



# Cook Islands Telecommunications Market Competition Policy 2019



**Consultation  
Draft**



**May 2019**

Prepared by the Economics Unit, Ministry of Finance and Economic Management and the ICT Division, Office of the Prime Minister, in collaboration with the Pacific Private Sector Development Initiative, a technical assistance project of the Asian Development Bank.

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## Abbreviations and acronyms

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<b>ADB</b>	Asian Development Bank
<b>ccTLD</b>	Country code Top-Level Domain. For the Cook Islands, .ck.
<b>CM</b>	Cabinet Minute
<b>GB</b>	gigabyte
<b>ICT</b>	Information Communication Technology
<b>MB</b>	megabyte
<b>MEO</b>	Medium earth orbit – satellite with an orbit within the range from a few hundred miles to a few thousand miles above the earth's surface
<b>MFAT</b>	New Zealand Ministry of Foreign Affairs and Trade
<b>NICTA</b>	National Information & Communications Technology Authority (Papua New Guinea)
<b>NSDP</b>	National Sustainable Development Plan
<b>OTT</b>	Over The Top – refers to content or messaging transmitted over the Internet rather than by traditional means e.g. Netflix, HBO Now (content) and Skype, WhatsApp (messaging)
<b>PSDI</b>	Pacific Private Sector Development Initiative
<b>PABX</b>	Private Automatic Branch Exchange – a telephone switch located in a customer's premises that primarily establishes voice-grade circuits between individual users (extensions) and the switched telephone network <sup>1</sup>
<b>TCI</b>	Telecom Cook Islands Limited
<b>TCNZ</b>	TCNZ Cook Islands Limited
<b>TPP</b>	Telecommunications Policy Principles – endorsed by Cabinet of Cook Islands Government in 2013
<b>UN</b>	United Nations
<b>VoIP</b>	Voice over Internet Protocol
<b>VSAT</b>	Very Small Aperture Terminal – a satellite communications system that serves home and business users

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<sup>1</sup> Goleniewski, L (2007). *Telecommunications Essentials* (2<sup>nd</sup> edition), p 786.

## Foreword

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Kia Orana,

An efficient, effective and competitive telecommunications industry that provides high quality and affordable information and communication technology (ICT) services is essential to improving the standard of living across the Cook Islands.

Cook Islanders, at work and at home, rely on a wide range of ICT services on a daily basis to conduct business, to connect with friends and family across the globe, and for entertainment.

The Cook Islands has been serviced by a single telecommunications operator, partly-owned by the Government, under a legislated monopoly since 1989, with limited independent oversight.

While this approach has served the Cook Islands well to date, the ICT landscape, both here and abroad, has changed considerably since the *Telecommunications Act 1989* came into force. Innovation and development in the telecommunications industry in the form of new services – such as the ‘app’ economy – are posing new challenges and opportunities for established regulation.

The local infrastructure landscape is also changing. The Manatua Cable, which is expected to start service in mid-2020, will provide fast, reliable and affordable internet services.

In addition, experience elsewhere in the world has demonstrated the benefits of competition in the telecommunications industry: for consumers through access to new services and lower service prices, and for business through new investment opportunities.



The Government is committed to opening up the telecommunications market to competition to secure these benefits, and at the same time adapting the regulatory framework so that it is fit for purpose in this 21st Century ICT environment. The Government’s proposals in this regard are set out in this draft *Cook Islands Telecommunications Market Competition Policy 2019*.

A key element of the new policy is a Universal Service Access commitment. This will ensure that affordable and quality telecommunications and internet services remain available to all Cook Islanders, especially those living in the Pa Enua.

I would like to thank all those that have contributed to the development of this policy, including the Asian Development Bank-funded Pacific Private Sector Development Initiative.

I invite all stakeholders to engage in the public consultation on this draft policy in the interests of achieving our common goals.

Kia Manuia,

*Hon. Mark Brown*  
*Deputy Prime Minister/ Minister of Finance*

## Document structure

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This document is organised in five parts:

- **Part I: Policy rationale and objectives** describes the current state of affairs in the Cook Islands telecommunications industry, presents the Government's reasons – the policy need – for liberalising the market, sets out the Government's objectives in this regard, and the principles underpinning the draft policy.
- **Part II: Independent regulatory authority** presents the form and function of the independent regulatory authority that the Government proposes to establish and that will be charged with regulating telecommunications service providers under the new legislative arrangements.
- **Part III: Telecommunications regulatory framework** sets out the Government's proposed legislative arrangements that will open up the Cook Islands telecommunications market to competition.
- **Part IV** sets out the Government's intended approach to transitioning from the current regulatory arrangements to the new framework described in **Part III**, to ensure an orderly transition from one to the other.
- **Part V** details the Government's approach to consultation on this draft Policy.

## Executive summary

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### Introduction and call for submissions

The draft *Cook Islands Telecommunications Market Competition Policy 2019* (draft **Policy**) sets out the Government's approach to opening up the telecommunications market to competition and regulating service providers in an efficient and effective manner that achieves the Government's objectives for the telecommunications sector.

The Government is seeking stakeholder feedback, from both industry and the Cook Islands community, on the proposals contained in this draft Policy.

Please provide your comments before 5:00pm on **Friday 14 June 2019**, by:

- **Telephone:** 29511 (please ask for 'Economics Unit')
- **Email:** [mfem.economics@cookislands.gov.ck](mailto:mfem.economics@cookislands.gov.ck)
- **Hard copy:** Economics Unit, Ministry of Finance and Economic Management, PO Box 120, Avarua.

### Policy rationale

Telecommunications services – fixed line, mobile, internet and other services – have been provided in the Cook Islands by a single operator, pursuant to a statutory monopoly since 1989 under the *Telecommunication Act 1989* (and amendments of 1991, 1992, 1997 and 2003).

The Government considers that the Cook Islands would benefit, as many other Pacific islands countries have benefitted, from the introduction of competition to the market for telecommunications services. Competition has been defined as 'a process of rivalry between firms seeking to win customers' business over time by offering them a better deal.'<sup>2</sup>

Competition is expected to deliver benefits to consumers through lower prices, increased consumer choice and service quality, and improved incentives to invest and innovate. Prices will be lower because the pressure of competition will force service providers to find the most efficient, lowest cost ways of providing services.

The provision of telecommunications services is not currently subject to formal independent regulation in the Cook Islands. In the past, while the telecommunications operator has been licensed by the Government and has agreed with the Government to meet certain services commitments, it has otherwise been largely self-regulating. Where there are no competitive forces at play nor independent scrutiny, there exists the potential for inefficiency in terms of either higher prices or lower service.

In addition, innovation and development are highly desirable in the Cook Islands telecommunications industry. The construction of the Manatua Cable will bring an important opportunity for innovation in services and will pose new challenges for established regulation.

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<sup>2</sup> Competition Commission and the Office of Fair Trading *Merger Assessment Guidelines: OFT1254* (2010) para 4.1.2.



Finally, the current statutory and regulatory framework for telecommunications in the Cook Islands has not been substantially revised since 1989, though postal services have been added and some changes made by amendments. That framework has not kept pace with the rapid developments in technology and business models in the telecommunications industry. The framework is also affected by various gaps and inconsistencies. The Government therefore considers that revising and updating the telecommunications regulatory framework is in the interests of the telecommunications industry and users alike.

### **Policy response**

The Government's ICT vision, as stated in the National Information and Communication Technology Policy 2015–20 (**ICT Policy**), is:

ICT will be effectively utilized to achieve sustainable improvements in social, economic, cultural, and good governance thus improving the quality of life of all Cook Island citizens.

The *Cook Islands Telecommunications Market Competition Policy 2019* (draft **Policy**) aims to further the achievement of the Government's ICT vision by creating a policy and legal framework under which service providers will have the opportunity to enter, invest in and competitively supply telecommunications services in the Cook Islands.

More specifically, the primary objective of this draft Policy is to enable the emergence and development of competition among suppliers of telecommunications services, in the interests of:

- promoting consumer welfare (e.g. access to new services and lower service prices);
- creating opportunities for investment; and
- ensuring high quality, sustainable reliable telecommunications infrastructure.

The Government proposes to give effect to the new regulatory framework through two Bills, to be introduced to Parliament this year:

- the Competition and Regulatory Authority Bill 2019; and
- the Telecommunications Bill 2019.

The Competition and Regulatory Authority Bill 2019 will set out the form, function and general powers of the telecommunications industry regulator. In a separate, but related matter, the Government has identified a need for independent regulation of the provision of monopoly services in the electricity and water and sewerage industries. The proposal, as endorsed in principle by Cabinet on 15 August 2018 (CM (18) 0215), is to extend the role of the telecommunications regulator to include the two additional sectors, following its establishment. Having a separate regulatory authority Bill will make it easier to accomplish this.

Table ES1 summarises the proposed key roles and responsibilities of the Regulator that will be set out in the Competition and Regulatory Authority Bill. See **Part II** of this draft Policy for more detail.

**Table ES1: Competition and Regulatory Authority summary**

Key element	Policy position summary
<p><b>Competition and Regulatory Authority</b></p> <p>The organisation to be charged by Government with effective regulation of the telecommunications industry.</p>	<p>Establishment of a Competition and Regulatory Authority:</p> <ul style="list-style-type: none"> <li>• Powers –investigative, apply to court for penalties for infringements.</li> <li>• Review – judicial, expert panel review.</li> <li>• Scrutiny - public consultation and publication of decisions.</li> <li>• Funding – joint industry and Government.</li> </ul>

The Telecommunications Bill 2019 will set out the proposed new framework for liberalising the telecommunications industry. The key policy elements that will be given effect to in the Bill are summarised in Table ES2. See **Part III** of this Policy for more detail.

**Table ES2: Telecommunications competition policy summary**

Key element	Policy position summary
<p><b>Licensing of telecommunications service providers</b></p> <p>The means by which the Government proposes to continue to exercise control, in the public interest, over the opportunity to offer telecommunications services to the public.</p>	<p>Regulator to issue telecommunications licence by type for fixed period, with spectrum licences separate.</p> <p>Initial core licence terms conditions set out in the legislation, subject to variation by the Regulator: scope, term, fees, Universal Service Obligation etc.</p> <p>Toll bypass: seeking views on how best to deal with OTT providers.</p>
<p><b>Interconnection between telecommunications networks</b></p> <p>Enables a customer of Network A to place a call to a customer of Network B.</p>	<p>Bill and keep charging regime – each operator recovers its costs of providing interconnection to other operators through its retail charges.</p> <p>Power for the Regulator to:</p> <ul style="list-style-type: none"> <li>• set ex ante bill and keep safeguards to avoid manipulation/ unfair burdens;</li> <li>• determine 'Interconnection Principles' applicable to licensed operators e.g. thresholds, location of traffic handover, form of interconnection.</li> </ul> <p>Obligation to on operators to:</p> <ul style="list-style-type: none"> <li>• supply interconnection services and carriage services on an equivalent basis;</li> <li>• endeavour to negotiate a commercial arrangement for interconnection</li> </ul>
<p><b>Access and resale</b></p> <p>'Resale' refers to the purchase of a network operator's wholesale services for the purpose of distribution to customers at the retail level, using the reseller's branding and billing arrangements.</p>	<p>Right for a telecommunications licensee to have reasonable access to the facilities of another licensee, either on a reciprocal basis or the Regulator's estimate of reasonable incremental costs of shared access.</p> <p>Right for a licensed reseller to acquire services from a network operator for resale, at a price negotiated between the two or, failing agreement, at a price determined by the Regulator.</p> <p>Regulator power to:</p>

Key element	Policy position summary
<p>'Access' refers to the access of a network operator or a reseller to infrastructure (e.g. towers, poles, ducts, manholes, cabinets, etc.) that are owned by another operator or reseller.</p>	<ul style="list-style-type: none"> <li>determine resale prices for (wholesale) acquisition of services by a reseller; on the basis of the network operator's effective retail price minus a margin to be determined by the Regulator;</li> <li>mandate the provision of access to a specified facility on terms and conditions determined by the Regulator.</li> </ul>
<p><b>Consumer protection</b></p> <p>Telecommunications services are an important and regular consumer purchase, for very many Cook Islanders. The Government considers that consumers' rights require particular protection in relation to telecommunications services.</p>	<p>Licensees obliged to:</p> <ul style="list-style-type: none"> <li>establish consumer complaints-handling procedures, with the Regulator investigating unresolved complaints;</li> <li>not engage in misleading or deceptive conduct;</li> <li>provide services that meet minimum quality/reliability standards (that may be prescribed by the Regulator) and pay compensation if in breach;</li> <li>protect the privacy of users' communications, subject to lawful interception with warrant;</li> <li>protect the confidentiality of users' personal information.</li> </ul> <p>Regulator power to make a binding Consumer Code.</p>
<p><b>Numbering resource</b></p> <p>Telecommunications subscriber numbers are a finite resource which the Government considers should be managed in the best interests of Cook Islands telecommunications users.</p>	<p>Regulator to:</p> <ul style="list-style-type: none"> <li>determine a National Numbering Plan;</li> <li>allocate number ranges and codes to licensed operators;</li> <li>determine rules around emergency services number assignment, priority, capacity and quality;</li> <li>review number portability, at the request of the Minister.</li> </ul>
<p><b>Competition safeguards</b></p> <p>Means to safeguard against anti-competitive conduct and other acts that could undermine the Government's market liberalisation objectives.</p>	<p>Regulator power to:</p> <ul style="list-style-type: none"> <li>make price control regulations via Order in Council, but only if there is no effective competition in the market for the telecommunications service in question and price control regulations are in the long term economic and social interests of end users;</li> <li>specify 'rules of competitive conduct';</li> <li>apply penalties for anti-competitive conduct.</li> </ul> <p>Prohibition on:</p> <ul style="list-style-type: none"> <li>licensee with substantial degree of market power engaging in conduct that will substantially lessen competition;</li> <li>licensee with substantial degree of market power engaging in price discrimination at wholesale level, except on the basis of substantiated differences in costs;</li> <li>two or more operators engaging in concerted practices that would substantially lessen competition e.g. price fixing.</li> </ul>
<p><b>Radio spectrum resource</b></p> <p>The radiofrequency spectrum is a resource which the Government</p>	<p>Regulator power to:</p> <ul style="list-style-type: none"> <li>allocate, licence and assign Cook Islands radio spectrum frequencies;</li> </ul>

Key element	Policy position summary
<p>considers should be managed in the best interests of Cook Islanders.</p>	<ul style="list-style-type: none"> <li>• declare vacant spectrum that has previously been assigned, and assign it to a different person, with or without compensation;</li> <li>• establish effective liaison on spectrum matters.</li> </ul> <p>Minister to make regulations, on advice of the Regulator, for licence fees, tenders, auctions or other means of allocating spectrum within specified bands.</p>
<p><b>Technical standards</b></p> <p>The telecommunications industry is technically complex, with the quality, reliability and security of services, and the safety and security of end users, dependent on operators' and customers' use of equipment that meets appropriate standards.</p>	<p>Regulator power to:</p> <ul style="list-style-type: none"> <li>• determine technical standards for interconnection or access between operators;</li> <li>• determine technical standards to protect against damage to networks/ facilities, degradation of service quality, public nuisance, environmental harm or danger to persons;</li> <li>• recognise and apply technical standards and rules of other countries;</li> <li>• prohibit the use or supply of equipment that does not comply with technical standards.</li> </ul>
<p><b>Universal service</b></p> <p>The Government considers that all Cook Islanders should have access to a certain basic level of telecommunications, regardless of where they live.</p>	<p>Regulator power to:</p> <ul style="list-style-type: none"> <li>• make and update a Universal Service Plan (USP), with a levy;</li> <li>• establish and manage USP fund, subject to transparency requirements.</li> </ul> <p>Minister power to approve a USP proposed by Regulator and to make a regulation imposing a levy.</p>
<p><b>Public emergencies</b></p> <p>The Government considers it desirable to confirm access to telecommunications services in circumstances of a 'disaster' or 'emergency' in terms of the Disaster Risk Management Act 2007.</p>	<p>Licensed operators to be compelled to cooperate with Emergency Management Cook Islands in making telecommunications continuation or restoration plans after a disaster or emergency;</p> <p>The Response Executive, after a state of disaster or emergency has been declared, may direct a licensed operator to carry, or refrain from carrying, messages of a specified nature, or to provide telecommunications services of a specified kind. The Government to pay compensation to any licensed operator for any costs it may incur in complying with a direction of this kind.</p>
<p><b>Access to land</b></p> <p>To facilitate network construction and maintenance, the Government proposes to give licensees certain rights of access to third parties' land (including public land) for the purposes of constructing or maintaining networks, subject to appropriate safeguards.</p>	<p>Powers for licensed network operator to gain access to land for repair, maintenance, installation, etc. of facilities.</p>
<p><b>Domain management</b></p> <p>The Cook Islands country code top-level domain (ccTLD) '.ck' is currently managed by the incumbent operator.</p>	<p>The Government proposes that the Regulator should have responsibility for oversight of the ccTLD and all domains under it.</p>

Key element	Policy position summary
<p><b>Transition arrangements</b></p> <p>Arrangements for an orderly transition from the current to the proposed new regulatory framework.</p>	<p>The following transitional arrangements are proposed:</p> <ul style="list-style-type: none"> <li>• TCI to be licensed on transitional basis under current arrangements and then for 15 years by the Regulator.</li> <li>• Avaroa Cable Limited to be licensed for 15 years under the new framework.</li> <li>• Current TCI spectrum licence arrangements to be extended for three years under the new framework, with the Regulator then issuing a new licence.</li> <li>• In the first three years, only one additional mobile network licence, in respect of a significant investment proposal (greater than \$5 million) that the Regulator, following a public consultation process, determines will contribute to achieving the primary objective of this Policy.</li> <li>• No licence fees until the new Universal Service Plan comes into effect.</li> <li>• Regulator fully funded by Government for first 3 years.</li> </ul>

## PART I: Policy need and objectives

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**Part I** describes the current state of affairs in the Cook Islands telecommunications industry, presents the Government's reasons – the policy need – for liberalising the market, sets out the Government's objectives in this regard, and the principles underpinning the draft *Cook Islands Telecommunications Market Competition Policy 2019*.

### 1.1 Background

#### 1.1.1 Telecommunications services in the Cook Islands

##### Telecom Cook Islands Limited

Fixed and mobile telecommunications services are currently provided in the Cook Islands solely by Telecom Cook Islands Limited, trading as Bluesky Cook Islands (**TCI**). TCI, a company incorporated under the *Companies Act 1970-71*, is a 60:40 joint venture between TCNZ Cook Islands Limited (**TCNZ**) and the Cook Islands Government.

Teleraro Limited, a consortium led by the Bluesky Group, acquired the TCNZ shares in February 2015 from Spark New Zealand. The consortium includes a Trust which holds 10 per cent of the Teleraro shares on behalf of participating TCI employees in the Cook Islands. It also includes a Trust which holds 15 per cent of the shares of Teleraro for Cook Islanders to purchase.

In February 2019 Amalgamated Telecom Holdings Limited (**ATH**) of Fiji acquired the controlling interest in the Bluesky group of companies from Amper SA which gives ATH the controlling interest in TCI.<sup>3</sup>

In 2010 TCI contracted with satellite operator O3b Networks, for internet service to the Cook Islands by means of medium earth orbit (**MEO**) satellite transponders. This service was launched in Rarotonga in late 2013.

All internet connectivity in the Cook Islands is provided by TCI. Some commercial users obtain satellite internet connectivity via Very Small Aperture Terminal (**VSAT**) terminals under arrangements with TCI.

TCI describes its service offerings as follows:<sup>4</sup>

Bluesky's product range offers core telecommunication services of fixed-line, mobile, internet, postal and Moana TV (IPTV). Products for the home and individual users as well as corporate solutions to corporate clients (PABX, dedicated lines), international and

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<sup>3</sup> <http://www.ath.com.fj/images/athcompletespaymentbluesky.pdf>.

<sup>4</sup> <http://www.bluesky.co.ck/about-us>. Accessed 22 January 2019.

national (long distance) calling services, prepaid calling cards, wifi/hotspots, e-charges services, mobile products and accessories.

TCI provides comprehensive fixed line, mobile phone and broadband network coverage, as shown in Table 1.

**Table 1: TCI service coverage indicators**

Service	Detail
<b>Network coverage</b>	<p>91 per cent of occupied premises connected by fixed line broadband service.</p> <p>99 per cent geographical coverage for mobile services with over 15,200 active subscribers.</p> <p>99 per cent broadband coverage with each populated island having access to fixed broadband, prepaid broadband over the mobile network or via wifi hotspots at popular locations.</p>
<b>Broadband speed</b>	<p>Broadband speeds range from 4Mbits/s to 15Mbits/s depending on subscription.</p> <p>Average achievable speed across the network is 21Mbit/s on ADSL2+ technology.</p> <p>Fibre connected businesses on Rarotonga can be provided 1 Gigabit line rate.</p>

Source: TCI.

TCI broadband products and prices are available on the Bluesky website at <http://www.bluesky.co.ck>. Post-paid plans range from \$8.17 per gigabyte (GB) for the standard plan to \$4.66/GB for the Mega plan. Pre-paid products range from \$25/GB for the 3-day pass to \$16.67/GB for the one month pass.<sup>5</sup> Promotional rates on prepaid can be as low as \$8.33/GB.

Monthly post-paid mobile phone plans range from \$49 for 200 minutes of national calls, 1,000 SMS and 2GB data, to \$119 for 600 minutes of national calls, 1,500 SMS and 12GB data. Pre-paid products include the Visitor SIM, targeted at the tourist market, a 15-day product which provides 30 minutes of national calls, 300 SMS and 3GB data for \$49.

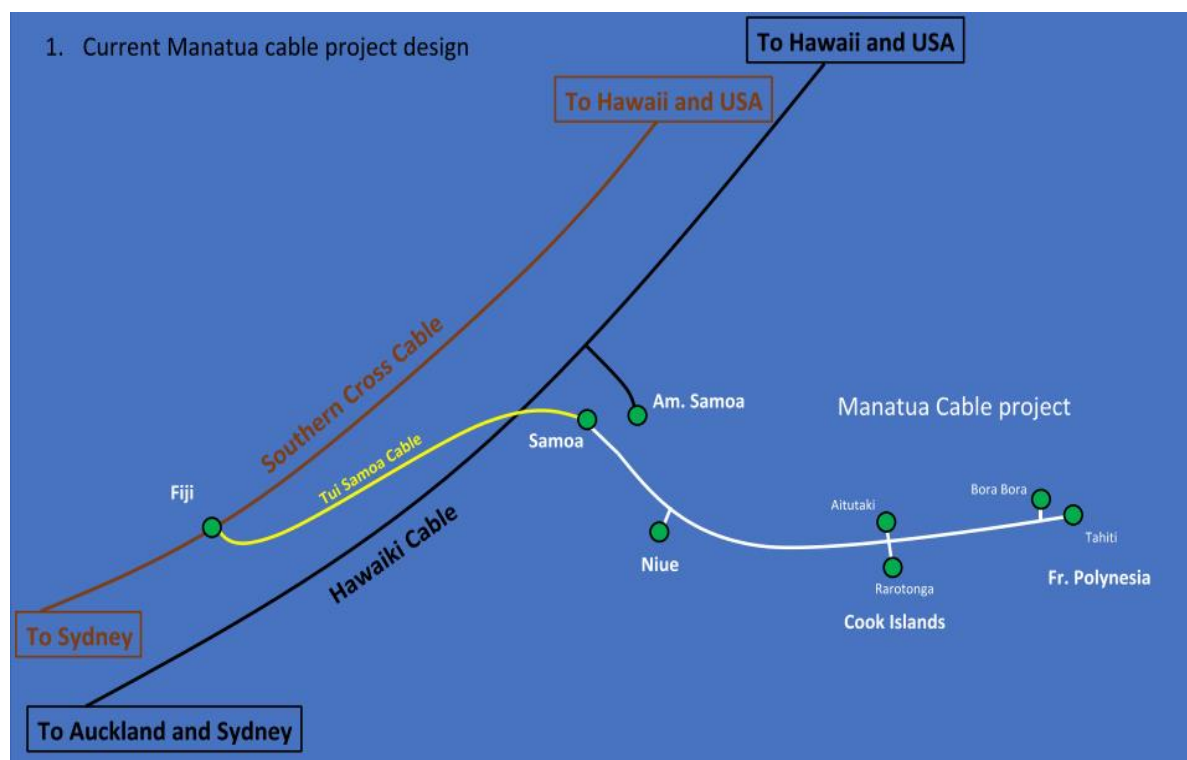
### 1.1.2 Submarine cable service

#### Manatua Cable

The Government is in the process of constructing a new submarine telecommunications cable under the auspices of the Manatua Cable project, a four-country partnership between the Cook Islands, Niue, French Polynesia and Samoa. The submarine cable will link Samoa (with onward connections through, for example, the Tui-Samoa and the Southern Cross cable) and French Polynesia (with onward connections to the Honotua Cable) and branches to Niue and the Cook Islands (Rarotonga and Aitutaki) enabling two reliable, high-capacity gateways to the global internet for the Cook Islands.

<sup>5</sup> Prices as at 7 May 2019.

Figure 1: Manatua Cable configuration



The key objective of the Manatua Cable project is to be an enabler for the provision of reliable, high-capacity bandwidth at affordable prices by retailers for Cook Islands consumers. The Cook Islands' participation in the Manatua Cable project is supported and funded jointly by New Zealand's Ministry of Foreign Affairs and Trade (**MFAT**) and the Asian Development Bank (**ADB**):

- Grant Funding Arrangement with MFAT to fund up to \$10.1 million (subsequently raised to \$15 million) of the Cook Islands contribution to the construction of the Manatua Cable, with terms and conditions set out in the *Grant Funding Arrangement: Pacific Connectivity Project- Manatua Submarine Cable Contribution, Activity Code: A12815-A01*.
- 20-year loan agreement with the ADB for US\$15 million, with terms and conditions set out in the *Loan Agreement 3632-COO (Improving Internet Connectivity for the South Pacific Project)*.<sup>6</sup>

Recognising that effective market oversight, in particular price regulation and governance of telecommunications operators would be key to ensuring the economic benefits of the proposed investment, the Cook Islands Government committed to the establishment of an effective telecommunications regulatory framework.

The [Cook Islands Government] will ensure that effective telecommunications regulation is established prior to the service date of the submarine cable. This includes the passing of

<sup>6</sup> <https://www.adb.org/sites/default/files/project-documents/50110/50110-001-lna-en.pdf>.



legislation to enable the creation of [a Regulator], as well as the establishment of such an office and the recruitment of an appropriate regulator to perform that function.<sup>7</sup>

.....

The [Regulator] will ensure that pricing of internet capacity in both the wholesale and retail markets is set at a fair and competitive level, to ensure that the benefits of the submarine cable are delivered to the end consumer.<sup>8</sup>

The ADB loan agreement for the Manatua Cable also commits the Cook Islands Government to the establishment of an effective telecommunications regulatory framework, with section 5.01 requiring the Government to perform its obligations under the New Zealand GFA.

The supply and installation of the Manatua Cable is underway, with the contract between the Manatua Consortium and Subcom, a US-based undersea cable installation company, coming into force in November 2018.<sup>9</sup> The construction timeline is approximately 18 months.

### **Avaroa Cable Limited**

Avaroa Cable Limited (**ACL**), a wholly Government-owned company, has been established to build, own and operate the Cook Islands portion of the Manatua Cable and provide broadband services to the islands of Rarotonga and Aitutaki. ACL expects to begin providing services in mid-2020.

ACL's primary objective is to provide commercially sustainable, low cost, high quality, wholesale international connectivity services to the Cook Islands. ACL intends to provide a competitive alternative in the wholesale market to current satellite providers.

ACL was established in March 2017 as a limited liability company under Part IV of the *Companies Act 1970-71*. ACL is overseen by a majority-independent board, chaired by a private-sector board member. These steps have been taken to minimise the potential for conflicts of interest, perceived or real, between the Government's policy-making role and its ownership interest in a market participant.

ACL will be subject to the same rules as other telecommunications operators under the proposed new regulatory framework set out in **Part III** of this draft Policy. These will include licensing by the independent regulator, and prohibition on anti-competitive practices, for example.

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<sup>7</sup> Grant Funding Arrangement: Pacific Connectivity Project- Manatua Submarine Cable Contribution, Activity Code: A12815-A01, p4.

<sup>8</sup> Ibid, p7.

<sup>9</sup> <https://www.subcom.com/documents/Manatua-CIF-SubCom-final-19NOV2018.pdf>.

### 1.1.3 Regulatory framework

#### Introduction

The current regulatory framework that governs the provision of telecommunications services in the Cook Islands by TCI comprises a mix of legislation and contractual arrangements. The primary legislation is the *Telecommunications Act 1989*, with the contractual arrangements set out in a Joint Venture Agreement (**JVA**) entered into between the Government and TCNZ.

#### Legislation

The telecommunications industry in the Cook Islands is regulated at present under the *Telecommunications Act 1989* (and amendments of 1991, 1992, 1997 and 2003), and the *Radio Regulations 1993*,<sup>10</sup> made under the *Telecommunications Act 1989*.<sup>11</sup>

The *Telecommunications Act 1989* sets out:

- TCI as the monopoly telecommunications network operator;
- the powers TCI has in relation to protecting the network, such as tree removal and rights of entry;
- TCI's accountability requirements, including its commercial and non-commercial objectives, and provision of annual statements of corporate intent and annual financial reports to the responsible Minister;
- requirements related to the licensing and regulation of radio apparatus;
- powers for the making of regulations; and
- offences, enforcement and remedies relating to contraventions.

The *Radio Regulations 1993* sets out matters related to:

- the application and grant of apparatus licenses by the Minister;
- privacy in relation to radio communications;
- the management of radio frequency spectrum;
- certificates of competency to operate radio apparatus;
- interfering with radio communications;
- radio communication within territorial limits in relation to ships and aircraft; and
- fees, offences and penalties.

TCI holds the following licences, issued under the provisions of the *Telecommunications Act 1989* and the *Radio Regulations 1993*, to provide a range of services:

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<sup>10</sup> Available at: <http://dir.bluesky.co.ck/admin/data/files/Radio%20Regulations.pdf>.

<sup>11</sup> The principal act is available at: [http://www.paclii.org/ck/legis/num\\_act/ta1989214/](http://www.paclii.org/ck/legis/num_act/ta1989214/). Amendments can found at: [http://www.paclii.org/ck/indices/legis/Chronological\\_Table\\_of\\_Acts.html](http://www.paclii.org/ck/indices/legis/Chronological_Table_of_Acts.html).

- wireless broadband communication service;
- GSM network operation;
- fixed and mobile satellite services;
- maritime radio services;
- cellular mobile telephone service;
- radio paging network service;
- mobile radio service; and
- radio telephone service to the outer islands, as backup in case of satellite failure.

The following legislation may also apply to telecommunications providers and users, depending on their activities:

- *Broadcasting Act 1989* (and amendments of 1997);
- *Consumer Guarantees Act 2008*;
- *Copyright Act 2013*;
- *Crimes Act 1969* (and proposed computer crime amendments);
- *Fair Trading Act 2008* (and amendments of 2012); and
- *SPAM Act 2008*.

The Government notes that the *Broadcasting Act 1989* may be out of date, given that Cook Islanders are now viewing and listening to content in new ways. Reform of the *Broadcasting Act 1989* might therefore be considered, in consultation with broadcasters and the public, in the near future.

### **Joint Venture Agreement**

On 30 June 1997, the Government and TCNZ signed a joint venture agreement (JVA). The JVA sets out the arrangements under which TCI provides services, including:

- operating domestic and international telecommunications systems to, from and throughout the Cook Islands;
- selected radio and broadcasting distribution services for Rarotonga and the outer islands; and
- postal services to Rarotonga and the outer islands.<sup>12</sup>

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<sup>12</sup> ADB (2013) Cook Islands: Report on the Feasibility of an International Submarine Cable System for the Cook Islands, p.12; Raymond, J (2017) Bluesky Cook Islands Investment Case Study.

## 1.2 Policy rationale

### 1.2.1 Introduction

Liberalisation of the telecommunications market is a standard case of microeconomic reform. The fundamental objective of microeconomic – or structural – reform is to improve the economy’s technical, allocative, and dynamic efficiency, leading to improvements in social welfare – or standard of living. Effective microeconomic reform requires two things. The first is a commitment to facilitating well-functioning markets and to letting market competition determine economic outcomes where competition is appropriate. The second is effective regulation to guide economic outcomes when competition is not effective.

### 1.2.2 Competition benefits

The Government’s view is that competition in the telecommunications market will drive efficiency improvements that will in turn generate consumer benefits.

The Government’s desire to open up the telecommunications market to competition, overseen by an independent regulator, is not new.

Over the last decade, the Government has made a number of efforts to liberalise the market, including the preparation of a draft Telecommunications Bill in 2009. This followed lobbying from the business community for reform, and a report by the Pacific Islands Forum Secretariat in February 2007 on options and strategies to develop the Cook Islands telecommunications market. The report recommended a set of actions to be followed including an immediate tariff review, amendments to the *Telecommunications Act 1989*, and the establishment of a regulator to facilitate the introduction of competition to the sector.<sup>13</sup>

Competition can be defined as ‘a process of rivalry between firms seeking to win customers’ business over time by offering them a better deal.’<sup>14</sup> In economic terms, competitive rivalry between telecommunications operators is expected to yield efficiency benefits for the economy:<sup>15</sup>

- **Better resource allocation** – in competitive markets, service providers respond to price signals, so that consumers can obtain the amounts of goods and services they require at the price they are willing to pay: service providers do not seek to restrict output.
- **More efficient production** – the pressure of competition forces service providers to deliver services at the lowest cost possible: to maximise their profits, service providers must find the most efficient ways of producing their goods or services.

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<sup>13</sup> Budden, John (2007). Cook Islands Telecommunications Strategy 2007, Economic Infrastructure Advisor. Pacific Islands Forum Secretariat, Suva, Fiji. February 2007: p 3-5.

<sup>14</sup> Competition Commission and the Office of Fair Trading Merger Assessment Guidelines: OFT1254 (2010) para 4.1.2.

<sup>15</sup> See, for example, Whish, R. and Bailey, D. Competition Law (7th edition, 2012): p5-7.

- **Innovation** – under competitive conditions, producers are more likely to innovate and develop new products and methods of supplying products or more efficient means of production.

Competitive forces can exert strong pressure on service providers to find the least costly way of serving customer needs and to innovate, in order to better serve those needs. Individual service providers can benefit from cost savings they make in the form of higher profit, and consumers and commercial users downstream can also benefit, as competition from other service providers reduces those profits and drives prices down towards costs.

This dynamic process leads to prices that reflect production costs, and to costs that are as low as possible. Both types of efficiency ensure the highest possible levels of income. Not only do falling costs and prices matter but so too do choice, variety and quality. Many consumers routinely look for new options and better delivery.

Another benefit of competition is that it can make an economy more flexible and robust to external shocks. Service providers used to out-guessing rivals on a daily basis will be better placed to react to adverse global market developments than producers who have no rivals. Furthermore, service providers with rivals will have a financial incentive to be better informed about likely global market developments.

Potential rivals are as important as actual ones. Even a monopoly supplier will be unable to inflate costs or profits on a sustained basis if this attracts the entry of a competitor who can produce at lower cost or with a smaller profit margin. So long as it is possible for a competitor to enter at any time with few irreversible costs, this will discipline an incumbent's behaviour. So the number of actual competitors may be less important than the absence of barriers to entry and exit. Contestability, or the threat of competitive entry, can be as potent an incentive to innovation and cost-cutting as actual competition.

Inevitably, some parts of the network cannot be efficiently duplicated by an entrant. Some degree of mandated access under regulation will remain necessary. The Government proposes to address this in the new *Telecommunications Act* by means of “mandatory access services” and “declared access services.”

### **1.2.3 Issues with current arrangements**

The current statutory and regulatory framework for telecommunications in the Cook Islands has not been substantially revised since 1989, though postal services have been added and some changes made by amendments.

The framework has not kept pace with rapid development in technology and business models in the telecommunications industry. For example, the current *Telecommunications Act 1989* is premised on the incumbent network operator having a monopoly over the construction and operation of telecommunications networks in Cook Islands. Consequently, the Act makes no provision for interconnection, resale, or access to facilities or services.

The current legislation and regulations made under it also contain various gaps, duplications and inconsistencies. Examples of such problems were brought to light in a case recently before the High Court. In his judgment, Justice Doherty noted:

[T]he [*Telecommunications Act 1989*] has not one section but two dedicated to the making of regulations for the use of apparatus. Both sections 37 and 46 purport to allow the making of regulations concerning the prohibition, licensing and use of apparatus but the regulations themselves give no clue as to which of these sections is the genesis of the regulations. To the contrary, the regulations purport on their face to be enacted by virtue of section 53 of the Act. There is no section 53, nor has there ever been.<sup>16</sup>

His Honour further observed:

[T]his case highlights that the form of the Act and regulations is not optimal in a telecommunications field that has moved so far technically since their enactment and which continues to move apace. The legislative changes foreshadowed by counsel for the Minister will be an opportunity to resolve any anomalies and to give clear guidance to parties wishing to enter and participate in the telecommunications industry in the Cook Islands.<sup>17</sup>

Other issues with the current regulatory arrangements include:

- Limited independent regulatory oversight of the telecommunications industry, particularly in relation to service standards, pricing and consumer protection.
- The lack of any formal consumer protection regulation for the telecommunications industry.
- Limited transparency around cross-subsidies that may be embodied in the current universal service arrangements.

The Government therefore considers that revising and updating the telecommunications regulatory framework is in the interests of the telecommunications industry and users alike.

## 1.3 Policy objectives

### 1.3.1 Policy purpose and context

This Policy has the following purposes:

- 1) to inform organizations and individuals, including providers and users of telecommunications, of the Government's intended approach toward the liberalisation and future regulation of the telecommunications industry in Cook Islands;
- 2) to provide guidance for telecommunications industry participants, officials and members of the public regarding the Government's objectives in respect of industry liberalisation; and

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<sup>16</sup> Judgement of Doherty, J, OA No. 1/2017, In the matter between Orama Limited, Telecommunications Minister, Telecom Cook Islands Limited and Attorney-General, 30 November 2017. In the High Court of the Cook Islands held at Rarotonga (Civil Division): para 12.

<sup>17</sup> *Ibid.* para 36.

- 3) to elaborate on the National ICT Policy in respect of issues and proposals in the particular context of liberalisation of the telecommunications industry.

This Policy should be read together with:

- the National Information and Communication Technology Policy 2015–20;<sup>18</sup>
- the Telecommunications Policy Principles;<sup>19</sup> and
- the National Sustainable Development Plan (NSDP) 2016–20.<sup>20</sup>

### 1.3.2 Vision and objective

For the purposes of this Policy, the Government reiterates its vision as stated in the National Information and Communication Technology Policy 2015–20:<sup>21</sup>

ICT will be effectively utilized to achieve sustainable improvements in social, economic, cultural, and good governance thus improving the quality of life of all Cook Island citizens.

This Policy aims to further the achievement of the Government’s ICT vision by creating a policy and legal framework under which service providers will have the opportunity to enter, invest in and competitively supply telecommunications services in the Cook Islands. More specifically, the primary objective of this Policy is to enable the emergence and development of competition among suppliers of telecommunications services, in the interests of:

- promoting consumer welfare (e.g. access to new services and lower service prices);
- creating opportunities for investment; and
- ensuring high quality, sustainable reliable telecommunications infrastructure.

The Expected Outcomes identified in the National ICT Policy as being associated with the Government’s ICT vision are:<sup>22</sup>

- All citizens will have Universal Service Access to affordable, reliable, resilient, secure ICT.
- All citizens will have the necessary knowledge and skills to effectively utilize various technologies to access information and online services such as e-learning, telemedicine, e-commerce.
- All citizens’ rights will be protected by appropriate cyber legislations and regulatory controls to ensure a safe and just society.

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<sup>18</sup> Available at: <http://pafpnet.spc.int/resources/537-cook-is-national-ict-policy-2015-2020>.

<sup>19</sup> Endorsed by Cabinet, 28 January 2013 (CM(13)018). Available at: <http://www.mfem.gov.ck/news1/121-finacial-secretary-office-news/479-cook-islands-telecommunication-principles>. Also see Appendix 1.

<sup>20</sup> Available at: [http://www.mfem.gov.ck/images/documents/CEO\\_docs/Other%20Documents/National-Sustainable-Development-Plan\\_2016-2020.pdf](http://www.mfem.gov.ck/images/documents/CEO_docs/Other%20Documents/National-Sustainable-Development-Plan_2016-2020.pdf).

<sup>21</sup> Cook Islands Government (2015). National Information and Communication Technology Policy, p 7.

<sup>22</sup> Ibid.

- Government will utilize ICT to more effectively achieve our national sustainable development outcomes.
- The Cook Islands will be a fully functioning Knowledge Society.

This Policy aims to contribute to the achievement of the ICT vision, in particular by promoting legislation to give effect to outcomes one and three, above.

### **1.3.3 Links to the National Sustainable Development Plan**

This Policy aligns with the following goals of the NSDP 2016–20:

- **Goal 1:** Improve welfare, reduce inequality and economic hardship.
- **Goal 2:** Expand economic opportunities, improve economic resilience and productive employment to ensure decent work for all.
- **Goal 5:** Build resilient infrastructure and ICT to improve our standard of living.

Of these, Goal 5 is engaged most directly by this Policy. The following four indicators are associated with Goal 5:

#### **Improve ICT connectivity**

##### *Indicator 5.1 Broadband Connectivity Index*

This indicator looks at broadband connectivity through two variables – speed and penetration. Broadband speed is used to measure how advanced our national telecommunications system is. This is also used internationally as an indicator of economic development (or potential for growth). ‘Penetration’ relates to ‘how many people have access to broadband internet’. Improved connectivity represents educational and economic opportunities which will spur continued investment in ICT infrastructure.

#### **Improve broadband affordability**

##### *Indicator 5.2 Percentage of median income spent on broadband*

This indicator looks at how much the average person spends on ICT as a percentage of their income. Affordability is a key consideration in improving access to ICT with access being determined not only by geographic proximity, but the financial means available to effectively use ICT.

#### **Improved mobile connectivity**

##### *Indicator 5.3 Mobile Connectivity Index*

This indicator assesses the connectivity of Cook Islanders using mobile technologies (such as smart phones and tablets) based on three variables – data speed, penetration and average data usage. Global trends indicate that mobile technology will become increasingly important in connecting people to the internet.



## **Build reliable and appropriate infrastructure**

*Indicator 5.4 Percentage of national infrastructure and public buildings that are fit for purpose*

This indicator aims to measure the delivery of basic acceptable infrastructure and public buildings to all our people. After fifty years of self-governance, we have improved much of our public infrastructure including airports, ports, roads, water, sanitation, and buildings. However, with our diverse and ambitious development aspirations, we must ensure that our infrastructure is resilient and built to meet our environmental, economic, and social needs.

The Government considers that this Policy is aligned with the indicators outlined above. The introduction and development of competition is expected to drive improved connectivity, including in broadband and mobile services (indicators 5.1 and 5.3), as rivalry between service providers drives innovation in services delivery and deployment of new technologies. Rivalry between service providers under competitive market conditions is also expected to improve broadband affordability, as providers contend to win customers by offering more attractive pricing.

The proposed regulatory framework also will ensure a clearer delineation between policy-making in the telecommunications sector, for which the Government has responsibility; administration and enforcement, which is the role of the Regulator; and commercial decision making within the framework set by the Government, which should be the concern of licensed operators.

### **1.3.4 Principles**

The Government considers that the Guiding Principles previously articulated in the National ICT Policy provide relevant guidance for the purposes of developing this Policy. Those Guiding Principles are:

#### **1. Coordination, collaboration and multi-stakeholder partnership**

To maximize the benefits of ICT and achieve our vision, a coordinated multi-stakeholder approach between business, industry leaders, non-government organizations, communities, and government is needed. This will ensure the sustainability of new technologies or systems, and related national development initiatives, minimise duplication of efforts, and maximize the return on investment. This policy recognizes the importance of engaging with partners in the region, and strengthening networks is essential to maintaining positive relations and opportunities for information sharing.

#### **2. Universal Service Access**

Affordable and accessible ICT reduces inequality amongst Cook Islands citizens thus enhancing economic opportunities through improved access to information, markets and services. Government will ensure that affordable and quality telecommunications and internet services are available to all citizens, particularly those living in the Pa Enea. Universal service access remains one of the core principles that will ensure all citizens

take full advantage of the benefits on offer, and can be achieved through resilient and secure ICT Infrastructure, strengthened legal and regulatory frameworks.

### **3. Transparency and Accountability**

This policy recognizes that transparency and accountability are essential for optimising policy outcomes, improving quality decision-making, and enabling innovation. Government will ensure timely access to information that can be used by citizens, and all stakeholders to measure our progress and hold government accountable for its actions. Keeping stakeholders informed and engaged will improve Government effectiveness in successful policy implementation, strengthen collaboration and result in greater public confidence.

### **4. Equity and Inclusiveness**

This policy recognizes the different perspectives of stakeholders and will actively engage with under-represented, minority groups through robust consultations to ensure fairness, inclusiveness, and strong ownership of the policy. Government will ensure all stakeholders have the opportunity to participate in the implementation of the ICT strategy.

In 2013, Cabinet endorsed a set of Telecommunications Policy Principles. These principles set out a range of commitments, including in respect of universal access, robust and secure network, encouragement of investment, promoting efficient interconnection, management of radio frequency spectrum and fair and efficient licensing of providers (see Appendix 1).

The Government has been guided by the principles set out in both the National ICT Policy and the Telecommunications Policy Principles in developing this Policy and will continue to be guided by them in its future implementation.

## **1.4 Identification of alternative policy options**

Three policy options have been considered in relation to the Government's objectives for the telecommunications industry (set out in section 1.3).

### **Option 1: Status quo**

The first option, the *status quo*, described in section 1.1, entails no change to the current regulatory framework, with a continuation of the current TCI monopoly under the *Telecommunications Act 1989* and the JVA. As described in section 1.2, the *status quo* is characterised by a single service provider, which is subject to neither competitive forces nor independent economic regulation. This would be out of step with the modern telecommunications world, and entail a lack of transparency around universal service arrangements. For all of these reasons, the *status quo* does not meet the Government's objectives.

### **Option 2: Monopoly with independent regulation**

A second option would be to retain the current monopoly service provider, but subject to the scrutiny of an independent economic regulator. The regulator would aim to promote efficiency by ensuring the service provider's costs were prudent and efficient and guarding against any abuse of market power, for example by regulating prices.

This approach is common in utility industries such as water and sewerage, and electricity and gas distribution, which are characterised by natural monopolies.<sup>23</sup> The Australian Energy Regulator regulates monopoly electricity and gas distribution service providers under this model.<sup>24</sup> A 'heavy-handed' regulatory approach is common in this situation with service providers subject to regular price reviews that entail detailed scrutiny of operating and capital costs to ensure prudence and efficiency.

While certain elements of the telecommunications industry might have natural monopoly characteristics, such as the 'last mile' in fixed-line telephone networks, the current consensus is that there is little in mobile technology that is a natural monopoly. This implies that competition is feasible throughout a mobile network.

Independent economic regulation of a monopoly provider can never be a perfect substitute for competitive forces because of information asymmetry. A fully informed regulator with complete authority could, by micro-managing the firm, simply order the firm to choose the competitive – or first-best – outcome. However, regulators are never fully informed and have limited powers.

As such, this option, while this option would be preferable to option 1 in terms of meeting the Government's objectives, it is unsatisfactory, because of the information asymmetry problem.

### **Option 3: Competition with independent regulation**

The third option entails opening the telecommunications market to competition among operators, overseen by an independent regulator to ensure effective competition by curtailing any anti-competitive practices to which incumbents may resort. Effective competition substitutes market forces for the more 'heavy-handed' direct regulatory oversight that would be required under option 2.

For the reasons outlined in section 1.2.2, the Government's view is that competition will deliver benefits to consumers through lower prices, increased consumer choice and service quality, and improved incentives to invest and innovate. Prices will be lower because competition will drive down prices by compelling service providers to find the least cost ways of providing services.

As such, the Government's preferred option is option 3, a combination of competition and the establishment of a regulator. This option is explored in detail in **Part II** and **Part III**.

The Government considers that the proposed new regulatory framework set out in this Policy should apply in respect of all telecommunications technologies (e.g. fixed, mobile, satellite, cable, Internet-Protocol-based (IP), infrastructure-based and resale-based, circuit switched and packet switched) but that other legislation should continue to apply to particular kinds of activities that involve the use of telecommunications. For example, the *Crimes Act 1969* will apply to criminal misuse of telecommunications and the *Broadcasting Act 1989* will apply to regulated broadcasting activities.

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<sup>23</sup> A natural monopoly arises where the least cost way to provide the service is by a single firm.

<sup>24</sup> <https://www.aer.gov.au/>.

## 1.5 Monitoring and evaluation

It is considered prudent to monitor any new regulatory arrangements to ensure that they have the desired effect on the behaviour of market participants, and do not have any unintended consequences.

The Government intends to charge the Regulator that will be established under the proposed new legislation to undertake regular monitoring of the performance of the market and market participants. This may include key indicators such as network coverage and service quality, reliability and pricing. The monitoring report will be made publicly available to ensure transparency.

As industry liberalisation is a process rather than an event, the Government will keep the liberalisation process under review as it proceeds and will consider amendments to this Policy or the legislation implementing it, if necessary.

## 1.6 Lead agency

This Policy was compiled and developed by the Government in collaboration with its development partner the Asian Development Bank<sup>25</sup> and key stakeholders.

The Economics Unit, Ministry of Finance and Economic Management will lead the implementation of this Policy, with support from the ICT Division, Office of the Prime Minister.

## 1.7 Scope and timeline

This Policy will come into effect upon endorsement by Cabinet.

The Government intends that legislation to give effect to the policy propositions set out in this Policy should be introduced to Parliament as early as practicable in 2019.

In concert with this Policy, the Government will draft a Telecommunications Bill 2019 to give effect to the principles of this Policy, for consideration by Parliament.

One of the policy principles proposed below (see **Part II**) is that an independent regulatory authority should be established, with responsibility for administering and enforcing telecommunications regulation in the Cook Islands. To this end, the Government proposes to develop a Competition and Regulatory Authority Bill 2019, for consideration by Parliament.

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<sup>25</sup> Pacific Private Sector Development Initiative, a technical assistance project of the Asian Development Bank.

## PART II: Independent regulatory authority

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**Part II** of this policy presents the form and function of the independent regulatory authority that the Government proposes to establish and that will be charged with regulating telecommunications service providers under the new legislative arrangements set out in **Part III**. Where relevant, different options are identified.

### 2.1 Discussion

The Government has considered various forms of regulator for the liberalised Cook Islands telecommunications industry.

In the past, while the incumbent telecommunications operator in the Cook Islands has been licensed by the Government, and has agreed with the Government to meet certain services commitments, it has otherwise been largely self-regulating. This entails costs for the operator and does not provide a strong assurance of objective regulatory decision-making. The Government considers that self-regulation will no longer be appropriate in the liberalised industry.

With the shift away from self-regulation, the incumbent network operator and any new entrants will be entitled to expect transparency, consistency and a degree of predictability in the external regulatory framework. This will enable them to continue to make the efficient and sustainable investment decisions which are vital to the success of their businesses and on which consumers ultimately depend.

In many countries today, the telecommunications industry is regulated by an appointed authority (an individual or board) vested with powers and functions in respect of the telecommunications industry alone (e.g. the Telecommunications Commissioner in Solomon Islands, and the National Information and Communications Technology Authority in Papua New Guinea) and supported by a full-time staff. In some countries, responsibility for regulation of the telecommunications sector is vested in an authority which has responsibility for other industries also (e.g. the Commerce Commission in New Zealand, and the Office of the Regulator in Samoa).

Regardless of the form of the regulator, the relevant Minister must have oversight, to ensure the agency is properly run, is accountable, and has due regard to Government policy. Balanced against Ministerial oversight, the regulator must also have autonomy, to ensure it administers the law impartially and consistently over time.

### 2.2 Government proposal

The Government proposes to establish a new regulatory authority in the Cook Islands, to be known as the Competition and Regulatory Authority (**Regulator**). The Regulator will have responsibility solely for the telecommunications industry, at first, but the Government will consider conferring additional responsibilities, in respect of other sectors, on the Regulator at a later date. As the Cook Islands is a small economy, the Government considers that it will be

more cost-effective to establish a multi-sector regulator rather than a regulator specific to the telecommunications industry.<sup>26</sup>

A key study by the World Bank proposed ten key principles of regulatory governance, in summary:<sup>27</sup>

- independence;
- accountability;
- transparency and public participation;
- predictability;
- clarity of roles;
- completeness and clarity in rules;
- proportionality;
- requisite powers;
- appropriate institutional characteristics; and
- integrity.

The Government has had regard to the above attributes of good regulatory governance, as well as to the immediate operational needs of a Cook Islands telecommunications regulator. Some of these attributes are in tension. For example, regulatory accountability to Government is in tension with regulatory independence from Government. Transparency may be in tension with integrity to the extent that the latter requires confidential treatment of information. The Government has had regard to the necessity of balancing such tensions in a regulatory authority that will be suitable for Cook Islands circumstances.

Options for a future telecommunications regulator in the Cook Islands could include self-regulation by the incumbent network operator or by the industry collectively but the Government considers that attributes of independence, role clarity and transparency would be too greatly compromised by this model. While industry participants have specialist knowledge, it would be difficult for them to act entirely objectively in a self-regulatory capacity, particularly in a setting in which competitive rivalry between operators is likely to be building. Similarly, the Government has considered, but rejected, the option of Ministerial (or Departmental) regulation of the telecommunications industry. While this option has the virtues of accountability and transparency, it would not ensure independence, which is valued highly by the industry and its investors.

The Government considers that, in summary, the Minister should retain policy responsibility but an independent statutory authority should bear administrative and enforcement responsibility. In making this proposal, the Government recognises that an independent

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<sup>26</sup> Cabinet has approved in principle the establishment of a multi-sector Utilities Regulator for the telecommunications, electricity and water and sewerage sectors (CM (18) 0215).

<sup>27</sup> Brown AC, Stern J, Tenenbaum B (2006). Handbook for Evaluating Infrastructure Regulatory Systems, World Bank: p 59–63.

statutory authority is likely to entail higher establishment and operational costs than either of the alternatives. The Government expects those costs to be justified by the value to the economy of independent and expert administration and enforcement of the new framework and will consider, at a later time, the possibility of extending the authority's responsibilities to additional industries.

It is proposed that the Regulator should be established under its own Act of Parliament. While the Regulator must remain accountable to the Government, and report annually to Parliament, it should be free to administer and enforce the *Telecommunications Act* independently from Government. It is proposed that the Regulator's empowering Act should provide for appointment of one full-time Commissioner and two part-time Associate Commissioners, supported by a small full-time staff. The Regulator should have regard to published Government policies but should otherwise not be subject to direction or control by the Minister or any other person. The Regulator should have a duty to consult before making significant decisions and to publish reasons for its decisions.

It is proposed that the Regulator should be able to cooperate with overseas agencies, where appropriate, and that its functions should include:

- promoting public understanding of the policy and law for which it has responsibility;
- advising the Minister on matters for which it has responsibility;
- promoting voluntary compliance with regulation;
- enforcing compliance with regulation, where necessary; and
- investigating possible infringements of the *Telecommunications Act*.

It is proposed that the Regulator should receive and investigate any complaints under the *Telecommunications Act*. The Regulator should be able to prosecute infringements of the *Telecommunications Act* and apply to a court for penalties and other orders but not impose penalties itself. The Regulator's investigative powers should include the power to require production of documents, to require persons to attend and answer questions, and to require persons to make statutory declarations as to the truthfulness of their answers. The Regulator should not be permitted to search premises or seize documents or objects unless it has a search warrant signed by a judge.

In addition to prosecuting infringements, the Regulator should be able to issue warning notices and accept enforceable undertakings from operators.

The Government proposes that the Regulator should be able to carry out an inquiry into an issue affecting the telecommunications industry, on its own initiative or on request by the Minister. The Regulator should report its findings to the Minister, for tabling in Parliament.

Any decision of the Regulator should be subject to judicial review by the High Court, in accordance with Cook Islands common law and Part 1A of the *Judicature Act 2008*. Certain decisions of the Regulator should also be reviewable by a panel of independent experts. The Government proposes that a party to a decision of the Regulator should have a right to have the decision reviewed and reconsidered by an expert panel, the members of which should be

appointed from time-to-time from a list of persons recognised as having relevant expertise in telecommunications and regulation. The review panel would determine its own procedures but would undertake the review based on the evidence that was before the Regulator. The review panel would then issue a reasoned opinion which either confirms the Regulator's decision or substitutes, in whole or in part, its decision in place of the Regulator's.

It is proposed that the Regulator should be funded in part by budget appropriation and in part by cost-recovery from the industries it regulates. As a transitional arrangement, as discussed in Part IV, it is proposed that the Regulator be funded entirely by Government appropriation for three years from the date the *Competition and Regulatory Authority Act 2019* comes into force.



## PART III: Telecommunications regulatory framework

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**Part III** of this Policy sets out the Government's proposed legislative arrangements that will open up the Cook Islands telecommunications market to competition, including the specific powers of the Regulator.

### 3.1 Licensing

#### 3.1.1 Discussion

The business opportunity to offer telecommunications services to the public is a privilege over which the Government proposes to continue to exercise control, in the public interest. The Government's aim, however, is to encourage and not to limit entry by new telecommunications providers.

The Government notes that different countries adopt different approaches to authorising public telecommunications, including:

- "Individual licences," which set out the rights and obligations of the particular operator to whom they are issued.
- "Unified licences," which impose a uniform set of rights and obligations on operators that provide differing kinds of services.
- "Class licences," which provide for standard rights and obligations for all operators within the bounds of a defined class.
- Free market entry, without a licence but imposing certain statutory responsibilities on operators who elect to enter the market.

In the Cook Islands, the incumbent network operator has been licensed to provide services under various instruments, over the years, including licences and Cabinet determinations. Having regard to current Cook Islands circumstances, the Government proposes to continue to issue an individual licence to each telecommunications operator, whether network-based or services-based but not to set any pre-determined limits on licence numbers.

#### 3.1.2 Government proposal

The Government proposes that the licensing regime under the new *Telecommunications Act* should have the following features:

- Telecommunications licences would be issued by the Regulator, for a fixed period.
- The Regulator may determine the types of telecommunications licence it will issue, with the expectation that initial licence types will include:
  - Fixed Network Operator;
  - Mobile Network Operator;
  - International Network Operator; and

- Services Based Operator.
- Telecommunications licences will be distinct from spectrum licences (so a telecommunications provider using radiofrequency spectrum might require both).
- To the extent possible, licences will be “technology neutral”, so that licensees are free to choose the technology they wish to use to provide the services for which they are licensed.
- Telecommunications licences would be subject to a set of core licence terms and conditions set out, initially, in a Schedule to the new *Telecommunications Act*.
- The Regulator would have authority to vary the core licence terms or supplement them with other terms or conditions.
- A breach of a term or condition of a telecommunications licence would be a serious matter, in respect of which the Regulator would be empowered to apply to a court for remedies or penalties.

The Government considers that “core licence terms” should reflect the following:

- Definition of the scope of the licensed business: as a general principle, operators should be licensed to provide a broad range of services, rather than being licensed for specific current or known services, to allow for innovation and delivery of future services not yet currently defined or known.
- Term of licence and renewal right (if applicable).
- Licence fees (if applicable).
- Universal service obligation (if applicable).
- Network roll-out obligations (if applicable).
- Information reporting requirements.
- Social obligations, such as participation in emergency calling services, minimum service standards and assistance in disaster responses.
- An obligation to seek the Regulator’s approval to merge with another licensee (including to acquire or dispose of substantial assets).

Under the existing law, no person is permitted to ‘promote or facilitate any callback service in the Cook Islands or use any telephone in the Cook Islands for the purpose of any callback service.’<sup>28</sup> The Government considers that this prohibition is no longer relevant or beneficial, having regard to recent changes in international calling rates and the emergence of alternative means of making international calls (e.g. Skype, Viber and other platforms). The Government therefore proposes to repeal this prohibition.

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<sup>28</sup> *Telecommunications Act 1989* s 4(1A). A “callback service” typically allows a person to place an international call at a cheaper rate than is available locally, by first dialling an overseas number, then waiting for a call back, which provides dial tone and the opportunity to then dial the person they wish to speak with.

The Government also seeks views on whether and how the regulatory regime should address “over the top” (**OTT**) providers. Traditionally the licensing and regulation of communications services has applied where a provider is supplying a consumer with ‘carriage’ – either switched voice calls or packets (which could be VoIP service bundled with the underlying broadband service). Now, however, OTT services can be provided separately from the underlying carriage service and by different providers.

OTT applications provide consumers with a rich array of remotely hosted (cloud-based) content, games and software applications which stimulate usage of, or compliment, traditional communications services. Applications offer alternatives to or substitutes for traditional telecommunications services. OTT VoIP apps can have associated standard telephone numbers and allow consumers to originate and receive voice calls, rather than using the standard fixed or mobile telephone offered by the network provider.

Innovations in apps bring benefits for consumers, but they also bring challenges to regulatory systems. The ‘new’ apps-based competitors and the ‘traditional’ carriage-based providers might not be competing on a level playing field. Consumer safeguards, including requirements for ‘life line’ services, do not necessarily apply to the ‘apps’ based providers. In-country network providers express concern that OTT apps providers are ‘siphoning’ revenue that would otherwise be available to fund infrastructure, including to meet escalating capacity demands driven by the OTT apps providers.

There are also practical problems involved in regulating apps under a national regulatory regime. Many apps are hosted overseas and the provider might have no presence in the Cook Islands. A significant part of the success and value of the internet is its largely unrestricted global accessibility.

The International Telecommunications Union (**ITU**) published a report in 2018 that analyses the challenges and opportunities in regulating the telecommunications sector as a result of the rise of what the ITU calls the ‘app economy’.<sup>29</sup>

Table 4 provides a summary of the ITU report’s view of the costs and benefits arising from the app economy.

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<sup>29</sup> The ITU defines the term ‘app economy’ as the sum of economic activity, products and services, required to deliver app functionality to end users, in particular via mobile broadband connection.

**Table 4: Benefits and costs created and redistributed in the app economy**

Group	Benefits	Costs	Outcomes
<b>Consumers</b>	Better, lower price services Wider range of innovative, content and services offerings	More advertising Loss of personal information (security and privacy) Complaints	Positive for consumers
<b>Non-communication businesses</b>	Better, lower price services Increased competitiveness New distribution and marketing channels increasing customer engagement	As telecommunication/ICT services increases as a proportion of GDP, non-communications businesses may see demand for their services decrease Possible industry disruption	Positive for business - except sectors disrupted
<b>Online service providers</b>	More users, more revenues Monetising personal info Opportunity to initial public offering, capital raisings, etc.	Increased provisioning costs May need to invest to address bottlenecks	Positive for over-the-top-services (OTTs)
<b>Existing fixed and mobile network operators, ISP, and broadcasters</b>	Increased demand for and revenue from data services Falling costs due to simplification and move to lower cost IP infrastructure	Reduction of revenue for legacy voice and SMS services Loss of market power Need for additional spectrum, investment to handle demand, congestion	Currently negative but increased data demand may make positive Partnering may be positive
<b>National governments</b>	Increased telecommunication/ICT efficiency Increased penetration Ability to provide government services online	Impact on taxation revenue and fees Decreased capacity for regulatory intervention Reduced ability to provide national security and policing – consumer protection	Negative except in developed/tax haven markets where OTTs based
<b>Country/ national level/ economy wide</b>	Increased telecommunication/ICT efficiency and consumer welfare Platform for the establishment of new and innovative disruptive businesses	Increased imports, loss of tax Reduced ability to pursue national objectives Fragmentation of national markets and undermining of national culture/sport markets	Variable depending on the country and its policies Active policy setting required

Source: ITU (2018) Regulatory challenges and opportunities in the new ICT ecosystem, p v.<sup>30</sup>

<sup>30</sup> [https://www.itu.int/dms\\_pub/itu-d/opb/pref/D-PREF-BB.REG\\_OUT03-2018-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-BB.REG_OUT03-2018-PDF-E.pdf).

## 3.2 Interconnection

### 3.2.1 Discussion

“Interconnection” involves the physical and logical connection of telecommunications networks.<sup>31</sup>

At the most basic, interconnection of networks is essential to enable a customer of Network A to place a call to a customer of Network B. Without interconnection, a customer of Network A would only be able to call other customers of Network A and competition could not be expected to develop between Network A and Network B.

The demands of interconnection and interoperability are expanding, due to:

- the ability and desire of consumers connected to one network to access applications and services hosted on other networks;
- the willingness of individual users to interchangeably use multiple fixed and mobile services from different providers; and
- the rapid emergence of ‘cloud’ applications which allow consumers to store content and data independently of their network providers.

Interconnection regulation needs to be capable of dealing with forms of interconnection and interoperability which have not existed in the past or have not traditionally been the subject of regulation.

The Government considers that licensed telecommunications operators in the Cook Islands should be required to interconnect their networks.

For separate networks and services to interconnect, a wide range of technical and commercial matters need to be resolved. Since interconnection is essential to competition, most countries around the world empower a regulator to intervene to set interconnection terms and conditions. Interconnection can be regulated in either of two ways:

- *ex post* intervention by the regulator if the operators are unable to agree, where the regulator seeks either to assist them to reach agreement or, failing that, imposes terms and conditions on them; or
- *ex ante* intervention where the regulator sets the key price and non-price terms upfront (to avoid drawn out interconnection negotiations, which delay market entry).

Interconnection regulation can be a complex matter, which can require considerable effort and resources on the part of operators and the regulator. Whether price terms are set *ex ante* or

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<sup>31</sup> Linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken. WTO Telecommunications Services: Reference Paper (Annex to the Fourth Protocol to the GATS Agreement (effective 1 January 1998).

*ex post*, a regulatory requirement for cost-based interconnection (the principle commonly applied in paid interconnection models) can require modelling involving advanced economic skills.

The Government recognises the demands which an overly complex interconnection regulatory model would place on the regulator, the incumbent and new entrants alike in the Cook Islands.

### 3.2.2 Government proposal

The Government is therefore proposing a more straightforward model, which it believes will be simpler to administer while still securing its competitive and consumer objectives. The future *Telecommunications Act* will promote network interconnection by providing for the following statutory rights and obligations:

- Introduction of a 'bill and keep' charging regime, as the primary cost principle of interconnection. Under this approach, each operator recovers its costs of providing interconnection to other operators through its retail charges. Bill and keep should be capable of applying between fixed and fixed networks, mobile and mobile networks and fixed and mobile networks.
- A power for the Regulator to set, on an *ex ante* basis, safeguards to ensure that bill and keep is not open to misuse or manipulation and does not impose an unfair burden on one operator. Bill and keep should apply only to classes of traffic which reasonably can be anticipated to be broadly symmetrical between networks.

The Regulator would have power to specify thresholds of imbalance in traffic between two networks (i.e. when one network sends more traffic to another network than it receives from that network) which, if exceeded, could trigger a right by an operator to request negotiation of paid interconnection, with the Regulator the having power to specify the cost principle to be applied.

It also may be appropriate for bill and keep to apply between traffic which has similar characteristics e.g. bill and keep should apply to in-country originated and terminated calls but it may be inappropriate to apply to termination of inbound international calls. The Regulator will have the power to exclude classes of traffic to which it is not appropriate to apply bill and keep (in which case the Regulator could specify an appropriate alternative cost standard).

- An obligation to supply interconnection services and carriage services on an equivalent basis i.e. with functionality and services comparable to that which the operator provides to itself or related parties.
- A power for the Regulator to determine Interconnection Principles applicable to licensed operators, which might address matters of the following kinds, for example:
  - the thresholds for triggering a consideration of non-bill and keep interconnection (e.g. magnitude of traffic imbalance);
  - the required location (or proximity) for traffic handover: as a general principle, each operator should be required to carry interconnected traffic through its network and

- hand it over to a terminating operator at a location which is closest to the called or messaged party;
  - the form of interconnection e.g. requiring virtual points of interconnection in each interconnected party's network can avoid complex arrangements for physical access to a physical interconnection point located in one party's premises;
  - the sharing of space at physical points of interconnection; and
  - the rules (including charges) for handling of transit traffic, which typically should not be subject to 'bill and keep.'
- An obligation on operators to endeavour to negotiate a commercial arrangement for interconnection within this framework. If agreement cannot be reached within a fixed period, an operator would have the right to request determination by the regulator of any interconnection term or condition on which the operators are unable to agree, with the costs of that proceeding to be apportioned between the operators by the Regulator.
  - Efficient decision-making tools to enable the Regulator to determine disputes, including the right to benchmark price and non-price terms against comparable jurisdictions, subject to appropriate adjustments for the Cook Islands.

### 3.3 Access and resale

#### 3.3.1 Discussion

'Access' refers to the access of a network operator or a reseller to infrastructure (e.g. towers, poles, ducts, manholes, cabinets, etc.) that are owned by another operator or reseller.

Access is important to enable the sharing of items of infrastructure that are necessary to enable an entrant to the market to operate but that are expensive or impractical for it to duplicate.

'Resale' refers to the purchase of a network operator's services, at the wholesale level, for the purpose of distribution to customers at the retail level, using the reseller's branding and billing arrangements, without the reseller having to own extensive (or any) network infrastructure.

#### The competitive spectrum

Competition in telecommunications can take different forms. The different forms of competition fall along a scale:

- At one end of the scale, is full facilities-based competition – in which competitors are expected to build their own end-to-end domestic fixed or wireless networks over which they offer the range of voice, data and entertainment services to customers directly connected to their networks.
- At the other end of the scale is resale-based competition – in which service providers can purchase 'white label' or 'wholesale' versions of services from a network operator, which those service providers then re-badge, re-price and market as their own retail services.

- Between these two ends of the scale lie mixtures of facilities-based and resale-based competition, in different balances with each other. For example, resale-based competition might be mandated only for a transitional period, to allow new entrants to build the customer base and scale they require in order to justify network deployment (called ‘climbing the ladder of investment’). Mandating access to support facilities, such as tower and site sharing, access to underground facilities and transmission services, on reasonable cost recovery terms can significantly lower entrant’s costs of deploying network infrastructure. Or resellers can be given regulated access to certain services and facilities but be required to make some degree of their own investment, rather than rely entirely on a facilities-based operator’s infrastructure. Mandating access to basic connectivity services, such as basic broadband carriage, can enable competition in services at higher levels of the network or service stack, such as internet access services, which otherwise would not be achievable if providers had to build their own delivery systems.

### **Weighing the alternatives**

Facilities-based competition is generally considered to deliver better outcomes for consumers because each facilities-based operator is free to make its own decisions about the technology it deploys. Operators are better placed than policy makers to make investment decisions. Regulation will be less extensive and intrusive in markets characterised by facilities-based competition: the role of regulation is to enable operators to make the investment choices that give consumers the best outcomes under local market conditions. Even in the facilities-based model, however, there needs to be some level of *mandated* access to each operator’s network to enable customers connected to one network to make and receive calls and send and receive data messages with customers connected to another network and to access and download content hosted on another network (the ‘any-to-any connectivity’ principle).

Demand for telecommunications services is growing rapidly in the Cook Islands, requiring continuing expansion in network capacity and capabilities, which provides opportunities for deployment of new technologies and an appetite for investment by new investors. Technology costs also are rapidly falling and capabilities are rapidly expanding, improving the economic viability of infrastructure duplication. The new undersea cable system connecting the Cook Islands should also accelerate demand and therefore create ‘space’ for new entrants in the market.

Enabled by these technology developments, an expanding range of business models is available to support deployment of infrastructure, including in rural or outlying areas. Local businesses or local communities, for example, may come together to support the deployment of fixed wireless local area networks.

At the same time, the Government needs to be realistic about the prospects for facilities-based competition in the Cook Islands, given the small size of our economy. End-to-end duplication of the incumbent’s network is unlikely. There will be areas where only one network is viable, whether built by the incumbent or a new entrant. There will be other areas where deployment of even a single network will be challenging, at least if not part of a network offering coverage to customers across a wider area.



Facilities-based competition also may be slow to develop. Networks take time to roll out and consumers can miss out on the benefits of competition in areas (e.g. rural and remote communities) where it is not feasible to deploy alternative infrastructure.

Resale is therefore important as a source of competition to the network-based operator(s) that does not depend on the entrant making a costly investment in physical infrastructure. While facilities-based competition potentially delivers greater innovation and efficiency, resale-based competition can be a stepping stone to facilities-based competition and, in small markets like the Cook Islands, can be an important generator of consumer choice in its own right.

Resale-based competition will typically develop more quickly than facilities-based competition. This ensures that consumers across the whole footprint of the current (and expanding) network can benefit earlier from having a choice of supplier. Resale-based competition enables a degree of price competition, although this depends on the level of the regulated wholesale price.

Mandating access to support services and facilities, such as tower and site sharing and transmission services, on reasonable cost recovery terms can significantly lower entrants' costs of deploying network infrastructure. Mandating access to basic connectivity services, such as basic broadband carriage, can enable competition in services at higher levels of the network or service stack, such as internet access services, which otherwise would not be achievable if providers had to build their own delivery systems.

Lastly, where it is feasible only to have one network, resale gives customers some measure of the benefits of competition enjoyed by customers living and working in more competitive areas. The additional usage which resale-based competition drives is beneficial to the underlying facilities-based provider also (who can realise benefits of increased scale because the traffic still remains on its network, even if a consumer chooses a competitor's retail service). Since the resale-based provider's offering necessarily uses the same underlying network technology as the facilities-based provider uses for its own retail services, resale-based competition provides less scope for service innovation.

Resale-based competition will generally require regulation to identify the services which should be subject to resale and to set fair terms and conditions for wholesale supply.

### **Mixed resale-based and facilities-based competition**

The Government has considered the advantages and disadvantages of each form of competition. The Government's preference is that the new regulatory framework should promote the early emergence of competition but should also encourage some degree of investment in new telecommunications capability, capacity and infrastructure for the Cook Islands by new entrants as well as by the incumbent network operator.

The Government considers that enabling a degree of resale-based competition will allow Cook Islands telecommunications users to see early benefits from competition between providers. At the same time, encouraging investment by entrants and the incumbent alike is the best means of promoting innovation, which is one of the main benefits of competition in a technology-based industry.

To achieve this balance between resale-based and facilities-based competition, a defined set of ‘mandated access services’ at the wholesale level must form a key element of the new regulatory regime for the Cook Islands.

Table 5 sets out the Government’s views on the initial set of mandated access services, with some examples of how those services could be used to promote competition.

**Table 5: Proposed mandated access services**

Policy objective	Mandated access service	Examples
<b>Any-to-any connectivity</b>	<ul style="list-style-type: none"> <li>mobile network terminating access for voice calls, SMS and MMS;</li> <li>fixed network terminating access for voice calls.</li> </ul>	A new mobile operator might initially deploy its network in Avarua. It would be able to offer its customers the ability to call any customer connected to the incumbent’s fixed or mobile network anywhere in its coverage area across the Cook Islands.
<b>Access to facilities, to support entrants in building their own networks.</b>	<ul style="list-style-type: none"> <li>access to radio communications sites, including site sharing and tower sharing;</li> <li>access to underground facilities, such as ducts;</li> <li>access to exchange buildings;</li> <li>backhaul transmission services.</li> <li>domestic mobile roaming, subject to minimum network rollout requirements to qualify and to coverage or rollout commitments over time.</li> </ul>	<p>As the new mobile operator expands its network beyond Avarua, it might find it cost effective to share existing sites of the incumbent because the infrastructure is already in place or can be more readily upgraded. The incumbent would recover its reasonable costs of sharing. This would enable the new mobile operator to invest in extending its coverage further than if it had to build its own sites from scratch.</p> <p>In the transition period while it is rolling out its network, roaming would allow a new mobile operator to offer nationwide coverage using resale services on the existing mobile network, both to customers who live and work in areas within its initial network footprint (e.g. Avarua) when they move outside that coverage area (e.g. travel to , another island to visit family) and also to compete in offering services to customers who live and work in areas where it has not yet built.</p>
<b>Competition in services at higher levels in the network using mandated access to basic connectivity</b>	<ul style="list-style-type: none"> <li>a basic broadband carriage service;</li> <li>internet peering for domestic originating and terminating IP messages.</li> </ul>	<p>A new internet service provider would be able to acquire basic broadband carriage over the incumbent’s network to offer competing internet access services to residential and business customers.</p> <p>The new ISP would establish a platform in the Cook Islands to support customer authentication, customer management and value</p>

Policy objective	Mandated access service	Examples
		added services and would acquire its own global connectivity to the Internet (such as over the new cable system).

As it is difficult to predict the pace and direction of emerging competition, the regulatory regime needs sufficient flexibility to recalibrate between facilities-based competition and resale-based competition. The Government intends that the Regulator should have the power to declare a particular service to cease to be a mandatory access service and also to establish new 'declared access services'.

A different balance between facilities-based competition and resale-based competition also may be required in different sectors to the extent that services are no reasonable competitive substitutes for each other: for example, facilities-based competition may be more feasible in mobile and other radio communications services than in fixed line services.

This flexibility to make adjustments in regulatory settings needs to be balanced with maintaining predictability for investors, including the incumbent network operator. This will be ensured by requiring the new regulator to undertake a public inquiry process, for its decisions (including its reasons) to be published, and for its decisions to be subject to independent review.

Finally, the Government also recognises that mandated access is not the only mechanism to promote entry of competitors and expansion of networks and service capability. Other Government policies also have a role to play in assisting in the deployment of facilities and the availability of new services. The ready availability of radio communications spectrum would allow new entrants to connect facilities and customers using radio links, such as their mobile tower sites or hotels in which they supply internet services, rather than having to rely on backhaul services from the incumbent. The Government is also a major user of telecommunications services and it can aggregate demand so that it serves as a 'cornerstone' customer for new networks or services in an area. The Government can, through universal service funding or other financial assistance, help meet the costs of network and services in loss-making areas.

### 3.3.2 Government proposal

The Government proposes that the new *Telecommunications Act* should provide for:

- A right for a telecommunications licensee to have reasonable access to the facilities of another licensee, either on a reciprocal basis (where both have facilities in place) or on the basis of the Regulator's estimate of the reasonable incremental costs of shared access. Some overseas facilities-sharing regulatory regimes require operators to work with each other in the planning of physical infrastructure, to maximise opportunities for sharing and avoid unnecessary duplication. The Government sees advantages in taking a similar approach in the Cook Islands.

- A right for a licensed reseller to acquire services from a network operator for resale to business or residential users, at a price negotiated between the network operator and the reseller or, failing agreement, at a price determined by the Regulator. Resale rights should not be applied in a way which might constrain innovation by operators, however. An important incentive to innovate is the first mover advantage from making the investment in product innovation. This can be undermined if the innovating operator has to share new products immediately with its competitors. The Regulator should have the power to determine whether services (including a class of services) should be subject to a resale obligation, having regard to factors that include promoting competition, rewarding innovation and protecting the interests of consumers.
- A power for the Regulator to determine resale prices for (wholesale) acquisition of services by a reseller, on the basis of the network operator's effective retail price minus a margin to be determined by the Regulator. Resale prices, in particular, have proved amenable to applying benchmarking resale discounts in other jurisdictions, which tend to fall in a range below 20 or 25 per cent.
- A power for the Regulator to mandate the provision of access to a specified facility on terms and conditions determined by the Regulator.

### **3.4 Consumer protection**

#### **3.4.1 Discussion**

Telecommunications services are an important and regular consumer purchase, for very many Cook Islanders. The Government considers that consumers' rights require particular protection in relation to telecommunications services.

Consumers' rights that are relevant in this setting include:

- privacy of communications;
- confidentiality of customers' personal data;
- full disclosure of prices and charges for services; and
- accuracy in billing, including an ability for consumers to check their usage over a period.

#### **3.4.2 Government proposal**

The Government proposes that the new *Telecommunications Act* should provide for:

- Licensees to be obliged to establish consumer complaints-handling procedures.
- The Regulator to receive and investigate consumer complaints that are not resolved by the licensees' complaints-handling procedures.
- A prohibition against any conduct by a licensee that is misleading or deceptive or likely to mislead or deceive.

- An obligation for licensees to provide services that meet certain minimum standards of quality and reliability (which may be prescribed from time to time by the Regulator) and pay compensation if they breach these standards.
- A requirement for licensees to protect the privacy of users' communications (subject to lawful interception pursuant to a warrant).
- A requirement for licensees to protect the confidentiality of users' personal information.
- A power for the Regulator to make a binding Consumer Code, dealing with the above matters.

### **3.5 Competition safeguards**

#### **3.5.1 Discussion**

The Government's primary objective in seeking to liberalise the Cook Islands' telecommunications industry is to enable the emergence and development of competition among suppliers of telecommunications services, in the interests of:

- promoting consumer welfare (e.g. access to new services and lower service prices);
- creating opportunities for investment; and
- ensuring high quality, sustainable reliable telecommunications infrastructure.

The Government is concerned that this objective could be frustrated if one or more businesses were able to engage in anti-competitive conduct in the Cook Islands.

Experience overseas indicates that competition can be excluded or hindered by various forms of behaviour by an operator that possesses power in a market. The operator that is the first to be established in a market enjoys incumbency advantages, which normally include a large market share and possibly a position of substantial market power or dominance. These advantages can enable an operator to engage in conduct that is detrimental to other operators attempting to enter the market, such as:

- failing to respond in a timely way to requests to provide (or upgrade) facilities access, resale services or interconnection;
- reducing retail charges to a level which does not cover costs and drives competitors out of the market;
- making the sale of one product (to competitors or customers) conditional on the purchase of a different product; and
- providing services to competitors at lower quality or higher price than the same service is provided to a wholly-owned or affiliated retailer.

#### **3.5.2 Government proposal**

The Government proposes that the future *Telecommunications Act* should guard against the possibility of anti-competitive conduct by providing for:

- A power for price control regulations to be made by Order in Council, but only if the Regulator has previously determined that: (a) there is no effective competition in the market for the telecommunications service in question; and (b) price control regulations are in the long term economic and social interests of end users.
- A prohibition on any licensee that has a substantial degree of power in a market engaging in conduct that has the effect or would be likely to have the effect of substantially lessening competition in any market.
- A prohibition on any licensee that has a substantial degree of power in a market engaging in price discrimination at the wholesale level, except on the basis of substantiated differences in costs.
- A prohibition on two or more operators entering into or giving effect to an agreement or arrangement or engaging in concerted practices (in any market affecting communications services or equipment) with the effect or likely effect of substantially lessening competition. Agreements, arrangements or concerted practices should be deemed to have the effect or likely effect of substantially lessening competition if they fix prices.

The proposed power to impose price control is intended as a reserve power merely, to operate only where there is a persisting absence of competition. As safeguards, the Regulator must determine that effective competition is absent from the market for the relevant service; the Regulator must determine that control is in end-users' long term interests; control cannot be imposed by the Regulator but only by Order in Council; and control can be imposed for a finite term only, e.g. two years.

The proposed rule against wholesale level price discrimination would operate as an *ex post* rule, with exemptions where there are commercially reasonable grounds (which the operator can substantiate) for the discrimination in question.

The Government recognises that the investigation and resolution of allegations of anti-competitive conduct can be complex, resource intensive exercises. While these powers will be an important part of the Regulator's arsenal, it should also have power to specify, in effect, 'rules of competitive conduct' which upfront set a broad framework or 'guard rails' within which fair competition can occur. This power could be used, for example, to specify:

- maximum durations of service contracts or caps on exit fees to ensure that an operator does not unfairly 'lock up' customers;
- limits on bundling of different services, which also can unfairly 'lock in' customers; and
- rules that would apply when a customer 'churns' from one licensee to another licensee, to prevent the losing operator from imposing unreasonable procedural requirements.

The Regulator would have the right to apply to the High Court for pecuniary penalties and orders to restrain a licensee from anti-competitive conduct.

## **3.6 Numbering resource**

### **3.6.1 Discussion**

Telecommunications subscriber numbers are a public resource which the Government considers should be managed in the best interests of Cook Islands telecommunications users. The Government considers it necessary to make provision for:

- allocation of numbers and codes by the Regulator to licensed operators;
- assignment of individual numbers and codes by operators to their customers; and
- the ability of customers potentially to move ('port') their numbers between networks and services.

### **3.6.2 Government proposal**

The Government proposes that the future *Telecommunications Act* should provide for:

- Determination by the Regulator of a National Numbering Plan, which shall replace any numbering plan previously in use and shall conform with any international treaties or commitments to which the Cook Islands is a party.
- Allocation by the Regulator of number ranges and codes to licensed operators.
- Determination by the Regulator of rules regarding the assignment and use of numbers.
- Determination by the Regulator of rules regarding assignment of emergency services numbers and priority, capacity and quality requirements in respect of calls to emergency services numbers.
- An obligation on operators to use numbers allocated to them efficiently and in accordance with the National Numbering Plan and any applicable rules.
- A prohibition against operators using any numbers not allocated to them.
- Operators and end-users not to have property in any numbers allocated or assigned to them.
- The Regulator to undertake a review, upon request by the Minister, on whether to mandate number portability, having regard to the costs and benefits of such in the Cook Islands and in consultation with telecommunications licensees and the public.

## **3.7 Radio spectrum resource**

### **3.7.1 Discussion**

The radiofrequency spectrum is a public resource which the Government considers should be managed in the best interests of Cook Islanders.

The Government observes that mobile services of various kinds (including mobile telephony, and Wi-Fi), which depend on access to radiofrequency spectrum, are soaring in popularity worldwide, raising challenges for the efficient allocation of spectrum and pricing of access to it. A range of approaches to spectrum allocation are in use around the world, including:

- the ‘command and control’ model, for allocation of exclusive but limited rights by the regulatory authority;
- the ‘property rights’ model, involving a freely tradeable exclusive right to spectrum;
- the ‘commons’ model, allowing shared access to spectrum for all users who comply with pre-set technical limits; and
- the ‘easement’ model, relying on intelligent technologies to permit subsidiary use of spectrum by unlicensed parties, where spectrum licensees are not fully utilising it.

### 3.7.2 Government proposal

The Government proposes that the future *Telecommunications Act* should provide for:

- The Regulator to have the exclusive right to allocate and assign Cook Islands radio spectrum frequencies.
- The Regulator to prepare, consult on, publish and maintain a National Radio Spectrum Plan and associated Frequency Band Plans.
- The Regulator to prescribe types of radio spectrum licences and radio equipment licences.
- The Regulator to receive and respond to radio interference complaints and resolve them by means of mediation, appointment of an arbitrator, or making an appropriate order or direction.
- The operator of any radiofrequency emitter to be bound to comply with an order or direction issued by the Regulator in respect of relevant equipment or emissions.
- The Minister to make regulations, on the advice of the Regulator, for licence fees, tenders, auctions or other means of allocating spectrum within specified bands. This could include limits on the amount of spectrum which one or more existing licensees can hold, in order to ensure that there is spectrum available for new entrants.
- The Regulator to have the power to declare vacant spectrum that has previously been assigned, and to assign it to a different person, without compensation, where:
  - necessary to comply with Cook Islands law or international obligations;
  - the previous assignee agrees to vacate the spectrum;
  - the previous assignee has failed to comply with the Act or a lawful determination of the Regulator and failed to remedy that non-compliance;
  - the previous assignee’s application for the spectrum was false or misleading in a material particular;
  - the previous assignee has entered into liquidation, voluntary winding-up or dissolution; or



- the spectrum in question is in demonstrable demand but the previous assignee has not made significant use of it and not made a credible commitment to make significant use of it.
- The Regulator to have the power to declare vacant spectrum that has previously been assigned, and to assign it to a different person, with compensation, where:
  - the Regulator determines that to do so is in the public interest; and
  - the Regulator shall pay, or procure the new assignee to pay, reasonable compensation; and
  - the previous assignee may appeal to the High Court regarding the legality of the vacation and the amount of compensation.
- The Regulator to establish effective liaison on spectrum matters with:
  - other countries and international organisations;
  - the Police and emergency services in the Cook Islands;
  - any military, defence or security services authorised to operate in the Cook Islands; and
  - radio and television broadcasters in the Cook Islands.

## **3.8 Technical standards**

### **3.8.1 Discussion**

The telecommunications industry is technically complex. The operation of networks and successful provision of services depends to a great extent on the interoperability of services and equipment. The quality, reliability and security of services, and the safety and security of end-users, depends on operators' and customers' use of equipment that meets appropriate standards.

The Government considers, therefore, that the future *Telecommunications Act* should make provision for the specification and enforcement, where necessary, of technical standards for telecommunications equipment and services.

### **3.8.2 Government proposal**

The Government proposes that the future *Telecommunications Act* should include provision for:

- Determination by the Regulator of technical standards necessary for interconnection or access between one licensed operator and another.
- Determination by the Regulator of technical standards and rules to protect against damage to telecommunications networks or facilities, degradation of service quality, public nuisance, environmental harm, or danger to persons.

- Recognition and application in the Cook Islands of technical standards and rules from other countries.
- Prohibition against the use or supply of equipment that does not comply with technical standards or rules in force in the Cook Islands.

### **3.9 Universal service**

#### **3.9.1 Discussion**

Basic telecommunications services are an important part of daily life for most Cook Islanders. The Government considers that all Cook Islanders should have access to a certain basic level of telecommunications, regardless of where they live.

The National ICT Policy includes ‘Equitable, Affordable and Non-Discriminatory Access to reliable quality ICT facilities and services for all’ as a policy objective. To achieve that objective, the Government has committed to six strategies, as follows:<sup>32</sup>

- 1.1 Develop appropriate pricing, policies and regulation to promote universal service access.
- 1.2 Promote fair competition in the telecommunication market that is conducive to achieving accessible and affordable communications for all.
- 1.3 Explore regulatory mechanisms [that] provide oversight and management of the ICT Sector.
- 1.4 Improve ICT access to all citizens regardless of economic status, geographic location, education level, age, or gender, to improve opportunities for all.
- 1.5 Improve ICT access for vulnerable groups to enhance their quality of life.
- 1.6 Improve ICT access and connectivity to people living in the Pa Enua to raise their standard of living.

For telecommunications operators, it is most profitable to offer services in densely populated locations, such as Avarua. It is less profitable, or unprofitable, to offer services in remote or sparsely populated locations, such as the Pa Enua. (Although, as the Government acknowledges, new technologies have the potential to change this.)

In recent years, the incumbent network operator in the Cook Islands, TCI, has built infrastructure and maintained services to many areas of the country with small populations and doubtful profitability, by agreement under the JVA. It is possible that these services have been loss-making for the operator, which may have funded this activity from profits earned in other areas of its business.

The Government aims to promote the development of competition among service providers, in the expectation that competition will help to drive prices down and service quality up. An

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<sup>32</sup> Cook Islands Government (2015). National Information and Communications Technology Policy, p 8.

operator cannot be expected to continue serving loss-making locations voluntarily, however, if it faces competition in the locations that have hitherto been sufficiently profitable to fund its subsidies to loss-making activities.

Internationally, various means have been used to support an operator to deliver basic telecommunications service to loss-making areas. Traditionally, universal service regimes have involved, in summary:

- Definition of a specified service as a “universal service.” (Traditionally, universal service has focused on voice telephony but broadband access increasingly is viewed as the key service for consumers, including to support VoIP applications.)
- Definition of specified geographic areas as ‘universal service areas’.
- Designation of an operator (usually the incumbent fixed network operator) as the ‘universal service carrier’.
- Imposition on all operators of a ‘universal service levy’, calculated in proportion to their respective markets shares, calculated on a revenue basis.
- Disbursement of funds (from levies) to the universal service carrier in compensation for the costs incurred by it in providing the universal service in universal service areas.

In some places, newly-licensed operators have also been required to commit to building network and providing services to specified locations (‘roll-out’ obligations).

It is important to bear in mind that these overseas universal service models were typically developed to support fixed line networks, before the ubiquity of mobile voice and data services. Mobile services can be more commercially viable to deploy in non-urban settings than fixed networks. Mobile network construction costs typically are lower, and operators have an incentive to promote their superior service coverage, to customers and potential customers in urban areas. While some funding support for extension of coverage in more remote areas might still be beneficial, the dynamics of mobile networks can change the focus and scale of universal service schemes.

### **3.9.2 Government proposal**

The Government proposes that the new *Telecommunications Act* should provide for a set of powers that are flexible, within reasonable bounds, for subsidising the provision of telecommunications to those areas, or those groups of customers, which the operators cannot reasonably serve on a profit-making basis. The Government intends that such powers should involve:

- A power for the Regulator to make (and from time to time update) a Universal Service Plan which, among other things:
  - defines the characteristics and service standards of a ‘universal service’;
  - identifies geographic areas, or groups of telecommunications users, as universal service clients;

- identifies one or more operators, or a class of customers, or a service, or class of services as being subject to a universal service levy.
- A power for the Minister to approve a Universal Service Plan proposed by the Regulator and to make regulations imposing a levy in accordance with the Plan.
- A power for the Regulator to establish a fund (including banking arrangements) for the management of levies collected.
- A power for the Regulator, subject to transparency requirements, to enter into arrangements to fund universal service. This might involve funding a licensee to extend or improve its network (i.e. the 'traditional model' used overseas for fixed network USO) but the Regulator should also have the flexibility to utilise other models to achieve universal service, such as supporting co-funding by local communities.
- An obligation on the Regulator to maintain proper financial records in relation to the universal service fund, obtain annual audit reports, and report annually to Parliament on the administration of the universal service fund.

The Government recognises that the provision of submarine cable services to Rarotonga and Aitutaki, with attendant bandwidth and price benefits under the new regulatory framework has the potential to drive a service quality gap between these islands and the Outer Islands. This could potentially have implications for levels of income inequality between Rarotonga and the Outer Islands.

The Household Income and Expenditure Survey 2015/16 reports that there is a degree of inequality in the distribution of household income across the Cook Islands and within each strata.<sup>33</sup> Almost 29 per cent of total household income in the Cook Islands is accounted for by around one-quarter of households and the lowest earning 20 per cent account for only 9.8 per cent of total income. A Gini Coefficient of 0.36 was estimated for the Cook Islands, 0.329 for Rarotonga and 0.386 for the Outer Islands.<sup>34</sup> The report indicates that a Gini Coefficient of 0.36 can be described as a moderate degree of inequality.

To mitigate any potential negative impacts, stakeholder views are sought on innovative ways, perhaps using new technologies, to provide high quality and affordable telecommunication services to the more remote parts of the Cook Islands.

At a broader level, the Government is the early stages of developing an Economic Development Strategy 2030, which will provide a clear, concise and integrated plan for economic development in the Cook Islands over the next 10 years. A key element of the strategy will be addressing economic constraints and driving development opportunities in the Outer Islands.

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<sup>33</sup> Cook Island Government (2018) Household Income and Expenditure Survey 2015/16. Available at: [http://www.mfem.gov.ck/images/documents/Statistics\\_Docs/5.Census-Surveys/3.Income-and-Expenditure-Survey-Tables/Cook\\_Islands\\_2015-16\\_HIES\\_final\\_report\\_-\\_FINAL.pdf](http://www.mfem.gov.ck/images/documents/Statistics_Docs/5.Census-Surveys/3.Income-and-Expenditure-Survey-Tables/Cook_Islands_2015-16_HIES_final_report_-_FINAL.pdf).

<sup>34</sup> The Gini Coefficient is a measure of income distribution, with a value of zero representing perfect equality and one representing perfect inequality.

## **3.10 Public emergencies**

### **3.10.1 Discussion**

Telecommunications services have become an important means for sharing information about imminent or actual emergencies, including natural disasters, and for supporting recovery work in their wake.

The Government has no reason to doubt the support of the incumbent network operator in the Cook Islands in such circumstances, but considers it desirable for the future *Telecommunications Act* to confirm access to services in circumstances of a 'disaster' or 'emergency' in terms of the *Disaster Risk Management Act 2007*.

### **3.10.2 Government proposal**

The Government proposes that the future *Telecommunications Act* should provide that:

- a licensed operator shall cooperate with Emergency Management Cook Islands in making appropriate plans for the continuation or restoration of telecommunications after a disaster or emergency.
- the Response Executive may, after a state of disaster or emergency has been declared, direct a licensed operator to carry, or refrain from carrying, messages of a specified nature, or to provide telecommunications services of a specified kind; and
- the Government shall pay compensation to any licensed operator for any costs reasonably incurred in complying with a direction of this kind.

## **3.11 Access to land**

### **3.11.1 Discussion**

The construction of telecommunications networks necessarily involves the installation of physical infrastructure (such as towers, poles, ducts and cabinets) on land owned or leased by third parties. To facilitate network construction and maintenance, the Government proposes that the future *Telecommunications Act* should give licensees certain rights of access to third parties' land (including public land) for the purposes of constructing or maintaining networks, subject to appropriate safeguards.

### **3.11.2 Government proposal**

The Government proposes that the future *Telecommunications Act* should provide:

- That a licensed network operator may enter land to gain access to a telecommunications facility for inspecting, maintaining or repairing it, on reasonable notice to the owner or occupier and at reasonable times.
- That a licensed network operator may request an owner or occupier to trim or remove a plant or tree that is interfering or likely to interfere with a telecommunications facility and may seek a court order to trim or remove it if the owner or occupier does not do so.

- That a licensed network operator may enter land and trim or remove a plant or tree that is likely to cause imminent danger or serious interference to a telecommunications facility.
- That a licensed network operator may open a road and reposition a water or gas pipe (other than a main) for the purpose of constructing or maintaining a communication facility on, along, across or under a public road. If Parliament enacts the Infrastructure Bill 2019, these activities should be performed in compliance with that law and the reasonable requirements of Infrastructure Managers.
- That a licensed network operator must not place, inspect, maintain, etc. a telecommunications facility in such a manner as to interfere with lawful traffic on a road or with navigation of navigable waters.
- Every person whose property is damaged as a result of the exercise of these powers is entitled to compensation from the licensed network operator.
- Any telecommunications facility that is fixed to or installed on or under a third party's land at the date of commencement of the Act shall be deemed to be lawfully fixed or installed.

The Government would welcome comments on how best the law can protect both landholders' interests and operators' reasonable needs for access to land.

## 3.12 Cybercrime and cybersecurity

### 3.12.1 Discussion

'Cybercrime' refers broadly to any crime involving a computer and network. The United Nation's Comprehensive study on Cybercrime identified three relevant categories of cybercrime offending:<sup>35</sup>

1. Acts against the confidentiality, integrity and availability of computer data or systems
  - Illegal access to a computer system;
  - Illegal access, interception or acquisition of computer data;
  - Illegal interference with a computer system or computer data;
  - Production, distribution or possession of computer misuse tools;
  - Breach of privacy or data protection measures.
2. Computer-related acts for personal or financial gain or harm
  - Computer-related fraud or forgery;
  - Computer-related identity offences;
  - Computer-related copyright or trademark offences;

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<sup>35</sup> UN (2013). Comprehensive Study on Cybercrime, p 16.

- Sending or controlling sending of Spam;
  - Computer-related acts causing personal harm;
  - Computer-related solicitation or 'grooming' of children.
3. Computer content-related acts
- Computer-related acts involving hate speech;
  - Computer-related production, distribution or possession of child pornography;
  - Computer-related acts in support of terrorism offences.

### **3.12.2 Government proposal**

It is the Government's view that appropriate and effective provision must be made under the laws of Cook Islands to deter and sanction cybercrime. Such provision should be made in the *Crimes Act 1969*, rather than in the proposed *Telecommunications Act*. To this end, the Government has proposed a range of new "offences involving computers" (Part 7, Subpart 9 of the *Crimes Bill 2017*).

The Government intends to consider further the nature of threats to, and appropriate precautions to protect, the Cook Islands' cybersecurity.

## **3.13 Domain management**

### **3.13.1 Discussion**

The Cook Islands country code top-level domain (ccTLD) '.ck' is currently managed by the incumbent network operator, TCI. Whether TCI continues to manage the ccTLD or a different governmental or non-governmental body assumes that responsibility, internationally agreed domain management rules will continue to apply. The Government proposes that the Regulator should have responsibility for oversight of the ccTLD and all domains under it.

### **3.13.2 Government proposal**

Accordingly, the Government proposes that the future *Telecommunications Act* should provide:

- The Regulator or a person nominated by it shall have responsibility for registration and allocation of all domains under the .ck ccTLD.
- The Regulator may make rules, guidelines, orders and directions relating to registration of .ck domains by a nominated person.
- The assumption of responsibility for .ck domains by the Regulator or a nominated person, shall be subject to approval by the Internet Assigned Numbers Authority.
- The Regulator or a nominated person shall comply with the rules and procedures of the Internet Assigned Numbers Authority.

- The Regulator shall monitor the compliance of a nominated person with the requirements of the *Telecommunications Act*.

### **3.14 Broadcasting**

Broadcasting in the Cook Islands is currently regulated under the *Broadcasting Act 1989* (as amended in 1997).

The Government considers that the *Broadcasting Act 1989* should continue to govern the activities of broadcasters, rather than provision being made in the new *Telecommunications Act*, though the Government does not rule out reviewing and updating the *Broadcasting Act 1989* at a future point.



## PART IV: Transitional arrangements

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**Part IV** of this Policy sets out the Government's intended approach to ensuring an orderly transition from the current arrangements to the new framework described in **Part III**.

Moving from an established legislative framework to a new regulatory environment, especially one that opens up a monopoly market to competition, requires certain arrangements to be put in place to ensure an orderly transition from one to the other.

This includes allowing time for the Government to put in place necessary administrative and enforcement arrangements, ensuring that there is no gap in the licensing of the incumbent network operator, and giving affected operators a fair opportunity to ensure they are in a position to comply with the requirements of the new framework.

The transitional arrangements proposed below provide a balance between providing sufficient time for an orderly transition and ensuring that the expected service and price outcomes for customers contingent on opening up the market are not unnecessarily delayed.

Stakeholder views are sought on the Government's proposed transitional arrangements.

### 4.1 Legislation

The Government intends that new legislation will be enacted to give effect to this Policy.

The Government proposes that the *Telecommunications Act 1989* should be repealed and replaced with a new *Telecommunications Act 2019*. A Bill for a new *Telecommunications Act* will be prepared to give effect to such policy decisions as Cabinet ultimately makes in respect of the matters set out in this draft Policy.

The Government proposes that an independent Regulator should be established to administer and enforce the proposed new *Telecommunications Act*, as set out in **Part II** of this draft Policy. It is anticipated that the *Telecommunications Act*, or key provisions of it, will commence after the Act establishing the new Regulator has commenced, on a date Gazetted by the Minister.

The period between commencement of the *Competition and Regulatory Authority Act* and the *Telecommunications Act* is intended to allow the necessary time to recruit and establish the office of the Regulator so that the Regulator can be ready to carry out its functions in respect of the new telecommunications framework when that comes into operation.

#### 4.1.1 Fixed network services

The Government proposes that TCI will initially be licensed on a transitional basis to continue to provide the facilities and services that it is providing as at 1 January 2019. The Regulator will be empowered to expand these transitional rights, to the extent that TCI might reasonably require.

TCI will subsequently be licensed for 15 years, under new licence terms to be determined by the Regulator (in accordance with the licence principles discussed in section 3.1), to provide fixed network telecommunications facilities and services. New licences will take effect from

the date that the Regulator issues them, which is expected to be within 12 months of the commencement of the *Telecommunications Act*.

#### **4.1.2 International connectivity services**

The Government proposes that Avaroa Cable Limited (**ACL**) be licensed for 15 years under the new framework, from the date the *Competition and Regulatory Authority Act 2019* comes into force to provide international telecommunications facilities and services.

As a telecommunications operator and licence holder, ACL will be bound to comply with the *Telecommunications Act* and relevant determinations of the Regulator. The Regulator will be empowered to enforce the *Telecommunications Act* and its determinations against ACL and ACL will have the same rights of appeal and review as other licensed operators.

The Government intends that it will in the near term review its investment in ACL, including whether it should continue in future to be an ACL shareholder, as a separate exercise from the present Policy project.

#### **4.1.3 Transitional spectrum licensing**

The Government proposes that the current TCI spectrum licence arrangements be extended for 3 years under the new framework from the date the *Competition and Regulatory Authority Act 2019* comes into force. Within this period the Regulator will review TCI's spectrum use, and at the conclusion of the 3 year period, issue TCI with a new licence for the spectrum necessary for TCI to provide services efficiently.

#### **4.1.4 Transitional mobile networks**

The Government proposes the following transition arrangements to apply in respect of mobile network licences, for a period of 3 years from the *Competition and Regulatory Authority Act 2019* coming into effect:

- the Regulator will issue only one mobile network licence in addition to that issued to TCI;
- the additional licence will only be issued in respect of significant investment proposal that the Regulator, following a public consultation process, determines will contribute to achieving the primary objective of this Policy, as set out in section 1.3.2.; and
- a significant investment is defined as capital investment in mobile network infrastructure in the Cook Islands of NZ\$5 million or more.

#### **4.1.5 Transitional licence fees and levies**

The basis on which licence fees should be calculated, and the resulting level of fees, remain to be determined by the Regulator. The Government proposes that licence fees should be set, broadly, at a level appropriate to recover the Regulator's reasonable operating costs. Cost recovery licence fees will not operate during the transition period.

The Government proposes that Regulator not levy any licence fee on any telecommunications operator under the new framework until the Universal Service Plan has come into effect.

The Government proposes to fund the Regulator by Government budget appropriations, supplemented by possible donor grant funding, during the period of 3 years from the date the *Competition and Regulatory Authority Act 2019* comes into force.

#### **4.2 Transitional universal service arrangements**

The Government proposes that the telecommunications and postal services currently provided by TCI to the Outer Islands (those islands of the Cook Islands other than Rarotonga) continue to be provided on the current basis until the Universal Service Plan has been approved by the Minister and the new universal service arrangements come into force.

#### **4.3 Postal, maritime radio and broadcasting services**

The Government recognises that under current arrangements, certain TCI services may be funded by internal cross-subsidies between customer classes and service segments. Under the new framework, universal service costs must be transparent, and clearly accounted for in order to be eligible to receive support.

The Government proposes further consultation with TCI on suitable arrangements, both transitional and long-term, for the continued provision of postal, maritime radio and TV broadcasting infrastructure services under the new regulatory framework.

## PART V: Consultation approach

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**Part V** of this Policy sets out the Government's approach to consultation on this Policy.

### 5.1 Consultation

The Government recognises that the stakeholders that will be affected by the proposed liberalisation of the telecommunications industry in Cook Islands are numerous and diverse.

The Government is concerned that all stakeholders should have the opportunity to consider and, if they wish, respond to the Government's proposals.

The Government is seeking industry and community feedback on the proposals contained in this Policy.

Please provide your comments before 5:00pm on **Friday 14 June 2019**, by:

- **Telephone:** 29511 (please ask for 'Economics Unit')
- **Email:** [mfem.economics@cookislands.gov.ck](mailto:mfem.economics@cookislands.gov.ck)
- **Hard copy:** Economics Unit, Ministry of Finance and Economic Management, PO Box 120, Avarua.

Submissions will be treated as public, unless confidentiality is requested. If a party wishes to request confidential treatment of any part(s) of its submission, that party must:

- identify the part(s) of its submission in respect of which it asserts confidentiality;
- set out the reason(s) for those part(s) of the submission to be treated as confidential; and
- provide a redacted public version of the submission, for publication.

Please do not identify other persons or businesses in your submission.

### 5.2 Next steps

The Government will have regard to all relevant comments on this draft Policy that are received prior to the close of the consultation period and will make such changes as it considers are required in light of those comments.

The Government will also publicly consult on the draft legislation that will give effect to this Policy.

This Policy and implementing legislation, with any such changes, will then be submitted for consideration by Cabinet prior to its introduction to Parliament.

## Appendix 1      Telecommunications Principles

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### **The policy framework and intentions**

Telecommunications are a key driver of economic and social development in what continues to be an increasingly fast moving knowledge intensive global environment. Telecommunication services today are akin to the old trade routes which opened up economic opportunities and transformed the global economic environment.

The sector requires dynamic and innovative participation, ensuring the sector delivers on the opportunities and potentials which are and will become available.

A clear policy mandate for the sector is required to enable participants to invest, innovate and deliver services to the community. The Government of the Cook Islands has endorsed the following key policy principles for the sector. The sector should:

- provide affordable and quality telecommunication services to all people in the Cook Islands;
- establish an environment for the sustained adoption of technology which will assist in the public sector delivery of services such as education and health;
- establish an environment where economic services such as banking and commerce can be delivered more effectively and real time;
- establish an environment where services which are/were traditionally delivered by analogue means can be provided through a digital service;
- establish an environment where new services can be quickly provided; and
- be an investor friendly environment for attracting additional investments into the sector.

The Government clearly believes that the provision of world class telecommunications infrastructure and information is the key to rapid economic and social development of the country. The availability of affordable and effective telecommunications for households and businesses is at the core of the vision and a major goal of these principles. The major actions of the Cook Islands Government going forward are aimed at this vision and will include:

- the introduction of a less prescriptive legislative regime;
- changes to management of the spectrum; and
- reduce barriers to enter the telecommunications market.

Additionally, the Government will continue to have a number of roles in the sector including:

- as the policy and law maker;
- a major consumer of telecommunication services;
- hosting an independent regulator; and
- as a minority owner of the incumbent network operator, Cook Islands Telecom.

As mentioned previously, telecommunications is, and will continue to be for the foreseeable future a key enabler for the continued economic and social development of the Cook Islands.

As a service based economy the importance of reasonably priced effective telecommunications is a key to continued productivity and growth. Efficient and effective telecommunications is crucial to innovation and the creation of new services within the Cook Islands.

The Government wishes to ensure that the sector is structured in a manner that participants will maximise investment, strive for innovation and aim to provide improve service provision and reduce prices.

### **Universal access**

The Government wishes to ensure that the people of the Cook Islands have access to universal service which entails the provision of affordable and equitable telecommunications and internet services to every individual or household on demand. Such universal access would encompass at the minimum the following, telephony and internet services need to be:

- provided at affordable rates;
- of good quality and acceptable standards;
- available or accessible regardless of where people are located within the Cook Islands; and
- accessible to a larger proportion of the population of the Cook Islands.

### **Efficient and reliable provision of telecommunications services**

Telecommunications is ubiquitous; this basic service is required by almost all individuals, government agencies and industry. The Government will continue to advocate and promote the efficient and reliable provision of telecommunications services.

### **A network which meets the needs of the people of the Cook Islands**

The Government wishes to see the development of a robust and secure telecommunication network which will provide seamless coverage aimed at closing the digital divide and driving socio-economic development. Essentially, this would revolve around:

- continuing to encourage an inclusive knowledge society by providing for the proliferation of affordable and high quality broadband services across the Cook Islands; and
- allowing for innovation in the sector which will see a faster evolution of the mobile device as an instrument of socio-economic empowerment for Cook Islanders and visitors to the Cook Islands.

### **Encouraging investment**

The Government believes that continued investment is required to ensure continued development in the sector. Market pressures and competition for the provision of improved and less costly services should lead to greater investments for those firms who wish to meet market demand and keep market share.

Therefore the Government will create greater flexibility in the telecommunications market to ensure a competitive environment exists without compromising but rather complementing its other objectives, in particular universal and affordable access for all Cook Islanders.

### **Promote efficient interconnection arrangements between network providers and other providers**

Competition in the sector will only occur if entrants are able to interconnect their facilities with those of the incumbent or other market players and to do so at terms that allow the entrant to provide the service at competitive levels of price and quality. A 'fair and reasonable' interconnection policy is a critical input to foster competition in telecommunication markets.

### **Spectrum management**

The spectrum is a key government asset, and as a result it is crucial to promote the efficient use of spectrum.

The Government wishes to regain the management of spectrum. This will see a move towards liberalising spectrum use so that it will enable the use of spectrum in any band to provide any service in any technology and enable optimal utilisation of spectrum through an appropriate regulatory framework.

A new approach to spectrum management will allow the regulator to spectrum and allocate alternative frequency bands or media to service providers from time to time to make spectrum available for introduction of new technologies for telecom applications.

### **Fair, objective, and transparent licensing regimes for service providers and network providers**

Establishment of a commission to licence the three major areas including:

- spectrum licensing;
- service provider licensing; and
- network provider license.

Additionally, it will allow for an efficient approval regime for apparatus.

### **Multi-media approach**

The Government recognises the convergence of electronic media and will take a 'whole of media' approach with all forms of telecommunications, including radio and television broadcasting, incorporated into one piece of legislation.