 36 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

There are no requirements beyond spectrum allocation (see question 11).

#### 37 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content?

Except as noted below, there are no regulations as to foreign-produced programmes or minimum local content, although market demand encourages free to air broadcasters to broadcast substantial local content.

The public broadcaster, TVNZ, which is a Crown-owned company, has a legislated charter which includes content obligations. However, the incoming conservative government will remove or minimise charter obligations. Less than 10 per cent of TVNZ's funding comes from the government (revenues are predominantly ad-based).

#### 38 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast and online advertising is covered by general consumer protection legislation such as the Fair Trading Act and the Consumer Guarantees Act. As well as civil remedies, the Commerce Commission can prosecute for breaches of the Fair Trading Act, which deals, for example, with whether advertisements are misleading.

The Advertising Standards Authority operates a self-regulatory regime, with the purpose of ensuring advertising is socially responsible and truthful. Most broadcasters and print media are covered. Many, but not all, advertisements online will be within the regime, in view of the involvement in the scheme of advertising agencies and the main interactive advertising bureau.

#### 39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There are no 'must carry' or similar obligations (apart from minor political broadcast commitments). Any change is unlikely in the medium term in view of a government decision in April 2009 to that effect (see question 1).

#### 40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

Other than removal of the public broadcaster's Charter obligation (see question 37), change is unlikely in view of the government's decision to make no change in April 2009 (see question 1).

Specific legislation for broadcast to mobiles is unlikely for the same reason.



### Update and trends

The hot and emerging topics are particularly focused around NGN developments including:

- the government-funded urban FTTP and rural broadband initiatives, and handling of open access and price;
- implications of FTTP in particular for the incumbent, Telecom – such as a serious threat to its position, whether it seeks to structurally separate to benefit from FTTP; whether functional separation is changed or removed as a result, etc;
- implications for potential providers of FTTP such as the electricity utilities relying on their existing infrastructure;
- the challenges and opportunities of NGN and regulatory implications, including NGN access and interconnection, net neutrality, convergence and the interests of content providers;
- how competition over cabinets and FTTP plays out, via bitstream (particularly VDSL) and sub-loop unbundling; and
- IP peering between providers.

Other issues include:

- resolution of mobile termination (by regulation or acceptance of undertakings); and
- the Supreme Court decision, which may alter the controversial interpretation of the monopolisation provision in the antitrust legislation.

#### 41 Regulation of online content

How is the delivery of content online regulated?

There is no specific regulation for delivery of content online, consistent with the government's decision not to regulate broadcasting and related content provision (see question 1).

#### 42 Digital switchover

When is the switchover from analogue to digital broadcasting required? How will radio frequencies freed up by the switchover be reallocated?

Government has indicated that the likely digital switchover will be 2015 or when 75 per cent of households have digital receivers.

Government has also indicated the likely split of digital dividend spectrum as between broadcasting (such as high-definition TV (HD) channels) and telecommunications (such as mobile services). It has indicated that it is premature to make decisions about allocation of spectrum for rural wireless solutions.

### Regulatory agencies

#### 43 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

The telecommunications commissioner regulates telecoms. There is no broadcasting regulator apart from a content regulator (the Broadcasting Standards Authority). Spectrum is managed by the Ministry of Economic Development. See question 1.

#### 44 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

Each regulator is established by legislation. All are independent of network operators and service providers. The Commerce Commission, Telecommunications Commissioner and the Broadcasting Standards Authority have a high level of independence from government. Spectrum is managed by a government department but in accordance with legislation and general principles. Its decisions are reviewable by the courts although the scope of that review is relatively narrow.

#### 45 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

Most if not all decisions by the regulatory bodies can be judicially reviewed, applying public law principles generally applicable in jurisdictions such as the UK. In broad terms, judicial review involves natural justice considerations, and focuses on the process rather than the merits.

Under the Commerce Act there is a right of appeal against many Commerce Commission determinations. Depending on the particular determination, the appeal may lie as to questions of fact and law or just law.

Pursuant to the Telecommunications Act, appeals, where available, are generally limited to questions of law.

#### 46 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages? Explain the interaction between interception and data protection and privacy laws.

Most telecommunication networks and services must have facilities to enable interception by law enforcement agencies (Telecommunications (Interception Capability) Act). The ability to intercept is closely controlled (for example, by requiring enforcement agencies to have a search warrant). In effect, action by enforcement agencies is not subject to data protection and privacy obligations.

#### 47 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations? Will they be compensated for their efforts?

Under the Privacy Act (which is currently under review) there are disclosure and retention obligations in relation to data about individuals not corporate. Under that Act there are specific telecoms obligations pursuant to the Telecommunications Information Privacy Code.

The Act and the Code broadly follow OECD principles. For example, any information retained by a telco must be securely stored, only used for purposes related to the purpose it was provided, and must be kept only so long as necessary. The Code provides that, where the security of the network, etc, is at stake, the telco can view or listen to personal information.

#### 48 Unsolicited communications

Does the legislation prohibit unsolicited communications? Are there exceptions to the prohibition?

The Unsolicited Electronic Messages Act prohibits unsolicited commercial electronic messages (eg, e-mail and SMS). The Act imposes certain requirements (such as inclusion of address details) on commercial electronic messages. Included is not just spam; marketing e-mails to individuals from legitimate businesses are included too.

Faxes and voice calls (including automated voice calls) are excluded.

### Competition and merger control

#### 49 Competition and telecoms and broadcasting regulation

What is the scope of the general competition authority and the sectoral regulators in the telecoms and broadcasting sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

As there is no broadcasting regulator (except as to content), the issue only arises in telecoms. The two regimes (regulatory under the Telecommunications Act and general competition law under

the Commerce Act) co-exist. In particular, under a provision in the Telecommunications Act (section 63) the Commerce Act does not apply in respect of any Telecommunications Act determination. The Commerce Commission has issued guidelines as to the relationship between the two Acts.

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**50 Competition law in the telecoms and broadcasting sectors**

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

For both telecoms and broadcasting, general competition law (the Commerce Act) operates generally on an ex post basis. It is the courts (at the instigation of an affected party or the Commerce Commission) that make the relevant decisions.

Also, for telecoms, the Telecommunications Act has the collateral effect of controlling, ex ante, some anti-competitive practices. Action under this Act is undertaken by the telecommunications commissioner or the court, depending upon the particular issue.

See questions 1 and 49.

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**51 Jurisdictional thresholds for review**

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting sector?

Only general competition law applies in all sectors, namely the Commerce Act.

The Commerce Commission can give clearances to mergers, acquisitions and joint ventures, where they ‘[...] would not have, or would not be likely to have, the effect of substantially lessening competition in a market’.

Additionally, the Commission can authorise such a transaction if it ‘will result, or will be likely to result, in such a benefit to the public that it should be permitted [...]’.

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**52 Merger control authorities**

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms and broadcasting sectors?

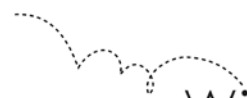
The Commerce Commission (see question 51).

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**53 Procedure and timescale**

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

Application is made to the Commerce Commission. The Commerce Act provides that a decision is made within 10 working days for clearances and 60 working days for authorisations, although extended time periods are often agreed between the applicant and the Commission.



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