

Telecommunications Amendment Bill

19 June 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: TELECOMMUNICATIONS AMENDMENT BILL

1. We have considered whether the Telecommunications Amendment Bill ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on 22 June 2006.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching that conclusion we have considered possible inconsistencies with sections 14 (freedom of expression) and 27(1) (the right to natural justice). Our analysis under those sections is set out below.

PURPOSE OF THE BILL

3. The Bill amends the Telecommunications Act 2001 ('the Act') which provides the regulatory framework for the telecommunications industry. The purpose of the amendments is to promote competition in the telecommunications market, and increase the availability and uptake of broadband internet services.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Freedom of Expression

4. Section 14 of the Bill of Rights Act provides that:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

5. The term "expression" has been interpreted as encompassing any conduct that has an expressive component.^[1] The Courts in Canada and the United States have held that freedom of expression necessarily entails the right to say nothing or the right not to say certain things.^[2]

Application of Section 14 to the Bill

6. Clause 13 of the Bill inserts a new section 30F into the Act which empowers the Commerce Commission to require access providers to submit a standard term proposal setting out terms for access to telecommunications services. A new section 30G specifies what must be included in the proposal.

7. Clause 32 of the Bill inserts a new Part 2A into the Act which deals with information disclosure requirements for access providers. Included in the new part is new section 69C which requires Telecom to keep separate accounts for its wholesale and retail operations. Accounting separation itself does not raise any issue under the Bill of Rights Act; however, Telecom will be required to supply information about its wholesale operation to the Commission for the purpose of public disclosure. New section 69D includes information disclosure requirements for all access providers.
8. A failure to comply with these requirements under new section 30F and Part 2A makes a person liable for a civil infringement notice up to \$2000 or a court imposed pecuniary penalty of up to \$1,000,000, in the case of account separation, or \$300,000 for other breaches.
9. The imposition of a penalty creates a clear element of compulsion. Despite this, it is arguable whether any of the disclosure requirements in the Bill amount to compelled 'expression' for the purposes of section 14 of the Bill of Rights Act. This is because Telecom and other access providers are not required to express opinions or ideas but simply to provide factual information. Nevertheless, we have considered whether the relevant clauses are justifiable under section 5 of the Bill of Rights Act. A limit on a right can be justified where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.[\[3\]](#)
10. The disclosure of relevant information by access providers, and in particular Telecom, is designed to enable more effective regulation of telecommunications services. This is a significant and important objective. This objective is made more difficult by the information asymmetry between the regulator and the access provider.
11. It is rare for a public Act to impose obligations on a specific private organisation (in this case Telecom), especially where it is an offence not to comply. That provision reflects the unique position of Telecom as the dominant incumbent provider of fixed line telecommunications services in New Zealand. The purpose of the provision is to reduce the imbalances in information between Telecom, access seekers and the regulator. It is intended to increase the transparency of Telecom's monopolistic wholesale business (as opposed to its retail businesses which operates in a more competitive market). Accordingly, there appears to be a rational and proportionate connection to the objective.
12. For these reasons we have concluded that the disclosure provisions contained in the Bill appear to be consistent with the Bill of Rights Act.

Right to Natural Justice

13. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice.
14. Clause 13 of the Bill inserts a new section 30Y into the Act that requires the Commission to notify relevant parties that it has received an application for a residual terms determination. The parties have 10 working days to comment. Clause 15 inserts a new section 34 into the Act that imposes the same 10 working day limit on the time parties have to comment when the Commission receives an application for a multi-network determination.

15. It should be noted that sections 30Y and 34 only relate to consultation when an application for a determination is received. Consultation on the draft determination itself is provided for in section 38 of the Act. Accordingly, we have concluded that the timeframes included in these sections are adequate and do not limit the right to natural justice affirmed in section 27 of the Bill of Rights Act.
16. Clause 54 of the Bill inserts a new section 156I into the Act which limits the time that parties have to appeal a civil infringement notice to 20 working days. The 20 working day period relates only to the time to lodge an appeal. Accordingly, this provision appears to reach an appropriate balance between the rights of the individual and administrative efficiency.
17. For completeness, we note that clause 13 also inserts a new section 30L into the principal Act, which states that the Commission may consult any person that it considers has a material interest in a draft standard terms determination. This section has been included in order to be consistent with similar provisions already in the Act. It does not appear to alter any obligation the Commission might have to consult with interested parties.

CONCLUSION

18. We have concluded that the Bill is consistent with the rights and freedoms contained in the Bill of Rights Act.

Jeff Orr	Margaret Dugdale
Chief Legal Counsel	Policy Manager, Bill of Rights/Human Rights
Office of Legal Counsel	Public Law Group

Footnotes

1 *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, 968

2 *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

3 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

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