

26 July 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Telecommunications (New Regulatory Framework) Amendment Bill

Purpose

1. We have considered whether the Telecommunications (New Regulatory Framework) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 19872/6.2). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 21 (unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The purpose of this Bill is to amend the Telecommunications Act 2001 ('the principal Act') to:
 - a. establish a stable and predictable framework for fibre fixed line access services in New Zealand
 - b. remove unnecessary copper fixed line access service regulation
 - c. streamline regulatory processes to enable a rapid response to any competition problems, particularly in the mobile communications market, and
 - d. provide more regulatory oversight of retail service quality.
5. This new regulatory framework has been designed following a statutory review under section 157AA of the principal Act. It is based on utility regulation in Part 4 of the Commerce Act 1986 and includes two types of regulation: price-quality regulation and information disclosure regulation.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
7. The telecommunications market is uncompetitive. Clause 23 of the Bill inserts a new Part 6, which contains the new regulatory framework for fibre fixed line access services with the purpose of promoting outcomes consistent with those produced in competitive markets. A number of provisions in new Part 6 compel the provision of information and therefore appear to limit s 14 of the Bill of Rights Act.

Public disclosure of information

8. New subpart 4 of new Part 6 provides that certain regulated fibre service providers are required to publicly disclose information in accordance with requirements determined by the Commerce Commission ('the Commission'). The purpose of the disclosure requirements is to ensure that any interested persons can assess whether the purpose of Part 6 (see previous paragraph) is being met.
9. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.
10. We consider that any limitation on freedom of expression arising from the public disclosure requirements is justified under s 5 of the Bill of Rights Act. The objective is sufficiently important to justify a limitation on the right and the requirements are rationally connected to that objective.
11. The information required is factual in nature and is of a type that market participants can reasonably be expected to provide in the highly regulated telecommunications sector. Furthermore, new s 212 gives the Commission the power to exempt disclosure of commercially sensitive information. We therefore consider the provisions impair the right to freedom of expression no more than is reasonably necessary to achieve the objective, and the limits are in due proportion to the importance of the objective.

Monitoring and compliance provisions

12. New subpart 5 of new Part 6 inserts provisions that compel the provision of information for the purposes of monitoring compliance with price and quality regulations. Further, new subpart 8 inserts provisions which allow the Commission, for the purposes of carrying out its functions and exercising its powers under the new regulatory framework, to require providers to produce and provide information such as forecasts and forward plans. Similar provisions in Part 3 of the Bill require the provision of information for the purposes of monitoring retail service quality codes.
13. We consider any limitations arising from these provisions to be justified under s 5 of the Bill of Rights Act. The provisions contribute to the objective of administering, and

¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

monitoring compliance with, the regulatory framework. We consider this objective to be sufficiently important and the information required is rationally connected to this objective.

14. The information required is factual in nature and is of a type that market participants can reasonably be expected to provide in the highly regulated telecommunications sector. We therefore consider the provisions impair the right to freedom of expression no more than reasonably necessary in order to achieve the objective, and the limits are in due proportion to the importance of those objectives.

Order to disclose information or publish advertisement

15. Clause 29 provides that if a person commits a breach of a retail service quality code, the High Court can make orders requiring the disclosure of relevant information or the publication of corrective statements.
16. Ensuring compliance with a retail service quality code and requiring the provision of information to remedy a breach is a sufficiently important objective and the information required is rationally connected to this objective. We consider the provisions impair the right to freedom of expression no more than reasonably necessary to achieve the objective, and the limits are in due proportion to the importance of the objective.
17. For these reasons, we conclude that any limits to the right to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 21 – Unreasonable search and seizure

18. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence, or otherwise.
19. A number of clauses already discussed above require providers to supply documents to the Commission for the purposes of monitoring compliance or investigating breaches of the regulatory framework. Failure to comply with these provisions is punishable by a civil pecuniary penalty.
20. We consider that the requirement to produce documents under a statutory authority, particularly as failure to do so results in a possible sanction, is likely to constitute a search for the purposes of s 21 of the Bill of Rights Act. However, we do not consider the search power unreasonable in terms of s 21 for the following reasons:
 - a. the search powers appear to be for a legitimate and appropriate purpose
 - b. the search powers contribute to the important objective of administering, and/or monitoring compliance with, the regulatory regime
 - c. the production of documents is less of an intrusion into a person's expectation of privacy than a power of entry, and
 - d. a regulated provider in an uncompetitive marketplace has less of an expectation of privacy than an ordinary citizen.

Conclusion

21. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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