



Telecom New Zealand Limited

Submission in respect of the

**Ministry of Economic Development's Review of
the Clearance and Authorisation Provisions under
the Commerce Act 1986:**

Discussion Paper dated May 2007

Friday 10 August 2007

A INTRODUCTION

- 1 Telecom is pleased to have the opportunity to comment on the MED's Review of the Clearance and Authorisation Provisions under the Commerce Act 1986.
- 2 We think it is timely for the MED to be undertaking a review of the clearance and authorisation provisions. General observation of the clearance process suggests that it has become slower and more bound up with process than was initially envisaged in the Act. It is fair to say that more complicated or significant acquisitions are now being submitted for clearance. But this requires a more sophisticated response than only increasing the time periods. The whole approach of the Commission should be over-hauled to recognise the complexity, time and expense faced by firms.
- 3 In light of the need for review we anticipate that the proposals we have made will assist in making the clearance and authorisation processes for the Commission more efficient, enabling more timely mergers or acquisitions for the benefit of firms and consumers. These proposals have been considered with the objectives of the Commerce Act and some of the Government's broader objectives in mind. In particular, the economic transformation agenda and trans-Tasman coordination. Therefore we envisage that these proposals will promote a dynamic and internationally competitive economy while aligning with the Government's desire of enhancing the prosperity for New Zealanders.
- 4 We do not propose to comment on all aspects of the Discussion Paper, which we consider to be well thought out and written. But we do want to comments on some specific issues in the paper. The first part of this submission offers some suggestions in relation to the process the Commission undertakes when considering a clearance or authorisation, specifically the questions that the Commission must determine as part of its examination. The second part of this submission deals with miscellaneous issues, including:
 - Timeframes for dealing with applications and for appealing;
 - The proposal for a trade practices clearance regime and how that might fit with the authorisation regime; and
 - Appeal issues.
- 5 Telecom would be happy to meet with the MED to discuss these submissions further. Any questions should be directed to:

- Lucy Riddiford, Senior Counsel Litigation (09 362 8108; lucy.riddiford@telecom.co.nz); and
- Brendan Scroope, Group Economic Strategist (04 498 9487; brendan.scroope@telecom.co.nz).

B FRAMEWORK FOR ASSESSING COSTS AND BENEFITS

PURPOSE OF THE COMMERCE ACT

- 6 The purpose of the Commerce Act (the Act) is to promote competition in markets for the long-term benefit of consumers within New Zealand. Telecom supports the total welfare maximisation focus of the Act.

ISSUES

- 7 In reviewing the discussion document on Part 5 of the Commerce Act, Telecom has considered the questions raised in relation to the overall objectives and outcomes which the Government is seeking to achieve through providing clearances or authorisations for potential mergers or acquisitions.
- 8 Generally, the areas of analysis that the Commission undertakes on whether a merger or acquisition will result in a substantial lessening of competition is consistent with international practice of competition regulators in comparable jurisdictions. However, we do think that the Commission's overall approach to clearances and authorisations for mergers or acquisitions could be enhanced and accordingly we offer some suggestions in this submission.
- 9 Areas which Telecom would like to discuss are:
- i. The threshold for determining when the New Zealand Commerce Commission is required to provide clearance or authorisation for a proposed merger;
 - ii. The restriction on the Commission's discretion to accept behavioural undertakings;
 - iii. The overall process for assessing whether to provide a clearance or authorisation;
 - iv. How market definition is determined. Particularly in regard to time horizons used for a SSNIP test and general market structure;
 - v. The rationale for quantification of benefits and costs;
 - vi. Integration of international considerations in to public welfare tests.
- 10 While a number of the points made do not directly correspond to the specific MED questions, they do flow from the following sections of the MED discussion document:
- Behavioural undertakings;
 - The assessment of efficiency gains and losses;
 - The treatment of international competitiveness claims;
 - The quantification of costs and benefits;
 - Time frames over which costs and benefits are assessed; and
 - Market definition.

REGULATORY THRESHOLD FOR CLEARANCE OR AUTHORISATION

- 11 Competition regulators in different jurisdictions approach clearances and authorisations with a starting hypothesis. In Australia it is stated in the ACCC guidelines that they assume the majority of mergers or acquisitions will not result in a substantial lessening of competition and that only exceptional cases will require regulatory consideration. Both the UK and Canadian regulators also take a starting hypothesis that horizontal mergers or acquisitions are most likely to result in concerns about a substantial lessening of competition and that it is unlikely similar issues will arise with vertical or conglomerate mergers or acquisitions.
- 12 Although the safe harbours contained in the Commerce Commission's guidelines do to some degree provide a similar effect as a hypothesis, we believe an explicit inclusion in the preamble of the Commission's guidelines would be beneficial. For example the guidelines could make a statement giving effect to the notion that the majority of mergers or acquisitions will not result in a substantial lessening of competition and clarify most regulatory concerns will arise with mergers or acquisitions which are horizontal in nature. This inclusion would assist in giving potential applicants a guide as to whether it is likely clearance or authorisation is required.
- 13 Currently the threshold which must be reached before the Commission is required to provide a clearance or authorisation for a proposed merger or acquisition is 'substantially lessening competition'. Telecom believes a second limb which considers substance or size would be of benefit. Telecom favours adoption of a similar legislative test in the legislation as is used in Australia. Namely, for it to be illegal, the transaction must substantially lessen competition in a 'substantial market'. Telecom believes that the Commission should then provide guidance on what it considers to constitute a 'substantial market'. We are happy to engage with Officials to assist in the development of a sound approach to defining a 'substantial market'.
- 14 Both the Australian Competition and Consumer Commission (ACCC) and the United Kingdom's Office of Fair Trading (OFT) have a substantially lessening competition threshold with a second limb that provides a substance or size threshold. In Australia, it is 'substantially lessening competition in a substantial market'.¹ In the UK the merger must result in the cessation of two or more enterprises and meet a 'turnover' test or

¹ See s. 50.85 *Trade Practices Act 1974* (ACCC Guidelines)

'share of supply' test.² Although we favour the approach adopted in Australia we recognise the benefits and costs which correspond with legislation that enables flexible discretionary decisions, as is the case in Australia, or prescribed numerical thresholds as used in the United Kingdom.

- 15 The key benefit of including a size threshold is it provides certainty to businesses and enables the Commission to only consider mergers or acquisitions that are likely to have substantial impacts on the New Zealand economy and the broader welfare of New Zealanders. The overall objective of the Act, promoting welfare maximisation, is likely to be promoted by the introduction of a size threshold alongside the substantially lessening competition test.
- 16 In light of the increasingly complex nature of mergers and the need for efficient markets in a small open economy, regulatory responses need to be timely to aide efficient commercial acquisitions. Introduction of a substance or size arm to the substantially lessening competition test would enable mergers which are unlikely to have substantial economic impacts to proceed without regulatory involvement therefore limiting the risk of a loss in first mover advantages in making the acquisition. The Commission would then have greater capacity to target its resources to mergers of greater substance or likely to have larger impacts on consumer welfare. We consider that the Commission might then be able to meet the existing timeframes in the Act, although we do agree with the recommendation that the timeframe be increased from 10 to 30 days.

BEHAVIOURAL UNDERTAKINGS

- 17 The MED discussion paper states a preliminary view that the Commerce Commission should be denied the discretion to accept behavioural undertakings in the merger approval process. The reasons given for this view are summarised in the below quote from page 8.

"Behavioural undertakings would be tantamount to foregoing competition and replacing it with what is regulation by another name. Generally speaking, regulated monopolies do not perform as well as firms that face

² We note the approach applied in the United Kingdom on the basis that it provides a clear fixed test contained in legislation. This is in comparison to the Australian approach which involves a discretionary decisions to be made. In the UK the "turnover test" requires the acquisition to be valued at more than £70 million. The "share of supply test" requires that the post transaction entity must account for at least 25% of all particular goods and services of that kind supplied in the UK or in a substantial part. See Office of Fair Trading, *Mergers: Substantive Assessment Guidance*, May 2003, para 2.3

workable or effective competition. Allowing the Commission to decide to regulate a firm under Part 5 would also be inconsistent with the scheme of Part 4, which allocates the responsibility for determining the firms or sectors that will be regulated to government ministers.

“There are other potential downsides. Market circumstances change over time and a possibly well-targeted undertaking could become ineffective or counterproductive. We also note that behavioural undertakings may not be fully effective unless they cover a wide range of potentially anticompetitive conduct and address the risks of price gouging. There could also be substantial ongoing monitoring and enforcement costs for the Commission.”

- 18 In Telecom’s view the reasons given above are good and valid reasons for the Commission to exercise careful discretion when considering behavioural undertakings. However, they do not necessarily justify a blanket restriction on the exercise of discretion.
- 19 Conceptually, behavioural undertakings may provide one key benefit. They could create greater flexibility either for firms applying for a clearance or authorisation, or the Commission. At the same time we recognise there are a number of risks and costs attached to this approach. Two key risks are much greater legal complexity and costs to monitoring the behavioural undertaking, and a probability that regulatory decisions being made by the regulator beginning to rely on behavioural undertaking for mergers and acquisitions rather than focusing on the core task of making firm decisions around a substantial lessening of competition and welfare maximisation. We are willing to engage with the MED further if Officials see benefit in exploring this option more.

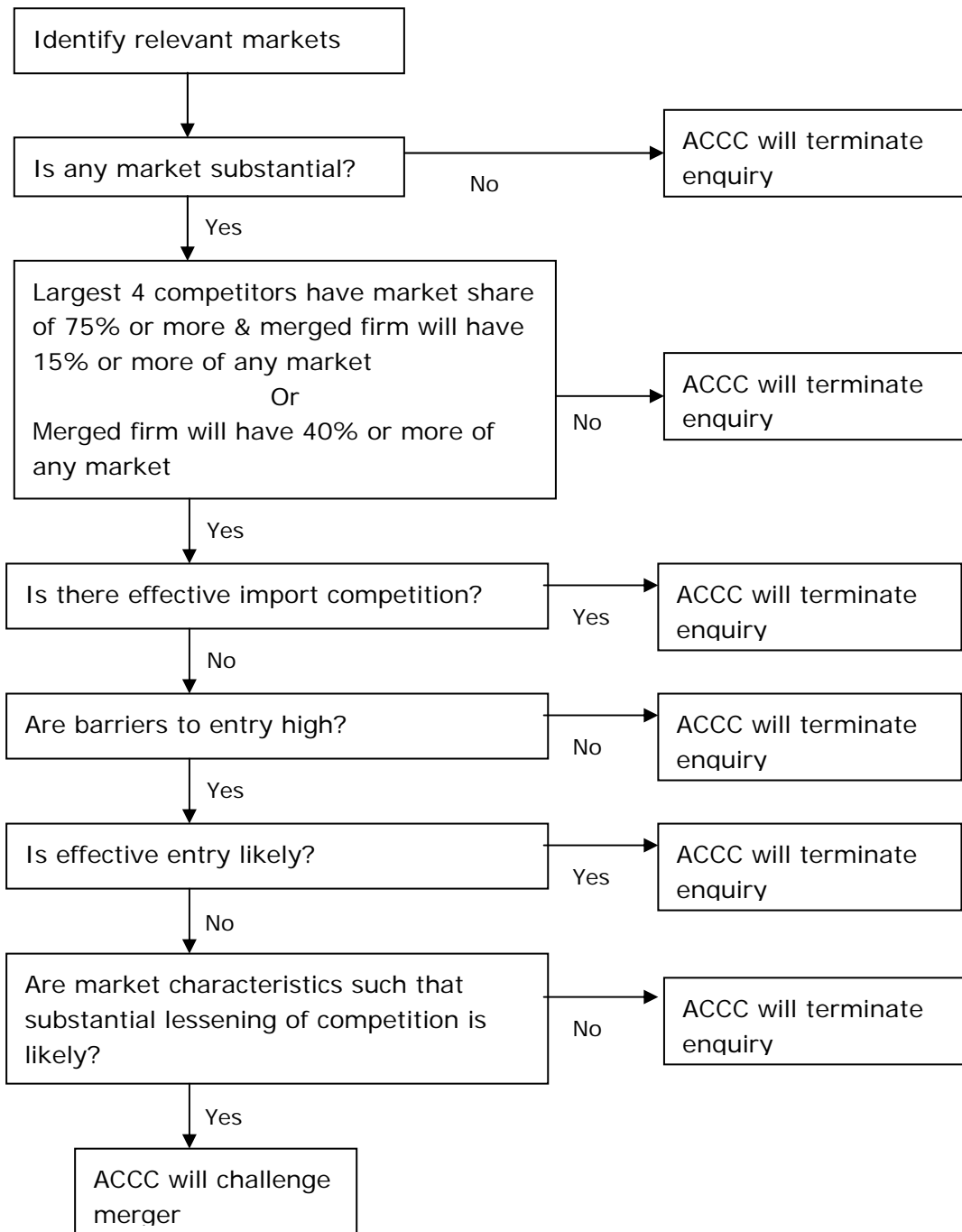
PROCESS TO ASSESS A SUBSTANTIAL LESSENING OF COMPETITION

- 20 Analysis undertaken by the Commission to determine whether a merger or acquisition will likely result in a substantial lessening of competition is thorough. The key areas of the Commission’s analysis are relatively consistent with Australia, Canada and United Kingdom. Each jurisdiction broadly addresses matters such as, but not limited to, market share and industry concentration, barriers to entry, countervailing factors, and impacts of imports.
- 21 However, the key area of difference between New Zealand and these other jurisdictions does not relate specifically to the areas of analysis but rather

the framework for assessment. In Australia, Miller's Annotated Trade Practices Act (Miller's)³ provides the following diagrammatic exposition of a tiered decision making tree describing ACCC decision making.

³ Source: Miller's Annotated Trade Practices Act; *Australian Competition and Consumer Law, 28th Edition*, Thomson, Sydney, Australia 2007

Diagram 1⁴



22 Telecom New Zealand thinks there is merit in considering this decision making framework. Although this diagrammatic illustration of the

⁴ Source: Miller's Annotated Trade Practices Act; *Australian Competition and Consumer Law, 28th Edition*, Thomson, Sydney, Australia 2007

Australian approach doesn't exactly model the ACCC approach in practice, creating a tiered decision making tree would afford the Commission and applicant greater flexibility when considering clearances. It would also promote clarity to applicants (and opponents) as to where the Commission places weight in its analysis.

- 23 Generally the Commission analyses the same range of key areas the ACCC does to assist in identifying whether a potential merge or acquisition is likely to result in a substantial lessening of competition. This proposed framework in Diagram 1 would not lessen or restrict the depth of the existing areas of analysis. Rather it would simply create a tiered framework providing 'off ramps' for the Commission. This may assist in addressing some concerns about the timeliness of decisions to provide clearance by the Commission.
- 24 A further advantage of a tiered threshold approach to analysis would likely be some greater ability to identify where key issues may arise when the Commission undertakes its analysis of whether there will be a substantial lessening of competition. A corporate applying for clearance, in conjunction with the Commission, would have greater ability to determine areas where each believe there may be concern or matters requiring more in depth analysis. This would enable more targeted analysis of potential issues rather than a 'fishing' exercise for information and data. Overall, this could be further enhanced through the publishing of the Commission's analysis in regard to each area of regulatory assessments outlined in Diagram 1.
- 25 In light of closer economic relations with Australia, it is useful to consider whether trans-Tasman coordination is beneficial. Coordination on business law matters between New Zealand and Australia is even more relevant given the increasing number of firms operating trans-Tasman and greater economic integration between the two jurisdictions. Developing a similar threshold and approach to clearances and authorisation of potential mergers or acquisitions to Australia in New Zealand would be consistent with the over-arching objective of minimising impediments to commercial transaction where appropriate.

MARKET DEFINITION

- 26 The approach adopted by the Commission when identifying the relevant market through dimensions such as product, geography, function, time and customer is relatively comparable with other jurisdictions (such as Australia, Canada and the United Kingdom). Adoption of the assumption that the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant

and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test) is also fairly standard internationally.

- 27 Generally, for reasons outlined below, we believe that the relevant market definition should not be overly narrow. This is because a narrow market definition will likely result in a number of potentially efficient mergers and acquisitions failing to be provided with clearance or authorisation. The outcome would be total welfare maximisation likely being compromised.
- 28 It is important to emphasise that market definition is not an end in itself.⁵ There are some limitations to the SSNIP test. Ultimately, any finding regarding market definition should not unduly restrict the analysis to exclude the role of substitutes that lie outside the definition of the market adopted. Famously, in *Kodak v Image Tech*, Kodak did not attempt to argue that after sale servicing was in the same 'market' as equipment sales. However, Kodak did argue, successfully, that consideration of competition in equipment sales was important to understand why Kodak did not have market power in after sales servicing 'markets' (should such a separate market exist). The US Supreme Court accepted this decision stating:

"Courts usually have considered the relationship between price in one market and demand in another in defining the relevant market. Because market power is often inferred from market share, market definition generally determines the result of the case. Kodak chose to focus on market power directly rather than arguing that the relationship between equipment and service and parts is such that the three should be included in the same market definition. Whether considered in the conceptual category of 'market definition' or 'market power', the ultimate inquiry is the same – whether competition in the equipment market will significantly restrain power in the service and parts market."

- 29 In other words, a narrow definition of the relevant market does not mean that competitive constraints from outside that market can be ignored.
- 30 Telecom believes that this issue is particularly important in telecommunications where there are high sunk costs due to large investment programmes which often mean that investment driven competitive responses (such as entry or geographic expansion) do not occur in the short term. As such, carrying out a SSNIP test using a short

⁵ See Office of Fair Trading, *Mergers: Substantive Assessment Guidance*, May 2003, para 3.11

time horizon may artificially restrict the true level of competitive constraint on an operator.

- 31 A further challenge of the SSNIP test, particularly for the telecommunications market, is the rapidly changing environment due to technological change. The ongoing development in telecommunications technology makes definitive substitutability analysis problematic. It may well be that certain products or infrastructure are not substitutes today. However, they may be expected to be tomorrow or at a minimum, some positive probability is attached to them becoming substitutes. Ignoring the competitive constraint that this places on telecommunications providers would be a grave error. Convergence tends to imply that products which are not substitutes today may become substitutable in the near future. This is not always the case. Therefore, as the SSNIP test is an experimental thought process relying on quantification, it may not provide pragmatic solutions.
- 32 Regarding the time horizon for any SSNIP analysis, assumptions made about market structure should intuitively inform the appropriateness of chosen time horizons. Before delving into these issues it is worthwhile refreshing why the Commerce Act has focused on regulating market structures so as to protect the outcome of welfare maximisation.
- 33 Competition, and in particular workable competition, is but a process whereby rival firms, in attempt to maximise rents, undertake their commercial activities in a manner which will place pressure on each market participant's price and output decisions. That is to say, competition is a process not a situation. As stated in the ACCC Merger Guidelines⁶ "whether firms compete is very much a matter of the structure of the markets in which they operate". Through this process of competition, the resulting market structure produces allocative, productive and dynamic efficiencies. These efficiencies contribute toward the desired outcome of the government long-term total welfare maximisation for consumers. Hence the regulatory focus should be on appropriate market structure to promote long-term welfare maximisation.
- 34 At times a single firm may develop market power. In response a competition regulator may be concerned that the competitive process is being inhibited therefore enabling a firm to profitability alter its prices or quality of its product or service, variety, service or innovation from a competitive equilibrium level for a sustained or substantial period. This

⁶ See ACCC, *Merger Guidelines*, June 1999, p.23

was reinforced in Australia with Dawson J in QWI quoted the Kaysen and Turner definition of market power:

*A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.*⁷

- 35 In light of a potential accretion to market power from a merger (or exercise of existing power through anti-competitive behaviour), all other things being equal, the underlying policy principles of the regulatory framework should trigger a regulator to impose some form of intervention to re-adjust the market structure/conduct to facilitate welfare maximisation.
- 36 However this static approach would fail to account for the dynamic effects of a market where the rise in market power for one firm will act as an incentive for other firms to enter the market in attempt to capture some of the additional rents this one firm possesses.
- 37 In the case of mergers and acquisitions, the regulatory response to protect the outcome of welfare maximisation is the refusal to provide clearance or authorisation. Such a refusal acts as a preventative measure. It prevents a market structure developing which would likely enable market power to arise thereby inhibiting welfare maximisation.
- 38 Following from this discussion is a key policy question of whether it is market structure that the clearance and authorisation provisions of the Commerce Act is trying to alter so as to facilitate the outcome of welfare maximisation or whether is it attempting to impose a market structure of more pure competition – even where such a market structure is not efficient (welfare enhancing). In principle Telecom believes it should be the former as different products exist in varying markets structures. Markets with small economies of scale and general homogeneity of products can lean towards perfect competition. Providers of infrastructure operate in markets resembling an oligopoly. Each economic market structure has very different characteristics. This requires policy makers to incorporate these differences when attempting to define markets through a SSNIP test.

⁷ Kaysen and Turner *Antitrust Policy*, 1959, p. 75; *Queensland Wire Industries Pty. Ltd. V The Broken Hill Proprietary Company Limited & Anor* (1989) ATPR 40-925, at 50,015.

- 39 Upon determining the most appropriate market structure for the relevant product, the time horizon applied to the SSNIP test should intuitively follow. Due to the differences in market structures precise periods to be taken into account will vary according to the facts of each case and the business concerned.
- 40 Therefore when applying the SSNIP test for a hypothetical market which closely resembles perfect competition, for reasons such as ease of entry, it should be subject to shorter time periods to determine at which point a price increase would result in sustained profits. Firms operating in a market closer resembling an oligopoly due to, for example, high sunk costs through large investment programmes for infrastructure, adopting a short time period over which the SSNIP is applied would likely falsely induce the regulator to not approve a clearance or authorisation.

QUANTIFICATION OF BENEFITS AND COSTS

- 41 Benefit cost analysis and its requisite quantification is an important tool to assessing the welfare implications of a change in market structure. Quantification, in conjunction with sound qualitative analysis, should inform a regulator when making judgments as to which regulatory tools it will engage to ensure long-term welfare maximisation is maintained. In the case of the previous discussion document on Parts 4 and 4A of the Commerce Act regulation focuses at a firm's conduct which may be abusing market power. On the other hand, the regulator's focus for mergers and acquisitions is preventative in nature. The regulator should use its quantitative analysis to determine whether it will enable a certain market structure to arise as a result of the merger or acquisition.
- 42 Empirical analysis is playing an ever larger part in competition policy. This in part is in response to the greater ability for firms and regulators to access a greater quantity and quality of data. In light of this, accurate analysis and interpretation of quantitative evidence becomes more crucial to decision making processes. Therefore the weight one places on quantitative analysis will vary given the interface quantification plays with qualitative analysis.
- 43 It is important, however, that complex competition analysis undertaken through technical economic and legal input does not lead to quantification diminishing the benefits produced by common sense and pragmatic judgements, which do not provide certainty and predictability in

application.⁸ In other words, the use of empirical estimates should not lead to the Commission to place less weight on matters that can not be easily quantified but may nonetheless be critical to assessing the impact of a merger on competition.

- 44 For the purpose of improving transparency and accountability in the clearance and authorisation process, publishing of the Commission's qualitative and quantitative analysis would provide a number of benefits. First it would enable parties to assess the underlying assumptions which have driven the results produced by the Commission. This would then enable robust debate as to how and why the Commission's quantification arrived at a certain result. In turn, the corresponding debate would place healthy pressure on the regulator to ensure it undertakes robust analysis.
- 45 A failure to undertake robust quantification in conjunction with quality qualitative analysis can have particularly perverse results for the efficient functioning of the economy. Quantification which fails to accurately capture welfare effects resulting in a potential merger or acquisition being declined will pressure firms who want to grow to do so internally. A likely result could be the inefficient creation of excess capacity in the economy. The firm applying to undertake an acquisition may have assessed that a merger was an efficient growth strategy but is now required by government to do this through other internal mechanisms. Such a move would be contrary to more contemporary industrial organisation economic literature.
- 46 Similarly, consider quantification that ignores the entry deterring impact of merger policy. For example, consider the business plans for a potential third entrant into the network based mobile telephony industry in New Zealand. Whether or not it enters today will depend on whether, in a probabilistic sense, it will expect to make a profit. This, in turn, will depend in part on the probability attached to failure (exit) and on the losses expected to be attached to exit.
- 47 The mergers policy of the Commission will be an important determinant of the expected losses attached to the possibility of unsuccessful entry. If the Commission is expected to block any future sale of its operations to Telecom or Vodafone then the expected cost of failure will be increased.⁹

⁸ See Fung, C., *Response to Further Public Consultation: Draft Competition Guidelines*, Department of Economics, Lingnan University of Hong Kong, July 2007

⁹ Even if sale to Telecom is expected to be blocked this would eliminate competitive tension from any sale to Vodafone and also increase the expected cost of failure.

In turn, this will tend to deter entry by reducing the expected profits from entry.

- 48 This simple example highlights the far reaching implications of mergers policy – especially in relatively concentrated industries. A mergers policy that attempts to impose market structures on industries where those market structures don't fit is likely to be counterproductive. This is illustrated in the above example, the expectation that the Commission would attempt to 'keep' a third mobile player in the market, even if it had not succeeded, is likely to deter entry in the first place. That is, overly 'strict' merger policy has the potential to actually increase concentration by deterring entry rather than increase it by preventing exit. This is especially true in industries like telecommunications.
- 49 Overall, Telecom believes that the quantification of benefits and costs should only be focused at quantifying the overall efficiency implications of a potential merge or acquisition. This is because the clearance and authorisation process is focussed at maintaining an efficient market structure so as to maximise welfare for all New Zealanders.

INTERNATIONAL COMPETITIVENESS EFFECTS

- 50 In a global economy, market definition should already account for international markets. Therefore in performing analysis of welfare maximisation, the Commission should include the effects the potential merge or acquisition will have on New Zealand's international competitiveness.
- 51 For example a firm producing a good for consumption domestically in New Zealand may also export the same product to foreign markets. The export revenues derived from the international sale of the product will flow back to New Zealand contributing to the overall welfare of New Zealanders. Over time, this firm may recognise that to maximise export earnings its production requires greater integration so as to harness the economic benefits of scale and scope. The most efficient method of doing this may be the acquisition of another large firm in the same domestic market. As it is likely this will result in a substantial lessening of competition in New Zealand the acquisition will require authorisation by the Commission.
- 52 If the subsequent quantification of long-term welfare implications of this acquisition failed to incorporate the additional benefits of increased export competition then the merger would not be authorised. The consequence would be the loss of welfare in pursuit of a market structure that would continue to comprise a larger number of firms. The resulting outcome for the firm in this example would be an inability to obtain the productive

efficiencies to effectively compete internationally due to a failure in the quantification of welfare maximisation.

C OTHER ISSUES

- 53 As indicated in the introduction, we don't propose to comment on all of the issues in the paper. This section contains comments on some of the remaining issues in the Discussion Paper.
- 54 **Merger Issues:** As outlined in the preceding section, we think that more is needed to address the process failures with clearance and authorisation applications than simply increasing the statutory timeframe. However, we also agree that the statutory timeframe for dealing with clearance applications should be increased from 10 working days to 30 working days. This would ensure that the legislation more accurately reflects what happens in practice, so parties who are unfamiliar with the process are able to get a better understanding of how it will really work.
- 55 In relation to reasons, we think that the practice of the Commission issuing reasons for clearances should be codified. It is a fundamental requirement of administrative law that the decision maker be required to give reasons for any form of substantive administrative decision. We agree that a requirement that the Commission release reasons at the same time as its decision could add further delay to the decision process. But we do think that it is unsatisfactory that the statutory time frame for appeal may well expire before the reasons are released. We favour option (b) and do not agree that the law should not be changed simply because the words in the Act do not necessary reflect what happens in practice. Such reasoning would suggest that there should be no extension of the timeframe for making decisions on clearance and we all agree there should be an increase. As an alternative, we suggest that the Act be amended so that the time for appeal is 20 working days from the release of the decision, or 20 working days from the release of the reasons, whichever is the later.
- 56 **Restrictive Trade Practices Issues:** We favour the introduction of a clearance regime for restrictive trade practices. Telecom, as a consequence of its place in the market, has been the subject of a number of investigations under Part 2 of the Commerce Act. Not all of these investigations has resulted in the Commission choosing to take action. But the mere fact of an investigation gives rise to significant expense and can involve hours of management time. Such investigations give rise to uncertainty. Many investigations can take many years before there is any outcome (for example, the Commerce Commission investigation into Data Pricing was commenced in 2000, with proceedings issued in 2004; the Commission commenced an investigation into the bundling of data products in 2004 - Telecom is not aware of any activity in relation to this investigation since January 2006, but it is aware that the investigation has not yet been closed, because the Commission has made recent public

statements to this effect). A voluntary restrictive trade practices clearance process would allow commercial parties to avoid this uncertainty, cost and delay. We accept that such a regime would be more suited to section 27 issues than section 36 issues, but we still think that the introduction of such a process would be a good step. We think that any clearance regime should also include conduct that falls within the definitions of the *per se* offences.

57 Given that we think that a clearance regime for trade practices issues should be introduced, we agree that it should be designed to fit with the authorisation process in the same way as it does for mergers. In other words, the options available should be:

- Apply for a clearance – Commission can grant or decline;
- Apply for an authorisation – Commission can grant a clearance (if the threshold jurisdiction test for an authorisation is not met), grant an authorisation, or decline.

58 We believe that the second limb of section 65(1) (which permits the Commission to revisit an authorisation where there has been a material change in circumstances) should be revoked. As outlined in the Discussion Paper, there is an issue in relation to infrastructure investment. Regulatory risk is widely accepted to be a deterrent to infrastructure investment. We agree that *ex ante* business certainty should be the primary concern.

59 We agree that there should be more flexibility in relation to halting conduct while an authorisation is being considered (once an agreement has been entered into). If an agreement has already taken effect, there is less incentive for the parties to seek an authorisation. However, the parties will still have appropriate incentives in circumstances where conduct is in the “grey area”, because section 59B provides sufficient incentives to discourage parties from engaging in anticompetitive conduct.

60 **Appeal Issues:** We think that whether third parties have standing to appeal should be an issue that is within the discretion of the Court to decide, but third parties should be required to show that they have a material interest in the outcome.

61 As we said in our submissions on the regulatory control provisions in the Act, although we like the idea of having a specialist competition tribunal to deal with appeals, we acknowledge that in a country the size of New Zealand this may be impractical. In the future, as we move towards harmonisation with Australia, the concept of using the Australian Competition Tribunal is attractive. However, at present, we consider that

the High Court, sitting with a lay member is probably the most appropriate appeal body. We support the wider use of lay members.