BEST PRACTICE REGULATION IN THE CONTEXT OF A PACIFIC ISLAND NATION: TELECOMMUNICATIONS APPEALS (SAMOA)

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INTRODUCTION

Telecommunications regulation in small island countries is a fairly recent concept. Countries in the Pacific started opening up their telecommunications markets at the beginning of the 21st century; with reform made possible by funding from multilateral institutions like the World Bank. Part and parcel of policy-based funding projects was an obligation on governments to achieve certain deliverables, such as the adoption of 'good regulatory practice'[1] which had proved successful in the developed world. Good international practice or best practice is based on a set of principles which encourage the establishment of an independent regulatory authority, mandated by legislation to create clear rules and guidelines for the regulation of telecommunications networks and services, ensure transparency and public participation, intervening only where necessary, applying proportionate regulation where needed and issuing orders and decisions in relation to matters within its jurisdiction; such orders being subject to scrutiny by an independent judicial-type body to ensure accountability for the same[2]. In adopting best international practice, small developing countries enacted legislation which mirrored statutes in the developed world. Due to the nature of competition in the telecommunications industry, it is often the case that these 'new' statutory rules are tested very early on during the transition process. For developing countries, this presents an enormous challenge particularly in terms of resources[3]. As a consequence, developing countries quickly realise the need to modify provisions in their newly adopted legislation. Accordingly, over time one finds that many of the telecommunication laws transposed from developed countries undergo a process of evolution; such progress in some instances resulting in significant changes to already existing structures. These adjustments are often warranted to ensure that the laws in place remain pertinent in effectively regulating the sector.

Contextual Background

Samoa's experience illustrates the evolutionary journey traversed by many small countries and is recognised as *one of the success stories of the Pacific in terms of comprehensive regulatory*

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[1] Walden Ian (ed.), *Telecommunications Law and Regulation* (4th ed, 2012)

[2] Brown Ashley C, Stern Jon and Tenenbaum Bernard, '*Handbook for Evaluating In Infrastructure Regulation*' (2006)

[3] Ogus, Anthony, '*Towards Appropriate Institutional Arrangements for Regulation in Less Developed Countries*' (Working Paper No. 119, Centre on Regulation and Competition, United Kingdom, 2005) 8

reform of its telecommunications sector.[4] Its program for reform included the enactment of legislation which incorporated good international practice. In introducing competition into the telecommunications market, the statute provided an environment which fostered private investment into the sector and established an independent regulatory authority to ensure the interests of stakeholders are protected and that the policy directives set out by the Government of Samoa (GoS) are implemented. In addition, the legislation set in place an appeals mechanism ensuring that the independent regulator is held accountable for its actions. Competition was introduced in mid-2000 and within 10 years, Samoa's regulatory landscape underwent significant changes. This paper examines Samoa's experience with best practice regulation and provides valuable insight for policy development and regulatory practice in a Pacific Island country.

WHAT IS BEST PRACTICE REGULATION?

The term 'best regulatory practice' in the context of telecommunications refers to a particular set of principles established during the liberalisation of telecommunications markets in the developed world. Best regulatory practice is often understood to include the creation of an independent regulator, subject to measures ensuring accountability for decisions made; such decisions being the result of a transparent process.

Historical perspective

Liberalisation of telecommunications markets began in the United States and the United Kingdom in the 1980s, with many of the European countries following soon after. In the 1990s, this trend became an international phenomenon with the signing of the World Trade Organisation's (WTO) Agreement on Basic Telecommunications. By the end of 2000, 55% of 236 countries had undergone significant reform in their telecommunications sectors.[5] The introduction of competition into telecommunications markets is a complex task. As noted by Wellenius and Stern, reforming of the telecommunications sector involves some degree of change along four directions – (i) commercialising and separating operations from government; (ii) increasing the participation of private enterprise and capital; (iii) containing monopolies, diversifying supply of services and developing competition; and (iv) shifting government responsibility from ownership and management to policy and regulation.[6] Liberalisation therefore required an extensive exercise involving the formulation of new sector policies including the development of new rules and regulations applicable for transition from monopoly to competition.

Prior to liberalisation, the telecommunications sector was characterised by natural monopolies with services provided by the state, more often than not via a government ministry which was responsible for formulating sector policy and operating the country's telecommunications

[4] 'Ofa, Siope Vakataki, *Telecommunications Regulatory Reform in Small Developing States: The Impact of the WTO's Telecommunications Commitment* (2012)

[5] Sanchez, Milagros Rivera and Peng Hwa, Ang, 'Effective Regulators: A Response to the International Telecommunication Union's Case Study on Singapore', (2003) '4(1)' *Asian-Pacific Law & Policy Journal* 1.

[6] Wellenius Bjorn, and Stern, Peter (eds), *Implementing Reform in the Telecommunications Sector: Lessons from Experience* (1994).

network.[7] Telecommunications services were heavily subsidised and as such there was no incentive for the government operator to invest in improving both the quality and quantity of services. As a result, the development of the sector was very slow. However, in the 1980s, governments began to recognise that there was a growing demand for infrastructure investment which could only be met through private finance.[8] The problem was private investors were reluctant to invest millions of dollars in a market where the 'regulator' was itself a provider of telecommunications services. The realisation of the need to separate the operational arm and policy arm of the relevant ministries resulted in the emergence of independent regulatory authorities. The success experienced in the countries like the United States and the United Kingdom by substantially opening up their telecommunications markets to competition led other countries to realise the potential benefits their own economies could achieve with similar strategies. At the same time, the United States and United Kingdom actively promoted similar market openings in other countries through multilateral negotiations of international agreements.[9] In promoting the introduction of competition, these countries also encouraged the establishment of similar legal and regulatory frameworks which were seen as an essential component for the development and sustaining of sector competition. When the World Trade Organisation (WTO) signed the Agreement of Basic Communications in 1997, the concept of independent regulatory agencies received global recognition. This was further assisted by the developments in the European Union with the adoption of its regulatory framework for electronic communications in 2002. The 'Telecoms Package' comprised of a series of directives which were based on best practice principles contained in the Framework Directive.[10]

Independent Regulator

There is ample literature on the independence of a regulator[11]. However, it is important to note that the concept of regulatory independence is subject to a number of definitions and is not

[7] Often referred to as the PTT (Post, Telecommunications and Telegraph) regulatory model in policy circles, see Sanchez, supra note 5.

[8] Stern, Jon, 'What makes an Independent Regulator Independent?', (1997), '8(2)', *Business Strategy Review*, 67.

[9] Wellenius and Stern, supra note 6.

[10] Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications network and services, OJ L108, 24.04.2002

[11] Levy, Brian and Spiller, Pablo T, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation', (1994), '10 (2)', *Journal of Law, Economics & Organisation,* 201-246; Everson, Michelle, 'Independent Agencies: Hierarchy Beaters', (1995), '1(2)', *European Law Journal*, 180-204; Intvern, Hank (ed), 'Telecommunications Regulation Handbook', (2000) World Bank; OECD, 'Telecommunications Regulation: Institutional Structures and Responsibilities', (2000) Working Party on Telecommunications and Information Services Policies, DSTI/ICCP/TISP(99)15/FINAL; Bruce, Robert and Macmillan, Rory, 'Feedback to Regulators from Investors, Telecommunications in Crisis: Perspectives of the Financial Sector on Regulatory Impediments to Sustainable Investment', A Report to the International Telecommunications Union (ITU) Global Symposium for Regulators, Hong Kong, 7-8 December 2002; Gilardi, Fabrizo, 'Policy Credibility and Delegation to Independent Regulatory Agencies: a Comparative Empirical Analysis', (2002), '9(6)', *Journal of European Public Policy*, 873-893; Wu, Irene, 'Traits of an Independent Regulator: A Search for Indicators, (FCC International Bureau Working Paper Series, No. 1, June 2004); Trillas, Francesc, 'Independent Regulators: Theory, Evidence and Reform Proposals', (IESE Business School, University of Navarra, Working Paper WP-860, May 2010); Jamison, Mark and Berg, Sanford V, 'Utility Regulatory Fundamentals: A reference handbook for PURC Training Program', (2012)

straightforward.[12] Smith provides a definition of independence which in the author's view is most reflective of best international practice[13]. He notes that independence consists of three elements – (i) an arm's-length relationship with political authorities; (ii) and from operators, consumers and other private interests; and (iii) organisational autonomy in terms of finance and exemption from restrictive public service salary rules for example. Each of these elements is briefly discussed below.

Independence from political authorities

The hallmark of an independent regulator is its ability to make regulatory decisions without being subject to external government ministries or agencies. The decisions made by a regulatory authority impacts directly on the telecommunications market. Where a regulator is seen as conforming to the wishes of the political party which currently holds power, investors are less likely to risk investing in the sector. As a consequence, investment and subsequently competition in the market is likely to dwindle.[14]. The existence of an independent regulator provides investors with degree of legal certainty that their interests will not be subject to coercion from politicians of the day. In effect, independence makes a regulatory more credible in the eyes of stakeholders. In discussing the ten key principles of an independent regulator model of regulatory governance, Brown, Stern and Tenanbaum note that,

> '*[i]nfrastructure regulators should, by law, be free to make decisions within the scope of their authority without having to obtain prior approval from other officials or agencies of the government.'*[15]

Independence from market participants

The rationale behind the imposition of regulation on telecommunications markets is based on a government's desire to protect consumers from service providers with substantial market power, to promote investment by providing protection for investors and the need to contain previous monopolies which may continue to have exclusivity for particular services in the market even after the market has been liberalised.[16] The regulator must therefore be in a position to be able to take necessary action when any of the abovementioned guarantees is breached. Moreover, regulators must ensure that all operators are treated in a non-discriminatory fashion and as such, an arms-length relationship is crucial to avoid regulatory capture. This position is reflected in the WTO Agreement on Basic Telecommunications Services, particularly in the annexed Reference Paper which contains a set of regulatory principles which Member States are required to implement as part of their scheduled commitments. Principle 5 of the Reference Paper requires a regulatory body to be *separate from, and not accountable to any supplier of telecommunications services*.[17] This separation from operators was taken further by the Framework Directive to include even those operators

[12] Stern, supra note 8.
[13] Smith, Warrick, 'Utility Regulators – The Independence Debate', (Public Policy for the Private Sector, Note No. 127, The World Bank Group, Washington D.C., 1997)
[14] Levy, Brian and Spiller, Pablo T, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation', (1994), '10(2)', *Journal of Law, Economics & Organisation* 204
[15] Brown, Stern and Tenenbaum, supra note 2.
[16] Smith, supra note 13.
[17] The Reference Paper is available at <http://wto.org/english/tratop_e/serv_e/teecom_e/tel23_e.htm>

which are owned by the state. Article 3 of the Framework Directive requires Member States to guarantee the independence of regulatory authorities, ensuring that they are legally distinct from and independent of all organisations providing electronic communications networks, equipment, or services. It makes no distinction between private companies and state-owned enterprise.

In addition to independence from operators, best practice also encourages regulatory independence from other sector stakeholders such as consumers groups and other industry bodies. A regulator must be seen to be impartial so that regulatory decisions which impact on the market are seen as credible. This is also important for competition. Telecommunications operators and investors must have confidence in the regulator's decision being objective and transparent – not tied to any particular interest.[18]

Organisational Autonomy

Best practice requires that regulators have the autonomy in the day-to-day management of the regulatory organisation. This requires the regulatory authority to be financially independent, in that it has sufficient financial support to carry out its statutory tasks. Under the Framework Directive[19], Member States are required to ensure that national regulatory authorities have adequate financial resources in order to operate efficiently. In addition to financial independence, best practice requires that the regulator has autonomy in relation to the recruitment of employees and make personnel changes.[20] Regulators must be in a position to hire qualified persons which with necessary skill with regard to addressing regulatory matters. Recruiting expert staff requires the ability to offer competitive salary as opposed to being tied to the salary structure laid out for public service organisations.[21]

Accountability

In addition to ensuring regulatory authorities are insulated from the influence of politics and industry, there is a need to balance that independence using appropriate accountability measures. Accountability allows for decision-making to be *visible, reasonable and justifiable.*[22] Regulators are *"non-majoritarian" institutions*[23] – unlike politicians who are held to account for their decisions by voters on a periodic basis through the process of elections, independent regulators are not subject to public scrutiny in the same manner. Therefore other measures need to be in place to ensure that regulators are held accountable for their decisions; such measures often include providing parties with the right of appeal[24] where such persons

[18] Intvern, Hank, *Telecommunications Regulation Handbook*, (2000)
[19] Directive 2002/21/EC, supra note 13 Directive 2002/21/EC
[20] OECD, 'Telecommunications Regulation: Institutional Structures and Responsibilities', (Working Party on Telecommunications and Information Services Policies, DSTI/ICCP/TISP(99)15/FINAL, May 2000)
[21] Smith, supra note 16, footnote 13.
[22] Baldwin, Robert, Cave, Martin and Lodge, Martin, *The Oxford Handbook of Regulation*, (2010)
[23] OECD Working Party on Regulatory Management and Reform, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation', (Proceedings of an Expert Meeting, London, 10-11 January 2005)
[24] Brown, Stern and Tenanbaum, supra note 2, p.60; see also Levy, Brian and Spiller, Pablo T, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation", (1994),

believe the regulator has acted contrary to the law; reporting obligations to a parliamentary oversight committee including the submission of an annual report; adherence to extensive transparency obligations with regard to the making of regulatory decision (for example, an obligation on the regulator to provide reasons for his decisions). Countries which are noted for effective regulatory practices employ accountability measures to ensure that regulators make legitimate, reasonable and transparent decisions.

Transparency

Transparency is a natural consequential tool of independence and accountability. For regulation to be effective, Brown and Stern note that the *entire regulatory process must be fair and impartial and open to extensive opportunity for public participation.*[25] They note that a regulator must ensure that all information used in the decision-making process must be made available for public inspection. In addition, the regulator must ensure all affected parties are informed on the process in advance; and ensure that regulatory decisions are made publicly available; such decisions to be in writing, clearly set out with details for the reasons behind the same. *Effective utility regulatory institutions are ones that promote transparency and predictability.*[26] In essence, it is the obligation of an effective regulator to ensure that interested parties are not in the dark about serious regulatory decisions.

CASE STUDY – SAMOA

Samoa like many other small island states undertook reform of its telecommunications sector with the financial assistance of the World Bank. The Samoa Telecommunications and Postal Sector Reform Project (Project)[27] was the consequence of advice provided to the GoS after the World Bank had conducted a study of Samoa's telecommunications and postal sectors. At the time, the quality of telecommunications service available in the country was poor and accessibility to such services was limited to urban areas where most businesses were located. The study concluded that an improvement of such services would be beneficial to the national economy and reforming these sectors would make way for private investment needed to develop the country's telecommunications infrastructure. The GoS acted on this advice and noted its commitment to reform in its national strategy for development.[28] As part of the expected deliverables under the Project, the GoS was required to establish a legal and regulatory regime for the telecommunications which would cater for competition including new rules and regulations to address issues arising out of transition from monopoly to competition. As a consequence, consultants hired under the Project drafted a telecommunications Bill *based on principles that have been used in many countries pursuing*

'10(2)', *Journal of Law, Economics and Organisation* 201; Bovens, Mark, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', *Western European Politics*, (2010), '33(5)' 946

[25] Brown, Stern and Tenenbaum supra note 2.

[26] Stern, Jon, 'What makes an Independent Regulator Independent?' (1997), '8(2)' *Business Strategy Review* 70.

[27] World Bank 'Samoa Telecommunications and Postal Sector Reform Project Report No. PID10846', see <http://worldbank.org/projects/P075739/samoa-telecommunications-postal-sector-reform-project?lang=en>

[28] Ministry of Finance, "Strategy for the Development of Samoa (SDS) 2002-2004" (Samoa)

telecommunications sector reform[29], that is, regulatory independence, accountability and transparency. The Telecommunications Act of 2005 (Telecoms Act) came into force in July 2005[30] and competition was subsequently introduced in 2006 when the GoS issued three mobile licences, one to the state-owned incumbent SamoaTel Limited, one to Telecom Samoa Cellular (a subsidiary of Telecom New Zealand) and one to Digicel (Samoa) Limited, an Irish based telecommunications company who had established itself in the Caribbean region and was looking to do the same in the South Pacific[31].

Market History

Prior to the liberalisation, Samoa's telecommunications sector was monopolistic in nature, with all communications services being provided by a government ministry. In 1996, the GoS granted a cellular licence to Telecom Samoa Cellular (TSCL) giving it a ten-year monopoly (1997-2007) for the provision of cellular services on an analogue type (TDMA) network. In 1999, the GoS subsequently separated out the operational arm of the Ministry of Post and Telecommunications forming a new state-owned enterprise, SamoaTel Limited (SamoaTel). In addition to exclusivity in fixed line services, SamoaTel's general deed of licence also gave it exclusive rights to operate an international gateway which meant all international traffic going out and coming into Samoa went through SamoaTel's network. This exclusivity continued even after competition was introduced, expiring on 30 June 2009. Apart from TSCL and SamoaTel, all other service providers were restricted to retail internet service providers which leased capacity from SamoaTel via wholesale arrangements.

The introduction of competition was not a smooth process. Resistance to the opening up of the mobile market was expressed by TSCL which saw competition as a threat to its operations.[32] This resistance evolved into a legal dispute with the GoS over the conditions of its ten-year licence. In an effort to prevent a delay in the opening of its telecommunications market to competition, the GoS entered into negotiations with TSCL, and the dispute was eventually settled via a deed of settlement, which among other things guaranteed TSCL one of the three mobile licences the GoS was intending to grant as part of its restructuring program for the sector. The three licences granted to TSCL, SamoaTel and Digicel authorised the respective providers to provide digital cellular (GSM) services in Samoa. With respect to international traffic, TSCL and Digicel were authorised to transmit only that category of international traffic which originated or terminated on their networks. This restriction was based on the fact that SamoaTel continued to have exclusivity in international gateway services. In August 2006, Digicel advised the newly formed regulator of its intention to purchase TSCL and requested the regulator's approval for transfer of shares as required under the Telecoms Act. In purchasing TSCL, Digicel acquired not only TSCL's network but also its entire customer base.

[29] Favaro, Edgardo (ed), '*Small States Smart Solutions: Improving Connectivity and Increasing the Effectiveness of Public Services'* (2008)
[30] Ministry of Communications and Information Annual Report 2005-2006 (Samoa)
[31] For copies of licences see < http://regulator.gov.ws/licences >
[32] Favaro, supra note 29.

Accordingly, at the commencement of competition, SamoaTel dominated the fixed line market and correspondingly, Digicel dominated the mobile market.[33]

The Telecommunications Act 2005[34]

One of the major outputs of the Project was the enactment of the Telecoms Act which set up a framework for introducing competition in many parts of Samoa's telecommunications market. Consisting of a list of thirteen objectives, the Telecoms Act sought to promote the efficient and reliable provision of telecommunications services relying as much as possible on market forces such as competition[35]; encourage sustainable foreign and domestic investment into the sector[36]; establish a framework for the control of anti-competitive conduct in the sector[37]; promote efficient management of scarce resources (such as radio spectrum and numbers)[38]; and define and clarify the institutional framework for policy development and regulation of the telecommunications sector, separating the government's policy and regulatory functions from those providing telecommunications services.[39] Part of separating government's policy and regulatory functions was the establishment of the Office of the Regulator in 2006 – an independent regulatory authority created pursuant to section 9 of the Telecoms Act, charged with the statutory responsibility of implementing the provisions of the same. The head of the office is appointed by the head of state acting on the advice of Cabinet and may only be removed from office during tenure on the basis of a conviction of an offence in Samoa or elsewhere, bankruptcy or for failure to adhere to the Public Service's Code of Conduct.[40] In terms of finance, the OOTR obtains revenue from the collection of licence fees charged to service providers. However, the OOTR does not have full autonomy over funds generated from licence fees. Instead, its budget is subject to the national budgetary process of the GoS which earmarks a particular amount for the OOTR's use each financial year.[41]

The regulator's functions and duties are contained in section 8 of the Telecoms Act and encompass a broad range of interrelated powers including among other things the advising of the Minister on policy matters; regulating interconnection between telecommunications service providers; arranging a universal access plan and establishing rules required to give effect to the provisions of the statute; and making orders with respect to any matter within his statutory

[33] One of the first tasks of the regulator was to define markets and designate dominance in accordance with the Telecoms Act. Section 26 of the Act states that service providers with gross revenues in a specific telecommunications market which constitutes 40% or more of the gross revenues of all services providers in that market shall be designated a dominant service provider in that market. Accordingly, the regulator issued two orders: Order of the Regulator No. 2006/01 designating SamoaTel as dominant provider of fixed line services and Order of the Regulator No. 2006/06 designating Digicel as dominant provider in the mobile services market. For copies of orders see < http://regulator.gov.ws/orders >

[34] *The Telecommunications Act 2005* (Samoa)

[35] Ibid, s 3(c)

[36] Ibid, s 3(e)

[37] Ibid, s 3(f)

[38] Ibid, s 3(j)

[39] Ibid s 3(i)

[40] Ibid, s 6

[41] In fact, the OOTR's collected revenue is recorded as revenue for the Ministry of Communications and Information Technology when it is presented to the Ministry of Finance for review. Accordingly, the OOTR does not have financial independence and its development is crippled by a lack of funds.

jurisdiction. In carrying out his functions, the regulator is obligated to *act independently*, in a *manner that is separate from, and not accountable to, any service provider, including a service provider owned by the government*.[42] Under section 11, any order issued by the regulator was subject to an appeal to the Supreme Court on a question of law, who had the authority to declare such order unlawful and remit that order to the regulator for further determination[43].
From the very beginning, the OOTR was at a disadvantage. Whilst in essence, the Telecoms Act was an enabling piece of legislation outlining a clear and robust system for regulation, the OOTR did not have the necessary financial and human resources required to undertake such an enormous task.[44] Manned by a total of seven staff including an expatriate consultant as its head, the OOTR was expected to regulate a complex sector equipped with very limited resources. The result of such a handicap was a constant struggle to counter the well-versed positions of service providers in relation to a range of issues, including but not limited to interconnection. Shortly after competition was introduced, the OOTR was thrown before the Supreme Court to defend an appeal lodged by Digicel against an order issued by the regulator establishing interconnection rates for fixed and mobile networks in Samoa.

The first interconnection dispute

It is important to note that before the liberalisation of the sector, the two monopoly providers, SamoaTel and TSCL had in place a "sender keeps all" arrangement with regard to interconnection. This approach meant that there was limited scope for dispute with regard to interconnection payments where customers from SamoaTel's network called a customer on TSCL's network and vice versa because the service providers did not pay each other for transmitting the other's traffic over their respective networks. As such, the absence of a regulatory authority did not have a major impact. However, when competition was introduced, the dynamics with regard to interconnection arrangements (among other things) changed. As dominant service providers in fixed and mobile markets, SamoaTel and Digicel (upon purchasing TSCL) initiated interconnection negotiations in August 2006. Negotiations were unsuccessful and by mid-October 2006, the parties advised the then regulator, Mr. John Morgan, that they had failed to an agreement with respect to interconnection charges and requested that the regulator determine interconnection rates. In accordance with the Telecoms Act, the regulator advised the parties of his intention to conduct a cost analysis with the aim of establishing interconnection rates[45]. In addition, he would impose interim interconnection rates which would apply until such time when the cost study was completed. The regulator subsequently issued an order[46] on 30 October 2006 detailing imposing interim interconnection rates on SamoaTel and Digicel. The regulator provided both operators with a copy of guidelines on developing top-down and bottom-up cost models sourced from the Danish Telecommunications Regulator, advising the parties that the document was indicative of

[42] Ibid, s 8(3)
[43] Section 11 of the Telecoms Act was later repealed by the Telecommunications Amendment Act 2008 – the progression of events leading up to such amendments are discussed in a latter part of the research.
[44] see Office of the Regulator, Annual Report 2006-2007 (Samoa)
[45] s 36 of the Telecoms Act requires that interconnection rates of dominant service providers are to be based on cost
[46] Order of the Regulator No. 2006/04 (Samoa)

guidelines he was intending to issue for Samoa during this process.[47] In a subsequent email to the providers, the regulator noted his preference for a bottom-up approach which he believed would be quicker to carry out.[48] A consultancy firm, Intercai Mondiale Limited, UK (IML) was hired to assist the regulator in conducting the cost study with an expected timeframe for completion of March 2007. It is apparent from evidence presented to the Supreme Court that the regulator and providers engaged in a series of discussions[49] during the conducting of the cost study; with the regulator requesting the submission of comments from the providers on a number of issues including the regulator's cost-modelling proposal. During this period, the regulator also issued a document detailing cost study guidelines for cost-based interconnection for Samoa.[50] Both SamoaTel and Digicel submitted cost models for the regulator's consideration in March 2007. Upon evaluating the respective cost models, IML advised the regulator that it required further information from Digicel with respect to the model it had provided. IML's request for information was forwarded to Digicel. In his email, the regulator noted his concern with regard to the standard of the document Digicel had submitted to support its cost model, namely, that the main body of the document referred to Trinidad, not Samoa and the three-pages of information presented in support of the model was not in line with international best practice.[51] A meeting was scheduled between Digicel and IML in April 2007 to discuss concerns raised with regard to Digicel's cost model. However, such meeting did not eventuate due to Digicel having other commitments. It then appears from the evidence that in his eagerness to complete the process, the regulator instructed IML to construct its own model of Digicel's costs on a Fully Allocated Cost (FAC) basis. According to the regulator's affidavit[52], the instruction to IML was due to Digicel's failure to provide adequate information. The construction of a cost model using a FAC approach was done without Digicel's knowledge. The cost study exercise was completed in May 2007 with IML providing the regulator with its final report on 15 May 2007; such report including recommended interconnection rates based on the FAC model IML had constructed. The regulator accepted IML's recommendations and on 16 May 2007 sent an email to the providers attaching an order establishing long-term interconnection rates for fixed and mobile networks in Samoa.[53] *The new rates anticipated revenue loss for Digicel*;[54] there was a significant decline from the 45 sene (sene equates to cents in Samoan currency) per minute (peak hour) prescribed in the interim order[55] to the 22.8 sene per minute included in the new order. In addition, Digicel was looking at an increase in interconnection payments for termination of its traffic on SamoaTel's fixed line network from 8.2 sene per minute to 11.8 sene per minute. Accordingly, Digicel was not pleased with the new rates. The crux of its argument before the Supreme Court was that it has not been afforded an opportunity to comment, correct or contradict the information relied upon by the regulator

[47] *Digicel v Attorney General* [2008] WSSC 15 (30 March 2008), [31]
[48] Ibid, [30]
[49] Ibid, [19]-[84]
[50] Ibid, [37]
[51] Ibid, [78]
[52] Ibid, [83]
[53] Order of the Regulator No. 2007/04 is available at <http://regulator.gov.ws/orders>
[54] 'Ofa, Siope Vakataki, *Telecommunications Regulatory Reform in Small Developing States: The Impact of the WTO's Telecommunications Commitment* (2012)
[55] Order 2006/04, supra note 19

in making his determination and as such he had failed to satisfy procedural fairness standards. After consideration of the evidence before him, the Chief Justice found in favour of Digicel and allowed the appeal. The regulator's order was declared unlawful and remitted back to him for reconsideration. In his decision, the Chief Justice noted his acceptance of the evidence provided by Digicel's expert witnesses stating that the witnesses *have enormous experience in regulatory proceedings* and *their evidence was well supported*.[56] The Supreme Court also ordered the regulator to pay the cost of litigation equating to WS$1 million (US$400,000); such sum was subsequently paid by the GoS.

The outcome of the court decision was a significant blow to the OOTR (and the GoS) in terms of financial loss – the payment of WS$1million of public funds for litigation was an extremely high amount for a small island government. There were some that were of the opinion that *the fact that a private foreign company took a statutory arm of government to court and won convincingly created some bitterness*.[57] Irrespective of such opinion, the court decision highlighted fundamental flaws within the regulatory system. Firstly, the decision painted a negative portrait of the OOTR in terms of its effectiveness or lack thereof. It was clear from the court decision that the regulator had failed to implement a fair and proper process (lack of transparency) with regard to the determination of interconnection rates; particularly, the regulator had unilaterally decided to switch from a bottom-up approach to a top-down approach without consulting either of the service providers. Secondly, the decision highlighted the lack of technical expertise existing in the OOTR at the time. The absence of skilled staff within the OOTR was reflected in its inability to properly address issues associated with the interconnection dispute. Thirdly, whilst the Telecoms Act was clear that interconnection rates should be cost-based, it did not account for periods of transition. A cost-study exercise would not be completed overnight; however, there was no guidance for the regulator in the Telecoms Act in terms of what rates should apply in the interim. Fourthly, there was a lack of specialised knowledge of telecommunications matters within the Supreme Court. This was apparent from the Chief Justice's decision, particularly, his reliance on definitions of technical terms and regulatory practices provided by expert witnesses who gave evidence on behalf of the appellant. It was obvious as a result of the Supreme Court decision that there were gaps in the law that needed to be addressed, more particularly, provisions to deal with *issues surrounding the establishment of interim interconnection rates*[58] and consideration of whether there was a need for the creation of a specialised tribunal,[59] manned by experts who would be in a position to properly deal with complex technical issues associated with regulation of the sector; a knowledge and skill that the Supreme Court did not have. A specialised appellate body would allow for the sourcing of professionals in the area to sit on the appellate panel; particularly those with both the know-how and experience in regulatory matters and this would be

[56] *Digicel,* supra note 46, [141]

[57] 'Ofa, supra note 53.

[58] ITU/EC ICB4PAC Capacity Building and ICT Policy, Regulatory and Legislative Frameworks for Pacific Island Countries, "Interconnection and Cost-Modelling: Knowledge Based Report", ITU, Geneva, 2013 see <http://itu.int/en/ITU-D/Projects/ITU-EC-P/ICB4PAC/Documents/FINAL%20DOCUMENTS/interconnection.pdf>

[59] Wade, Sir William and Forsyth, Christopher, *Administrative Law* (10th ed, 2009); Cane, Peter, *Administrative Law* (4th ed, 2004); Dokeniya, Anupama, 'Reforming the State: Telecommunications Liberalization in India' (1999) 23 *Telecommunications Policy* 105

advantageous in terms of providing affected parties with a *simpler, speedier, cheaper and more accessible justice*[60] than that available through the ordinary courts.

The Telecommunications Amendment Act 2008[61]

After the decision, the Office of the Attorney General conducted a review of the Telecoms Act and as a result of that review, the Telecommunications Amendment Act 2008 (TA Act 2008) was enacted by Parliament, coming into force on 8 June 2008. The TA Act 2008 dealt primarily with the issue of interim interconnection rates and the establishment of a new appellate body. In relation to interim interconnection rates, the TA Act 2008 strengthened the regulator's position by empowering the regulator to direct service providers to enter into negotiations and agree on interconnection rates; and where the service providers failed to reach an agreement within fourteen days, the regulator has the power to impose interim interconnection rates in accordance with the TA Act 2008[62].

With regard to appeals, Part IIA of the TA Act 2008 established the Telecommunications Tribunal (Tribunal). The old section 11 of the Telecoms Act was replaced with a new provision which specified that an appeal against an order of the regulator may only be made to the Telecommunications Tribunal upon the filing of a Notice of Appeal; such notice to be accompanied by a bank cheque of WS$100,000 and a signed undertaking by the appellant to pay damages and all costs arising from the appeal proceeding or a subsequent order of the regulator issued as a result of the appeal. The Tribunal consisted of three members, with a judge or lawyer appointed by the Chief Justice as the presiding member; and two other members to be appointed by the head of state acting on the advice of Cabinet. The non-legal members of the Tribunal were required to have professional knowledge, particularly in the areas of economics and telecommunications engineering.

> *The main objective was to provide a specialist forum to hear appeals. Such forum would be familiar with the technical issues specific to the sector and would hopefully produce quicker decisions.*[63]

The Tribunal was granted statutory powers and protection similar to that awarded to a Commission of Inquiry under the Commission of Inquiry Act 1964[64] including protection against any action which would otherwise have arisen from something a member said during the course of a proceeding. Moreover, section 11G specified that a decision of the Tribunal shall be final and binding on all parties, and all persons named in any order made by a Tribunal; with parties barred from lodging an appeal against a decision of the Tribunal. A decision of the Tribunal was subject only to judicial review proceedings in the Supreme Court[65]. Of particular interest for the purposes of litigation, the TA Act 2008 specifically exempted the government from the payment of any costs associated with a Tribunal hearing.[66] Not long after the TA Act

[60] Wade and Forsyth, ibid, 770.
[61] *Telecommunications Amendment Act 2008* (Samoa)
[62] Ibid, s *39A*
[63] Email from Aumua Ming Leung Wai <mingleungwai@ag.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 26 February 2014
[64] *Commission of Inquiry Act 1964* (Samoa)
[65] *Telecommunications Amendment Act 2008* (Samoa)
[66] Ibid, s 11F

2008 had been enacted, the regulator was summonsed before the Tribunal to defend an appeal against two orders it had issued with regard to interconnection rates.

The second interconnection dispute

The appeal against the regulator's orders[67] were lodged by SamoaTel in October 2008 (the actual hearing took place in May 2009). Both Order 2008/03 and Order 2009/01 which were the subject of the appeal were issued by the regulator pursuant to s. *39A* of the TA Act 2008 and both orders set out interim interconnection rates applicable to SamoaTel and Digicel as dominant service providers. In its submissions, SamoaTel claimed that both orders were essentially an extension of Order 2006/04 which had been intended to be a temporary measure until long-term interconnection rates had been established. The continued application of Order 2006/04 was problematic as the rates included in the order were not cost-based[68] and were higher than rates recommended by particular cost studies[69] which were available to the regulator at the time such orders had been made. In doing so, the regulator had failed to consider relevant matters and as a result had reached an unreasonable decision. It was argued that the continued application of the rates in Order 2006/04 through the regulator's issuance of the subsequent orders had a detrimental impact on SamoaTel's *ability to earn an adequate return on investment was impeded by interconnection rates*. This would in turn cause serious harm to the company's *commercial viability and hinder the development of sustainable competition*.[70] As part of its evidence, SamoaTel referred to a letter from the regulator dated 5 May 2008 which stated that the regulator was in agreement with SamoaTel that it was inappropriate that the rates contained in Order 2006/04 remain in effect any longer than necessary.[71] The regulator had urged the parties to reach an agreement on new rates prior to the end of May and noted that failure to do so would result in his taking of regulatory action to address the problem, particularly, the issuance of a regulatory instrument to cancel Order 2006/04 and impose a *10/10 sene*[72] per minute arrangement as had existed between SamoaTel and TSCL previously. However, before the regulator acted on his threat, Parliament enacted the TA Act 2008 and accordingly the regulator advised the parties that Order 2006/04 would not be cancelled but that the regulator would instigate the process for the setting of interim interconnection rates as laid out in s. *39A* of the TA Act 2008. In response to the regulator's request, both SamoaTel and Digicel submitted comments on appropriate rates. Not long after comments were received, the regulator left Samoa and was replaced by a consultant with Network Strategies, a regulatory consultancy firm in New Zealand which had been engaged by the GoS to act an interim

[67] Order of the Regulator No. 2008/03 and Order of the Regulator No. 2009/01 (Samoa)

[68] Although s *39A* states that interconnection rates need not be cost-based, the regulator (and the Tribunal) accepted that s 32 (a) of the Telecoms Act applied to the setting of interim interconnection rates. Under s 32(a), the regulator is obligated to promote adequate, efficient and cost-oriented interconnection of telecommunications networks. A reference to s 32(a) was included in a document prepared by the regulator and attached to Order 2009/01

[69] In its evidence, SamoaTel referred to an August 2008 benchmarking study which had been prepared by Network Strategies for the GoS. The study included median cost-based rates for domestic mobile termination and fixed termination for comparable developing countries. Both median rates were far below the rates contained in Order 2008/03

[70] *SamoaTel v Regulator and Digicel*, Telecommunications Tribunal, 22 May 2009, [100]

[71] Ibid, [30]

[72] Ibid

regulator (for three months from June 2008) while the GoS looked at recruiting a new head for the OOTR. Shortly after the consultant's arrival, the regulator issued Order 2008/03 which made no material change to Order 2006/04 and would be in force for a period of six months (until March 2009). In an affidavit, the regulator stated that the rates included in Order 2008/03 had been the result of having considered among other things the submissions made by SamoaTel and Digicel, current international trends and practices, engineering elements which influence interconnection and associated charges, and the potential impact of changes to interconnection rates on network operators. However, during cross-examination, the regulator admitted that the rates in Order 2008/03 had simply been based on the rates contained in Order 2006/04;[73] such rates having no connection with any cost element. Evidence given by an expert witness confirmed that it was *contrary to accepted international practice for a Regulator to set interconnection rates without relying on any cost information or data.*[74]

In February 2009, a new regulator was appointed and after his arrival, Mr. Donnie De Freitas issued Order 2009/01 which was to take effect from the expiry of Order 2008/03. The rates contained in the new order reflected the rates contained in the previous orders. SamoaTel submitted a complaint arguing that these rates (like those set in prior orders) bore no relationship with cost and as such, application of the same would continue to be detrimental to SamoaTel's commercial viability.

In assessing the evidence, the Tribunal found that the regulator had in fact acted unreasonably and had misused his discretion. Noting the objectives of the Telecoms Act and the regulator's obligation to promote adequate, efficient, and cost-oriented interconnection of telecommunications services, the Tribunal rightly determined that rates in Order 2006/04 had no identifiable relationship with costs. Accordingly, the Tribunal referred both orders back to the regulator, instructing the regulator to reconsider the rates taking into account the studies presented as evidence during the proceeding.[75] In addition, the Tribunal ordered that any interconnection payments between SamoaTel and Digicel which were in excess of payments required under reconsidered rates were to be refunded.[76] The Tribunal further urged the regulator and service providers to work towards developing cost-based rates as soon as practicable *with particular attention to recent relevant international practice*,[77] noting that it would be inappropriate for the regulator to put in place any further interim interconnection rates until the establishment of new cost-based interconnection rates.

The Tribunal's landmark decision confirmed that the amendments passed in June 2008 was a step in the right direction. The hearing of the appeal was completed within one week and this was attributed to the presence of two experts on the panel. The Tribunal's decision also provided much needed clarity with regard to the subject of interconnection in Samoa. Despite the Tribunal finding against the OOTR, the outcome of the appeal was welcomed by the regulatory authority.

> *'Decisions by the [Tribunal] have the positive impact of clarifying the regulatory landscape even though it might be a ruling against the Order of the Regulator; [The*

[73] Ibid, [38]-[39]
[74] Ibid, [44]
[75] Ibid, [100(d)]
[76] Ibid, [100(f)]
[77] Ibid, [100(h)]

decisions] have allowed the regulator to move forward and implement new cost-based rates knowing what the views of the Court are and avoiding past errors thus minimizing effective challenges to decisions.'[78]

The regulator's sentiments were echoed by other government officials. The Attorney General believed the establishment of the Tribunal and appointment of expert members allowed for more appropriate decisions to be made.[79] A former in-house counsel for SamoaTel agreed stating that the Tribunal meant there was expert assistance in the appellate body's decision-making process from '*specialists with wide practical experience (in law, economics, telecommunications and regulatory)'*.[80] Following the Tribunal's decision, the regulator completed a cost-study and successfully established long-term interconnection rates.

The LCR dispute

The praises with regard to the Tribunal's efficiency were soon forgotten when a further appeal was lodged by Digicel on 26 November 2010. The appeal was against an order[81] of the regulator issued after the OOTR investigated a long outstanding complaint[82] lodged by SamoaTel against the appellant. SamoaTel's complaint revolved around Digicel's marketing of SIM boxes as least cost routers (LCRs) and using these boxes to convert fixed line calls into Digicel mobile calls. This enabled Digicel to transmit the call through Digicel's international gateway and earn international revenue associated with that call. Through this process, Digicel could charge its local customers for the call as a call originating from a Digicel cellular phone. SamoaTel's had also alleged that Digicel was also offering Digicel customers a retail rate which was below the wholesale rate it was charging SamoaTel for mobile interconnection, and this meant Digicel was in breach of the Telecoms Act.[83] In his affidavit dated 25 February 2011 (submitted to the Tribunal as part of its evidence), the regulator stated that although there was no statutory obligation to initiate consultation with the providers, he had instigated the investigation on the premise of the Supreme Court decision on interconnection rates which noted that as an administrative body the OOTR had a duty to ensure that the process followed was fair and transparent. Accordingly, the regulator had forwarded the complaint to Digicel and advised both providers of his intention to investigate the matter. During the course of the regulator's investigation, both Digicel and SamoaTel had been properly informed and both providers had been allowed ample opportunity to make comments during the investigation process. Following his investigation, a draft determination was sent to the service providers on

[78] Email from Donnie De Freitas <ddefreitas@regulator.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 27 February 2014

[79] Email from Aumua Ming Leung Wai <mingleungwai@ag.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 26 February 2014

[80] Email from Ioane Okesene <ioane.okesene@mcil.gov.nz> to Elisa Kohlhase <ekohlhase@gmail.com> 21 March 2014

[81] Order of the Regulator No. 2010/03 (Samoa)

[82] The complaint was one of a list of complaints outstanding from as far back as 2007 which had been set aside by previous regulators on account of trying to deal with interconnection matters. Upon resolution of the interconnection dispute the Regulator and service providers agreed on a list of complaints which would be addressed by the regulator; SamoaTel's complaint on least cost routers was identified as one of the top priorities.

[83] Section 27(3) prohibits a dominant service provider from abusing its dominant position in the market by supplying competitive telecommunications services at prices below costs. The Telecoms Act identifies costs as long run average incremental costs

13 May 2010 for comment. Upon consideration of submissions received from the same, the Regulator subsequently issued his final determination in October 2010. The regulator concluded that Digicel was marketing SIM boxes as LCRs when in fact the unit housed a single SIM card (Digicel) which meant that customers did not have a choice as to which network their calls would be 'routed' through. Instead, all calls would automatically be routed to Digicel's mobile network. Accordingly, the regulator ordered Digicel to reprogram the SIM boxes to include features of a least cost router. In addition, the regulator determined that Digicel was in breach of section 27(e) of the Telecoms Act and ordered Digicel to refrain from charging its customers retail rates which were below the mobile termination rate which had been established by the regulator.[84] Digicel disputed the regulator's findings and consequently lodged an appeal with the Tribunal. According to Digicel's evidence, the regulator misunderstood the structure and operations of Digicel's LCR units and as a result of that misunderstanding had made an error of fact in relation to same. Digicel also argued that the regulator had failed to consider relevant information which had been presented by Digicel during the process of its investigation and that failure has resulted in the issuance of an unreasonable decision. Upon the filing of Digicel's appeal, the Tribunal convened, with the Chief Justice as presiding member and two experts from Australia as the expert panellists. The hearing of the appeal was conducted over a period of one week, with final submission presented to the Tribunal on 4 March 2011. Unlike the previous Tribunal case, a decision was not forthcoming at the conclusion of the hearing. Several letters requesting a decision were sent to the Tribunal by the OOTR but to no avail. The failure of the Tribunal to issue a decision after the hearing has caused concern within the sector. According to the Regulator, the delay in providing a decision *has to some extent created an uncertainty to the approaches and the response that the Regulator has on current issues*. Following the hearing, the regulator was reluctant to make decisions on pending matters before the OOTR '*in dread of the Tribunal decision having a negative domino effect on subsequent orders of the Regulator'*.[85] The lack of a decision caused policymakers to look at ways of improving the appeals process. These considerations led to the formulation of further amendments to the telecommunications stature; now enacted in the Telecommunications Amendment Act 2014 (TA Act 2014).

The Telecommunications Amendment Act 2014

The TA Act 2014 provided further clarification of the appeals process. It gave the Tribunal power to control its own processes, make its own rules with regard to procedure necessary to '*facilitate the just and timely resolution of matters*.'[86] The statute empowered the Tribunal to create rules for pre-hearing conferences, dispute resolution processes, the receipt and disclosure of information, filing of notices, procedures for preliminary or interim matters, exclusion of witnesses, witness fees and expenses, amendments to an application and responses to that application, and application to set aside any summons served by a party. It requires the Tribunal

[84] For the regulator's full decision, "Determination in relation to Digicel's use of LCR units" see <http://regulator.gov.ws/files/documents/Use_Determination-re-LCR-units-281010-for-website.pdf >

[85] Email from Donnie De Freitas <ddefreitas@regulato.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 27 February 2014

[86] *Telecommunications Amendment Act 2014* (Samoa)

to publish any rules and procedures the Tribunal creates and allows the Tribunal to modify or waive these rules in exceptional circumstances.

In addition, section 6 addresses the issue of withdrawing an appeal before the proceeding is completed. It was understood that while the tribunal process was less formal than that of a normal court proceeding, the efforts relating to the convening of a tribunal to conduct a hearing were extensive and as such should not be taken for granted. Section 6 specifies that where an appeal has been lodged, an appellant can only withdraw such appeal with the permission of the Tribunal. The Tribunal may refuse an application to withdraw where there were issues of costs outstanding or the subject matter of the appeal was one of public interest. Where an application to withdraw is granted, the appellant is barred from lodging a subsequent appeal on the matter. Moreover, where an appellant opts to withdraw its appeal, they are not entitled to a refund with regard to the WS$100,000 bank deposit which is a prerequisite for filing its notice. The inclusion of a 'no refund' provision was a response to a request submitted by Digicel in an appeal it lodged in November 2009 against an order issued by the regulator. The order was directed at replacement interconnection rates. A pre-hearing conference was held to discuss preliminary issues including defects in the notice of appeal filed by Digicel, issues of jurisdiction and the setting of a date for the hearing. However, before the actual Tribunal hearing, Digicel wrote to the Tribunal requesting that its appeal be withdrawn. Digicel also sought a refund of the deposit that the company had paid as part of filing its claim. The Tribunal granted Digicel's request to withdraw; however, it did not discuss the issue of the refund. The issue of refund was instead addressed in the new amendments. The 'no refund' provision in the new statute was seen as a way to '*avoid frivolous and vexatious claims and appeals that wastes time and money'*.[87] In addition to the abovementioned provisions, the TA Act 2014 also included more detailed alternative disputes mechanisms (ADR) which were inserted to address concerns raised by smaller operators, who argued that they would not be in a position to pay the deposit to being a claim before the Tribunal. The ADR options included mediation managed by the OOTR which was viewed as more affordable and '*a positive way of reaching a consensus*.'[88]

LEGISLATIVE LANDSCAPE

Multi-sector Regulator

In 2010, Parliament enacted the Broadcasting Act 2010 and the Electricity Act 2010 adding the regulation of these respective sectors to the OOTR. Included in these new Acts were appeals provisions establishing specific tribunals charged with the responsibility of hearing appeals against orders of the Regulator issued in regard to broadcasting and electricity issues respectively. Concerned with the impracticality of such provisions, the OOTR proposed the drafting of a new legislation which would seek to consolidate the administrative functions of the OOTR with regard to the three sectors; and in addition, provide clarification with regard to the appeals mechanism to be employed. The regulator proposed that a single Tribunal be

[87] Email from Donnie De Freitas <ddefreitas@regulato.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 27 February 2014

[88] Ibid

formed, along similar lines to the existing Telecommunications Tribunal but for the two expert panellists appointed, who would vary depending on the subject matter of the appeal. A Multi-Sector Regulator Bill[89] was drafted and submitted to the AGO for consideration. As at the date of this article, the Bill has not made it before the relevant parliamentary select committee. Consequently, there has been no progress in consolidating the regulator's different legislative responsibilities under a single statute.

Competition and Consumer Act 2016

Prior to the enactment of the Telecoms Act, Samoa did not have any competition type laws in place. The competition provisions contained in the Telecoms Act albeit specific to the telecommunications sector were the first of its kind in Samoa. In 2012, the GoS enlisted the assistance of the Asian Development Bank (ADB) to develop a legal framework for competition in Samoa. The ADB project included the formulation of a new national Competition Policy and the drafting of a new Competition Bill. While the Bill was still in its draft stage, the regulator raised some concerns in relation to the duplication of effort which the regulator believed would eventuate with the passing of this new law. The regulator also raised its concern about the impact of a new regulatory-type body on the already stretched human resources available in Samoa for this type of work.[90] The Competition and Consumers Act was eventually enacted in 2016. The statute established the Competition and Consumers Commission ('Commission') to advise the relevant Minister on competition, consumer protection and prices in Samoa. The Commission would also conduct research into matters affecting competition and consumer protection as well as promote the use of internal controls and risk management measures by businesses in the country. The Commission would be comprised of three to seven members, with 'each regulator' being a member. Following the enactment of this new law, the OOTR and MCIL signed a Memorandum of Understanding (MOU)[91] to clarify jurisdictional boundaries in relation to matters where the purview of the regulator and the Commission was likely to overlap.[92] The MOU recognises the regulator's jurisdiction over the telecommunications, broadcasting, and electricity sector – with all other competition-type matters falling under the purview of the Commission. Interestingly, unlike regulatory orders under the Telecoms Act 2005 which were appealable to a specialist tribunal, the Commission's orders would be subject to judicial review by the Supreme Court.[93]

[89] Source: Office of the Regulator

[90] Email from Donnie De Freitas <ddefreitas@regulator.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 27 February 2014

[91] Memorandum of Understanding between The Regulator and the Samoa Competition and Consumers Commission <https://www.mcil.gov.ws/storage/2019/03/MOU-00000002.pdf>

[92] Email from Donnie De Freitas <ddefreitas@regulator.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 27 February 2014

[93] *The Competition and Consumers Act 2016* (Samoa)

Challenges and Recommendations

Limited capacity

Capacity issues continues to be a major challenge for Samoa as it is for most if not all small island nations. The lack of skilled professionals is not limited to engineers and technicians but extends to a short supply of regulatory managers, accountants, and lawyers. Accordingly, it is difficult to build up enough expertise that is required to implement telecommunications policies and enforce legislative requirements.

> '*One of the key challenges for the government and the regulator on the telecommunications reform in Samoa is not having enough manpower on the ground, particularly at the ministerial level. [The lack of expertise as] experienced in Samoa highlight[s] a wider supply constraint, of a limited number of skilled people across the industry sectors, common in many Pacific Island countries.*[94]

As early as 2009, the regulator began recruiting staff with a particular set of skills with the intention of providing them with the opportunity to enhance their knowledge through an institutional capacity building plan;[95] such plan involved local staff attending recognized international training courses specific to infrastructure regulation. This approach to training has continued over the past 10 years[96] and the number of staff at the OOTR has increased two-fold. Despite this, there remains an inadequate number of professional staff specialized in regulatory affairs. The lack of institutional knowledge and skill means that regulatory decisions are often exposed to challenges from well-resourced service providers who have the financial means of engaging the services of experts to argue their position successfully.

Duplication of Effort

This problem with capacity has been exacerbated by the enactment of the 2016 competition laws. The competition laws have established a separate regulatory body, responsible for regulating competition across sectors; including matters which may involve telecommunications services. As a result, in addition to the responsibility of investigating regulatory matters for the telecommunications, broadcasting, and electricity sectors, the OOTR now has the added burden of sorting through issues to identify which matters it can consider and what matters must be passed onto the Commission. This is a requirement under the MOU between the two bodies. While this exercise exhausts the OOTR'S already limited resources, it is a necessary process to avoid a potential duplication of effort. The inefficiency of this arrangement needs to be addressed. From a practical perspective, it would be advisable that the management of all competition-related matters be centralised under the Commission's umbrella of responsibility. Streamlining competition-related issues under the Commission's purview would alleviate some of the pressure on the overstretched staff in the OOTR and allow it to focus its efforts on regulating the technical aspects of networks and infrastructure.

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[94] Ofa, Siope Vakataki, *Telecommunications Regulatory Reform in Small Developing States: The Impact of the WTO's Telecommunications Commitment* (2012)

[95] see Office of the Regulator, Annual Reports, 2009-2010 and 2011-2012 (Samoa)

[96] see Office of the Regulator, Annual Reports, 2019-2020 (Samoa)

Need to consolidate statutes.

The OOTR's powers and responsibilities for regulating the telecommunications, broadcasting, and electricity sectors are contained in three separate statues. But for the sections specific to the relevant sector, many of the statutory in these separate statutes mirror each other. For example, sections containing rules and processes relating to appeals such as when an appeal can be lodged, the payment of a non-refundable deposit, the pre-hearing and hearing processes and the consequences of a tribunal decisions are all similar in nature. Consolidating these statutes into one Act will provide consistency and coherence within the legal framework. It will harmonize the OOTR'S functions regarding each sector by removing any overlapping provisions and streamlining processes such as those associated with appeals. In addition, a more uniform approach in the law enhances legal predictability by lessening the risk of confusion and conflicting interpretation and consequently reduces the risk of contradictory judgments.

Adapting to changes in environment.

Although the examination of Samoa's regulatory experience has highlighted some flaws, it is still sufficient to say Samoa has been to a large extent successful in ensuring that its telecommunications legislation is adjusted to suit the local context. Whilst some have categorized the amendments to the Telecoms Act as an obstacle to the ability of private investors to seek legal justice through the court systems,[97] it can be argued that such modifications were necessary. In fact, following Samoa's example, Fiji, Vanuatu, and Papua New Guinea adopted similar amendments.[98] Effective regulatory governance is about flexibility and adaptation to new changing circumstances or heeding lessons of past failures.[99] Moreover, the amendments to the Telecoms Act have resulted in noticeable benefits, albeit with a few hiccups, for the regulatory scheme and the sector. The constant refining of the law is '*an exercise of ensuring that the law is able to regulate in a timely manner the developments that are introduced in [the telecommunications] sector. For instance, the amendments made to the Act in 2008 as well as the intended amendments currently in Parliament is to ensure the law addresses regulatory issues [arising in] this sector.'*[100]

Final Remarks

An evaluation of Samoa's regulatory experience thus far provides valuable insight into the issues facing a small island country in the implementation of international best practice. The case study validates the need for a regulatory authority to have access to sufficient resources to effectively regulate the telecommunications sector - without those resources, regulatory determinations are open to constant challenges. In addition, it confirms that lawmakers can resolve some of the procedural issues by amending the law to suit the local environment.

[97] 'Ofa, supra note 93.
[98] 'Ofa, supra note 93.
[99] Crew, Michael and Parker, David (eds), *International Handbook on Economic Regulation* (2006)
[100] Email from Aumua Ming LeungWai, <mingleungwai@ag.gov.ws> to Elisa Kohlhase <ekohlhase@gmail.com> 26 February 2014

Although the amendments have not removed all challenges, Samoa's telecommunications sector continued to grow, and the regulatory landscape is improving. In effect, adhering to best practice has proven advantageous for Samoa's telecommunications sector. Nevertheless, Samoa' experience underscores that these benefits were realized only when these best practice principles were modified to align with the specific nuances of the local context, rather than simply replicating regulatory frameworks implemented in more developed countries.